The Federal Trade Commission Bureau of Consumer Protection Under the Second Trump Administration: Top 10 Things to Know About Priorities, Enforcement, and Case Law Developments

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Companies developing Federal Trade Commission ("FTC") compliance programs, or under investigation by the FTC's Bureau of Consumer Protection, should be aware of significant developments impacting the Commission's regulatory authority and enforcement priorities under the second Trump administration.

President Trump designated Andrew Ferguson as Chairman of the FTC on January 20, 2025. He replaced former Chair Lina Khan, who resigned from the Commission shortly after President Trump took office. President Biden nominated Chair Ferguson to serve as an FTC commissioner on July 11, 2023.[1] Prior to his time at the FTC, Chair Ferguson served as solicitor general of the Commonwealth of Virginia, chief counsel to U.S. Senator Mitch McConnell, and a Republican counsel on the U.S. Senate Judiciary Committee.

In addition to designating Chair Ferguson as the new FTC Chair, President Trump also nominated Mark Meador, a Republican, to serve as a commissioner on December 10, 2024. Meador was confirmed by the Senate on April 10, 2025, and sworn in on April 16, 2025. He previously worked at both the FTC and the U.S. Department of Justice, Antitrust Division. He also spent three years as a staffer to Utah Senator Mike Lee, a leading Republican on the Senate antitrust subcommittee. Melissa Holyoak is the third FTC commissioner (also a Republican).

On March 18, 2025, President Trump fired the two Democratic commissioners, Commissioner Rebecca Slaughter and Commissioner Alvaro Bedoya, whose respective terms were intended to end in September 2029 and September 2026, respectively. Chair Ferguson supported President Trump's decision and authority to fire the commissioners.[2]

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1 FTC Chair Welcomes Ferguson and Holyoak as FTC Commissioners, Congratulates Commissioner Slaughter on Confirmation to Another Term (Mar. 8, 2024), available here.

2 Statement of Chairman Andrew N. Ferguson (Mar. 18, 2025), available here; Memo. in Support of Defendant's Cross-Motion, *Slaughter v. Trump*, Case No. 1:25-cv-00909-LLA (filed Apr. 23, 2025), available here.

Commissioners Slaughter and Bedoya subsequently filed a lawsuit alleging the firings violated federal law based upon legal precedent establishing that the President cannot fire independent FTC commissioners without cause.[3] In addition, United States Senators Amy Klobuchar (D-MN), Dick Durbin (D-IL), Maria Cantwell (D-WA), and more than two dozen other Senate Democrats, released a statement calling on the administration to reverse the decision and allow Commissioners Slaughter and Bedoya to continue their terms.[4] The Senate statement provides: "[t]his action contradicts long standing Supreme Court precedent, undermines Congress's constitutional authority to create bipartisan, independent commissions, and upends more than 110 years of work at the FTC to protect consumers from deceptive practices and monopoly power."[5] Until the resolution of the lawsuits, there are currently three Republican FTC commissioners and no Democrats on the commission.

On February 10, 2025, Chair Ferguson appointed Chris Mufarrige as Director of the Bureau of Consumer Protection. Mufarrige previously served as Chief of Staff and Attorney Advisor to FTC Commissioner Holyoak, and in the first Trump administration as Senior Adviser to the Director and Deputy Director of the Consumer Financial Protection Bureau (the "CFPB").

Under the leadership of former FTC Chair Lina Khan, the FTC aggressively enforced existing FTC consumer protection laws—including privacy and cybersecurity violations—and adopted an expansive view of the FTC's regulatory authority. The aggressive nature of the FTC under Chair Khan had its critics, and the two Republican commissioners during the Biden administration, including Chair Ferguson, expressed disagreement with the Democratic majority regarding the breadth of the FTC's existing legal authority and issued a number of strongly worded dissents.[6]

The dissents written by Chair Ferguson and Commissioner Holyoak during Chair Khan's term signal that the change in leadership at the FTC under the second Trump administration will likely bring a number of policy changes. We anticipate, for example, that the FTC will be less aggressive in seeking civil penalties under Section 5 of the Federal Trade Commission Act (the "FTCA"), more selective when bringing certain

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3 Compl., *Slaughter and Bedoya v. Trump, Ferguson, Holyoak, and Robbins*, No. 1:25-cv-00909 (D.D.C., Mar. 27, 2025), available here.

4 Klobuchar, Durbin, Cantwell, Colleagues Call on President Trump to Reverse the Illegal Firing of FTC Commissioners (Mar. 19, 2025), available here.

5 *Id.*

6 *E.g.*, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), available here; Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), available here; Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), available here.

types of cases based upon unfairness or deception, and overall, the FTC will move away from pursuing new or novel rulemaking authority. However, cybersecurity, data privacy, and AI regulation will still likely be top priorities for the agency.[7]

The Commission may also be facing major structural changes that could impact its ability to pursue certain types of cases and enforce its policies independent of political interference. Consistent with President Trump's position that the President has the authority to fire FTC commissioners without cause, the U.S. Department of Justice has stated it will no longer defend the status of the FTC as an independent agency.[8] The FTC's overall constitutionality has also recently been challenged by a slew of cases, and many are still working their way through the courts. We can expect that the FTC will need to respond to recent case law posing challenges to its long-standing practices and legal interpretations, including decisions such as *Loper Bright Enterprises v. Raimondo*,[9] *Axon Enterprise, Inc. v. Federal Trade Commission*,[10] and *Securities and Exchange Commission v. Jarkesy*.[11]

Recent executive orders signed by President Trump will also impact the FTC's ability to create new rules and regulations. On January 31, 2025, President Trump issued an executive order requiring that for each new regulation or guidance issued, at least 10 prior regulations or guidance documents must be identified for elimination.[12] Then, on February 18, 2025, President Trump signed another executive order requiring independent agencies, including the FTC, to submit any proposed regulation to the White House for approval.[13] Finally, an executive order issued on February 19, 2025, gave federal agencies 60 days to identify allegedly unlawful regulations and terminate them immediately without notice-and-comment rulemaking (based upon the "good cause" exception under the Administrative Procedure Act). Any decision to revoke FTC rules without notice-and-comment rulemaking will assuredly be challenged in court.

Based upon these developments, regulated industry should be cognizant of judicial, regulatory, and legislative crosscurrents that may impact the FTC's investigative

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7 As recently as January 17, 2025, the Commission voted 5-0 to issue a staff report about AI partnerships. FTC Staff Report on AI Partnerships & Investments 6(b) Study (Jan. 17, 2025), available here.

8 Letter from Sarah M. Harris, Acting Solicitor General, U.S. Department of Justice to Senator Richard J. Durbin (Feb. 12, 2025), available here.

9 *Loper Bright Enterprises et al. v. Raimondo, SEC, et al.*, 603 U.S. 369 (2024) (requiring courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous).

10 *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023) (holding that federal courts have jurisdiction over constitutional claims brought against the FTC without the FTC needing to review the claim first).

11 *SEC v. Jarkesy*, 603 U.S. 109 (2024) (holding that the SEC does not have authority to bring certain charges in its internal administrative legal system).

12 Executive Order 14192, Unleashing Prosperity Through Deregulation (Jan. 31, 2025), available here.

13 Executive Order 14215, Ensuring Accountability for All Agencies (Feb. 18, 2025), available here.

approach and enforcement authority. This article provides an overview of 10 key points companies should be aware of when developing FTC compliance programs, remediating past behavior, or confronting potential enforcement.

Look to FTC Chair Ferguson's and Commissioner Holyoak's Dissents During the Biden Administration to Predict Future Policy Shifts

Chair Ferguson's dissents during his term as Commissioner under the Biden administration lay a framework for what to expect during his term as FTC Chair. His dissents indicate that the FTC is likely to reverse the expansion of FTC regulatory authority that took place under Chair Khan. Chair Ferguson will likely favor a reserved approach to unfairness and deception claims, while aiming to preserve free speech and avoid stifling innovation as much as possible.

For example, following the growth of artificial intelligence ("AI") in recent years, the FTC has brought complaints against companies marketing AI tools and issued multiple reports about the potential dangers of AI.[14] Chair Ferguson has taken the stance that AI and targeted advertising are not inherently dangerous tools and that overregulation of AI products may cool innovation and harm competition.[15] In September 2024, the FTC brought a complaint against Rytr LLC, a company marketing an AI tool allowing users to generate consumer reviews. The FTC accused the company of violating Section 5 of the FTCA by furnishing its users with the "means and instrumentalities" to deceive consumers.[16] Commissioners Ferguson and Holyoak dissented in this case, arguing that treating an AI tool as categorically illegal "merely because of the possibility that someone might use it for fraud is inconsistent with [FTC] precedents and common sense."[17] Additionally, Chair Ferguson dissented from the sections of an FTC report dealing with the use of AI in online targeted advertising, claiming the report overstates the criticisms of both AI and targeted advertising.[18] He has noted that using "generative

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[14] Dissenting Statement of Commissioner Andrew N. Ferguson Regarding *In the Matter of Rytr LLC* (Sept. 25, 2024), available here; FTC Takes Action Against Evolv Technologies for Deceiving Users About Its AI-Powered Security Screening Systems (Nov. 26, 2024), available here; Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the Social Media and Video Streaming Services Report (Sept. 19, 2024), available here; Concurring and Dissenting Statement of Andrew N. Ferguson Regarding the FTC Staff Report on AI Partnerships & Investments 6(b) Study (Jan. 17, 2025), available here.

[15] *Id.*

[16] FTC Announces Crackdown on Deceptive AI Claims and Schemes (Sept. 25, 2024), available here; Compl. In the Matter of Rytr LLC, FTC Matter No. 232-3052 (Sept. 25, 2024), available here.

[17] Dissenting Statement of Commissioner Andrew N. Ferguson Regarding *In the Matter of Rytr LLC* (Sept. 25, 2024), available here.

[18] Concurring and Dissenting Statement of Andrew N. Ferguson Regarding the FTC Staff Report on AI Partnerships & Investments 6(b) Study (Jan. 17, 2025), available here.

AI technology to lie, cheat, and steal" is punishable, but that the FTC should not "bend the law to get at AI."[19]

Chair Ferguson also has made it clear, alongside Commissioner Holyoak, that the FTC under the Trump administration will prioritize protecting free speech and avoiding censorship.[20] Both Chair Ferguson and Commissioner Holyoak wrote a concurring and dissenting statement regarding the Social Media and Video Streaming Services Staff Report in September 2024, taking issue with the report's failure to address that social media platforms can censor posts related to specific ideologies or politicians.[21]

Chair Ferguson also dissented from the Commission's Non-Compete Clause Rule.[22] In his dissent, he explains that the rule would invalidate over 30 million existing contracts, prohibiting a "practice that has been lawful for centuries."[23] In line with his other dissents, he also believes this to be a step beyond the authority that Congress granted to the Commission.[24] On August 20, 2024, the FTC was ordered to stop enforcing its Non-Compete Clause Rule by a district court.[25]

However, as recently as February 26, 2025, Chair Ferguson announced the launch of the FTC's new Joint Labor Task Force.[26] While Chair Ferguson's prior statements against the FTC's Non-Compete Clause Rule raised doubt as to whether the agency would continue penalizing non-compete clauses, his recent actions and statements indicate that he will target non-compete clauses regularly, just on a case-by-case basis.[27] The Task Force appears to have broad authority to scrutinize labor practices, but the FTC will likely use targeted enforcement as opposed to rulemaking.

While Chair Ferguson has been critical of the extent to which the FTC has expanded its reach under the FTCA, in most cases, his dissents still concur with the broad strokes of countering deceptive and unfair acts.[28] Material misrepresentations and unsubstantiated

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19 Dissenting Statement of Commissioner Andrew N. Ferguson Regarding *In the Matter of Rytr LLC* (Sept. 25, 2024), available here.

20 Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson (Sept. 19, 2024), available here; Concurring and Dissenting Statement of Commissioner Melissa Holyoak (Sept. 19, 2024), available here.

21 *Id.*

22 Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak *In the Matter of the Non-Compete Clause Rule* (Jun. 28, 2024), available here.

23 *Id.*

24 *Id.*

25 Noncompete Rule, 15 U.S.C. §§ 45, 46(g), available here.

26 FTC Launches Joint Labor Task Force to Protect American Workers (Feb. 26, 2025), available here.

27 *Id.*

28 Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *FTC v. Handy Technologies, Inc.* (Jan. 7, 2025), available here; Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *In the Matter of Grubhub, Inc.* (Dec. 17, 2024), available here; Concurring and

claims will also remain a priority for the Commission to enforce, but the FTC will likely lean on court proceedings and rulings for enforcement guidance rather than promulgating new regulations or agency guidance.[29]

For example, in *FTC v. Handy Technologies, Inc.*, Chair Ferguson concurred with all the counts except Count V, drawing the line at using Section 5 of the FTCA to seek civil penalties. He also indicated that there are other instances where he would have found counts against similar claims to have been unwarranted.[30] In his dissent, Chair Ferguson agreed that Handy Technologies, Inc. did materially misrepresent its claims.[31] However, he specified that he does not believe "up to" claims are typically material misrepresentations and that reasonable consumers would know the claim is not a guarantee.[32] Based upon the above, we can expect the FTC to continue enforcing against material misrepresentations and unsubstantiated claims, such as the ones in *FTC v. Handy Technologies, Inc*. and *United States v. Lyft, Inc*., while at the same time raising the threshold for claims the FTC considers to be material misrepresentations.

Chair Ferguson also agreed in *In the Matter of Grubhub, Inc.* that the company had made unsubstantiated claims about earnings for prospective delivery drivers. However, in his dissent, he disagreed with the allegation that Grubhub engaged in an unfair method of competition by listing restaurants on its platform without the restaurants' express, informed consent.[33] Chair Ferguson argued that this allegation comes from an expansive reading of FTCA Section 5 set forth in an FTC policy statement and not from the statute or case law. He wrote that under Chair Khan, the FTC routinely brought and settled cases with the intent of influencing future consumer protection practices without having to litigate.[34] In his opinion, alleging a claim of unfair method of competition in a settlement furthered the "regrettable practice of advancing [the FTC's]

Dissenting Statement of Commissioner Andrew N. Ferguson *In the Matter of Invitation Homes, Inc.* (Sept. 24, 2024), available here.

29 Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *United States v. Lyft* (Oct. 25, 2024), available here.

30 Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *FTC v. Handy Technologies, Inc*. (Jan. 7, 2025), available here; *see also* Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *United States v. Lyft* (Oct. 25, 2024) (Chair Ferguson considered ambiguous language about a potential bonus to be unfair or deceptive, while considering "up to" claims about earnings to be fair), available here.

31 Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *FTC v. Handy Technologies, Inc*. (Jan. 7, 2025), available here.

32 Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *In the Matter of Grubhub, Inc.* (Dec. 17, 2024) ("I nevertheless concur in the 'up to' counts in the Complaint because I have reason to believe that Grubhub has failed to substantiate its 'up to' claims even under the Commission's historical approach."), available here.

33 *Id.*

34 *Id.*

most aggressive and novel theories in cases no judge will decide."[35] We expect Chair Ferguson to abandon many of Chair Khan's boundary pushing interpretations of the FTCA and to stay within the bounds of more traditional interpretations.

Recognize That Artificial Intelligence, Cybersecurity, and Data Privacy Remain Top Issues for the FTC

The FTC has regulatory authority over advertising claims made for AI products (including claims for most medical devices containing AI), and the agency has indicated it intends to actively surveil these claims.[36] On April 25, 2023, the FTC and officials from three other federal agencies (including the Consumer Financial Protection Bureau[37]) issued a statement emphasizing the FTC's commitment to monitoring the development and use of AI products.[38]

Former FTC Chair Lina Khan warned companies that "[t]here is no AI exemption to the laws on the books, and the FTC will vigorously enforce the law to combat unfair or deceptive practices or unfair methods of competition."[39] In an April 2025 speech, Commissioner Holyoak said the agency will continue to "aggressively root out AI-powered frauds and scams and stop companies from making false or unsubstantiated representations that harm consumers."[40] At the same time, she acknowledged the opportunities of new technology and the need for flexibility to avoid "misguided enforcement actions or excessive regulation" that could "stifle innovation and competition."[41]

On February 27, 2023, the FTC issued a blog post titled "Keep Your AI Claims in Check."[42] The FTC advised companies that the agency may pursue enforcement against those marketing AI products with false or unsubstantiated claims about the products' abilities or benefits. In the post, the FTC indicates it is aware that AI is a "hot marketing term" and cautions companies against "overusing and abusing" the term. It should be

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35 *Id.*

36 The FTC is also focused on AI's potential for discrimination or bias (available here) and the use of AI to commit fraud (available here) or influence people's beliefs, emotions and behavior (available here).

37 For more information on the regulation of artificial intelligence in the financial sector, *see* Debevoise In Depth: Increased Focus by Federal Regulators on AI and Consumer Protection in the Financial Sector (Nov. 10, 2021), available here.

38 FTC Chair Khan and Officials from DOJ, CFPB and EEOC Release Joint Statement on AI (Apr. 25, 2023), available here.

39 *Id.*

40 Alison Grande, FTC's Holyoak Wants "Predictable" Regulatory Space for AI, *Law360* (Apr. 22, 2025), available here.

41 *Id.*

42 FTC Business Blog, Keep Your AI Claims in Check (Feb. 27, 2023), available here (no longer available).

noted, however, that although the FTC may still maintain its current AI-related policies and positions, a significant portion of its business guidance blogs, over 300, were removed from the FTC's website on March 18, 2025, so the previous guidance may no longer be accessible.

The guidance provided by the agency on avoiding violations of Section 5 of the FTCA (which prohibits unfair or deceptive acts or practices) is consistent with principles used by the FTC in other contexts for decades. The FTC advises companies marketing AI products that: (1) performance claims must have scientific support and companies should not claim a product can do something beyond the current capability of any AI technology; (2) comparative claims (e.g., claims that an AI product does something better than a non-AI product) must also have support; and (3) if a company claims a product is AI-enabled, it must actually employ AI ("merely using an AI tool in the development process is not the same as a product having AI in it").[43] Companies should carefully evaluate AI-related product claims prior to dissemination, as it is clear the FTC will enforce against violative claims.[44]

Companies need to also be aware of algorithmic discrimination and how to avoid it. Algorithmic discrimination is the use of artificial intelligence in a manner that discriminates or creates unfair results. For example, companies that use AI products to automate decisions may end up with unbalanced results that favor specific races, ethnicities, sexes, genders, or ages. The FTC brought its first suit related to algorithmic discrimination against Rite Aid in late 2023.[45] Companies should carefully evaluate their use of algorithms, screen these algorithms for bias, and suspend the use of AI tools that do result in bias.

The FTC has also been monitoring the use of AI to create product or service reviews. In their rule published on August 14, 2024, the FTC explicitly banned the use of AI to generate fake reviews.[46] However, Chair Ferguson in his dissent in *In re Rytr* emphasized that an AI product that can generate fake reviews or be used for deceptive or unfair

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[43] FTC Business Blog, Keep Your AI Claims in Check (Feb. 27, 2023), available here (no longer available).

[44] For more information on FTC enforcement trends, *see* Debevoise In Depth: A New Era of Federal Trade Commission ("FTC") Privacy and Cybersecurity Oversight: Top-10 Things Companies Should Know When Assessing FTC Compliance and Exposure (Jan. 14, 2022), available here; FTC Takes Action Against Evolv Technologies for Deceiving Users About Its AI-Powered Security Screening Systems (Nov. 26, 2024), available here.

[45] Compl., *FTC v. Rite Aid Corp.*, FTC Matter No. 202-3190 (Dec. 19, 2023), available here.

[46] Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials (Aug. 14, 2024), available here; *see also* FTC Order Against AI-Enabled Review Platform Sitejabber Will Ensure Consumers Get Truthful and Accurate Reviews (Nov. 6, 2024) (FTC charged Sitejabber of inflating customer review ratings and counts), available here.

conduct is not inherently unlawful if it has a genuine or legitimate use.[47] The violation of the FTCA would come from creating a product for only illegitimate uses or using a product for those deceptive or unfair purposes.

The FTC has continuously pursued companies for cybersecurity issues, and cybersecurity and data privacy will likely remain a top issue for the FTC under Chair Ferguson. With regard to privacy, the FTC remains concerned with a lack of consent, anonymity, and protection regarding data collection. Location data and personally identifiable information ("PII") are considered particularly sensitive. Taking inadequate measures to protect consumer privacy or acquire proper consent for data collection or sales could result in FTC enforcement.

In just the last year, the FTC has settled a slew of complaints against a variety of companies for cybersecurity violations and has pursued new cases as well. Common cybersecurity violations include (1) disclosing and selling precise geolocation data without consent,[48] (2) allegedly failing to adequately secure and protect consumer data,[49] and (3) failing to properly anonymize data.[50]

Taking proactive measures to protect customer data can reduce risk of a cybersecurity violation or future FTC complaint. Although beyond the scope of this article, there are many steps companies can take to reduce FTC enforcement risk, based upon a careful review of historical FTC complaints, settlements, and lawsuits.

Understand the FTC Civil Investigative Demand Process and Timelines

Many FTC consumer protection investigations (particularly for advertising violations) are initiated by FTC staff via informal "access letters." As a general rule, however, the FTC's Division of Privacy and Identity Protection (the "DPIP") initiates privacy and cybersecurity investigations via civil investigative demands ("CIDs").

A CID is a type of commissioner-authorized subpoena, enforceable in court, that subjects the recipient to a number of formalized processes and timelines. Companies

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47 Dissenting Statement of Commissioner Andrew N. Ferguson Regarding *In the Matter of Rytr LLC* (Sept. 25, 2024), available here.

48 FTC Takes Action Against General Motors for Sharing Drivers' Precise Location and Driving Behavior Data Without Consent (Jan. 16, 2025), available here; *In the Matter of Mobilewalla, Inc.* (Jan. 14, 2025), available here.

49 *In the Matter of GoDaddy, Inc., et al.* (Jan. 15, 2025), available here; *In the Matter of Marriott International, Inc. and Starwood Hotels & Resorts Worldwide, LLC* (Oct. 9, 2024), available here. Debevoise & Plimpton LLP represented GoDaddy in the FTC investigation and settlement.

50 *In the Matter of Gravy Analytics, Inc.* (Dec. 3, 2024), available here.

should be aware of the rules and procedures that govern the formalized CID process.[51] As a general rule, CIDs are confidential and not publicly disclosed by the FTC during the investigation period unless the recipient voluntarily discloses the existence of the investigation or files a petition to quash.

After reviewing the CID, a critical first step is the "meet and confer" with FTC staff, which must take place within 14 days after receipt of the CID. This is when critical subjects are discussed, including the potential for a rolling production and approaches to minimize the burden of the production. If disagreements remain, companies have the option of filing a petition to quash within 20 days after receipt of the CID. Such petitions are rarely successful, and the petition and FTC response are publicly disclosed (which means the existence of the CID would become public).

Understand the FTC's Legal Standards for Establishing Deception or Unfairness

Section 5 of the FTCA prohibits unfair or deceptive acts or practices. Privacy and cybersecurity cases can be predicated on deception, unfairness, or both.

For cases predicated on deception, the FTC's "Deception Policy Statement" provides an overview of the Commission's authority.[52] As a general rule, there must be a material representation, omission, or practice that is likely to mislead reasonable consumers.

For cases predicated on unfairness, the FTC may consider an act or practice is unfair if it: (1) causes or is likely to cause substantial injury to consumers; (2) is not reasonably avoidable by consumers themselves; and (3) is not outweighed by countervailing benefits to consumers or to competition. FTC precedent suggests that "substantial" injury should implicate more than theoretical harm and should involve some form of tangible injury.

Evaluate Whether the Alleged Deceptive or Unfair Practices Are Ongoing

On February 25, 2019, the United States Court of Appeals for the Third Circuit upset decades of FTC practice by significantly limiting when the FTC can bring competition and consumer protection enforcement actions in federal court.[53] *In FTC v. Shire ViroPharma, Inc.*, the Third Circuit ruled that absent an allegation that a violation of the

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[51] 16 C.F.R. Part 2.

[52] FTC Policy Statement on Deception (Oct. 14, 1983), available here.

[53] *See* Debevoise Update: The Third Circuit Sharply Curtails the FTC's Preferred Enforcement Power (Mar. 1, 2019), available here.

FTCA "is" occurring or "is about to" occur, the FTC is limited to its administrative enforcement mechanism. This means that the FTC largely has lost its ability to seek injunctive and monetary relief for past violations that are not ongoing in Delaware, New Jersey, Pennsylvania, and the Virgin Islands. The decision could impact other Circuits as well.

Under the Biden administration, the FTC unsuccessfully lobbied Congress to restore its ability to bring actions in federal court even if conduct is no longer ongoing or impending when the suit is filed and requested this legislative fix in its September 2021 Report to Congress.[54] It is unclear whether the FTC led by Chair Ferguson will continue to pursue a legislative fix in the current Congress.

Recognize That the FTC Can Pursue Individual Liability Under Certain Circumstances

Companies under investigation should be aware that the FTC can name individuals in its enforcement actions in addition to the company as a whole. To establish individual liability, the FTC must show that the individual defendant participated directly in the illegal practices or had authority to control them. The FTC will often consider whether there is a "culture of compliance" and if senior executives ignored warning signs. The FTC's goal in pursuing individual liability is to achieve specific and general deterrence and obtain appropriate injunctive relief. In this regard, one commissioner has noted:

> "In considering whether naming senior leaders is necessary for a settlement to achieve specific and general deterrence, I am particularly interested not only in the evidence of the leaders' involvement and knowledge but also in the extent to which the alleged law violations permeated a core aspect of the business and whether the corporate culture is one of compliance."[55]

Notably, individuals in large publicly traded companies are rarely named with respect to initial violations under the theory that decision-making is diffuse at these large companies. Individuals in smaller companies, particularly active executives involved in day-to-day decision-making, are more likely to be named. The FTC even recently imposed individual liability on in-house counsel, but one Commissioner emphasized

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[54] FTC Report to Congress on Privacy and Security at 5 (Sept. 13, 2021), available here.

[55] Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding *FTC v. Progressive Leasing* (Apr. 20, 2020), available here.

that the attorney was named based upon his actions while functioning in a business capacity rather than as an attorney.[56]

Recognize the Importance of the Supreme Court's Recent AMG Capital Decision and the Potential Impact on the FTC's Ability to Obtain Monetary Remedies

Reversing decades of FTC precedent, on April 22, 2021, the Supreme Court in *AMG Capital Management, LLC v. FTC* unanimously held that Section 13(b) of the FTCA does not grant the FTC authority to obtain monetary remedies in federal court. The Supreme Court's decision overturned long-standing FTC reliance on Section 13(b) for monetary remedies and has far-reaching implications for pending and future FTC consumer protection and antitrust disputes.[57]

Although the plain language of Section 13(b) is limited to permanent injunctions, ever since the provision was enacted in 1973, the FTC has steadily expanded the use of Section 13(b) to seek monetary equitable remedies in consumer protection and antitrust cases. The FTC has obtained a wide range of equitable remedies under Section 13(b), including billions of dollars in monetary remedies (i.e., restitution or disgorgement to compensate consumers for alleged harm arising from unfair and deceptive acts and practices found to violate Section 5 of the FTCA).

As a consequence of the AMG Capital decision, as described in greater detail immediately below, the FTC is likely to rely more heavily on administrative actions under Section 19 of the FTCA than on initial proceedings in federal court. If the Commission issues a final administrative cease-and-desist order, the FTC may then bring a subsequent federal court case to obtain monetary remedies, though it would face a heightened standard of proof requiring evidence of "dishonest or fraudulent" conduct.

Understand the FTC's Administrative and Judicial Enforcement Options to Obtain Monetary Remedies Despite the Supreme Court AMG Capital Decision

As explained below, in the absence of legislation reversing the Supreme Court's AMG Capital decision, the FTC has indicated that it intends to rely on other statutory

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[56] Concurring Statement of Commissioner Christine S. Wilson, *FTC v. ITMedia Solutions* (Dec. 16, 2021), available here.

[57] *See* Debevoise In Depth: Unanimous Supreme Court Curtails the Federal Trade Commission's Authority to Obtain Monetary Remedies in Federal Court (Apr. 26, 2021), available here; Debevoise Update: Third Circuit Strikes Another Blow Against the FTC's Preferred Enforcement Power, Setting the Stage for a Supreme Court Showdown (Oct. 5, 2020), available here.

provisions to obtain monetary remedies from companies accused of violating the FTCA.[58]

Before addressing the primary mechanisms currently available for the FTC to obtain monetary remedies, it is important to distinguish between civil penalties and consumer redress. Civil penalties, which are paid to the U.S. Treasury, are based upon the number of violations of the FTCA and are not necessarily commensurate with consumer harm.[59] The maximum civil penalty amount is currently $53,088 per violation.[60] There is significant dispute regarding what constitutes a "violation," but the FTC generally takes the position that each consumer impacted by violative conduct constitutes a separate "violation." Consumer redress, on the other hand, refers to restitution or disgorgement that is tied to consumer harm (or the benefit obtained by a company allegedly violating the FTCA).

With that background, we summarize below the primary mechanisms the FTC can currently employ to obtain monetary remedies (i.e., civil penalties or consumer redress) for consumer protection violations, including cybersecurity and privacy investigations:

- **Civil Penalties[61] for Order Violations**. Section 5(l) of the FTCA authorizes the FTC to obtain civil penalties against companies or individuals that are violating an existing FTC order against them. This provision is irrelevant for first-time offenders not subject to an existing FTC order or decree.

- **Civil Penalties for Rule Violations**. Section 5(m)(1)(A) of the FTCA authorizes the FTC to obtain civil penalties against companies or individuals who violate existing FTC rules. At the present time, however, there are limited FTC rules (due in part to the complex rulemaking process imposed by Congress) that would authorize civil penalties.[62] Examples include the telemarketing sales rule, children's online privacy

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58 The FTC has broader authority to obtain injunctive relief than monetary relief. Although the FTC's injunctive authority is not addressed in this article in any detail, we note that, in the privacy and cybersecurity context, the FTC has used its injunctive authority quite liberally, and companies can benefit from assessing prior cybersecurity/privacy FTC settlements in order to obtain insight into the breadth of the FTC's purported authority as well as guidance for developing compliance programs.

59 The FTC must first refer civil penalty cases to the Justice Department pursuant to Section 16 of the FTCA. The Justice Department will decide whether to pursue the case and, if not, in most cases, the FTC can litigate on its own behalf. Companies targeted for civil penalty cases may have a jury trial.

60 On February 11, 2025, the FTC published its updated inflation-adjusted civil penalty amounts, increasing civil penalties from $51,744 to $53,088 per violation. FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2025 (Feb. 11, 2025), available here.

61 The FTC's civil penalty authority was addressed by the Government Accountability Office (the "GAO") in January 2019. GAO, Internet Privacy: Additional Federal Authority Could Enhance Consumer Protection and Provide Flexibility (Jan. 2019), available here.

62 The FTC Safeguards Rule—which provides specific criteria for what safeguards nonbanking financial institutions, such as mortgage brokers, motor vehicle dealers, and payday lenders, should implement to keep

protection rule, and health breach notification rule.[63] In addition, the FTC is currently contemplating the issuance of a privacy/cybersecurity rule, but even if the agency goes forward with this initiative, it would take a number of years before such a rule would be finalized. In order to bring an action under this provision, the FTC must establish that the defendant had actual or constructive knowledge (i.e., "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."). The FTC is also authorized to obtain consumer redress for rule violations (see below).

- **Civil Penalties under the FTC's "Penalty Offense Authority."** Section 5(m)(1)(b) of the FTCA contains a unique provision that under certain circumstances enables the FTC to obtain civil penalties from companies that knowingly engage in actions that have been previously deemed unfair or deceptive by the FTC and further documented in an order against a third party. These are challenging cases for the FTC to bring, as the FTC must establish that the defendant had "actual knowledge that such act or practice is unfair or deceptive and is unlawful." Under Chair Khan, the FTC aggressively used this existing statutory provision, and in order to satisfy the "actual knowledge" requirement, sent letters to hundreds of companies purportedly putting them on notice that certain actions may result in civil penalties pursuant to the FTC's "penalty offense authority." Specifically, the FTC sent hundreds of letters to advertisers[64] (informing them of requirements applicable to

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their customers' information safe—is an instructive example. *See* Debevoise Update, The FTC's Strengthened Safeguards Rule and the Evolving Landscape of Reasonable Data Security (Nov. 18, 2021), available here. Although the FTC and U.S. GAO have historically indicated that the FTC does not have the authority to obtain civil penalties for violations of the FTC Safeguards Rule, it is unclear whether the FTC under Chair Khan will attempt to assert civil penalty authority. *See* GAO, Consumer Data Protection: Actions Needed to Strengthen Oversight of Consumer Reporting Agencies (March 26, 2019) ("However, FTC does not have civil penalty authority for violations of requirements under the Gramm-Leach-Bliley Act (the "GLBA")…."), available here; *FTC v. RCG Advances LLC et al*., FTC's First Amended Complaint for Civil Penalties, Permanent Injunction, Monetary Relief, and Other Relief (filed June 10, 2021), available here; *see also* Proposed Rule: Standards for Safeguarding Customer Information, 84 FR 13158 at FN 123 (Apr. 4, 2019) ("A federal standard under GLB would be largely redundant because of state breach notification laws and because a requirement under the Rule would have limited effect, because the Commission cannot obtain civil penalties for violations of the Rule."), available here.

63 It is important to note that statutes other than the FTCA authorize civil penalties in certain circumstances. For example, the American Recovery and Reinvestment Act of 2009 instructed the FTC to issue a final rule requiring vendors of personal health records and mobile apps that interact with such records to notify consumers when the security of their data is compromised and authorized civil penalties for violations. The FTC has never enforced its Health Breach Notification Rule, but recently, in September 2021, the agency issued a written statement clarifying the rule, suggesting that the FTC intends to enforce the rule and bring civil actions. Separately, the COVID-19 Consumer Protection Act authorized civil penalties from companies and individuals engaging in deceptive practices associated with "the treatment, cure, prevention, mitigation, or diagnosis of COVID-19." The FTC has already filed multiple cases seeking civil penalties for such violations.

64 FTC Notices of Penalty Offenses Concerning Endorsements, available here.

testimonials and endorsements) and for-profit colleges[65] (informing them of prohibitions on certain types of false or deceptive claims) in an effort to better position the FTC to bring future civil penalty actions. However, Chair Ferguson believes that this strategy relied on "dubious legal theories;" he instead will likely require that a predicate cease-and-desist order be identified in order to seek civil penalties. In general, Chair Ferguson has consistently rejected the use of Section 5(m)(1)(b) for civil penalties and is unlikely to continue this practice.[66]

- **Redress Actions for Rule Violations**. Section 19(a) of the FTCA authorizes the FTC to obtain consumer redress in federal court for companies violating existing FTC rules, subject to a three-year statute of limitations (see provision above addressing civil penalties for rule violations). Section 19(b) authorizes a court to grant such relief as the court finds necessary to redress consumer injury, and such relief may include: 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. Exemplary or punitive damages, however, are expressly not authorized.

- **Redress Actions for Initial Violations Where the FTC Engages in a Lengthy Two-Step Process**. Section 19(a)(2) of the FTCA authorizes the FTC to obtain consumer redress in federal court in situations where the FTC: (1) issues a final cease-and-desist order against a company or individual (affirmed after all appeals); and (2) subsequently brings an action in federal court, subject to a three-year statute of limitations, and "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." Congress intentionally chose this exacting standard in order to make it challenging for the FTC to obtain monetary remedies from first-time offenders unless the behavior was so egregious that it could be deemed "dishonest or fraudulent."

Finally, we note that the FTC can also enter into settlements that provide for monetary payments not expressly authorized by any statutory provisions. In fact, in one recent case, the two Republican commissioners wrote a dissent arguing that Section 19 does not permit the Commission to accept monetary remedies in an administrative settlement beyond consumer redress for injured consumers and that the settlement amount far exceeded any injury suffered by the consumers in that case.[67] The dissent

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[65] FTC Notices of Penalty Offenses Concerning Education, available here.

[66] Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *FTC v. Handy Technologies, Inc.* (Jan. 7, 2025), available here. *See also* Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part *United States v. Lyft* (Oct. 25, 2024), available here.

[67] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson *In the Matter of Resident Home LLC* (Oct. 7, 2021), available here.

also forcefully opposed the FTC's willingness to enter into settlements that include monetary payments not authorized by statute: "The majority is correct that, as a practical matter, the government has the ability to extort that to which it is not entitled under law. As we have said on other occasions, though, just because we can does not mean that we should."[68]

While the FTC has been able to obtain monetary remedies in a variety of ways, and has ordinarily done so, the FTC under the Trump administration has been more hesitant to pursue civil penalties in routine cases. In *United States v. Xlear, Inc.*, the FTC filed a complaint against Xlear in 2021 for violations of the FTCA and the COVID-19 Consumer Protection Act, alleging that Xlear falsely advertised its nasal spray as a Covid-19 treatment.[69] The FTC sought civil penalties as part of its complaint. In March 2025, however, the DOJ (representing the FTC) asked the court to dismiss the case entirely.

When Confronting Potential FTC Enforcement, Recognize That Deciding Whether to Settle or Litigate Requires a Case-by-Case Assessment of a Wide Range of Factors

The vast majority of FTC consumer protection enforcement actions result in settlements. In deciding whether to settle with the FTC or litigate, companies must balance an assortment of business and reputational considerations. Litigation is costly, time- and resource-intensive, and can play out over many years before resolution. In contrast, a settlement provides the certainty and closure that many companies value.

Companies should recognize, however, that the FTC recently acknowledged that "federal courts may approve settlements that include relief beyond what could have been awarded at trial."[70] The FTC may, for example, demand that monetary relief or "fencing-in" provisions be included in a settlement even though a federal court may be unwilling to award such relief through litigation. In fact, the three companies that litigated cybersecurity cases against the FTC all arguably came out better than they would have if they had settled in the absence of litigation.

Accordingly, companies must assess a wide range of issues, including the unique facts associated with each case and the company's tolerance for litigation, in order to determine whether it would be advisable to settle with the FTC or litigate.

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68 *Id.*

69 Compl., *U.S. v. Xlear, Inc*, No. 2:21-cv-00640-RJS (D. Utah., Oct. 28, 2021), available here.

70 Joint Statement of Chair Lina Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter *In the Matter of Resident Home LLC* (Oct. 8, 2021), available here.

Monitor Agency Responses to Recent Administrative Law Developments

The FTC is confronting a variety of challenges to its constitutionality and authority as an independent agency.

A key issue is whether the President has the authority to remove FTC Commissioners without cause. In 1935, the Supreme Court decided in *Humphrey's Executor v. United States* that the President does not have unlimited power to fire independent agency heads and that Congress can impose for-cause removal protections on multimember boards of independent agencies.[71] The recent case law, however, has begun to chip away at this holding,[72] and President Trump has challenged precedent by firing FTC Commissioners Slaughter and Bedoya without cause, as well as members of the National Labor Relations Board (the "NLRB") and Merit Systems Protection Board (the "MSPB").

The DOJ, in addition, has said it will no longer defend for-cause removal restrictions and will instead urge the Supreme Court to overturn Humphrey's Executor, claiming that the President should have the authority to remove executive branch officials (including heads of independent agencies).[73] In *Harris v. Bessent and Wilcox v. Trump*, the U.S. Court of Appeals for the District of Columbia Circuit determined that President Trump overstepped, ordering the Trump administration to reinstate the NLRB and MSPB leaders.[74] The federal government appealed this decision to the Supreme Court, and the reinstatements of both Harris and Wilcox are stayed until the Supreme Court considers the pending case. Meanwhile, the complaint by former FTC Commissioners Slaughter and Bedoya has been filed against President Trump, and many amicus briefs have been filed in support of the Commissioners.

Loper Bright Enterprises v. Raimondo involved a challenge to a rule promulgated by the National Marine Fisheries Service that required certain commercial fishing vessels to fund at-sea monitoring programs. The petitioners alleged that the governing statute did not authorize the agency to create funding mandates. The Supreme Court overturned the concept of "*Chevron* deference" (a standard mandating that courts defer to reasonable agency interpretations when an underlying statute is ambiguous[75]), holding that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority and

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71 *Humphrey's Executor v. United States*, 295 U.S. 602, 623 (1935).

72 *Seila Law v. CFPB*, 591 U.S. 197 (2020) (holding that the *Humphrey's Executor* removal protection only applies to agencies that either (1) have multimember commissioners or (2) do not wield substantial executive power).

73 Letter from Sarah M. Harris, Acting Solicitor General, U.S. Department of Justice to Senator Richard J. Durbin (Feb. 12, 2025), available here.

74 *Harris v. Bessent*, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025).

75 *See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.[76]

The FTC has routinely, under *Chevron*, used its authority as an independent agency to create rules and regulations through its interpretations of the FTCA and other relevant statutes, especially under the last administration. However, under Loper, the FTC's ability to interpret the FTCA could lessen, as courts will not necessarily defer to the FTC's judgment.[77]

The FTC's recent Non-Compete Clause Rule[78] has already been deemed invalid in a case where the judge ruled that the FTC had exceeded its statutory authority through rulemaking.[79] *Loper* has also made it easier to challenge certain FTC regulatory decisions through litigation. Based upon the Loper decision, the FTC may opt to issue nonbinding guidance, which may be more difficult to challenge, instead of pursuing rulemaking.

In Axon Enterprise, Inc. v. FTC, Axon sued to enjoin the FTC from bringing a claim against the company, challenging the constitutionality of the FTC's administrative law judges and judicial processes.[80] The Supreme Court considered whether a defendant must bring constitutional challenges through an administrative law proceeding before bringing that same claim in federal court.[81] In Axon, the Supreme Court determined that a federal district court did in fact have jurisdiction over the constitutional challenge without requiring a company to first undergo FTC's review process.[82] Although the FTC had intended to proceed with an administrative trial, the Ninth Circuit ordered a stay, and the FTC ended up dismissing the complaint.[83]

Following *Axon*, numerous companies have attempted to challenge the FTC's constitutionality. These claims come in response to FTC enforcement actions and are in varying stages of litigation. For example, the Kroger Co. ("Kroger") filed a motion for preliminary injunction against the FTC after the FTC had challenged Kroger's merger

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76 *See generally Loper Bright Enterprises et al. v. Raimondo, SEC, et al.*, 603 U.S. 369 (2024).

77 Maura Kathleen Monaghan & Jacob W. Stahl, *The death of* Chevron*: Implications of the* Loper *decision for public companies*, 2024 WL 4204079 (Sept. 17, 2024), available here.

78 *See* Debevoise In Depth: FTC Issues Final Noncompete Rule (Apr. 24, 2024), available here.

79 *See generally Ryan, LLC v. FTC*, 746 F. Supp. 3d 369 (N.D. Tex. 2024).

80 *See generally Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023).

81 *Id.*

82 *Id.* Additionally, in *SEC v. Jarkesy*, 603 U.S. 109 (2024), the Supreme Court determined that the SEC can no longer bring certain cases within its internal courts but rather must bring those cases in federal court. While the opinion itself does not mention the FTC, the FTC's laws and overall structure mirror that of the SEC. Many of the cases mentioned in this section raise arguments based, at least in part, upon the *Jarkesy* decision. *See* Debevoise In Depth: Supreme Court Punches SEC APs Right in the Seventh Amendment (June 28, 2024), available here.

83 *In the Matter of Axon Enterprise, Inc.*, Order Returning Matter to Adjudication and Dismissing the Compl. (Oct. 6, 2023), available here.

with Albertson's Companies, Inc., arguing that the FTC's administrative tribunal is unconstitutional.[84] Kroger argued that the FTC's administrative proceedings were unconstitutional because: (1) the Administrative Law Judge was not removable by the President, and (2) the FTC seeks to adjudicate private rights outside of the judicial branch.[85] Shortly after, the FTC dismissed their complaint against Kroger,[86] and Kroger subsequently dropped their challenge against the FTC.

The FTC's constitutionality is also being challenged by Intuit, Inc. ("Intuit"), after the agency filed an administrative complaint against Intuit for deceptive advertising. Intuit argued to the Fifth Circuit that the FTC's administrative proceedings are unconstitutional, as the administrative judges have "unchecked power." The FTC, however, filed a Final Order after denying Intuit's motion to stay while awaiting the review of the Fifth Circuit, and that Fifth Circuit case has not been heard yet.[87]

As a final example, H&R Block motioned to disqualify the Administrative Law Judge in its case, alleging that the FTC's administrative law judges are unconstitutional under Article II of the Constitution.[88] However, the FTC denied that motion,[89] and eventually filed a decision and order finding that H&R Block had been deceptive, requiring H&R Block to pay $7 million to the FTC.[90]

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

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84 Kroger Files Motion to Enjoin the FTC's Administrative Merger Challenge (Aug. 19, 2024), available here.

85 *Id.*

86 Joint Mot. to Dismiss Compl., *In the Matter of The Kroger Co. and Albertsons Co., Inc.*, Docket No. 9428 (filed Dec. 16, 2024), available here.

87 Order, *In the Matter of Intuit, Inc.*, Docket No. 9408 (filed Jan. 22, 2024), available here.

88 Mot. to Disqualify, *In the Matter of H&R Block Inc.*, Docket No. 9427 (filed Mar. 26, 2024), available here.

89 FTC Denies Motion to Disqualify Administrative Law Judge in H&R Block Case (Oct. 18, 2024), available here.

90 Decision and Order, *In the Matter of H&R Block Inc.*, Docket No. 9427 (Jan. 8, 2025), available here.

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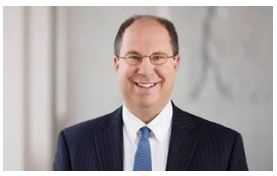

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