

FTC Ramps Up Tech Investigations, Reduces Investigators' Hurdles

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At its September 14, 2021 open meeting, the Federal Trade Commission (FTC) announced the passage of eight “omnibus” resolutions by a 3-2 party-line vote to authorize quicker investigations into prioritized issues. The resolutions allow staff attorneys to use compulsory process demands, which are usually issued as civil investigative demands or subpoenas, with approval from only one commissioner. Previously, agency staff were expected to receive approval from the full commission prior to issuing demands for information from companies.

The resolutions aim to facilitate investigations into:

1. unlawful conduct directed at veterans and service members;
2. unlawful conduct directed at children;
3. bias in algorithms and biometrics enabling discriminatory practices;
4. dark patterns and deceptive online conduct that lure users into making unwanted purchases;
5. repair restrictions that allegedly harm competitors and consumers;
6. abuse of intellectual property;
7. common directors and officers and common ownership; and
8. monopolization offenses.

FTC Chair Lina Khan and Commissioner Rebecca Slaughter, both Democratic appointees, issued a statement in support, commending the resolutions for making the FTC’s “process more efficient and streamlined” for the agency’s staff “to expeditiously move matters along.” They also noted that commissioners “receive briefings on the state of investigations” and assured detractors that “no enforcement action can proceed without” a majority vote of the five commissioners.

Rohit Chopra, the third Democrat-appointed commissioner, also issued a statement in which he specifically supported the resolutions’ focus on investigations into “potentially unlawful practices targeting service members, veterans, and their families.”

The two dissenting Republican-appointed commissioners, Christine Wilson and Noah Phillips, issued their own [statement](#) in which they accused the majority of using the resolutions to create “less accountability and more room for mistakes, overreach, cost overruns, and even politically-motivated decision making.” They cautioned that with these eight omnibus resolutions, the FTC has now issued 15 omnibus resolutions which “authorize compulsory process in investigations of possible illegality.” The dissenters further charged that these resolutions make merger review less efficient despite the FTC’s current claims “that the agency is overwhelmed by merger filings.” The statement in support by Chair Khan and Commissioner Slaughter indicated they were undeterred and claimed that the full Commission approval functioned as part of the “bureaucratic hurdles that slow down the agency staff’s ability to expeditiously move matters along.”

Takeaways

These resolutions forewarn a significant uptick in FTC demands in ongoing and future investigations, many in line with the recent Executive Order on Competition (see our coverage [here](#) and [here](#)). In particular, the resolution on conduct directed at children could implicate internet companies and platforms that have minors as consumers or users. Companies that provide “freemium” products should also be wary if users have complained that they were tricked or deceived into making purchases that were not intended. Technology companies that rely on proprietary intellectual property, including as licensor or buyer, must also be on the lookout for allegations of abuse that might draw attention from FTC staff investigators.

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