



Shadow Cast by Supreme Court Ruling on FTC Privacy Regulatory Effort

August 23, 2022

According to privacy analysts, the Federal Trade Commission's efforts to restrict the use of online commercial surveillance technologies are expected to encounter legal challenges.

The action follows a recent U.S. Supreme Court decision in which the majority indicated support for a legal doctrine that requires agencies to have clear statutory authority from Congress to impose regulations on issues of significant national significance. This comes as Congress continues to struggle to pass a comprehensive federal privacy law. Together, privacy experts warned that the FTC's commercial surveillance proposal has a significant danger of legal challenges unless Congress approves legislation giving it clear regulatory authority over the subject.

This month, the agency published an advanced notice of proposed rulemaking with 95 questions covering, among other topics, algorithms, targeted advertising, and the use of technology by young people. The FTC claims that new laws may be required to protect people's privacy online because "mass surveillance has heightened the dangers and stakes of errors, fraud, manipulation and other abuses."

"A rulemaking with as profound an impact as this may have is likely to see a challenge given that it's a major question and subject to Congressional authority," said Will Duffield, a speech and internet governance analyst at the Cato Institute, a libertarian think tank in Washington, D.C.

The regulatory procedure is still in its early stages with the regulation. Following its publication in the Federal Register, which is anticipated on August 22, consumers and other interested parties will have 60 days to offer comments. The FTC must inform Congress of its decision to proceed after the initial comment period before releasing a notice of proposed rulemaking. After another comment period and hearings with tech and privacy stakeholders, the second published notice would be followed by a finalised version of the rule being published and enforcement would start.

First steps

The topics raised in the initial batch of inquiries, combined with the responses the commission anticipates receiving in the ensuing months, will help shape the FTC's agenda on the subject, according to Tatiana Rice, policy counsel at the Future of Privacy Forum. A think tank and advocacy group dedicated to promoting best practises and laws for privacy protections is called the Future of Privacy Forum.

In an email to S&P Global Market Intelligence, an FTC representative stated that the agency is not currently proposing any particular regulations. The spokeswoman stated that Chairwoman Lina Khan and the four commissioners who backed the initiative are hopeful for federal privacy

legislation but were unable to give a timeframe for the rulemaking process. The spokeswoman stated, “This is the first stage in the process, and we can’t forecast how long it will take.”

Christine Wilson and Noah Phillips, two Republican FTC commissioners who rejected the rulemaking, would rather wait for the bipartisan and bicameral American Data Privacy and Protection Act to pass before proceeding. That bill, which is up for a vote in the House and Senate, would give the FTC the power to develop additional privacy protections and privacy laws. The law specifically calls for regulations to prevent the discriminatory use of American data and mandates that platforms like [shoppingmode Google](#) LLC and Meta Platforms Inc. limit the amount of user data they need to acquire in order for their services and products to operate. Additionally, it increases child and minor data security and gives consumers the option to reject targeted advertising. Even some who agree that the FTC has the right to create and enforce preemptive regulations for security and privacy point out the inevitable legal difficulties.

While the FTC has the right to enact rules that fulfil their duty to protect consumers through their privacy rulemaking, Jesse Lehigh, co-founder of Accountable Tech, which advocates for strengthened oversight of Big Tech companies, said he would not be surprised at future challenges to the rulemaking. When drafting a final order, the FTC is likely to take the most recent Supreme Court decision into consideration, according to Rice of the Future of Privacy Forum.

Industry impact The rulemaking’s likely impact on tech industry behemoths is still uncertain at this early stage. According to Cato’s Duffield, the FTC might decide to prioritise data collection or security, areas in which the agency has more defined jurisdiction.

However, in the interim, “it’s really hard to say which path [the FTC] would go,” the Cato researcher added, citing concerns about the way tech companies react to customers following a data breach. Others see the initial rulemaking as a chance for cooperation between the tech industry and the authorities. Technology giants’ work in security and user authentication technologies, according to Shane Tews, a nonresident senior scholar at the American Enterprise Institute who focuses on privacy, can assist the FTC in developing contemporary privacy policies.

“[Collaboration] very much could be a problem-solving entity to a lot of the questions around privacy. You can’t have privacy without security,” Tews said in an interview. According to Lehigh from Accountable Tech, the safeguards outlined by the FTC’s early regulatory efforts ultimately depend on tech businesses being open about their data collection activities.