

How FTC Consumer Protection May Fare Under Reg Freeze

By **Roy Abernathy, Nicholas Pung and Holly Melton** (February 6, 2025, 5:55 PM EST)

On Jan. 20, President Donald Trump issued an executive order on a regulatory freeze pending review. The executive order directs all executive departments and agencies to freeze all pending rulemaking activity.[1]

Further, the executive order requires that federal agencies ensure that an agency head appointed or designated by Trump on or after Jan. 20 reviews and approves any pending rule.

In addition, the order requires agencies to withdraw any rules that have been sent to the Office of the Federal Register, but not yet published, and to consider postponing the effective date of any rules published by the Office of the Federal Register that have not yet taken effect for an additional 60 days.

In both scenarios, the executive order seeks to have a Trump-appointed or designated agency head review and approve pending rules, but also suggests that a further comment period may be advisable to allow for interested parties to provide additional comments.

Notably, the executive order identifies the term "rule" to include rules, regulatory actions and guidance documents. Each term has a citation to a specific definition, but the thrust of the executive order is meant to cover any substantive agency action.

The executive order concludes by stating "should actions be identified that were undertaken before noon on January 20, 2025, that frustrate the purpose underlying this memorandum, I may modify or extend this memorandum."

Given this statement and agencies' option to open additional notice-and-comment periods, pending rules could be delayed by well over 60 days, and, of course, ultimately withdrawn.

Requests to pause agency rulemaking when the Oval Office changes hands are not unusual. It is historically typical for a new administration to deputize new agency leaders to reevaluate any pending agency rulemaking upon taking over.

However, this is the first time that such a request has come in the form of an executive order. Further, the executive order could be particularly impactful for the Federal Trade Commission's Bureau of



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This is because the bureau engaged in unprecedented rulemaking activity following the U.S. Supreme Court's 2021 decision in *AMG Capital Management v. FTC*, which significantly curtailed the commission's ability to seek monetary damages in federal court.[2]

The FTC: What's New

Currently, the commission is composed of two Democratic commissioners, Rebecca Kelly Slaughter and Alvaro Bedoya, and two Republican commissioners, Andrew Ferguson and Melissa Holyoak. The resignation from the commission of the previous chair, Lina Khan, was effective Jan. 31.

Ferguson was designated as the FTC chair on Jan. 20.[3] Trump has stated his intention to nominate Mark Meador to the FTC as the third Republican commissioner. As a new nominee, Meador will be subject to Senate confirmation.

During his first week as chair, the commission approved a motion to give Ferguson authority to comply with Trump's executive orders regarding DEI in the federal government.[4] And Ferguson subsequently issued a press release regarding the FTC's compliance.[5]

Given these actions, we expect Ferguson to comply with the executive order and conduct reviews of all pending FTC rules.

FTC Rules Affected by the Executive Order

The FTC remained actively engaged in rulemaking, even in the months leading up to Trump's inauguration. Thus, there are a number of rules that are likely to be affected by the executive order.

These FTC rules fall into three categories: (1) rules that have not been finalized by the FTC, (2) rules that were finalized by the FTC but were either pending before the Office of the Federal Register or were published with an effective date after Jan. 20, and (3) rules that became effective before the inauguration.

Nonfinalized Rules

FTC rules that have not been finalized include proposed changes to the "Business Opportunity Rule," a proposed new "Earnings Claim Rule" and an amendment to the "Impersonation of Government and Business Rule." For these rules, Ferguson will have the power to either push them forward or withdraw them.

Taken together, the proposed changes — to the rule for business opportunity,[6] Title 16 of the Code of Federal Regulations, Section 437, as well as a proposed new rule for earnings claims, Title 16 of the Code of Federal Regulations, Section 462 — would strengthen several of the FTC's tools.[7]

These include the tools to curb deceptive earnings claims in multilevel marketing programs and moneymaking opportunities, such as business coaching and investment opportunities, and would require companies to provide written substantiation to consumers to back up potential earnings claims.

The notice of proposed rulemaking on the rule for business opportunity, notice of proposed rulemaking

on the "Rule Covering Deceptive Earnings Claims in the MLM Industry," and the advanced notice of proposed rulemaking on "Additional Components of the Proposed Earnings Claim Rule" were announced on Jan. 13.[8]

The public comment period for all three proposals will last 60 days from when they are published in the Federal Register.

The commission votes to approve the issuance of the proposed changes to the rule on business opportunity and the proposed new rule on earnings claims in the Federal Register were 3-2, with Ferguson and Holyoak voting no.

Ferguson issued a dissenting statement joined by Holyoak. The dissenting statement noted that "the time for the Biden-Harris FTC to issue or propose new rules ended the morning after the presidential election."

It further stated that

[s]ome of these proposed rules may be in the public interest and within our legal authority. But whether they are lawful, and whether they are prudent and sound policy choices, are decisions that belong to the incoming Trump Administration and not to lame-duck Biden functionaries. Fortunately, because these are notices of future rulemaking, the Trump administration will decide whether they will ever become final rules.

Because the dissenting statement focused entirely on the outgoing commission's post-election rulemaking activity, it is difficult to predict what Ferguson will do with these rules.

The rule on impersonation of government and businesses became effective on April 1.

However, the FTC sought public comment on a supplemental notice of proposed rulemaking[10] that would prohibit the impersonation of individuals, extending the protections of the rule beyond government and business impersonation, and would address impersonation facilitated by artificial intelligence.[9]

Public comments on the supplemental notice of proposed rulemaking were accepted until April 30, and the FTC held an informal hearing on the proposed amendment on Jan. 17.

Like the rules on business opportunity and earnings claims it is unclear whether the supplementation to the rule on government and business impersonation will remain a priority, will be reshaped, or will be scrapped, as it was approved, by a vote of 3-0, before the Republican commissioners were sworn in.

Rules With Post-Inauguration Effective Dates

Rules that were finalized by the FTC before the inauguration but have an effective date that is either undetermined — the rule was pending before the Office of the Federal Register — or set in the future, include changes to the "Children's Online Privacy Protection Rule," or COPPA, and the "Rule on Unfair or Deceptive Fees," which is sometimes referred to as the junk fees rule.

For these rules, pursuant to paragraph three of the executive order, the chair has the option to respect the existing effective dates or delay the effective date by 60 days.

During that time, the chair can also seek and consider additional public comments to determine whether the law and policy of the rules align with the current administration's priorities. To be clear, however, any withdrawal or changes to these rules would require a full commission vote.

The changes to the rule for COPPA, Title 16 of the Code of Federal Regulations, Section 312, set new requirements around the collection, use and disclosure of the COPPA and gives parents new tools and protections to help them control what data about their children is provided to third parties.[10]

The changes require opt-in consent for targeted advertising and other disclosures to third parties, place limits on data retention and increase Safe Harbor programs' transparency. The changes to the rule were finalized on Jan. 16, and will become effective 60 days after publication in the Federal Register — with a compliance date 365 days after publication.[11]

For the changes to the COPPA, the commission vote approving publication in the Federal Register was 5-0.

Ferguson issued a concurring statement,[12] noting that the amendments "are the culmination of a bipartisan effort initiated when President Trump was last in office" but that there are "serious problems with the Final Rule, problems that are the result of the outgoing administration's irresponsible rush to issue last-minute rules two months after the American people voted to evict them from office, which the commission under Trump will have to address."

He noted three major problems with the proposed changes:

1. Every addition or change to the identities of third parties that receive children's information requires new parental consent, with no limits on materiality, which causes friction and may result in third parties being reluctant to change their policies.
2. Prohibiting personal information collected online from being retained indefinitely goes too far; the prior language that information should only be retained "as long as is reasonably necessary to fulfill the purpose for which the information was collected" is sufficient.
3. There should be clarification that the final rule is not an obstacle to the use of children's personal information solely for the purpose of age verification.

The FTC could attempt to address these perceived problems by opening an additional comment period, or could simply choose to enforce the rule in ways that align with the soon-to-be new commission's priorities.

The rule unfair or deceptive fees, sometimes referred to as the junk fees rule, Title 16 of the Code of Federal Regulations, Section 464, prohibits so-called bait-and-switch pricing and other tactics used to obscure junk fees and misrepresent total prices in the live-event ticketing and short-term lodging industries.[13]

It requires clear and conspicuous disclosure of the true total price, inclusive of all mandatory fees, whenever the price is displayed.[14]

The final rule was announced[15] on Dec. 17, 2024, was published in the Federal Register[16] on Jan. 10,

2025, and has an effective date of May 12, 2025.

The commission vote approving publication of the final rule on unfair or deceptive fees was 4-1, with Holyoak issuing a concurring statement^[17] and Ferguson issuing a dissenting statement.^[18]

Holyoak concurred because the commission narrowed the final rule, focusing only on specific and prevalent unfair or deceptive practices in live-event ticketing and short-term lodging, instead of an economy-wide rule mandating pricing disclosures, which she believed would require congressional action.

She also indicated that "the Final Rule comports with the strict requirements of the commission's Section 18 rulemaking authority" and "the Final Rule helps protect consumers and competition, while also preserving flexibility for businesses to engage in lawful advertising and pricing practices."

Ferguson stated that he dissented "on grounds having nothing to do with the merits of the Final Rule, or with its compliance with the requirements of Sections 5 and 18 of the Federal Trade Commission Act," instead dissenting "only on the ground that the time for rulemaking by the Biden-Harris FTC is over."

Ferguson clarified that his vote "should not be understood to state my position on the Final Rule's merits, or on whether the commission under President Trump should enforce the Final Rule."

This signals that enforcement of the rule will likely remain a priority for the FTC, even though there are opportunities to modify the rule before its effective date.

Rules That Became Effective Before the Inauguration

Rules that had effective dates before the Inauguration include the "Negative Option Rule" — sometimes referred to as the click-to-cancel rule — the "Rule on the Use of Consumer Reviews and Testimonials," amendments to the "Telemarketing Sales Rule" and the impersonation of government and businesses rule, without the supplementation of the impersonation of individuals.

While not directly affected by the executive order, the FTC will have discretion in terms of whether and how to enforce them.

Depending on the support of Ferguson — and also Holyoak and the future-appointed Republican commissioner — these rules could remain enforcement priorities.

The FTC could also attempt to repeal the rules, but that would require going through the rulemaking process again, which is especially arduous for the FTC, as it has to follow so-called Magnuson-Moss rulemaking under Section 18 of the FTC Act, Title 15 of the U.S. Code, Section 57a.

In addition, if any of the rules are challenged in court by a private party, the FTC could decline to defend the litigation.

The negative option rule, sometimes referred to as the click-to-cancel rule, or Title 16 of the Code of Federal Regulations, Section 425, requires sellers to make it as easy for consumers to cancel their enrollment as it was to sign up.^[19]

This rule requires that sellers clearly and conspicuously disclose material terms and obtain consumers'

express consent prior to obtaining a consumer's billing information and charging them.

The final rule was announced on Oct. 16, 2024,[20] and was published in the Federal Register[21] on Nov. 15, 2024, and had an effective date of Jan. 14, 2025.

For the negative option rule, the commission vote approving publication of the final rule in the Federal Register was 3-2, with Holyoak and Ferguson voting no.

Holyoak issued a separate dissenting statement,[22] in which she was critical of the fact that "[i]nstead of pursuing targeted enforcement efforts or finalizing a rule consistent with the Commission's authority under Section 18 of the FTC Act, the Commission has used its limited resources to promulgate a broader regulation that may not survive legal challenge."

She dissented for three reasons: (1) "this rulemaking did not follow the FTC Act's Section 18 requirements for rulemaking," (2) "the Rule's breadth incentivizes companies to avoid negative option features that honest businesses and consumers find valuable," and (3) "the Rule represents a missed opportunity to make useful amendments to the preexisting negative option rule within the scope of the Commission's authority."

This indicates that enforcement of this rule will be less of a priority for the new commission, and that, if the rule is challenged by an independent third party, the FTC might not defend it.

The law on consumer reviews and testimonials,[23] Title 16 of the Code of Federal Regulations, Section 465, prohibits:[24] fake or false consumer and celebrity reviews and testimonials, buying reviews, insider reviews and consumer testimonials, company-controlled review websites, review suppression and misuse of fake social media indicators.[25]

The final rule was announced[26] on Aug. 14, was published in the Federal Register[27] on Aug. 22, 2024, and had an effective date of Oct. 21. The commission vote to approve the consumer reviews and testimonials law was 5-0, indicating that its enforcement will remain a priority for the commission.

The other two rules finalized in 2024, revisions to the rule on telemarketing sales and the government and business impersonation rule, are unlikely to be unwound by the new commission, as both appear to be generally popular and uncontroversial within the business community.

The amendments to the rule on telemarketing sales,[28] or Title 16 of the Code of Federal Regulations, Section 310, extended the rule's coverage to so-called inbound telemarketing calls made for technical support services, targeting calls made by consumers to companies pitching technical support services through advertisements or direct mail solicitations.[29]

The amendments were announced[30] on Nov. 27, 2024, were published in the Federal Register[31] on Dec. 10, 2024, and had an effective date of Jan. 9, 2025. The commission vote approving publication of the notice of the rule on telemarketing sales amendments in the Federal Register was 4-1, with Ferguson voting no and issuing a dissenting statement,[32] explaining that he voted no "not because it is bad policy, but because the time for rulemaking by the Biden-Harris FTC is over."

The government and business impersonation rule, or Title 16 of the Code of Federal Regulations, Section 461, prohibits impersonation scams and providing impersonators with the means to harm consumers.[33]

These include banning scammers from using government seals or business logos when communicating with consumers by mail or online, spoofing government and business emails and web addresses, and falsely implying government or business affiliation.

The rule was finalized on Feb. 15, 2024,[34] was published in the Federal Register[35] on March 1, 2024, and became effective on April 1, 2024. The FTC also issued a supplemental notice of proposed rulemaking that would prohibit the impersonation of individuals, as discussed above.

Conclusion

Ferguson will likely comply with the executive order, and may exercise his power to delay certain rules' effective dates or seek additional public comment. Ferguson may even eventually urge the commission to modify such rules to more closely align with the current administration's priorities.

It will be interesting to see if the vote totals and public statements from Ferguson and Holyoak shed light on how consumer protection rules enacted during the Biden administration will fare under the new commission, after it takes shape.

We likely will not have clarity until the spring or summer, because the commission will not have a Republican majority until a new Republican commissioner is confirmed by the Senate.

Until then, the soon-to-be 2-2 split at the commission could frustrate any efforts to change or eliminate rules that made it across the finish line before the Inauguration, because such changes would require a majority vote of the full commission.

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[1] <https://www.whitehouse.gov/presidential-actions/2025/01/regulatory-freeze-pending-review/>.

[2] We assume for purposes of this analysis that the FTC is bound by the EO, although we recognize that there is debate among legal scholars regarding whether executive orders can bind independent government agencies like the FTC.

[3] <https://www.ftc.gov/news-events/news/press-releases/2025/01/andrew-n-ferguson-takes-over-ftc-chairman>.

[4] <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-grants-chairman-ferguson-authority-comply-president-trumps-orders-end-dei>.

[5] <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-chairman-ferguson-announces-dei-over-ftc>.

[6] <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-437-business-opportunity->

rule-notice-proposed-rulemaking-0.

[7] <https://www.ftc.gov/legal-library/browse/federal-register-notices/earnings-claim-rule-regarding-multi-level-marketing>.

[8] <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-proposes-rule-changes-new-rule-deter-deceptive-earnings-claims-multilevel-marketers-money-making>.

[9] <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-ferguson-joined-by-holyoak-regarding-business-opportunity-and-earnings-claim-rulemaking-notices>.

[10] https://www.ftc.gov/system/files/ftc_gov/pdf/r207000_impersonation_snprm.pdf.

[11] <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-312-coppa-final-rule-amendments>.

[12] <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-finalizes-changes-childrens-privacy-rule-limiting-companies-ability-monetize-kids-data>.

[13] <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/concurring-statement-commissioner-andrew-n-ferguson-coppa-rule-amendments>.

[14] <https://www.ftc.gov/legal-library/browse/federal-register-notices/trade-regulation-rule-unfair-or-deceptive-fees>.

[15] For more information on the regulation of junk fees, see Crowell & Moring's client alert, "Turning up the Heat on Junk Fees and Drip Pricing: Federal and State Regulations Require Increased Transparency into Pricing and Contract Cancellation." <https://www.crowell.com/en/insights/client-alerts/turning-up-the-heat-on-junk-fees-and-drip-pricing-federal-and-state-regulations-require-increased-transparency-into-pricing-and-contract-cancellation>.

[16] <https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees>.

[17] <https://www.federalregister.gov/documents/2025/01/10/2024-30293/trade-regulation-rule-on-unfair-or-deceptive-fees>.

[18] <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-melissa-holyoak-regarding-trade-regulation-rule-unfair-or-deceptive-fees>.

[19] <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-regarding-unfair-or-deceptive-fees-rulemaking>.

[20] <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-425-negative-option-rule>.

[21] <https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurring>.

[22] <https://www.federalregister.gov/documents/2024/11/15/2024-25534/negative-option-rule>.

[23] <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-melissa-holyoak-re-negative-option-rule>.

[24] <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-465-trade-regulation-rule-use-consumer-reviews-testimonials-final-rule>. For more information on the rule, see Crowell & Moring's client alert, "Final Rule Announced: The FTC Strengthens Its Enforcement Capacity Against 'Deceptive' Reviews and Testimonials" <https://www.crowell.com/en/insights/client-alerts/final-rule-announced-the-ftc-strengthens-its-enforcement-capacity-against-deceptive-reviews-and-testimonials>.

[25] <https://www.crowell.com/a/web/rPji2d8Vgou8DfecmLycVg/what-brands-need-to-know-for-marketing-compliance-in-2024>,
<https://www.law360.com/articles/1782052/what-brands-need-to-know-about-consumer-reviews-in-2024.pdf>.

[26] <https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials>.

[27] <https://www.federalregister.gov/documents/2024/08/22/2024-18519/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials>.

[28] <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-310-telemarketing-sales-rule-1>.

[29] For more information, see Crowell & Moring's client alert, "New FTC Telemarketing Sales Rule Amendments." <https://www.crowell.com/en/insights/client-alerts/ftc-telemarketing-sales-rule>.

[30] https://www.ftc.gov/news-events/news/press-releases/2024/11/ftc-takes-aim-top-fraud-driving-losses-among-older-americans?utm_source=govdelivery.

[31] <https://www.federalregister.gov/documents/2024/12/10/2024-28399/telemarketing-sales-rule>.

[32] <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-regarding-telemarketing-sales-rule>.

[33] <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-461-trade-regulation-rule-impersonation-government-businesses-0>.

[34] <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals>.

[35] <https://www.federalregister.gov/documents/2024/03/01/2024-04335/trade-regulation-rule-on-impersonation-of-government-and-businesses>.