

NSR Tech Policy Quick Hit: Will the FTC impose rules on data privacy and security?

By [Matt Perault](#) | August 11, 2022

What happened:

- Today the Federal Trade Commission announced that it is “exploring rules to crack down on harmful commercial surveillance and lax data security.”
- It issued an Advance Notice of Proposed Rulemaking (ANPR), which is a precursor to the process of developing a formal rule. The ANPR enables an agency to gather more information about whether a rule is needed.
- The FTC voted 3-2 along party lines in favor of the ANPR. Commissioners Phillips and Wilson dissented.
- The FTC will accept comments for the next 60 days, and will hold a public forum on the ANPR on September 8.

Our analysis:

- Rules issued by the FTC in privacy and security could have a sweeping and disruptive impact on the tech sector. The ANPR asks 95 questions about a range of issues, including data collection, consent, discrimination, and remedies.
- But the key question is whether such rules will ever take effect. We think there’s a good chance they won’t. If they do, it will take a significant period of time to enact them.
- First, the rulemaking process is lengthy. The ANPR is a preliminary step, and it takes significant time to issue rules. For comparison, the Commerce Department took 14 months to move from a proposed rule to an interim final rule on “Securing the Information and Communications Technology and Services Supply Chain.” FTC rules on privacy and data security could take longer.

- Second, the rules will face serious legal headwinds. Commissioner Phillips alluded to legal challenges in his dissent, in which he asserted the FTC was exceeding its authority. The Chamber of Commerce issued a statement asserting that “Congress must first give the FTC the authority before it can act.” These reactions suggest a legal challenge is highly likely, and even if the FTC were to prevail in a case, it will take time to work its way through the legal system.
- Third, the FTC will face more skepticism from judges than it would have a few months ago, due to the Supreme Court’s decision in *West Virginia v. EPA*. As we have written ([LINK](#)), that case will make it more difficult for agencies to engage in rulemaking.
- Fourth, if a Republican wins the presidency in 2024, Lina Khan would have less than 2.5 years remaining in her chair position. That doesn’t leave much time to get a rule on the books, let alone begin to enforce it.
- Fifth, even if the rule does take effect while Khan is still chair, it’s possible that a subsequent Republican Chair would either reverse the rule or implement it far differently than Chair Khan would.

Conclusion:

- Today’s announcement is just the beginning of a long, contested process. It’s possible that it will result in bold new rules in privacy and security, but the FTC will face extended administrative and legal battles along the way. Given the challenges, we think the possibility of sweeping new rules is unlikely.

Full 12-month historical recommendation changes are available on request

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