

IAPP Guide to FTC Privacy Enforcement

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This IAPP resource serves as a guide to the types of enforcement paths that the U.S. Federal Trade Commission pursues—and the various remedies it seeks—when it exercises its consumer protection enforcement authority to protect consumer privacy and data security.

The FTC's primary authority to pursue privacy cases is derived from its mandate to protect consumers under Section 5 of the FTC Act. Specifically, Section 5(a) prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). (This mandate extends to any activity of a person, partnership, or corporation that affects interstate commerce in the U.S., but certain industries are exempted, including banks, savings and loan institutions, common carriers, air carriers, etc. Nonprofits are also exempt from FTC authority.) A number of other U.S. statutes provide the FTC with additional enforcement authority over particular privacy issues. These include the [Children's Online Privacy Protection Act](#) (COPPA), the [Fair Credit Reporting Act](#) (FCRA), the [Gramm-Leach Bliley Act](#) (GLBA), and the [CAN-SPAM Act](#). Generally, these statutes simply extend the FTC's existing enforcement authority to cover practices that would not otherwise fall within Section 5(a), requiring that the Commission treat statutory violations as if they were “unfair or deceptive acts or practices.” Though some of these statutes include private rights of action, there is no Section 5 private right of action for consumers who are harmed by unfair or deceptive trade practices.

I. Administrative Enforcement Processes and Remedies:

A. Adjudication:

Section 5(b) of the FTC Act empowers the FTC to investigate companies within its jurisdiction that it suspects of engaging in unfair or deceptive activities. After conducting initial research into a target company's practices, the FTC's Bureau of Consumer Protection (BCP) will usually inform the target about the nonpublic investigation through one of two means. The more informal mechanism involves issuing what is known as a voluntary access letter. The access letter informs the company that the FTC is concerned about its activities, and gives the company a certain amount of time to provide requested information to aid the FTC's investigation. The access letter is not an enforceable legal demand for production, but [companies generally comply voluntarily with the FTC's requests](#).

The more formal mechanism is for the FTC to issue a civil investigative demand (CID), which requests the same type of information as a voluntary access letter, but also carries the weight of a subpoena that is enforceable in federal court. At this point, the target company may petition the Commission to either quash or limit the CID that has been issued against it, but [this is a rarely chosen path](#)—likely because it immediately makes an otherwise private investigation into a public case.

As provided under Section 5(b), once the FTC has “reason to believe” that a business entity has violated Section 5(a), the BCP will approve a proposed (and nonpublic) administrative complaint against the target of the investigation, setting forth the specific charges. The investigating division (usually the Division of Privacy and Identity Protection, or DPIP, for privacy cases) will also submit a proposed settlement to use in settlement negotiations. From here, the respondent may elect to proceed in one of two ways:

- 1. Settle the charges:** The target (now a respondent) will generally elect to negotiate with the Commission to settle the complaint. This involves substantial communications and in-person meetings with staff at all levels of the FTC and typically takes a few months to conclude. At the end of this process, if the Commission and the respondent have reached an agreement, the respondent signs a consent agreement (without admitting liability), consents to entry of a final order, and waives all right to judicial review. If the Commission accepts the proposed consent agreement (after approval from a majority of the Commissioners), it makes the proposed order available for public comment for a period of thirty days. After this time, the FTC officially enters the final enforceable consent order.

Aside from not having to admit wrongdoing, another incentivizing factor for the respondent to settle an FTC complaint is that the resulting consent order tends to have less severe terms than it would have had the case been litigated and lost. This is because the FTC, having limited resources, considers the public interest value of time and cost efficient processes, as well as the inherently uncertain nature of litigation. As Daniel Solove and Woodrow Hartzog explain in their 2014 article, [“The FTC and the New Common Law of Privacy”](#):

When the FTC has issued penalties for privacy-related violations, they have ranged from \$1,000 to \$35 million. In most instances (particularly those not involving a separate allegation of a statutory violation), companies pay nothing in response to a violation. In cases where companies might have to pay money in response to a violation, the companies that have settled with the FTC likely pay less than those that do not respond to the complaint and are subjected to a default judgment. (612)

On the other hand, consent orders do have drawbacks for the respondent to consider, particularly the level of adverse publicity they generate. With each consent order, the FTC issues its final complaint, an official press release, and often an analysis to aid public comment, sometimes with a corresponding press conference. The terms of the consent decree [do not apply to the content of these other public statements](#), so the FTC is often able to accentuate the nature and negative consequences of the respondent’s alleged illegal acts.

Examples of FTC Privacy Cases with Uncontested Settlements:

- [Nomi Technologies, Inc.](#)
- [Snapchat](#)
- [GeoCities](#)

Contest the complaint: Alternatively, the respondent may elect to contest the charges in the complaint—or simply fail to reach a settlement with the Commission. This leads to an adjudication of the complaint before an FTC administrative law judge (“ALJ”) in an administrative trial. The prosecution in such cases is handled by FTC “complaint counsel.” Once the administrative trial has concluded, the ALJ issues an “initial decision” to either issue a cease and desist order (find in favor of the FTC), or to dismiss the complaint (find in favor of the respondent). Either complaint counsel or the respondent may appeal the decision to the full Commission. If this happens, an appeal panel made up of the Commissioners of the FTC re-hears the case, issuing its own final decision and order. Any respondent against whom an order is issued may file an appeal with any court of appeals with appropriate jurisdiction. If the court of appeals affirms the Commission’s order, the court enters its own enforcement order. Whichever party loses in the appellate court may then attempt to seek review by the U.S. Supreme Court. Section 5 cases rarely make it to court because it is a costly process, and because [there is little financial incentive for respondents to fight FTC complaints](#), as the threat of financial penalties for violating Section 5 is often minimal. (611-612)

Examples of FTC Privacy Cases with (Contested) Administrative Trials:

- [Wyndham Worldwide Corporation](#)
- [LabMD, Inc.](#)
- [Accusearch](#)

After an administrative order is entered (and all judicial review is complete), the Commission may sue the respondent for consumer redress in federal district court for injury caused by the conduct that was at issue in the administrative proceeding. These suits are governed by Section 19 of the FTC Act, which requires the Commission to demonstrate that the respondent’s conduct was such as “a reasonable man would have known under the circumstances was dishonest or fraudulent.”

B. Rulemaking:

When faced with trying to curb unfair or deceptive practices that run rampant across entire industries, rather than carry out administrative adjudications against individual respondents, the Commission may instead use its administrative rulemaking powers to enact industry-wide trade regulation rules. Per Section 5(m)(1)(A) of the FTC Act, any business entity that violates

a trade regulation rule is liable for civil penalties for each violation if it had “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 Commission obtains such penalties by filing suit in federal district court. A rule violator is also liable for related injury caused to consumers, regardless of whether it knew that its conduct was prohibited by the rule. Section 19 of the FTC Act gives the Commission the ability to file such suits for consumer redress.

The FTC has not issued industry-wide privacy rules under its general rulemaking authority, though it has adopted rules under specific statutory authorities, including the [Children’s Online Privacy Protection Rule](#) (under COPPA), as well as the [Financial Privacy Rule](#) and [Safeguards Rule](#) (under GLBA).

C. Enforcing Violations of Final Orders:

Even after the Commission has determined through adjudication or rulemaking that a practice violates Section 5(a) of the FTC Act, it must seek action from a federal court to obtain civil penalties or consumer redress for violations of its consent orders or its trade regulation rules.

If a respondent violates a final Commission order, the Commission can bring a suit in federal district court to enforce the order, whereupon the court can assess a monetary penalty. Per [Commission Rule 1.98\(c\)](#), a respondent who violates an order is liable for a civil penalty for each individual violation, and the maximum penalty amount for each violation is \$40,000 ([recently raised from \\$16,000 per violation](#)). Additionally, Section 5(l) of the FTC Act provides that the court may also issue “mandatory injunctions” and “such other and further equitable relief” where appropriate.

Examples of FTC Privacy Cases that Enforced a Final Commission Order:

- [Upromise, Inc. \(2017\)](#) enforcing [Upromise, Inc. \(2012\)](#)
- [Google, Inc. \(Safari\)](#) enforcing (in part) [Google, Inc. \(Buzz\)](#)
- [LifeLock, Inc. \(2015\)](#) enforcing [LifeLock, Inc. \(2010\)](#)

If the Commission has determined via an administrative adjudicatory proceeding that a certain type of conduct violates Section 5 of the FTC Act, and it has issued a (corresponding) final order to a respondent, then it may also obtain civil penalties from other parties (non-respondents) who subsequently violate the standards of its order. In doing so, the Commission must demonstrate that the violator had “actual knowledge” that the act was unlawful. The Commission typically satisfies this requirement by showing that it had provided the violator with a copy or synopsis of the order at issue. Per Section 5(m)(1)(B) of the FTC Act, violators only get a “single bite of the apple” (usually in the form of a warning letter) before the Commission may levy monetary penalties against them.

II. Judicial Enforcement Processes and Remedies:

A. Direct-to-Court Challenges Under Section 13(b) of the Federal Trade Act

The Commission may also challenge a practice directly in court, without having to first make a formal, final administrative determination that the conduct in question is unlawful. Section 13(b) provides that the Commission may seek preliminary and/or permanent injunctive relief to remedy “any provision of law enforced by the FTC.”

Section 13(b) has two key provisos:

1. **Preliminary Injunction:** If the Commission has “reason to believe that any party “is violating or is about to violate” FTC law, it may ask the district court to preliminarily enjoin the conduct, pending the results of a subsequent administrative proceeding regarding the legality of the conduct.

Example of FTC Privacy Case with 13(b) Preliminary Injunction:

- [Cornerstone and Company, LLC](#)

2. **Permanent injunction:** “In proper cases,” the Commission may be able to have the court permanently enjoin the conduct. In addition to permanently barring the unfair or deceptive practices, through such an order, the Commission may also be able to obtain various kinds of equitable money relief (i.e., restitution and rescission of contracts) to compensate for past violations. In order to increase the likelihood of ultimate monetary equitable relief, under the right circumstances, the Commission may also be able to have the court freeze the respondent’s assets and order temporary receivers.

Examples of FTC Privacy Cases with 13(b) Permanent Injunction:

- [Vizio, Inc. and Vizio Inscape Services, LLC](#)
- [Lifelock, Inc. \(2010\)](#)

III. The FTC’s Analysis of Whether to Pursue Administrative or Judicial Enforcement

The additional remedies available to the FTC through 13(b) court actions, coupled with the fact that courts have consistently accepted the FTC’s construction of Section 13(b), most consumer protection enforcement now goes directly to court via Section 13(b) suits rather than first beginning with administrative adjudication. However, whether the FTC pursues an administrative or judicial path depends on the facts of each individual case.

Why the FTC Typically Prefers Judicial Enforcement over Administrative:

- The court may award **both** prohibitory **and** monetary equitable relief **in one step**.

- o In an administrative proceeding, by contrast, the FTC cannot obtain equitable monetary relief.
 - To do so, it would need to engage in further proceedings in a federal district court, and penalties can only be imposed when a defendant has violated the cease and desist order issued against it.
- Under 13(b), [the Commission is authorized to seek preliminary and permanent injunctions](#) to halt unfair and deceptive practices.
 - o A judicial injunction becomes effective immediately, while a Commission cease and desist order takes effect only 60 days after service.
- Under 13(b), the Commission is also authorized to freeze assets, appoint receivers, obtain disgorgement of profits related to the unfair or deceptive acts, and seek restitution and other relief to redress injury.

Why the FTC Would Sometimes Prefer Administrative Enforcement over Judicial:

- In an adjudicatory proceeding, the Commission has the first opportunity to make findings of fact and to argue the applicable legal standard.
- Reviewing courts will affirm the Commission's findings of fact if they are supported by substantial evidence.
- Reviewing courts have consistently granted substantial deference to the Commission's interpretation of the FTC Act and other applicable federal laws.
 - o Conversely, in a 13(b) suit, the Commission receives no greater deference than any other government plaintiff.
- Thus, for cases that involve **new or especially unique issues or facts**, the Commission tends to favor administrative adjudication.