SIDLEY

Privacy and Cybersecurity Roundtable

Takeaway Materials

April 11, 2022

Privacy and Cybersecurity Roundtable

Table of Contents

Agenda

CLE Presentation – Impact of Ransomware Attacks & Developing Regulatory and Legislative Landscape in 2022

The AMG Decision

Sidley Thought Leadership

Supplemental Reference Materials

Sean Royall Joins Sidley

Speaker Biographies

Privacy and Cybersecurity Roundtable

Privacy and Cybersecurity Roundtable Agenda

Privacy and Cybersecurity Roundtable

Agenda

Monday, April 11, 2022 | 1:00 – 5:45 p.m. | *A reception will follow the program*

1:00 p.m. **Welcome & Introductions**
Alan Charles Raul, *Partner, Sidley*

1:15 p.m. **CPO Perspectives**
Moderator: Colleen Theresa Brown, *Partner, Sidley*
Panel:
- Seth Blinder, *Managing Director and Chief Privacy Officer, Goldman Sachs Bank USA*
- Jane Horvath, *Chief Privacy Officer, Apple*
- Tom Moore, *Chief Privacy Officer and Senior Vice President, AT&T*

2:30 p.m. **Conversations with FTC Commissioner Slaughter and Attorney General Weiser**
Moderators: Alan Charles Raul and Sean Royall*, Partners, Sidley*
Panel:
- Hon. Rebecca Slaughter, *Commissioner, Federal Trade Commission*
- Hon. Phil Weiser, *Attorney General, State of Colorado*

3:30 p.m. **Cybersecurity Update**
Moderator: Sujit Raman, *Partner, Sidley*
Panel:
- Dmitri Alperovitch, *Founder and Chairman, Silverado Policy Accelerator, and Co-Founder and Former CTO of CrowdStrike Inc.*
- Jim Halpert, *General Counsel, Office of the National Cybersecurity Director, The White House*
- Sam Rubin, *Vice President, Palo Alto Networks/Unit 42*
- Tonya Ugoretz, *Deputy Assistant Director, FBI Cyber Division*

4:30 p.m. **European Update**
Moderator: William RM Long, *Partner, Sidley* and Francesca Blythe*, Senior Managing Associate, Sidley*
Panel:
- Bruno Gencarelli, *Deputy to the Director – Fundamental Rights and Rule of Law, Head of Unit – International Data Flows and Protection, European Commission*
- Joe Jones, *Deputy Director - International Data Transfers Data Policy Directorate, UK Department of Digital, Culture, Media and Sport*
- Dale Sunderland, *Deputy Commissioner, Data Protection Commission, Ireland*
- Thomas Zerdick, Head of Unit - Supervision and Enforcement, European Data Protection *Supervisor*

5:30 p.m. **Concluding Remarks**
William RM Long, *Partner, Sidley*

5:45 p.m. **Networking Reception: *Jurisdictional Competition: A "Brewing" Controversy***
Join us for a themed reception featuring craft beers representing jurisdictions that have passed comprehensive privacy legislation in the last two years.

Privacy and Cybersecurity Roundtable

CLE Presentation – Impact of Ransomware Attacks and Developing Regulatory and Legislative Landscape in 2022

Impact of Ransomware Attacks and Developing Regulatory and Legislative Landscape in 2022

Privacy and Cybersecurity Roundtable

April 11, 2022

TALENT. TEAMWORK. **RESULTS.**

Overview

1. Data and Trends in Ransomware Attacks
2. Ransomware and Health Data
3. Cybersecurity Legislation and Executive Actions on Ransomware
4. Overview of State Actions on Cybersecurity
5. Best Practices

What Is Ransomware?

1. Ransomware is a type of malware used by cybercriminals for financial gain.
2. It is delivered in the same way any type of malware makes its way onto a victim's systems.
   a. Attackers will exploit known vulnerabilities;
   b. Take advantage of systems that have already been compromised; and/or
   c. Use social engineering tactics, such as phishing emails, to get a foothold into an organization that they can use to carry out their attack.

How Is Ransomware Dangerous?

1. Once in, the ransomware will take over a victim’s files or systems and encrypt key information to render it unusable to the organization.
2. Typically, a ransom note is installed on a victim’s system at the same time the files/systems are encrypted. The note will include
   a. the amount of the ransom demand,
   b. a deadline for payment (sometimes including a discounted offer for early payment), and
   c. instructions on how to reach and pay the group demanding the ransom, providing details on the cryptocurrency wallet or other wiring information the victim will need to complete the transaction.
3. In recent years, the definition of ransomware has been extended to include double or multi-extortion attacks, which combine additional threats and tactics, on top of holding a victim’s data hostage.

Recurring Ransomware Tactics & Techniques

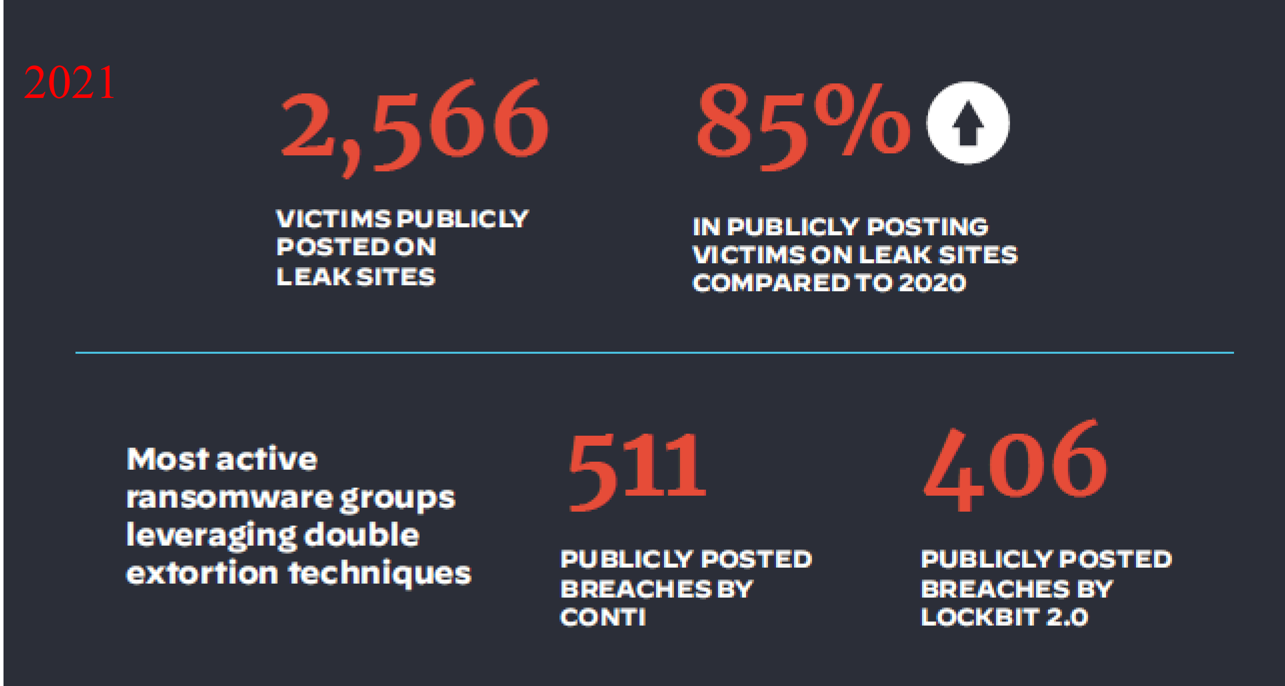
Based on Unit 42's comparison of ransomware activity in 2021 to activity of the past several years, the following recurring techniques were observed:

1. **Attackers take shortcuts.** Using an initial access broker, who sells ready access to corporate networks to anyone who will pay for it, is becoming standard for many ransomware gangs.
2. **Attackers will use any tricks they can.** Attackers are increasingly using anonymized services, which makes it more difficult for security researchers and law enforcement to track activities and identify indicators of compromise (IoCs) that can be used for network defenses.
3. **Attackers are innovative:** Ransomware threat actors continue to invest in their own tooling to keep compromising victims, developing new and updated ransomware variants for use as standalone malware or alongside commodity malware.

Three Ransomware Trends

1. Victim Shaming Is on the Rise
   a. Ransomware gangs not only encrypt an organization’s files, but also leverage leak sites and threaten follow-on attacks (e.g., DDoS) to incentivize a swift payout.
   b. Releasing samples of the victim’s stolen/compromised data on the dark web or their gang’s leak site is a way for the perpetrators to prove they have the information and the threat is serious.
2. Ransomware-as-a-Service (RaaS) Is Quickly Lowering the Technical Bar
   a. “Entrepreneurial” threat actors are offering RaaS. This is a business for criminals, by criminals, with agreements that set the terms for providing actual ransomware to affiliates, often in exchange for monthly fees or a percentage of ransoms paid.
   b. RaaS makes carrying out attacks that much easier, lowering the barrier to entry and expanding the reach of ransomware. Due to the success of these groups, we expect activity of this type to continue to grow.
3. Attackers Are Making Increasing Use of Zero-Days
   a. Threat actors are increasingly tracking high-profile vulnerabilities and exploiting them to gain an initial foothold in an organization. The timeframe from vulnerability to exploitation is getting shorter.

Insight from Ransomware Leak Sites



Source: Unit 42 Palo Alto Network, *2022 Ransom Threat Report*, 23 (2022).

2020	2021	
73%	54%	Cybercriminals succeeded in encrypting data
24%	39%	Attack stopped before the data could be encrypted
3%	7%	Data not encrypted but victim still held to ransom

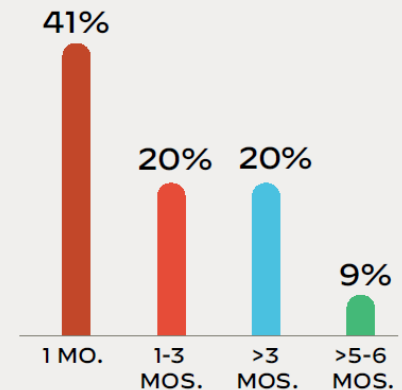
Did the cybercriminals succeed in encrypting your organization's data in the most significant ransomware attack? [2021=2,006, 2020=2,538] organizations were hit by ransomware in the last year.

Source: Sophos, *The State of Ransomware*, 9 (2021) (commissioning independent research house Vanson Bourne to survey 5,400 IT decision makers across 30 countries. The survey was conducted in January and February 2021).

Costs of Ransomware

1. An independent global survey of 1,100 IT and cyber security professionals found that:
   a. Ransomware attacks hit 80% of the organizations in 2021.
   b. More than 60% of those who were hit by the attacks paid the ransom.

   Source: *Claroty, The Global State of Industrial Cybersecurity 2021: Resilience Amid Disruption* (Sept. 2021).
2. In addition to the ransom—whether or not the organization decides to pay it—there are other ancillary costs that need to be factored into the damage inflicted by an attack:
   a. Costs associated with any downtime or disruptions to the business
   b. The impact of the breach on a company's brand reputation
   c. Time spent by IT staff dealing with and recovering from the incident
   d. Legal expenses incurred addressing regulatory and compliance considerations
   e. Most notably, any data loss that triggers any number of follow-on impacts



Source: Unit 42 Palo Alto Network, *2022 Ransom Threat Report*, 31 (2022).

Ransomware’s Impact on Industries

Overall, based on what Unit 42 saw in its incident response cases, the most affected industries were:

1. Professional and legal services;
2. Construction;
3. Wholesale and retail;
4. Health care; and
5. Manufacturing.

Increasing Cyberattacks & Health Data

1. On March 17, 2022, the U.S. Department of Health and Human Service's Office for Civil Rights (OCR) issued industry guidance for Health Insurance Portability and Accountability Act (HIPAA) — regulated entities to take preventative steps to protect against some of the more common, and often successful, cyberattack techniques.
2. Most ransomware attacks result in a breach of protected health information that must be reported under HIPAA, according to federal ransomware guidance for healthcare entities and business associates.
3. The number of breaches of unsecured electronic Personal Health Information (ePHI) reported to OCR affecting 500 or more individuals due to hacking or IT incidents increased 45% from 2019 to 2020.
4. Further, OCR noted that the number of breaches due to hacking or IT incidents accounted for 66% of all breaches affecting 500 or more individuals reported to OCR in 2020.

See Colleen Theresa Brown, Joyce Yeager, and Victor Manuel Flores, *Developments in Health Privacy and Cybersecurity Warnings and New Health Data Legislation Is Introduced*, Data Matters (Mar. 28, 2022).

OCR Guidance on Ransomware and HIPAA

1. On June 9, 2021, OCR distributed an update, sharing links to alerts and resources for addressing the growing number and size of ransomware incidents.
2. The OCR notice provides various additional resources, including its Fact Sheet: Ransomware and HIPAA (OCR Fact Sheet), which was designed specifically for entities regulated by HIPAA and associated business entities.
3. The OCR Fact Sheet instructs, among several recommendations, that:
   a. because ransomware denies access to data, maintaining frequent backups and ensuring the ability to recover data from backups is crucial to recovering from a ransomware attack;
   b. entities should conduct test restorations periodically to verify the integrity of backed up data and their data restoration capabilities. Maintaining backups offline and unavailable from networks is a practical suggestion for avoiding the removal or disruption of online backups by ransomware attackers;
   c. entities must update the firmware of network devices, especially when firmware updates are available to remediate known security vulnerabilities.

Ransomware and HIPAA Privacy Rule

1. Covered Entities regulated by HIPAA may be able to shift large amounts, if not all, of their patient data, including de-identified PHI, on the platforms and services of a technology company.
   a. Even if data is stored elsewhere, a provider is still responsible for data insecurity events.
   b. The Business Associate storing the data may have joint responsibility, but the Covered Entity remains responsible for some aspects of remediation and, perhaps, notice.
2. According to OCR, under the HIPAA Privacy Rule:
   a. When health information does not identify an individual, and there is no reasonable basis to believe that it can be used to identify an individual, it is "de-identified" and is not considered to be PHI, 45 CFR § 164.514 (b).
   b. A covered entity may use or disclose de-identified health information for any purpose without restriction (although other laws may apply).
3. Also, OCR guidance outlined in the HIPAA Breach Notification Rule defines a data breach as "an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of [PHI]."
4. Even if a ransomware attack is not considered a breach and de-identified data may not be subject to HIPAA, security needs to be taken seriously if HIPAA covered entities and their business associates stand to protect against mounting threats to PHI, including de-identified data.

U.S. Federal Government's Focus on Ransomware

Below are recent federal actions regarding cybersecurity:

1. **New Legislation:** On March 11, 2022, as part of federal omnibus appropriations legislation, the U.S. Congress passed Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA), which will require critical infrastructure entities to report *material cybersecurity incidents* and *ransomware payments* to the Cybersecurity and Infrastructure Security Agency (CISA) within 72 and 24 hours, respectively.
2. **Recent Executive Action:** Prior to Congress passing CIRCIA, the following federal executive actions took place:
   a. On May 12, 2021, President Biden issued an Executive Order outlining several actions to improve the nation's cybersecurity.
   b. On September 21, 2021, the U.S. Department of the Treasury Office of Foreign Asset Control (OFAC) imposed sanctions on a virtual currency exchange and published an updated advisory highlighting potential risks for those who facilitate ransomware payments.
   c. On September 22, 2021, CISA, Federal Bureau of Investigation (FBI), and National Security Agency (NSA) published a cybersecurity advisory (the Advisory) outlining the Conti ransomware group's tactics, techniques, and procedures (TTPs) to help companies protect against their attacks.

Background on CIRCIA

1. CIRCIA is intended to provide the federal government with a better understanding of the nation's cyberthreats and facilitate a coordinated national response to ransomware attacks.
2. The FBI currently provides an avenue for voluntarily sharing information about cyber incidents and estimates that only a quarter of cyber incidents are actually reported to the FBI.
3. Separately, current Department of Homeland Security (DHS) Transportation Security Administration directives impose cybersecurity and reporting requirements for designated transportation operators and pipelines.
4. Existing directives require select transportation and pipeline entities to report to CISA, within 24 hours, those cyber events that have the potential to disrupt operations.
5. CIRCIA now provides that federal agencies may enter into agreements regarding the sufficiency of any such existing, substantially similar reporting obligations. When such agreements are in place, the reporting entity is exempt from new reporting requirements imposed by CIRCIA.

See *Congress Passes Cyber Incident Reporting for Critical Infrastructure Act of 2022*, Sidley Austin LLP Privacy & Cybersecurity Update (March 21, 2022).

Breaking Down CIRCIA

1. **Reports to CISA:**
   a. The act requires the reporting of significant cyber incidents or ransomware payments to the Director of CISA for evaluation by the DHS National Cybersecurity and Communications Integration Center.
   b. Supplemental reports for both types of events will be promptly required, and covered entities will be required to preserve data relevant to the reporting.
2. **Cyber Incident Report:**
   a. The legislation requires reporting within 72 hours by "covered entities" within the critical infrastructure sector that reasonably believe a "covered cyber incident" has occurred.
   b. To be refined by the forthcoming rules, "covered entities" will be identified from within the currently designated "critical infrastructure sector" as defined in the existing Presidential Policy Directive 21.

Breaking Down CIRCIA (Cont.)

3. **Supplement Reports:** The act requires not just an initial report within 72 hours but also supplemental reporting if facts materially change as well as a filing that the incident is resolved and "fully mitigated." The act states that covered entities "shall promptly submit to the Agency an update or supplement to a previously submitted covered cyber incident report if substantial new or different information becomes available or if the covered entity makes a ransom payment after submitting a covered cyber incident report … until such date that such covered entity notifies the Agency that the covered cyber incident at issue has concluded and has been fully mitigated and resolved." Section 2242(a)(3).
4. **Ransomware:** The act requires detailed reporting of ransomware payments within 24 hours of payment. Reportable payments include the transmission of any money, property, or asset, including virtual currency, delivered as ransom in connection with a ransomware attack.
   a. A "ransomware attack" is "the use of threat or use of unauthorized or malicious code on an information system, or the use or threat of use of another digital mechanism such as a denial of service attack, to interrupt or disrupt the operations of an information system or compromise the confidentiality, availability, or integrity of electronic data stored on, processed by, or transiting an information system to extort a demand for a ransom payment."
   b. Critically, ransom payments must be reported even if the incident does not meet the definition of a covered cyber incident.

Mixed Response from Senior Government Officials

1. CISA Director Jen Easterly has been a vocal advocate for the law. “CISA will use these reports from our private sector partners to build a common understanding of how our adversaries are targeting U.S. networks and critical infrastructure,” Easterly explained.
2. FBI Director Chris Wray said the law “has some serious flaws” and “would make the public less safe from cyber threats” because it would slow down the FBI’s response to hacks and hamper the government’s ability to identify and disrupt other ongoing attacks.
3. Deputy U.S. Attorney General Lisa Monaco echoed Wray’s concerns, saying, “This bill as drafted leaves one of our best tools, the FBI, on the sidelines and makes us less safe at a time when we face unprecedented threats.”

CISA, FBI, and NSA Publish Technical Advisory on the Conti Group

1. The CISA, FBI, and NSA Advisory is especially notable because it is an example of the type of information sharing promised by the Biden administration, which includes technical details about the Conti group's TTPs
2. The Advisory also heralds the launch of new website called: StopRansomware.gov.
3. The Advisory recommends that companies take the following steps, among others, in order to protect against Conti ransomware attacks:
   a. implement multi-factor authentication;
   b. secure users' accounts by auditing logs and administrative user accounts;
   c. restrict access via Remote Desktop Protocol (RDP); implement certain network structure and monitoring tools (e.g., network segmentation and filter traffic, scan for vulnerabilities, keep software updated, remove unnecessary applications, and utilize endpoint and detection response tools); and
   d. use CISA's Ransomware Response Checklist to determine the best procedures when experiencing a ransomware attack

See Alan Charles Raul, Stephen McInerney, and Carly R. Owens, *The U.S. Federal Government Continues Its Focus on Ransomware Attacks: CISA, FBI, and NSA Publish Technical Advisory on the Conti Group*, Data Matters (Oct. 14, 2021).

U.S. Sanctions to Address Ransomware Threats

1. Ransomware threat actors usually demand payment in cryptocurrencies (like bitcoin); accordingly, victims often use third-party services to make such payments.
2. Having received the ransom payment, threat actors may then use virtual currency exchanges — most of which are legitimate businesses that allow customers to trade cryptocurrencies for other assets (including other digital currencies and conventional fiat money) — in an effort to launder the stolen funds and obscure their digital tracks.
3. As a result of these significant developments, the Biden administration in September 2021 announced a counter-ransomware strategy that includes four lines of effort:
   a. disruption of ransomware infrastructure;
   b. international cooperation to hold countries that harbor ransom actors accountable;
   c. expansion of cryptocurrency tracing analysis; and
   d. review of the U.S. government's policies and approaches to those who make ransomware payments.

See Sujit Raman, Sheila A.G. Armbrust, Andrew W, Shoyer, Barbara Broussard, and Michael R. Roberts, *Five Key Considerations Regarding New U.S. Sanctions to Address Ransomware Threats*, Data Matters (Sept. 24, 2021).

Making or Facilitating Ransomware Payments May Violate U.S. Sanctions

1. OFAC imposed sanctions on a virtual currency exchange called Suex OTC, S.R.O. (Suex) pursuant to the "cyber sanctions" authorized by Executive Order 13694, as amended (EO 13694), which permits the blocking of property of those who engage in significant malicious cyber-enabled activities.
2. According to a prominent blockchain analysis firm whose tools aided in the U.S. government's investigation of Suex, the exchange received "over $160 million from ransomware actors, scammers, and darknet market operators" in bitcoin alone and "tens of millions [of dollars] worth of cryptocurrency payments from addresses associated with several forms of cybercrime."
3. Relatedly, OFAC strongly discourages the payment of ransom demands. OFAC's updated advisory states that "the U.S. government strongly discourages the payment of cyber ransom or extortion demands."
   a. This messaging echoes the formal views of federal law enforcement, as the FBI also does not support paying a ransom in response to a ransomware attack.
4. Platforms facilitating currency exchanges may be subject to sanctions. While the October 2020 OFAC guidance identified attackers and payees who may be designated under OFAC's existing cyber-related sanctions authority, the agency's September 2021 designation of Suex is significant because, as noted above, it represents the first time that a virtual currency platform, as distinct from a malicious attacker, has been so designated.

Overview of State Legislation and Cybersecurity

2021 Introductions

At least 45 states and Puerto Rico introduced or considered more than 250 bills or resolutions that deal significantly with cybersecurity. Some of the issues seeing the most legislative activity include measures:

1. Requiring government agencies to implement cybersecurity training; to set up and follow formal security policies, standards, and practices; and to plan for and test how to respond to a security incident.
2. Regulating cybersecurity within the insurance industry or addressing cybersecurity insurance.
3. Creating task forces, councils, or commissions to study or advise on cybersecurity issues.
4. Supporting programs or incentives for cybersecurity training and education.

Overview of State Legislation and Cybersecurity

2021 Enactments

At least 35 states enacted bills in 2021. Among the bills enacted include those in about half the states that provide for strengthened security measures to protect government resources.

1. Enacted legislation in Connecticut and Utah provide incentives for private sector entities to have reasonable security practices in place at the time of a breach.
2. Georgia, Kansas, Michigan, Vermont, and Washington passed bills to exempt certain cybersecurity information from disclosure under public records laws.
3. At least six states — Hawaii, Iowa, Maine, Minnesota, Tennessee, and Wisconsin — passed legislation related to insurance data security standards.
4. Indiana and North Carolina passed legislation that expressly targets ransomware: Indiana requires reporting of ransomware incidents, and North Carolina became the first state to prohibit government entities from paying ransomware demands.
5. Louisiana and Virginia adopted resolutions providing for cybersecurity studies.

Mitigation Recommendations

CISA's Advisory identified five "immediate actions" that entities can "take now to protect against ransomware":

1. Update your operating system and software.
2. Implement user training and phishing exercises to raise awareness about the risks of suspicious links and attachments.
3. If you use RDP, secure and monitor it.
4. Make an offline backup of your data.
5. Use multifactor authentication (MFA).

Source: CISA et al., Joint Cybersecurity Advisory, *2021 Trends Show Increased Globalized Threat of Ransomware* (2022).

Beijing
Boston
Brussels
Century City
Chicago
Dallas
Geneva
Hong Kong
Houston
London
Los Angeles
Munich
New York
Palo Alto
San Francisco
Shanghai
Singapore
Sydney
Tokyo
Washington, D.C.

sidley.com

TALENT. TEAMWORK. **RESULTS.**

Disclaimer

This presentation has been prepared by Sidley Austin LLP and Affiliated Partnerships (the Firm) for informational purposes and is not legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. All views and opinions expressed in this presentation are our own and you should not act upon this information without seeking advice from a lawyer licensed in your own jurisdiction. The Firm is not responsible for any errors or omissions in the content of this presentation or for damages arising from the use or performance of this presentation under any circumstances.

Do not send us confidential information until you speak with one of our lawyers and receive our authorization to send that information to us. Providing information to the Firm will not create an attorney-client relationship in the absence of an express agreement by the Firm to create such a relationship, and will not prevent the Firm from representing someone else in connection with the matter in question or a related matter. The Firm makes no warranties, representations or claims of any kind concerning the information presented on or through this presentation. Attorney Advertising - Sidley Austin LLP, One South Dearborn, Chicago, IL 60603, +1 312 853 7000. Prior results do not guarantee a similar outcome. Photos may include Sidley alumni or other individuals who are not Sidley lawyers. Photos may be stock photographs.

Privacy and Cybersecurity Roundtable

The AMG Decision

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMG CAPITAL MANAGEMENT, LLC, ET AL. *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–508. Argued January 13, 2021—Decided April 22, 2021

The Federal Trade Commission filed a complaint against Scott Tucker and his companies alleging deceptive payday lending practices in violation of §5(a) of the Federal Trade Commission Act. The District Court granted the Commission's request pursuant to §13(b) of the Act for a permanent injunction to prevent Tucker from committing future violations of the Act, and relied on the same authority to direct Tucker to pay $1.27 billion in restitution and disgorgement. On appeal, the Ninth Circuit rejected Tucker's argument that §13(b) does not authorize the award of equitable monetary relief.

Held: Section 13(b) does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement. Pp. 3–15.

(a) Congress granted the Commission authority to enforce the Act's prohibitions on "unfair or deceptive acts or practices," 15 U. S. C. §§45(a)(1)–(2), by commencing administrative proceedings pursuant to §5 of the Act. Section 5(*l*) of the Act authorizes the Commission, following completion of the administrative process and the issuance of a final cease and desist order, to seek civil penalties, and permits district courts to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." §45(*l*). Section 19 of the Act further authorizes district courts (subject to various conditions and limitations) to grant "such relief as the court finds necessary to redress injury to consumers," §57b(b), in cases where someone has engaged in unfair or deceptive conduct with respect to which the Commission has issued a final cease and desist order applicable to that person, see §57b(a)(2). Here, the Commission responded to Tucker's payday lending practices

by seeking equitable monetary relief directly in district court under §13(b)'s authorization to seek a "permanent injunction." In doing so, the Commission acted in accordance with its increasing tendency to use §13(b) to seek monetary awards without prior use of the Commission's traditional administrative proceedings. The desirability of the Commission's practice aside, the question is whether Congress, by enacting §13(b) and using the words "permanent injunction," granted the Commission authority to obtain monetary relief directly from courts and effectively bypass the requirements of the administrative process. Pp. 3–6.

(b) Section 13(b) does not explicitly authorize the Commission to obtain court-ordered monetary relief, and such relief is foreclosed by the structure and history of the Act. Section 13(b) provides that the "Commission may seek . . . a permanent injunction." §53(b). By its terms, this provision concerns prospective injunctive relief, not retrospective monetary relief. Section 13(b) allows the Commission to go directly to district court when the Commission seeks injunctive relief pending administrative proceedings or when it seeks only a permanent injunction. Other statutory provisions, in particular the conditioned and limited monetary relief authorized in §19, confirm this conclusion. It is highly unlikely that Congress, without mentioning the matter, would grant the Commission authority to circumvent its traditional §5 administrative proceedings. Pp. 6–10.

(c) The Commission's contrary arguments are unavailing. First, *Porter* v. *Warner Holding Co.*, 328 U. S. 395, and *Mitchell* v. *Robert DeMario Jewelry*, *Inc.*, 361 U. S. 288, did not adopt a universal rule that statutory authority to grant an injunction automatically encompasses the power to grant equitable monetary remedies. Instead, the text and structure of the particular statutory scheme at issue can limit a court's jurisdiction in equity. Second, in enacting §19 two years after §13(b), Congress did not simply create an alternative enforcement path with similar remedies. The Court does not believe Congress would have enacted §19's provisions expressly authorizing monetary relief if §13(b) already implicitly allowed the Commission to obtain that same monetary relief without satisfying §19's conditions and limitations. Third, §19's saving clauses—preserving "any authority of the Commission under any other provision of law" and "any other remedy or right of action provided by State or Federal law," §57b(e)—do not help answer whether §13(b) gave the Commission the authority to obtain equitable monetary relief directly in court in the first place. Fourth, the Act's 1994 and 2006 amendments, which did not modify the specific language at issue here, do not demonstrate congressional acquiescence to lower court rulings that favor the Commission's interpretation of

§13(b). Fifth, policy arguments that §5 and §19 are inadequate to provide redress to consumers should be addressed to Congress. Pp. 10–14.

910 F. 3d 417, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 19–508

AMG CAPITAL MANAGEMENT, LLC, ET AL., PETITIONERS *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 22, 2021]

JUSTICE BREYER delivered the opinion of the Court.

Section 13(b) of the Federal Trade Commission Act authorizes the Commission to obtain, "in proper cases," a "permanent injunction" in federal court against "any person, partnership, or corporation" that it believes "is violating, or is about to violate, any provision of law" that the Commission enforces. 87 Stat. 592, 15 U. S. C. §53(b). The question presented is whether this statutory language authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement. We conclude that it does not.

I

Petitioner Scott Tucker controlled several companies that provided borrowers with short-term payday loans. The companies, operating online, would show a potential customer a loan's essential terms. When the companies explained those terms, they misled many customers. The companies' written explanations seemed to say that customers could normally repay a loan by making a single payment. And that payment would cost a person who, for example, borrowed $300 an extra $90. (The customer would

likely repay a total of $390.) But in fine print the explanations said that the loan would be automatically renewed unless the customer took affirmative steps to opt out. Thus, unless the customer who borrowed $300 was aware of the fine print and actively prevented the loan's automatic renewal, he or she could end up having to pay $975, not $390. Between 2008 and 2012, Tucker's businesses made more than 5 million payday loans, amounting to more than $1.3 billion in deceptive charges.

In 2012 the Federal Trade Commission filed suit and claimed that Tucker and his companies were engaging in "unfair or deceptive acts or practices in or affecting commerce," in violation of §5(a) of the Act. 15 U. S. C. §45(a)(1). (We shall refer to all of the defendants collectively as Tucker.) In asserting that Tucker's practices were likely to mislead consumers, the Commission did not first use its own administrative proceedings. Rather, the Commission filed a complaint against Tucker directly in federal court. The Commission, relying upon §13(b), asked the court to issue a permanent injunction to prevent Tucker from committing future violations of the Act. Relying on the same provision, the Commission also asked the court to order monetary relief, in particular, restitution and disgorgement. The Commission moved for summary judgment.

The District Court granted the Commission's summary judgment motion. The court also granted the Commission's request for an injunction and directed Tucker to pay $1.27 billion in restitution and disgorgement. The court ordered the Commission to use these funds first to provide "direct redress to consumers" and then to provide "other equitable relief" reasonably related to Tucker's alleged business practices. Finally, the court ordered the Commission to deposit any remaining funds in the United States Treasury as disgorgement.

On appeal, Tucker argued that §13(b) does not authorize the monetary relief the District Court had granted. The

Ninth Circuit rejected Tucker's claim. 910 F. 3d 417 (2018). It pointed to Circuit precedent that had interpreted §13(b) as "empower[ing] district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." *FTC* v. *Commerce Planet*, *Inc.*, 815 F. 3d 593, 598 (2016); see also *FTC* v. *H. N. Singer*, *Inc.*, 668 F. 2d 1107, 1113 (CA9 1982). Two judges, while recognizing that precedent in many Circuits supported that use of §13(b), expressed doubt as to the correctness of that precedent.

Tucker then sought certiorari in this Court. In light of recent differences that have emerged among the Circuits as to the scope of §13(b), we granted his petition.

II

The Federal Trade Commission Act prohibits, and authorizes the Commission to prevent, "[u]nfair methods of competition" and "unfair or deceptive acts or practices." 15 U. S. C. §§45(a)(1)–(2). The Act permits the Commission to use both its own administrative proceedings (set forth in §5 of the Act) and court actions in exercising this authority. In construing §13(b), it is helpful to understand how the Commission's authority (and its interpretation of that authority) has evolved over time.

Ever since the Commission's creation in 1914, it has been authorized to enforce the Act through its own administrative proceedings. Section 5 of the Act describes the relevant administrative proceedings in some detail. If the Commission has "reason to believe" that a party "has been or is using any unfair method of competition or unfair or deceptive act or practice," it can file a complaint against the claimed violator and adjudicate its claim before an Administrative Law Judge. §45(b). The ALJ then conducts a hearing and writes a report setting forth findings of fact and reaching a legal conclusion. *Ibid.* If the ALJ concludes that the conduct at issue was unfair or misleading, the ALJ will issue

an order requiring the party to cease and desist from engaging in the unlawful conduct. *Ibid.* The party may then seek review before the Commission and eventually in a court of appeals, where the "findings of the Commission as to the facts" (if supported by the evidence) "shall be conclusive." §45(c). If judicial review favors the Commission (or if the time to seek judicial review expires), the Commission's order normally becomes final (and enforceable). §45(g).

In the 1970s Congress authorized the Commission to seek additional remedies in court. In 1973 Congress added §13(b), the provision at issue here. That provision permits the Commission to proceed directly to court (prior to issuing a cease and desist order) to obtain a "temporary restraining order or a preliminary injunction," and also allows the Commission, "in proper cases," to obtain a court-ordered "permanent injunction." 15 U. S. C. §53(b). In the same legislation, Congress also amended §5(*l*) of the Act to authorize district courts to award civil penalties against respondents who violate final cease and desist orders, and to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." §45(*l*). Two years later, Congress enacted §19 of the Act, which authorizes district courts to grant "such relief as the court finds necessary to redress injury to consumers," including through the "refund of money or return of property." §57b(b). However, Congress specified that the consumer redress available under §19 could be sought only (as relevant here, and subject to various conditions and limitations) against those who have "engage[d] in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order which is applicable to such person." §57b(a)(2).

Beginning in the late 1970s, the Commission began to use §13(b), and in particular the words "permanent injunction,"

to obtain court orders for redress of various kinds in consumer protection cases—without prior use of the administrative proceedings in §5. See, *e.g.*, *FTC* v. *Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 59 (Md. 1981) (relying on §13(b) to order the defendant to notify past customers of their warranty rights); see also D. FitzGerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act 1–2, Paper at FTC 90th Anniversary Symposium, Sept. 23, 2004 (FitzGerald); Beales & Muris, Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act, 79 Antitrust L. J. 1, 3–4 (2013). The Commission used this authority to seek and win restitution and other forms of equitable monetary relief directly in court.

Similarly, in the late 1990s the Commission began to use §13(b)'s "permanent injunction" authority in antitrust cases to seek monetary awards, such as restitution and disgorgement—again without prior use of traditional administrative proceedings. See Complaint in *FTC* v. *Mylan Labs., Inc.*, No. 98–3114 (DC); Complaint in *FTC* v. *The Hearst Trust*, No. 01–734 (DC). In 2003 the Commission issued guidance that limited its use of §13(b) to obtain monetary relief to "exceptional cases" involving a "[c]lear [v]iolation" of the antitrust laws. Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (emphasis deleted). But in 2012 the Commission withdrew its policy statement and the limitations it imposed. See Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071.

The result is that the Commission presently uses §13(b) to win equitable monetary relief directly in court with great frequency. The Commission tells us that "the agency [now] brings dozens of [§13(b)] cases every year seeking a permanent injunction and the return of illegally obtained funds." Brief for Respondent 8; see also, *e.g.*, Ohlhausen, Dollars, Doctrine, and Damage Control: How Disgorgement Affects

the FTC's Antitrust Mission 7, Speech at Dechert LLP, NY, Apr. 20, 2016 (Commission sought disgorgement in antitrust cases four times between 2012 and 2016, which is "as many times as the [Commission] pursued such relief in the prior twenty years"). With respect to consumer protection cases, the Commission adds that "there's no question that the agency brings far more cases in court than it does in the administrative process." Tr. of Oral Arg. 49. In fiscal year 2019, for example, the Commission filed 49 complaints in federal court and obtained 81 permanent injunctions and orders, resulting in $723.2 million in consumer redress or disgorgement. See FTC, Fiscal Year 2021 Congressional Budget Justification 5 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf. In the same period, the Commission issued only 21 new administrative complaints and 21 final administrative orders.

Our task here is not to decide whether this substitution of §13(b) for the administrative procedure contained in §5 and the consumer redress available under §19 is desirable. Rather, it is to answer a more purely legal question: Did Congress, by enacting §13(b)'s words, "permanent injunction," grant the Commission authority to obtain monetary relief directly from courts, thereby effectively bypassing the process set forth in §5 and §19?

III

Several considerations, taken together, convince us that §13(b)'s "permanent injunction" language does not authorize the Commission directly to obtain court-ordered monetary relief. For one thing, the language refers only to injunctions. It says, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent *injunction*." 15 U. S. C. §53(b) (emphasis added). An "injunction" is not the same as an award of equitable monetary relief. Compare, *e.g.*, *United States* v. *Oregon State*

Medical Soc., 343 U. S. 326, 333 (1952) (injunction typically offers prospective relief against ongoing or future harm), with, *e.g.*, 1 D. Dobbs, Law of Remedies §4.1(1) (2d ed. 1993) (restitution typically offers retrospective relief to redress past harm). We have, however, sometimes interpreted similar language as authorizing judges to order equitable monetary relief. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert DeMario Jewelry*, *Inc.*, 361 U. S. 288 (1960).

But if this language alone is not enough, there is more. The language and structure of §13(b), taken as a whole, indicate that the words "permanent injunction" have a limited purpose—a purpose that does not extend to the grant of monetary relief. Those words are buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief. It says (in relevant part):

> "Whenever the Commission has reason to believe—
>
> "(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> "(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
> "the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided*, *however*, That if a complaint is not

> filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That *in proper cases the Commission may seek*, *and after proper proof*, *the court may issue*, *a permanent injunction*." 15 U. S. C. §53(b) (final emphasis added).

Taken as a whole, the provision focuses upon relief that is prospective, not retrospective. Consider the words "is violating" and "is about to violate" (not "has violated") setting forth when the Commission may request injunctive relief. Consider too the words "pending the issuance of a complaint," "until such complaint is dismissed," "temporary restraining order," "preliminary injunction," and so forth in the first half of the section. These words reflect that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness. Cf. §53(a) (providing similar provisional relief where false advertising regarding food, drugs, devices, and cosmetics is at issue). And the appearance of the words "permanent injunction" (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction. They might also be read, for example, as granting authority for the Commission to go one step beyond the provisional and ("in proper cases") dispense with administrative proceedings to seek what the words literally say (namely, an *injunction*). But to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large

dog.

Further, the structure of the Act beyond §13(b) confirms this conclusion. Congress in §5(*l*) and §19 gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the Commission has *issued cease and desist orders*, *i.e.*, where the Commission has engaged in administrative proceedings. Since in these provisions Congress explicitly provided for "other and further equitable relief," 15 U. S. C. §45(*l*), and for the "refund of money or return of property," §57b(b), it likely did not intend for §13(b)'s more cabined "permanent injunction" language to have similarly broad scope.

More than that, the latter provision (§19) comes with certain important limitations that are absent in §13(b). As relevant here, §19 applies only where the Commission begins its §5 process within three years of the underlying violation and seeks monetary relief within one year of any resulting final cease and desist order. 15 U. S. C. §57b(d). And it applies only where "a reasonable man would have known under the circumstances" that the conduct at issue was "dishonest or fraudulent." §57b(a)(2); see also §45(m)(1)(B)(2) (providing court-ordered monetary penalties against anyone who engages in conduct previously identified as prohibited in a final cease and desist order, but only if the violator acted with "actual knowledge that such act or practice is unfair or deceptive"). In addition, Congress enacted these other, more limited, monetary relief provisions at the same time as, or a few years after, it enacted §13(b) in 1973.

It is highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via §13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations. Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority

so readily to circumvent its traditional §5 administrative proceedings. See FitzGerald 1 (arguing that, in the mid-1970s, "no one imagined that Section 13(b) of the [FTC] Act would become an important part of the Commission's consumer protection program" (footnote omitted)).

At the same time, to read §13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: The Commission may obtain monetary relief by first invoking its administrative procedures and then §19's redress provisions (which include limitations). And the Commission may use §13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief. By contrast, the Commission's broad reading would allow it to use §13(b) as a substitute for §5 and §19. For the reasons we have just stated, that could not have been Congress' intent. Cf. *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U. S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes").

IV

The Commission makes several arguments to the contrary. First, the Commission points to traditional equitable practice and to two previous cases where we interpreted provisions authorizing injunctive relief to authorize equitable monetary relief as well. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert DeMario Jewelry*, *Inc.*, 361 U. S. 288 (1960). In *Porter* we said that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." 328 U. S., at 399. In *Mitchell* we said that, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of

the statutory purposes." 361 U. S., at 291–292. The Commission argues that these cases consequently support the proposition that the traditional equitable "authority to grant an 'injunction' includes the power to grant restorative monetary remedies." Brief for Respondent 21.

The problem for the Commission is that we did not in these two cases purport to set forth a universal rule of interpretation. And both cases involved different statutes. See *Porter*, 328 U. S., at 397 (Emergency Price Control Act provision authorizing courts to issue "'a permanent or temporary injunction, restraining order, or other order'"); *Mitchell*, 361 U. S., at 289 (Fair Labor Standards Act provision authorizing courts to "'restrain violations'" of the Act's antiretaliation ban). In both cases, we recognized that the text and structure of the statutory scheme at issue can, "in so many words, or by a necessary and inescapable inference, restric[t] the court's jurisdiction in equity." *Porter*, 328 U. S., at 398; *Mitchell*, 361 U. S., at 291. Thus in *Porter* we examined "other provision[s] of the [Emergency Price Control] Act" to determine whether they "expressly or impliedly preclud[e] a court from ordering restitution in the exercise of its equity jurisdiction." 328 U. S., at 403. And in *Mitchell* we examined other provisions of the Fair Labor Standards Act before concluding that there was "no indication in the language" that the statute precluded equitable relief in the form of lost wages. 361 U. S., at 294.

Moreover, more recently, we have held, based on our reading of a statutory scheme as a whole, that a provision's grant of an "injunction" or other equitable powers does not automatically authorize a court to provide monetary relief. Rather, we have said, the scope of equitable relief that a provision authorizes "remains a question of interpretation in each case." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 257 (1993). Our decision in *Meghrig* v. *KFC Western*, *Inc.*, 516 U. S. 479 (1996), is instructive. There, we considered a provision in the Resource Conservation and Recovery Act

that authorizes district courts "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste," and "to order such person to take such other action as may be necessary, or both." 98 Stat. 3268, 42 U. S. C. §6972(a). The question was whether this language permits courts to award restitution in the form of past cleanup costs. We concluded that, despite *Porter*, the provision's grant of equitable authority does not authorize past cleanup costs because the relevant statutory scheme (as here) contained other "'elaborate enforcement provisions,'" including (as here) provisions that explicitly provide for that form of relief. *Meghrig*, 516 U. S., at 487. Here, the inference against §13(b)'s authorization of monetary relief is strong and follows from the interpretive approach we took in *Meghrig*.

Second, the Commission argues that Congress simply created two enforcement avenues, one administrative and the other judicial, leaving the Commission the power to decide which of the two "separate, parallel enforcement paths" to take. Brief for Respondent 41. To the extent that §19 authorizes "similar relief" as §13(b), the Commission continues, that reflects only the fact that each pathway is an alternative route to "similar endpoints." *Id.*, at 41–42. This statement, however, does not overcome the interpretive difficulties we have set forth, for example permitting the Commission to avoid the conditions and limitations laid out in §19. We cannot believe that Congress merely intended to enact a more onerous alternative to §13(b) when it enacted §19 two years later.

Third, the Commission points to saving clauses in §19, which, it says, save its ability to use §13(b) to obtain monetary relief. See *id.*, at 42. Those clauses preserve "any authority of the Commission under any other provision of law" and preserve "any other remedy or right of action provided

by State or Federal law." 15 U. S. C. §57b(e). Here, however, the question is not one of preserving pre-existing remedies given by other statutory provisions. The question is whether those other provisions (namely, §13(b)) gave that remedy in the first place.

Fourth, the Commission points out that the courts of appeals have, until recently, consistently accepted its interpretation, and that Congress has in effect twice ratified that interpretation in subsequent amendments to the Act. See, *e.g.*, Brief for Respondent 8, and n. 3 (citing the similar conclusions of eight Circuits). But see *FTC* v. *Credit Bureau Center*, *LLC*, 937 F. 3d 764 (CA7 2019); *FTC* v. *AbbVie Inc.*, 976 F. 3d 327 (CA3 2020). We have held that Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation. See, *e.g.*, *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 338 (1988). We have also said, however, that when "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a court's] statutory interpretation." *Alexander* v. *Sandoval*, 532 U. S. 275, 292 (2001) (internal quotation marks omitted). We find this latter statement the more relevant here.

The two examples of acquiescence to which the Commission refers do not convince us that Congress acquiesced in the lower courts' interpretation. The Commission first points to amendments that Congress made to the Act in 1994. See §10, 108 Stat. 1695–1696. Those two amendments, however, simply revised §13(b)'s venue, joinder, and service rules, not its remedial provisions. They tell us nothing about the words "permanent injunction" in §13(b).

The Commission also points to amendments made to the Act in 2006. Those amendments modified the scope of §5 so that, where certain conduct in foreign commerce is in-

volved, §5 authorizes "'[a]ll remedies available to the Commission,'" including "'restitution.'" See §3, 120 Stat. 3372. We agree, however, that restitution is available, for example, when the Commission uses its administrative process. See, *e.g.*, 15 U. S. C. §57b(b). That being so, these amendments also tell us nothing about the scope of §13(b).

Fifth, the Commission and its *amici* emphasize the policy-related importance of allowing the Commission to use §13(b) to obtain monetary relief. They suggest that it is undesirable simply to enjoin those who violate the Act while leaving them with profits earned at the unjustified expense of consumers. See, *e.g.*, Brief for Respondent 8–9; Brief for Truth in Advertising, Inc., as *Amicus Curiae* 7–13; Brief for American Antitrust Institute as *Amicus Curiae* 9–21; Brief for National Consumer Law Center et al. as *Amici Curiae* 10–20; Brief for Illinois et al. as *Amici Curiae* 5–11. They point to the billions of dollars that the Commission has returned to consumers as a result of the Commission's §13(b) efforts. See, *e.g.*, Brief for Respondent 8–9; Brief for Illinois et al. as *Amici Curiae* 5.

Nothing we say today, however, prohibits the Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers. If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority. Indeed, the Commission has recently asked Congress for that very authority, see Hearing before the Senate Committee on Commerce, Science, and Transportation on Oversight of the Federal Trade Commission, Prepared Statement of the FTC, 116th Cong., 2d Sess., 3–5 (2020), and Congress has considered at least one bill that would do so, see S. 4626, 116th Cong., 2d Sess., §403 (2020) (revising §13 to expressly authorize restitution and disgorgement). We must conclude, however, that §13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief.

* * *

For these reasons, we reverse the Ninth Circuit's judgment, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Antitrust, Vol. 35, No. 3, Summer 2021. © 2021 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

A Watershed Moment? What Comes Next for the FTC in the Wake of *AMG*

BY M. SEAN ROYALL, RICHARD CUNNINGHAM, AND OLIVIA ADENDORFF

IT IS NOT OFTEN THAT THE NATION'S highest court completely repudiates a federal agency's long-standing view of its authority. Yet that is exactly what occurred when the Supreme Court, in late April of this year, issued its unanimous decision in *AMG Capital Management, Inc. v. FTC*,[1] bringing an end to decades of case law embracing the Federal Trade Commission's long-standing interpretation of Section 13(b) of the FTC Act. That provision, adopted by Congress in 1973, authorizes the FTC in certain circumstances to seek preliminary and permanent injunctions in federal court, but makes no mention of monetary remedies. Since the 1980s, however, the FTC has been invoking Section 13(b) as authority to seek and recover equitable monetary relief, such as restitution based on alleged consumer harm and disgorgement of alleged illicit profits. In the intervening years, the Commission came to rely on Section 13(b) as its principal vehicle for obtaining monetary relief in both consumer protection and antitrust cases. Through a combination of settlements and court judgments, over the years the agency has collected billions of dollars from corporate and individual defendants, citing to Section 13(b) as the sole basis for relief.

M. Sean Royall, Richard Cunningham, and Olivia Adendorff are partners at Kirkland & Ellis LLP. Mr. Royall served as Deputy Director of the FTC Bureau of Competition from 2001–2003 and Mr. Cunningham served as Staff Attorney and Senior Trial Counsel with the Bureau of Competition from 2004–2013. Messrs. Royall and Cunningham represent LendingClub in FTC v. LendingClub, *Case No. 3:18-cv-02454 (N.D. Cal.), a pending matter in which the FTC sought restitution pursuant to Section 13(b) of the FTC Act. Mr. Royall was previously appellate counsel for the defendant in* FTC v. Commerce Planet, *815 F.3d 593 (9th Cir. 2016). The authors also represent clients in ongoing investigations and other litigations in which the FTC sought, is seeking, or may seek monetary remedies.* *The authors thank Lucie Duvall and Emily Hsu for their valuable contributions to this article.*

The collapse of the FTC's Section 13(b) program is a modern-day legal spectacle to which the authors and the readers of this publication have had a front-row seat. In 2013, we argued before the Ninth Circuit in *FTC v. Commerce Planet, Inc.*,[2] that the plain text and legislative history of Section 13(b) support one conclusion—that the provision authorizes injunctive relief only. The Ninth Circuit disagreed. "Although this provision mentions only injunctive relief," the court's 2016 decision held, "it also empowers district courts to grant 'any ancillary relief necessary to accomplish complete justice,' including restitution."[3]

The Ninth Circuit's ruling in *Commerce Planet* was not an outlier. At that point in time, seven other circuits had held that Section 13(b) authorized the FTC to seek and obtain monetary relief in connection with requests for an injunction, and no court of appeals had ruled otherwise.[4] A former Director of the FTC's Bureau of Consumer Protection and advocate for a broad interpretation of the agency's Section 13(b) authority published an article in the Fall 2016 issue of ANTITRUST in which he summarized the uniform string of appellate rulings favoring the FTC's position and predicted that the law "is not going to change."[5] Even the title of that article signaled the view that critics hoping to establish limits on the FTC's authority were fighting a lost cause.

We expressed a contrary view in the Spring 2018 issue of ANTITRUST, noting the strained statutory reading required by the Commission's position, and that the Supreme Court's 2017 ruling in *Kokesh v. SEC*[6] raised questions about the SEC's disgorgement authority that arguably could be extended to the FTC.[7]

The next shoe to drop following *Kokesh* came later in 2018 when Ninth Circuit Judge Diarmuid O'Scannlain took the unusual step of writing a "special concurrence" to his own majority opinion in *FTC v. AMG Capital Management, LLC*.[8] In that opinion, Judge O'Scannlain, joined by another member of the panel, recognized that *Commerce Planet* was controlling circuit authority on the Section 13(b) issue, but nonetheless advocated that the Ninth Circuit reconsider that ruling en banc, suggesting that decisions upholding the FTC's monetary relief authority reflected "an impermissible exercise of judicial creativity" that "contravenes the basic separation-of-powers principle."[9]

The Ninth Circuit declined the invitation to reconsider *Commerce Planet*, but in 2019 the Seventh Circuit in *FTC v. Credit Bureau Center*[10] picked up where Judge O'Scannlain left off, becoming the first federal appeals court to rule against the FTC on this issue, consciously departing from the "consensus view" of its "sister circuits,"[11] and thereby setting up the circuit split that would lead to the Supreme Court agreeing to hear the issue.[12]

The Supreme Court's unanimous reversal is a stunning legal development, but the focus of this article is less on how we got to this point and more on what happens next. After exploring a bit further the run-up to *AMG* and the decision

itself, the balance of the article offers thoughts on how this decision may impact pending FTC enforcement actions and the agency's future enforcement strategies, and what may come of the FTC's calls for new congressional action to supplement the agency's remedial powers in the wake of *AMG*.

The Rise and Fall of the FTC's Use of Section 13(b) to Obtain Monetary Remedies

After the FTC began asserting that the words "permanent injunction" in Section 13(b) authorized the agency to obtain equitable monetary remedies, such as disgorgement and restitution, the issue filtered its way up through the courts, and the agency had tremendous success defending its position. The Seventh Circuit's 1989 decision in *FTC v. Amy Travel Services, Inc.*,[13] was the first appellate ruling to confront the issue, and the court embraced the FTC's broad interpretation of its statutory authority.[14] In time, seven other circuits would join suit. By the late 1990s, Section 13(b) became the primary mechanism by which the Commission obtained monetary relief in cases not involving enforcement of existing orders or rules.

The first sign that the FTC's position on Section 13(b) might be in jeopardy came with the Supreme Court's 2017 *Kokesh* decision. In that case, the Court held that disgorgement obtained by the SEC constitutes a "penalty" subject to a five-year statute of limitations under 28 U.S.C. § 2462 when the agency acts pursuant to statutory provisions similar to Section 13(b) of the FTC Act.[15] Although the holding in *Kokesh* was limited to the SEC and involved a statute of limitations question, the fact that the Court held that the SEC's disgorgement remedy constituted a "penalty" signaled that disgorgement may not be available to agencies seeking equitable relief, given that the Court had previously held that a court in equity may not enforce a "civil penalty."[16]

Shortly after *Kokesh* was decided, the defendants in *AMG* filed a brief with the Ninth Circuit citing the decision in support of their challenge to a $1.3 billion monetary judgment that the FTC obtained under Section 13(b). The *AMG* case concerned payday loan practices, and the FTC obtained this relief as restitution for the alleged consumer harm caused by the defendants' "unfair or deceptive practices."[17] The *AMG* defendants urged the Ninth Circuit to reconsider "[t]he availability of monetary awards under Section 13(b)—regardless whether a court labels them 'damages' or 'equitable restitution,'" and to apply the reasoning from *Kokesh* to "determine whether the FTC improperly uses Section 13(b) to pursue penal monetary relief under the guise of equitable authority."[18] As noted above, the panel declined to do so, as it was bound by the earlier Ninth Circuit *Commerce Planet* decision, but Judges O'Scannlain and Bea penned a special concurrence criticizing the basis of *Commerce Planet* and calling for en banc review.[19] After the Ninth Circuit declined en banc review, AMG filed a petition for certiorari.

Shortly thereafter, in August 2019, the Seventh Circuit in *Credit Bureau* reversed its heavily cited *Amy Travel* decision, becoming the first federal circuit court to hold that the FTC cannot obtain monetary relief under Section 13(b), and the court vacated a $5.26 million judgment in favor of the Commission.[20] After en banc review was denied, the FTC sought certiorari.

The Supreme Court granted certiorari in both *AMG* and *Credit Bureau* in July 2020. The Court subsequently vacated its grant of certiorari in *Credit Bureau*, leaving *AMG* as the vehicle through which it would address the scope of the FTC's Section 13(b) remedial authority.

In September 2020, the Third Circuit, in a pharmaceutical antitrust case, followed the Seventh Circuit's holding and vacated a $448 million judgment obtained by the FTC under Section 13(b), expanding the circuit split.[21]

The Court heard oral argument in *AMG* on January 13, 2021.

The *AMG* Decision

On April 22, 2021, a unanimous Supreme Court held that Section 13(b) does not authorize the FTC to seek—or a court to award—equitable monetary relief such as restitution or disgorgement.[22] The Court rejected the FTC's interpretation of the statute's reference to obtaining a "permanent injunction" and concluded that an "injunction" is not the same as an award of equitable monetary relief. Instead, the Court held that Section 13(b)'s language and structure indicate that the statute's reference to "permanent injunction" refers to "prospective, not retrospective" relief to "stop[] seemingly unfair practices from taking place while the Commission determines their lawfulness" in an administrative proceeding.[23]

The Court cited the structure of the FTC Act more broadly as corroboration for its conclusion. The Court explained that Congress would not have subsequently enacted other provisions in the FTC Act that explicitly authorize "conditioned and limited monetary relief" (namely, Sections 5 and 19 of the FTC Act, which impose, among other things, higher standards of proof and a statute of limitations) if the Act already allowed the FTC to "obtain that same monetary relief and more" without limits via Section 13(b).[24]

These structural concerns were previewed during the oral argument. Justice Gorsuch expressed the Court's "core concern" that the FTC's interpretation of Section 13(b) "render[ed] those protections [of Section 19] superfluous" and provided the Commission with "very little incentive . . . to ever comply with them."[25] Justice Kavanaugh characterized the crux of the case as one of "separation of powers," insofar as the Commission had "stretch[ed] the statutory language" such that it had resulted in a "transfer of power from Congress to the Executive Branch."[26] Justice Breyer likewise noted during argument that the FTC had initially indicated it would "only use [Section 13(b) to obtain monetary relief] in exceptional cases" but had instead proceeded to use it with "great frequency," creating a regime under which companies are "hit . . . with bad damages" before their conduct is even found to be in violation of the FTC Act.[27]

The Court's opinion addressed two principal FTC counterarguments. First, the Commission argued that prior Supreme Court precedent—*Porter v. Warner Holding Co.*[28] and *Mitchell v. Robert DeMario Jewelry, Inc.*[29]—"set forth a universal rule of interpretation" that "the traditional equitable authority to grant an injunction includes the power to grant restorative monetary remedies."[30] Second, the agency argued using Section 13(b) to obtain monetary relief is of "policy-related importance" because it keeps wrongdoers from retaining "profits earned at the unjustified expense of consumers."[31] The Court rejected both arguments. In response to the first point, the Court distinguished *Porter* and *Mitchell*, which involved different statutes. It noted that both decisions had analyzed the relevant statutes and, unlike here, did not find evidence that Congress had expressly or impliedly precluded a court from ordering restitution in the exercise of its equity jurisdiction.[32] With regard to the policy import of using Section 13(b) to seek monetary remedies, the Court pointed out that the Commission still had available avenues for obtaining restitution, referring to Sections 5 and 19 of the FTC Act, and that the Commission had the option of "ask[ing] Congress to grant it further remedial authority."[33]

Accordingly, the Court reversed and remanded the case for further proceedings.

The Impact of the *AMG* Decision on Pending Section 13(b) Cases

At the time *AMG* was decided, the Commission was a plaintiff in more than forty cases seeking monetary remedies pursuant to Section 13(b). How these pending matters are impacted by *AMG* will naturally vary, depending upon the strategies and positions taken by the parties and rulings by the presiding courts.

Some pending Section 13(b) matters include claims under other statutes that arguably independently permit the agency to obtain monetary relief. *FTC v. Simple Health*,[34] which is pending in the Southern District of Florida, is one example. In *Simple Health*, the FTC alleges that the company and its owner deceptively marketed limited indemnity health plans as comprehensive health insurance. The FTC's complaint seeks monetary relief pursuant to both Section 13(b) and the portion of Section 19 of the FTC Act permitting the FTC to obtain monetary remedies in rule violation cases. On April 27, 2021, five days after the Supreme Court issued the *AMG* decision, the FTC filed a Notice of Supplemental Authority alerting the district court to *AMG* and asserting that "the FTC remains able to obtain the [monetary] relief it seeks" because "Section 19 of the FTC Act [. . .] empowers the Court to grant relief for violations of rules," such as the FTC's Telemarketing Sales Rule, "including, but not 'limited to rescission or reformation of contracts, and the refund of money or return of property.'"[35] In cases such as this, *AMG* may have little or no impact on the matter substantively or procedurally because the Commission arguably can obtain the monetary relief it seeks without relying on Section 13(b).

In contrast to cases like *Simple Health*, where other statutory authority for monetary relief may exist, at the time *AMG* was decided there were, according to the Commission, approximately 24 pending cases in which the FTC relied exclusively on Section 13(b) as authority for seeking monetary relief. Then-Acting FTC Chair Rebecca Slaughter testified during an April 27, 2021, House Committee on Energy & Commerce hearing that a total of $2.4 billion is at stake in these cases.[36]

AMG had a near-immediate impact on some of these matters. For example, only four days after the Supreme Court decided *AMG*, the Ninth Circuit in *FTC v. Robb Evans & Association*[37] vacated a preliminary injunction entered to preserve assets to satisfy a potential monetary remedy under Section 13(b) because *AMG* eliminated the possibility of such a remedy. In addition, defendants can be expected to push to narrow the scope of ongoing discovery to exclude information relating solely to restitution or disgorgement, such as data production and expert analyses pertaining to the amount of consumer harm or the extent to which defendants profited from challenged practices.

Absent new statutory authority for the FTC in the near future, *AMG* may—and almost certainly will—also impact the long-term course and strategies of the parties in many of the FTC's pending Section 13(b) actions.

First, particularly with regard to recently filed matters, the FTC could conceivably pivot to an administrative litigation strategy, with the goal of obtaining monetary relief through Section 19 of the FTC Act. This process would require the FTC to (1) file and prevail in an administrative action subject to review by a federal appeals court, and (2) then file a subsequent action in federal court under Section 19. In that second action, if the Commission shows a "reasonable man would have known under the circumstances [the challenged conduct] was dishonest or fraudulent," the Commission can obtain monetary relief broadly similar to the remedies it obtained as equitable monetary relief under Section 13(b) prior to *AMG*. Yet the Commission may not be keen to pursue this strategy. As then-Acting Chair Slaughter emphasized repeatedly in recent congressional testimony, this process is more complex and resource-intensive for the agency, and the "dishonest or fraudulent" bar is high.[38]

Second, *AMG* may significantly increase the likelihood of settlements in a number of the pending cases. In many of these cases, the FTC's monetary demand was the principal driver of the litigation from the inception; in other words, had the FTC only been seeking injunctive relief, the matter may have been resolved short of litigation. And even if the parties do have material differences in terms of the scope of injunctive remedies, these are issues that can often be resolved after litigation, particularly when the court actively encourages the parties to settle. While courts obviously cannot impose settlement on the parties, they can and often

do strongly encourage consensual resolution by referring the parties to mediation, by signaling likely rulings on pivotal issues, and perhaps most effectively by moving matters rapidly towards trial.

Finally, there may be some pending Section 13(b) cases in which the *AMG* decision has a more tangential impact. In some FTC actions, while monetary relief is on the table, it is the FTC's demands for injunctive relief that most concern the defendant. This may be particularly true where a loss to the FTC could result in an injunction of indefinite duration that would place the defendant at a significant disadvantage vis-à-vis its marketplace rivals. In such cases, while the scope of discovery and trial may narrow somewhat, the path of the litigation through trial may not be materially changed by the FTC's loss of monetary relief authority.

The Impact of *AMG* on the Future of FTC Enforcement, Absent Congressional Action

In addition to its effect on pending litigation and absent new legislation addressing the issue, *AMG* is likely to significantly affect the FTC's enforcement strategies, particularly in consumer protection matters where the Commission has placed heavier reliance on Section 13(b) monetary relief claims. Although the strategic impact on antitrust matters may be more limited, some of the agency's largest recoveries under Section 13(b) in recent years have been in anticompetitive conduct cases, such as the $1.2 billion settlement in *FTC v. Cephalon, Inc.*[39]

Administrative Litigation and Section 19 of the FTC Act. As noted above, the FTC can obtain monetary remedies through Section 19 of the FTC Act. Assuming no new statutory authority, the FTC almost certainly will file more cases administratively, with the plan of obtaining monetary remedies pursuant to Section 19 if the evidence and liability ruling from the administrative action supports such a filing. We are aware of at least one instance, which occurred very shortly before the *AMG* decision was issued, in which the FTC Staff transparently shifted its enforcement recommendation to the Commissioners in a pending investigation from the filing of an action in federal court under Section 13(b) to the filing of an administrative action. We expect such shifts to occur in many pending and future FTC investigations.

Then-Acting Chair Slaughter and others have commented that the procedure contemplated by Section 19—an administrative action followed by a separate federal suit—is long and cumbersome. This argument is often supported by the timeline in *FTC v. Figgie, International, Inc.*,[40] the last litigated Section 19 case, where the process took more than a decade. Notably, however, in 2009, at the urging of former Commissioner Tom Roush, the Commission overhauled its administrative litigation procedures to dramatically tighten the process's timeline.[41] Thus, it is unclear whether using the Section 19 process would materially slow the resolution of matters relative to the timelines in recent Section 13(b) matters involving monetary remedies. The more salient difference may be the higher "dishonest or fraudulent" burden of proof applicable in Section 19 proceedings. This standard presumably would be easily met in fraud cases. But in antitrust matters, technical advertising substantiation cases, and privacy and data security matters, among other types of cases involving legitimate companies offering products and services consumers value, this standard may be quite difficult for the Commission to meet.

Leveraging Order Enforcement. We expect the FTC will increase its focus on, and shift resources to, enforcement of its existing orders. Breach of an administrative order can permit the FTC to obtain monetary civil penalties,[42] and breach of a federal court order may be prosecutable through contempt sanctions. Even before the Court decided *AMG*, then-Acting Chair Rebecca Slaughter testified before the U.S. Senate Committee on Commerce, Science, and Transportation that the Commission will be "reviewing comprehensively [the FTC's] past consent decrees," looking for violations, and further, that the Commission will "prioritize the consent decrees [it has] with the largest companies where the biggest harm is at stake."[43] At the same hearing, Commissioner Chopra emphasized that the Commission "must implement major changes when it comes to stopping repeat offenders," including "mak[ing] it clear that FTC orders are not suggestions."[44] Without the ability to seek monetary relief for first-time offenders through Section 13(b), order enforcement efforts are likely to receive even greater attention.

A logical complement to this strategy would be to utilize shorter, more targeted investigations aimed at securing injunctive-relief-only orders against first-time offenders. Conducting investigations solely focused on liability issues, and setting aside discovery and analysis focused on quantifying the defendant's revenues or profits, or the amount of consumer harm—inherently data intensive issues—would speed investigations. Focusing solely on injunctive relief could also reduce the degree to which companies resist settlement. Indeed, in our experience, the existence and size of a monetary payment has often been the sticking point in settling Commission investigations prior to litigation. Shorter, less-resource-intensive investigations would permit the agency to conduct a larger number of investigations. This correspondingly would lead to an increase in the number of outstanding FTC orders, and thereby expand the reach and impact of the Commission's order enforcement program.

Increased Rule Enforcement and Rulemaking. We also expect *AMG* to increase the FTC's interest in pursuing actions against companies violating the dozens of active rules promulgated by the FTC, such as the Children's Online Privacy Protection Rule (COPPA),[45] or more industry-specific rules such as the Health Breach Notification Rule[46] or the Contact Lens Rule.[47] Like actions enforcing prior Commission orders, actions under promulgated rules allow the FTC the opportunity to impose monetary civil

penalties on defendants, and the FTC signaled increased interest in rule enforcement even before the *AMG* decision was issued. For example, the Commission's settlement with Flo Health, Inc., a matter involving alleged privacy violations, was accompanied by statements from Commissioners Slaughter and Chopra expressing that the action should have included an allegation that the company's conduct violated the Health Breach Notification Rule, a rule that has not been previously asserted by the Commission in an enforcement action.[48]

In addition, the FTC is actively looking to promulgate more rules, enabling even more rule-enforcement actions. In express anticipation of the *AMG* decision, in March of this year then-Acting Chair Slaughter announced the creation of a new rulemaking group within the FTC's Office of the General Counsel that can create clearer rules for companies regarding what constitutes "unfair or deceptive practices," and more opportunities to secure civil penalties through enforcement of these new rules.[49] The Commission's announcement also explicitly referenced the possibility of rules addressing "our increasingly concentrated economy," suggesting that the Commission may be considering new rules in the antitrust arena specifically.[50]

Privacy is another area in which we suspect the Commission may promulgate new rules to delineate what it views as unfair practices. To date, the FTC has largely relied on its general authority pursuant to Section 5 of the FTC Act to challenge deceptive practices based on alleged gaps between a company's statements relating to its privacy practices, on the one hand, and its actual practices, on the other hand. And the FTC has not sought monetary relief in these matters. Rulemaking could focus on establishing required disclosures or affirmative consents for specific kinds of data sharing or data use, in addition to creating an arguable avenue for the agency to obtain monetary remedies in the event of rule violations in certain instances.

Collaboration with Other Enforcers. In matters where the Commission believes monetary remedies are appropriate and other routes to such relief are unavailable or unattractive to the agency, another enforcement option is to team up with other federal agencies, state attorneys general, or local law enforcers with authority to obtain monetary remedies. There is a long history of the Commission working with other federal and state agencies, including in enforcement actions involving large monetary payments—the Volkswagen *Dieselgate* matter being one prominent example.[51] In anticipation of the *AMG* decision, Commissioner Chopra vocally urged the FTC to leverage State Attorneys General partnerships to secure monetary awards.[52] And on May 19, 2021—less than a month after *AMG* was published—the FTC filed a consumer protection case in partnership with five state Attorneys General and two county district attorneys invoking various state laws to seek monetary remedies.[53]

While we expect that the FTC may collaborate more frequently with other enforcers to seek monetary remedies in federal court, we can imagine hesitancy from the Commission in pursuing this strategy too broadly. The Commission may have an understandable desire to exert sole control over certain cases. Other enforcers may have divergent goals or prefer different litigation strategies or venues. In addition, some degree of logistical complications inevitably accompanies inter-regulator coordination.

The Potential for New Statutory Authority

The largest question left looming by *AMG* is whether Congress will step in, and if so, what new authority will look like. One key issue is whether new statutory authority merely reinstates the prior interpretation of Section 13(b) that existed in certain lower courts, or whether the FTC will be required to meet a heightened burden of proof along the lines of the Section 19 standard in order to obtain monetary damages for a first-time offender. Another important issue under consideration is the scope of new legislation. Will it apply retroactively? Will it include a statute of limitations for enforcement actions? Moreover, it is possible that new FTC legislation could address issues beyond Section 13 remedies by, for example, setting new nationwide data privacy rules or altering the standards or burdens of proof for merger control.

Legislative work already began last year in anticipation of the *AMG* decision. In the 2019–2020 Congressional session, Senators Roger Wicker (R-MS), John Thune (R-SD), Deb Fischer (R-NE), and Marsha Blackburn (R-TN) sponsored the Setting an American Framework to Ensure Data Access, Transparency, and Accountability (SAFE DATA) Act. Among other initiatives, the SAFE DATA Act proposed to reform Section 13(b) of the FTC Act to explicitly include monetary remedies such as disgorgement and restitution.[54] Senator Wicker noted that he had explicitly included the Section 13(b) reform in the SAFE DATA Act because of the then-forthcoming *AMG* decision.[55] In the current session, Representative Tony Cárdenas (D-CA) has similarly proposed reforms to Section 13(b) that would provide for the FTC to collect monetary relief in the form of restitution and disgorgement as part of the Consumer Protection and Recovery Act.[56] Additionally, Senator Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act of 2021, which expands civil penalties under the Sherman, Clayton, and FTC Acts and directs the FTC to publish guidelines in conjunction with the Attorney General regarding civil penalties.[57]

Current and former FTC Commissioners from both sides of the aisle have supported legislative initiatives to provide the FTC with monetary relief powers under Section 13(b). On October 22, 2020, all five FTC Commissioners sent a letter to leadership in the Senate Committees on Energy and Commerce and Commerce, Science, and Transportation, stating that Section 13(b) "is a critical tool" for the FTC to enforce its consumer protection mandate, and that Section 13(b) is the "primary and most effective way" of providing

consumers with monetary restitution. The Commissioners noted that the FTC had been able to recover billions of dollars in consumer injury relief efforts under Section 13(b).[58]

Congress held several hearings regarding Section 13(b) in late April 2021, both before and after the Supreme Court issued its decision in *AMG*. Members of the Senate and FTC Commissioners discussed Section 13(b) at the April 20, 2021 Senate Commerce, Science, and Transportation Committee Hearing on Strengthening the Federal Trade Commission's Authority to Protect Consumers. In her opening remarks, then-Acting Chair Rebecca Slaughter urged Congress to enact Section 13(b) reforms, noting that the FTC would decelerate enforcement actions and would not be able to provide adequate consumer relief without the ability to collect restitution available under Section 13(b). Commissioner Noah Phillips argued that Section 13(b) monetary restitution provides an equitable remedy that benefits consumers rather than penalizes businesses. Commissioner Chopra added that Section 13(b) monetary relief is not considered a penalty because the FTC could only seek the amount defrauded as restitution under the statute. He urged the Senate to consider further remedies without disrupting business expectations. Commissioner Christine Wilson further stated that Congress could set parameters around disgorgement under Section 13(b) to create business certainty. Senator Maria Cantwell (D-WA), Committee Chair, stressed the importance of enacting the "right legal framework" as a replacement for Section 13(b), but promised to propose reforms with Commissioner input.[59]

On April 27, 2021, then-Acting Chair Slaughter testified before the House Committee on Energy and Commerce on the Consumer Protection and Recovery Act. In her written testimony, Slaughter noted that the FTC was able to recover monetary relief for victims of fraud related to the COVID-19 pandemic under Section 13(b), and reiterated the importance of Section 13(b) in obtaining monetary restitution.[60] At the hearing, she called for "quick Congressional action" to pass the Consumer Protection and Recovery Act, arguing that defendants would have "little incentive" to provide restitution to consumers without Section 13(b) reform. Representative Frank Pallone (D-NJ) stated that Congress must act to enable the FTC to provide monetary relief under Section 13(b) because alternative FTC powers are "too weak" or would not expeditiously grant relief. Then-Acting Chair Slaughter also noted at the hearing that restitution is more cumbersome under Section 19 of the FTC Act, and that civil penalties penalize entities rather than provide restitution for consumers.[61]

There has also been discussion regarding setting parameters around the FTC's Section 13(b) powers similar to those imposed under Section 19. In his testimony on the Consumer Protection Act, Howard Beales, a former Director of the Bureau of Consumer Protection, stated that Congress should explicitly set limits on use of Section 13(b), such that the FTC would be able to pursue restitution under Section 13(b) only pursuant to Section 19's higher proof standards. Representative Gus Bilirakis (R-FL) noted that he was concerned that the Consumer Protection and Recovery Act might lead to reduced due process, to which Professor Beales responded that adoption of Section 19 standards would ensure that the FTC would only recover restitution for what a reasonable person would know to be clearly fraudulent behavior.[62] Additionally, the U.S. Chamber of Commerce wrote in opposition to the Consumer Protection and Recovery Act, arguing that the Act does not include a "reasonable person test" that would limit liability similar to Section 19 of the FTC Act, that private plaintiffs may already seek monetary remedies through private litigation, and that the Department of Justice would not have similar remedial powers.[63]

In sum, while there appears to be a measure of bipartisan support for legislation to expand the FTC's authority to obtain monetary relief in reaction to *AMG*, debate among lawmakers is ongoing.

Conclusion

The Supreme Court's *AMG* decision is a dramatic development, and a fascinating example of how the rule of law can be applied with highly consequential effects, in this case overturning legal principles that a prominent federal agency had asserted and leveraged in enforcement actions against hundreds of companies and individuals for decades. Precisely what effects the Supreme Court's decision will have on current and future FTC matters, the agency's enforcement programs, and the possibility for new statutory authority all remains to be seen. What does seem clear is that the Commission's consumer protection and antitrust enforcement agendas in the coming years will remain highly active, and one can expect that the FTC—an agency whose lawyers' creativity established and leveraged a remarkably expansive reading of Section 13(b) in the first place—will find ways to ensure that this legal setback does not frustrate the agency's ability to continue pursuing its core mission. ■

[1] 141 S. Ct. 1341 (2021).

[2] 815 F.3d 593 (9th Cir. 2016).

[3] *Id*. at 597 (quoting FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982)).

[4] FTC v. Ross, 743 F.3d 886, 890–92 (4th Cir. 2014); FTC v. Bronson Partners, LLC, 654 F.3d 359, 365–66 (2d Cir. 2011); FTC v. Magazine Sols., LLC, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Gem Merch. Corp., 87 F.3d 466, 468–70 (11th Cir. 1996); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991).

[5] David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, ANTITRUST, Fall 2016, at 89.

[6] 137 S. Ct. 1635 (2017).

[7] M. Sean Royall, Richard H. Cunningham & Ashley Rogers, *Are Disgorgement's Days Numbered?* Kokesh v. SEC *May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, ANTITRUST, Spring 2018, at 94.

[8] 910 F.3d 417 (9th Cir. 2018).

[9] *Id*. at 429–37 (O'Scannlain, J., concurring).

[10] 937 F.3d 764 (7th Cir. 2019).

[11] *Id*. at 785.

[12] *See* M. Sean Royall, Richard H. Cunningham, Olivia Adendorff, & Ashley Rogers, *Seventh Circuit Sets Up Potential Supreme Court Review of FTC Monetary Relief Authority*, Antitrust, Fall 2019, at 54.

[13] 875 F.2d 564 (7th Cir. 1989).

[14] *Id.* at 571–72.

[15] *Kokesh*, 137 S. Ct. at 1643–44.

[16] *See id.*; Tull v. United States, 481 U.S. 412, 424 (1987).

[17] Opening Brief of Relief Defendants-Appellants at 89, 90, FTC v. AMG Capital Mgmt., LLC, No. 16-17197 (9th Cir. July 21, 2017), ECF No. 14.

[18] *Id.*

[19] *AMG Capital Management*, 910 F.3d at 437.

[20] *Credit Bureau Center*, 937 F.3d at 766–67 (affirming issuance of permanent injunction but vacating restitution award).

[21] FTC v. AbbVie Inc., 976 F.3d 327 (3d. Cir. 2020).

[22] *AMG Capital Management*, 141 S. Ct. at 1343.

[23] *Id.* at 1348.

[24] *Id.* at 1349.

[25] Transcript of Oral Argument at 50, AMG Capital Management LLC v. FTC, 141 S. Ct. 1341 (2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-508_3f14.pdf.

[26] *Id.* at 53.

[27] *Id.* at 37.

[28] 328 U.S. 395 (1946).

[29] 361 U.S. 288 (1960).

[30] *AMG Capital Management*, 141 S. Ct. at 1350 (internal quotation marks omitted).

[31] *Id*. at 1351.

[32] *Id.* at 1350.

[33] *Id.* (internal quotation marks omitted).

[34] No. 18-cv-62593 (S.D. Fla. 2018).

[35] *Id.* Dkt. No. 420 at 1–2 (quoting 15 U.S.C. §57b(b)).

[36] Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter at the Apr. 27, 2021 hearing on The Urgent Need to Fix Section 13(b) of the FTC Act Before the United States House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, https://www.ftc.gov/system/files/documents/public_statements/1589456/opening_statement_april_27_house_13b_hearing_427.pdf.

[37] D.C. No. 5:18-dv-02104-DMG-PLA (9th Cir. Apr. 28, 2021), Dkt. No. 44.

[38] *See, e.g.*, *The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers, Hearing Before the Subcomm. on Consumer Protection and Commerce of the H. Comm. on Energy and Commerce*, 117th Cong. (2021) (statement of Rebecca Slaughter, Comm'r and Acting Chair of the Fed. Trade Comm'n).

[39] Press Release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go to Purchasers Affected by Anticompetitive Tactics (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[40] 994 F.2d 595 (9th Cir. 1993).

[41] Press Release, Fed. Trade Comm'n, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice (Apr. 27, 2009), https://www.ftc.gov/news-events/press-releases/2009/04/ftc-issues-final-rules-amending-parts-3-4-agencys-rules-practice.

[42] *See* 15 U.S.C. § 45(l).

[43] Transcript of Comm. Hearing at 30, S. Com., Sci., and Transp. Comm. Hearing on Strengthening the Federal Trade Commission's Authority to Protect Consumers (Apr. 20, 2021), Bloomberg Gov't Transcripts (Apr. 21, 2021, 12:41 PM) [hereinafter Strengthening the FTC Hearing Transcript].

[44] *Id.* at 10.

[45] 16 C.F.R. § 312.

[46] 16 C.F.R. § 318.

[47] 16 C.F.R. § 315.

[48] Joint Statement of Comm'r Chopra and Comm'r Slaughter Concurring in Part, Dissenting in Part, In the Matter of Flo Health, Inc., FTC File No. 1923133 (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rcrks_statement_on_flo.pdf.

[49] Press Release, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

[50] *Id.*

[51] Press Release, Fed. Trade Comm'n, Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating.

[52] Prepared Remarks of Commissioner Rohit Chopra at the Jan. 7, 2021 Truth in Advertising Event on the FTC's Remedial Authority, https://www.ftc.gov/system/files/documents/public_statements/1589068/20210413_remarks_of_commissioner_chopra_at_tina.pdf.

[53] No. 2:21-cv-04155 (C.D. Cal. 2021).

[54] Press Release, U.S. S. Comm. on Com., Sci., and Transp., Wicker, Thune, Fischer, Blackburn Introduce Consumer Data Privacy Legislation (Sept. 17, 2020), https://www.commerce.senate.gov/2020/9/wicker-thune-fischer-blackburn-introduce-consumer-data-privacy-legislation; S. 4626, 116th Cong. § 4 (2020).

[55] Strengthening the FTC Hearing Transcript, *supra* note 42, at 4.

[56] H.R. 2668, 117th Cong. § 2 (2021).

[57] S. 225, 117th Cong. §§ 2(b)(6), at 9–12 (2021).

[58] Letter from Joseph J. Simons, FTC Chairman et al. to the Honorable Frank Pallone, Jr., Chairman, Committee on Energy and Commerce, of the U.S. House of Representatives et al. (Oct. 22, 2020), https://www.allaboutadvertisinglaw.com/wp-content/uploads/sites/21/2020/11/FTC-Letter-to-Energy-and-Commerce-Committee-Letters.pdf.

[59] Strengthening the FTC Hearing Transcript, *supra* note 43, at 7–11, 18.

[60] Prepared Statement of the Federal Trade Commission: The Urgent Need to Fix Section 13(b) of the FTC Act, before the Comm. on Energy and Commerce Subcomm. on Consumer Protection and Commerce, United States House of Representatives (Apr. 27, 2021), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Slaughter_CPC_2021.04.27.pdf.

[61] Transcript of Committee Hearing at 4–5, 10–11, 16–17, 30 House Energy and Com. Comm., Consumer Protection and Commerce Subcommittee Hearing on the Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers (Apr. 27, 2021), Bloomberg Gov't Transcripts (Apr. 28, 2021, 12:30 PM).

[62] *Id*. at 44, 48–49.

[63] Letter from Neil L. Bradley, Executive Vice President & Chief Policy Officer, Chamber of Commerce of the United States of America to the Honorable Janice Schakowsky, Chair, Subcommittee on Consumer Protection and Commerce, U.S. House of Representatives, and the Honorable Gus M. Bilirakis, Ranking Member, Subcommittee on Consumer Protection and Commerce, U.S. House of Representatives (Apr. 26, 2021), https://www.uschamber.com/sites/default/files/210426_ftcauthority_houseec.pdf.

Antitrust, Vol. 32, No. 2, Spring 2018. © 2018 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Are Disgorgement's Days Numbered? *Kokesh v. SEC* May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief

BY M. SEAN ROYALL, RICHARD H. CUNNINGHAM, AND ASHLEY ROGERS

THE FEDERAL TRADE COMMISSION'S Bureau of Consumer Protection recovers big dollars. Some recent examples: Vemma Nutrition Company agreed to pay $238 million to settle charges that the multi-level marketing company operated an illegal pyramid scheme; TracFone, the nation's largest prepaid mobile provider, paid $40 million to settle deceptive advertising charges; the marketers of Sensa settled charges of misleading weight-loss claims for $26.5 million; and Google agreed to pay at least $19 million to resolve charges relating to the in-app purchase feature in the Google Play Store.[1]

From the FTC's standpoint, there is nothing controversial about the agency seeking monetary relief from individuals and companies alleged to have engaged in deceptive or unfair practices that violate Section 5 of the FTC Act. Indeed, the FTC in December 2017 boasted that the Bureau of Consumer Protection obtained 168 court orders totaling over $12.72 billion between July 1, 2016 and June 30, 2017, resulting in more than $6.4 billion in consumer refunds.[2] The FTC obtains a substantial portion of these monetary remedies pursuant to Section 13(b) of the FTC Act—a provision that does not mention monetary remedies and speaks only in terms of "injunctions." Federal circuit courts have, nevertheless, construed Section 13(b) to allow the FTC to obtain monetary relief on the theory that Congress's use of the word "injunctions" permits the FTC to seek a full panoply of equitable relief, including disgorgement and restitution.

M. Sean Royall and Richard H. Cunningham are partners, and Ashley Rogers is an associate, with Gibson, Dunn & Crutcher LLP. Mr. Royall served as Deputy Director of the Bureau of Competition of the Federal Trade Commission from 2001 through 2003 and served as appellate counsel for the defendant in FTC v. Commerce Planet, Inc., *815 F.3d 593 (9th Cir. 2016). Mr. Cunningham served as Staff Attorney and Senior Trial Counsel with the Bureau of Competition from 2004 to 2013.* *The authors thank Natalie J. Hausknecht for her valuable contributions to this article.*

In an article published in the Fall 2016 edition of ANTITRUST, David C. Vladeck, a former Director of the FTC's Bureau of Consumer Protection and a current member of the faculty at Georgetown University Law Center, summarized the precedents in this area and concluded that the argument that the FTC lacks authority to obtain monetary relief pursuant to Section 13(b) "has been repeatedly and uniformly rejected by every court to address it."[3] Professor Vladeck then predicted that this "is not going to change" because "Section 13(b) of the FTC Act authorizes courts to grant injunctions, and that grant of authority empowers courts to order the full range of equitable remedies, including restitution and disgorgement."[4]

The Supreme Court, however, has never approved the FTC's monetary relief authority under Section 13(b) and, last summer, signaled in *Kokesh v. SEC* that significant limits on this authority may be on the horizon. In *Kokesh*, the Supreme Court held that disgorgement obtained by the Securities and Exchange Commission is a "penalty" subject to a five-year statute of limitations under 28 U.S.C. § 2462 when ordered pursuant to provisions similar to Section 13(b).[5] While *Kokesh*'s holding is confined to the SEC and a statute of limitations question, the Supreme Court's reasoning and analysis suggest potential implications for the FTC.

First, with regard to matters in which the FTC seeks disgorgement, the agency likely will be subject to the five-year statute of limitations in 28 U.S.C. § 2462. Each of the "hallmarks of a penalty" the Supreme Court identified in *Kokesh* applies equally to the FTC's use of disgorgement. This change alone may significantly decrease the size of the FTC's disgorgement awards, as the agency has frequently gone back much further than five years in its remedy calculations.[6]

Second, and perhaps more importantly, the Supreme Court signaled that federal agencies may not be able to obtain disgorgement or other remedies with similar characteristics as equitable relief ancillary to an injunction at all. In a footnote in the *Kokesh* opinion, the Court stated that it was not opining on "whether courts possess authority to order disgorgement in SEC enforcement proceedings" or whether disgorgement has been "properly applied."[7] At oral argument, several Justices posed questions suggesting discomfort with the SEC's current disgorgement practices. For example, Justice Kagan asked if the SEC has "ever set down in writing what the guidelines are for how the SEC is going to use disgorgement and what's going to happen to the monies collected?"[8] In addition, the fact that the Supreme Court deemed the SEC's disgorgement remedy to be a "penalty"

suggests that disgorgement may not be available as relief ancillary to an injunction in light of the fact that the Court has previously said that a court in equity may not enforce a "civil penalty."[9] Because the FTC relies on the same legal rationale as the SEC for its authority to obtain disgorgement, *Kokesh* raises the possibility of future Supreme Court decisions reaching the issues of whether and to what extent the FTC may obtain disgorgement or other monetary relief.

Targets of FTC enforcement actions are already arguing that *Kokesh* limits the FTC's ability to obtain monetary relief in Section 13(b) actions. The agency's response in the five instances in which *Kokesh*-related arguments have arisen to date has been to deny that *Kokesh* applies to the FTC. Notwithstanding this position, the agency has also simultaneously excluded from its remedy demands any funds associated with conduct outside of Section 2462's five-year statute of limitations. The FTC has also described its primary remedy demand as restitution—which focuses on harm to victims caused by the unlawful conduct—rather than disgorgement—which focuses on depriving the wrongdoer of ill-gotten gains, and/or has characterized the purpose of its monetary remedy request as victim compensation. Whether restitution in the context of a Section 13(b) enforcement action is substantively different than disgorgement in practice and does not constitute a "penalty" under *Kokesh* is an open question that undoubtedly will be litigated vigorously as this area of case law evolves.

The full impact of *Kokesh* on the FTC's authority under Section 13(b) remains to be seen. At a minimum, however, *Kokesh* provides a sound basis to question the view expressed by Professor Vladeck and others that challenges to the scope of the FTC's authority to obtain monetary relief under 13(b) are futile and that "courts are increasingly showing impatience with these long discredited arguments."[10]

Kokesh Limits the SEC's Disgorgement Authority

The facts at issue in *Kokesh* are straightforward. The defendant, Charles Kokesh, owned two investment-adviser firms that provided advice to business-development companies. In 2009, the SEC brought charges against Mr. Kokesh, claiming he had misappropriated $34.9 million from four of these clients and filed false reports with the Commission to cover this up for 14 years. The jury agreed.

The remedies phase is where *Kokesh* got interesting. In 2013, the Supreme Court had held in *Gabelli v. SEC* that the general five-year statute of limitations in 28 U.S.C. § 2462 applied when the SEC sought statutory monetary penalties.[11] The district court in *Kokesh* recognized that any monetary "penalty" against Mr. Kokesh therefore had to be based on his misconduct during the last five years of his scheme. The problem for the SEC was that Mr. Kokesh had taken the vast majority of the $34.9 million involved—$29.9 million to be exact—outside this limitations period. As a result, the district court concluded it could impose a civil fine of only $2.35 million for his unlawful behavior.[12]

To obtain a monetary remedy that reached back further in time, the SEC invoked its authority to seek disgorgement as relief ancillary to an injunction issued pursuant to the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act.[13] This authority had been widely accepted among the lower courts, even after Congress in 1990 gave the SEC the power to seek statutory civil fines instead.[14] Citing lower court decisions, the SEC contended that its disgorgement authority was not subject to 28 U.S.C. § 2462's statute of limitations because disgorgement is an equitable, "remedial" monetary sanction, rather than a "penalty."[15] The district court concurred and ordered Mr. Kokesh to pay $34.9 million in disgorgement and another $18.1 million in prejudgment interest on top of his civil fine. The Tenth Circuit likewise found "the reasons for th[at] view are clear" and affirmed.[16]

In a unanimous opinion penned by Justice Sotomayor, the Supreme Court reversed, holding that SEC disgorgement constitutes a penalty subject to the five-year statute of limitations found in Section 2482.[17] To reach this conclusion, the Court began by defining a "penalty" as a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws."[18] From this definition, the Court extrapolated three "hallmarks" of a penalty: (1) it is imposed to redress the violation of a public law; (2) it is sought for a punitive purpose such as deterrence; and (3) it is not intended solely to compensate a victim for his loss.[19]

Applying these factors, the Court determined that SEC disgorgement was a penalty subject to Section 2482. First, the Court noted that lower courts imposed SEC disgorgement as a consequence for violating public laws—i.e., a violation committed against the United States rather than an aggrieved individual.[20] A securities enforcement action may proceed, the Court reasoned, even if the victims do not endorse it.[21] Second, the Court concluded that disgorgement in the SEC context was imposed for the "inherently punitive" purpose of deterring of future public law violations.[22] Third, the Court recognized that "in many cases," SEC disgorgement was not compensatory because lower courts did not require the money actually be paid to victims.[23] The Court summarized its decision by stating that SEC disgorgement bore "all the hallmarks of a penalty: It is imposed as a consequence of violating a public law, and it is intended to deter, not to compensate."[24]

The Potential Implications of *Kokesh* for the FTC

Kokesh establishes a general definition of what constitutes a "penalty" subject to Section 2462's five-year limitations period. This definition is unlikely to be confined to the SEC and logically applies to the FTC's authority to seek monetary relief under Section 13(b).

The FTC's use of disgorgement meets each of the *Kokesh* criteria for a "penalty." The FTC—like the SEC—is not required to stand in the shoes of a particular victim when it

seeks disgorgement, nor is it seeking to vindicate the rights of any particular victims.[25] Lower courts have likewise held that the FTC, like the SEC, is not required to pay disgorgement to victims, and the Commission has maintained that it need not do so.[26] Additionally, as with SEC disgorgement, courts have held the primary purpose of FTC disgorgement is deterrence of future public law violations.[27] For these reasons, it appears very likely that FTC disgorgement will be limited by the five-year limitations period found in Section 2462. Indeed, the government acknowledged as much in its briefing in *Kokesh*. Specifically, the Solicitor General described the FTC as among the agencies whose authority to obtain monetary remedies would be curtailed by construing Section 2462 as applicable to the SEC's disgorgement authority.[28]

The more interesting question is whether *Kokesh* portends additional limits on the FTC's authority to obtain monetary relief. There are good reasons to believe that it does.

As noted above, the Supreme Court in *Kokesh* stated in a footnote that its decision should not be read to opine on whether courts actually possess authority to order disgorgement in SEC enforcement proceedings or "whether courts have properly applied disgorgement principles in this context."[29] This footnote suggests the Court may not consider either of these issues to be settled.

Justice Gorsuch also reminded the SEC at oral argument that the Court had never given its approval to the 50 years of lower court precedent holding a court could order disgorgement based on its inherent equitable authority ancillary to an injunction.[30] Justice Gorsuch further noted that the difficulty in defining reasonable limits for such a remedy might stem from the fact that "there's no statute governing it. We're just making it up."[31]

Justice Gorsuch was not alone among his colleagues in struggling to identify the source (and consequential limits) of SEC disgorgement. Chief Justice Roberts, too, signaled discomfort with the fact that Congress had never specified disgorgement or another monetary remedy in the text of the relevant provisions.[32] And the Chief Justice was joined by both Justice Kennedy and Justice Sotomayor in pressing the parties to identify a specific statutory authority for disgorgement.[33] Justice Kennedy, in particular, explained that he "understood in cases where the aggrieved party is before the Court, there can be equitable remedies under state law," but he queried whether "[i]t is clear that the district court has statutory authority" to obtain disgorgement otherwise.[34] Justice Sotomayor wondered how, if the money was not being returned to the harmed individuals as restitution, a statutory grant to seek equitable relief could serve as the basis for disgorgement.[35]

Kokesh's holding that disgorgement is not "remedial," but rather is a "penalty," suggests that the Court may question whether disgorgement is an appropriate equitable power when a statute merely authorizes injunctions. In *Tull v. United States*, the Court explained that "while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties."[36] Hence, if disgorgement is a "penalty," then presumably it cannot be a valid equitable remedy under *Tull*.

The entire final section of the *Kokesh* decision focuses on the differences between disgorgement, as applied in the lower courts, and the traditional characteristics of an equitable remedy. The decision notes, in particular, that SEC disgorgement is not "remedial" in large part because it does not simply restore the status quo by returning the defendant to the place he would have occupied had he not broken the law.[37] Rather, SEC disgorgement "sometimes exceed[s] the profits gained as a result of the violation" either by forcing a wrongdoer to disgorge gains that accrued to third parties or by failing to account for expenses that reduced the amount of illegal profit.[38] The Court cited the *Restatement (Third) of Restitution and Unjust Enrichment* for the proposition that such sanctions were punitive ones "that the law of restitution normally attempts to avoid."[39]

Viewed collectively, these are fairly strong signals that the Court might be uncomfortable classifying an agency's requested monetary remedy as equitable relief ancillary to its injunctive authority when the requested remedy has effects beyond merely addressing the harm caused by the defendant's conduct.

The FTC's Initial Response to *Kokesh*

Unsurprisingly, within a matter of days, arguments based on *Kokesh* began surfacing in ongoing FTC enforcement actions. To date, defendants in at least five FTC matters have raised *Kokesh*-related arguments—*FTC v. DirecTV LLC*, *FTC v. J. William Enterprises, LLC*, *FTC v. Credit Bureau Center, LLC*, *FTC v. Publishers Business Services, Inc.*, and *FTC v. AMG Capital Management, LLC*.[40]

FTC v. DirecTV. Fifteen days after *Kokesh* was decided, DirecTV filed a motion for leave to file an amended answer to add affirmative defenses based on *Kokesh* asserting that (1) the FTC is not entitled to seek restitution; and (2) even if it is, the request is subject to a five-year statute of limitations.[41]

In response, the FTC argued that DirecTV's request was untimely. The FTC further argued that *Kokesh* does not apply to an FTC action seeking restitution because the purpose of restitution is compensation rather than punishment, and therefore, restitution is not a "penalty" under *Kokesh*.[42] As a fallback, the FTC also maintained that even if *Kokesh* applies to an action seeking restitution, it did not apply in this case because the agency's complaint sought monetary relief "necessary to redress injury to consumers" that would be used to "provide redress to eligible consumers," in contrast with the *Kokesh* complaint, which sought "to disgorge an amount equal to the funds and benefits obtained illegally."[43] Notably, the FTC stated that its proposed order "recognizes the fundamental distinction between restitution and disgorgement by providing primarily for restitution while allowing for disgorgement of any residual funds for which distribution to

consumers is not feasible." And the agency all but conceded that a five-year statute of limitations applies to disgorgement by representing to the court that it intended to eliminate disgorgement from its proposed order, at least as to any "putatively time-barred claims."[44]

In August 2017, the district court denied DirecTV's motion on the basis that DirecTV was not diligent in asserting these affirmative defenses, expressly declining to "apply *Kokesh* to make broad generalizations."[45] The court did, however, state in dicta that "[a] fair reading of the first line of footnote 3 in *Kokesh* does not support the argument that the FTC is barred from seeking restitution" because "the Court explicitly declined to make any finding whatsoever, much less one relevant to whether the FTC has authority to seek restitution."[46]

FTC v. J. William Enterprises. In October 2017, defendants filed a partial motion for summary judgment based on Kokesh, asserting that (1) the Justices' comments during oral argument and the "ominous footnote" in the *Kokesh* decision "cast[] considerable doubt" on courts' authority to order restitution, rescission, refunds, or disgorgement in FTC enforcement actions; and (2) the three-year statute of limitations in Section 19 of the FTC act applies.[47] In response, the FTC maintained its position that *Kokesh* "involve[d] an entirely different and distinct statutory scheme" and "did not change the law . . . regarding the scope of remedies under the FTC Act." The agency also asserted that Section 19 of the FTC Act "has no bearing" on relief the FTC seeks under Section 13(b). But the agency again also indicated that it was willing to apply a five-year limit on its claims in order to "effectively render[] a ruling that *Kokesh* applies moot."[48]

The court accepted the FTC's arguments and held that *Kokesh* "provides no basis for this Court to disregard decades of precedent" permitting the equitable remedies sought by the FTC and contains "nothing . . . that indicates that the Court should apply section 19(b)'s statute of limitations to the FTC's claims under section 13(b)."[49]

FTC v. Credit Bureau Center, LLC. In November 2017, defendants filed a motion to modify a preliminary injunction entered against them based on *Kokesh*. Defendants argued that terms in the preliminary injunction continuing an asset freeze and appointing a receiver were improper because they were intended to hold assets for disgorgement and restitution. As such, the "principles" set forth in *Kokesh*, they contended, confirm that disgorgement and restitution are "penalties" that the FTC is not authorized to seek under Section 13(b).[50]

In response, the FTC again asserted that *Kokesh* "did not alter, let alone reverse" the scope of remedies available under the FTC Act, but instead narrowly held that "a five-year statute of limitations applies when the SEC seeks punitive disgorgement under the securities laws" and "expressly disclaimed any broader application."[51] The FTC also cited the *DirecTV* and *J. William Enterprises* matters discussed above, stating that "the only two courts to have considered the issue have similarly concluded that *Kokesh* does not disturb established precedent under Section 13(b)."[52] Nevertheless, the FTC again emphasized that "compensating victims is the primary goal" in the agency's case because the agency asked for relief "necessary to redress injury to consumers" and proposed to measure consumer recovery as "the full amount of consumer loss."[53] And again, the FTC maintained that even if *Kokesh* applies to FTC actions, "its only possible effect would be to impose a five-year statute of limitations on an award of disgorgement to the Treasury to the extent that the disgorgement amount exceeded defendants' gains," which would not affect the case because the alleged misconduct dates back only to 2014.[54]

In January 2018, the district court denied the defendants' motion, stating that the defendants' interpretation of *Kokesh* was a "considerable overstatement" because the decision said nothing about "whether disgorgement and restitution were, as defendants claim, 'authorized' under the securities statute."[55] The court held that controlling Seventh Circuit law "specifically authorizes disgorgement and restitution in FTC suits," that it saw nothing in the "principles of *Kokesh* undermining these decisions," and that it is "rather reckless to contend" that Justices' comments during oral argument in *Kokesh* "render existing precedent infirm."[56]

FTC v. Publishers Business Services. In this pending Ninth Circuit appeal, Publishers Business Services contests a monetary judgment of nearly $24 million, arguing (among other things)[57] that *Kokesh* makes clear that FTC disgorgement is a penalty that is outside the scope of permissible equitable relief under Section 13(b).[58]

In response, the FTC reiterated the position taken by the agency in both *DirecTV* and *J. William Enterprises*: *Kokesh* was a narrow decision that left undisturbed "decades of consistent law on the availability of equitable remedies under the FTC Act."[59] Yet again, however, the FTC was careful to state in its briefing that even if *Kokesh* did apply, it has no "practical application" to the present case because the entire judgment seeks "equitable monetary relief for consumers" that falls within Section 2462's five-year statute of limitations.[60]

FTC v. AMG Capital Management. In this pending Ninth Circuit appeal, the appellants filed a brief approximately one month after *Kokesh* was decided, citing to the Supreme Court's decision as a basis for challenging a $1.3 billion monetary judgment.[61] The appellants argued that *Kokesh* "mandates the application of a statute of limitations to FTC 13(b) enforcement actions" and that the Truth in Lending Act's one-year statute of limitations applies to the case or, in the alternative, that the three-year statute of limitations in Section 19 of the FTC Act applies. They also urged the Ninth Circuit to reconsider "[t]he availability of monetary awards under Section 13(b)—regardless whether a court labels them 'damages' or 'equitable restitution,'" and to apply the *Kokesh* factors to "determine whether the FTC improperly uses Section 13(b) to pursue penal monetary relief under the guise of equitable authority."[62]

In response, the FTC again characterized *Kokesh* as a narrow decision limited to disgorgement judgments "with the purpose of punishment and deterrence" under the Securities Exchange Act.[63] At the same time, the agency took pains to note that the judgment in the present case was intended to be used to "compensat[e] a victim for his loss" and that the Ninth Circuit "need not reach the issue" of whether *Kokesh* applies to FTC "requests for monetary relief" because the monetary judgment did not extend beyond five years.[64]

While these matters are likely just a taste of the *Kokesh*-related disputes the FTC can expect to encounter in the future, several recurrent themes seem to be emerging from the Commission's advocacy. First, the FTC is not explicitly conceding that *Kokesh* applies to it. Given that the government's briefing in *Kokesh* argued that the ruling would apply to the FTC, it will be interesting to see if the FTC will maintain this position in future *Kokesh*-related disputes. Second, the FTC is largely abandoning efforts to seek disgorgement outside of Section 2462's five-year statute of limitations, and may thereby minimize the likelihood of court rulings applying the core holding of *Kokesh* to the agency. Finally, the FTC appears to be emphasizing that the agency is primarily seeking restitution, as opposed to disgorgement, and characterizing the purpose of its monetary remedies as victim compensation—for example, by stating that its monetary relief demand is "necessary to redress injury to consumers" (*DirecTV* and *Credit Bureau Center*), constitutes "equitable monetary relief for consumers" (Publishers Business Services), and will be used to "compensat[e] a victim for his loss" (*AMG Capital Management* and *Credit Bureau Center*).[65] This presumably reflects an effort by the agency to distance its monetary remedies from the SEC disgorgement remedy directly at issue in *Kokesh*.

Can FTC Restitution Constitute a Penalty?

The FTC's apparent effort to emphasize that its primary monetary remedy request is in the form of restitution and that it is seeking funds for victim compensation raises the question whether FTC restitution can be classified as a "penalty" under *Kokesh*. For the reasons outlined above, this would call into question whether the FTC can obtain such relief beyond the five-year statute of limitations specified by 28 U.S.C. § 2462 and could lead to a finding that the FTC may not obtain such relief ancillary to an injunction under Section 13(b).

The FTC has previously described restitution and disgorgement as "related" equitable remedies that serve distinct purposes.[66] According to the agency, disgorgement is "designed to deprive a wrongdoer of his unjust enrichment and to deter others from future violations," and restitution is "intended to restore the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation."[67] Although the FTC's description of restitution emphasizes victim compensation and makes no mention of deterrence, the *Kokesh* decision suggests that the label attached to the monetary remedy is irrelevant—what matters is the remedy's objective, how it was calculated, and how it is used.

Applying the *Kokesh* factors to FTC restitution does not yield a clear answer. As to the first factor, which focuses on whether the case proceeds for law enforcement purposes, there is little the FTC can do to avoid the conclusion that the cases in which the agency seeks restitution may proceed "even if victims do not support or are not parties to the prosecution," and thus redress the violation of a public law under *Kokesh*.[68] Indeed, this is true of *all* FTC actions under Section 13(b).

Application of the other two *Kokesh* factors to FTC restitution is less clear-cut. As to the second factor—the degree to which the remedy is "punitive" and "deterrent" in nature—as noted above, the FTC describes restitution as focused on victim compensation, a purpose that is, generally speaking, remedial rather than punitive or deterrent.[69] In practice, however, FTC restitution has been calculated in a manner that has resulted in defendants being liable for amounts that significantly exceed the alleged harm to victims caused by the offending conduct. This occurs because some courts have permitted the FTC to base restitution amounts on rough approximations of consumer harm[70] that may fail to account for the fact that some purchasers of the product at issue (a) received significant value, and/or (b) were unaffected by the offending conduct because they did not see the deceptive advertisement or experience the unfair conduct.[71] If a restitution amount exceeds the amount of consumer harm caused by the conduct, the remedy arguably imposes costs on defendants that are punitive and serve to deter future violations. Thus, because the restitution amounts the FTC has sought and obtained have, at least in some cases, not been closely linked to the consumer harm actually caused by the defendant's conduct, the second *Kokesh* factor arguably supports the conclusion that the remedy is a penalty.

The third *Kokesh* factor turns on whether the recovered funds are actually paid to victims as compensation. The FTC has stated that, where it is feasible to do so, it endeavors to remit funds obtained as restitution to victimized consumers.[72] However, the FTC has not always accomplished this goal and, in some cases, the agency has sought instead to at least have the discretion to direct restitutionary funds to the U.S. Treasury, given difficulties in successfully remitting funds to affected consumers. To the extent such funds are not returned to consumers, one might think of this component of a monetary remedy as equitable disgorgement, not restitution.[73] *Kokesh* can be read to suggest that the relevant question when analyzing this factor is whether all of the funds collected go to the victims, as opposed to the government. Hence, because the FTC does not consistently remit *all* of the funds obtained as restitution to consumers, this may cut in favor of concluding that restitution obtained by the FTC does indeed function as a penalty.

Conclusion

What ultimate implications *Kokesh* may have for the FTC remains unclear. What is clear is that the agency is already confronting arguments that *Kokesh* significantly limits its ability to obtain monetary relief in Section 13(b) matters. While no court to date has issued a decision applying the reasoning of *Kokesh* to the FTC, there are strong arguments that FTC disgorgement is a "penalty" subject to the statute of limitations in 28 U.S.C. § 2462, and that this remedy may be entirely unavailable as relief ancillary to the Commission's statutory injunctive authority.

The agency does appear to be shifting its approach to equitable monetary remedies to avoid requiring a court to squarely decide these issues, including by imposing limitations on how far back in time its disgorgement calculations reach, and characterizing its monetary relief as restitution designed to facilitate victim compensation. Whatever courts conclude after delving more deeply into these issues, *Kokesh* already makes clear that the scope of the FTC's authority to obtain monetary relief under Section 13(b) is less settled than some previous commentators have suggested. ■

---

[1] Press Release, Fed. Trade Comm'n, Vemma Agrees to Ban on Pyramid Scheme Practices to Settle FTC Charges (Dec. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/vemma-agrees-ban-pyramid-scheme-practices-settle-ftc-charges; Press Release, Fed. Trade Comm'n, Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans (Jan. 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc; Press Release, Fed. Trade Comm'n, Sensa and Three Other Marketers of Fad Weight-Loss Products Settle FTC Charges in Crackdown on Deceptive Advertising (Jan. 7, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/sensa-three-other-marketers-fad-weight-loss-products-settle-ftc; Press Release, Fed. Trade Comm'n, FTC Approves Final Order in Case About Google Billing for Kids' In-App Charges Without Parental Consent (Dec. 5, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/ftc-approves-final-order-case-about-google-billing-kids-app.

[2] Fed. Trade Comm'n, Office of Claims and Refunds Annual Report (2017) [hereinafter FTC Office of Claims and Refunds Annual Report (2017)], https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effected-july/redressreportformattedforweb122117.pdf.

[3] David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, Antitrust, Fall 2016, at 89.

[4] *Id.*

[5] Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017).

[6] *See* M. Sean Royall & Richard H. Cunningham, *Will* "Kokesh v. SEC" *Put a Kink in the Federal Trade Commission's Disgorgement Hose?* (July 10, 2017), https://wlflegalpulse.com/2017/07/10/will-kokesh-v-sec-put-a-kink-in-the-federal-trade-commissions-disgorgement-hose/.

[7] *Kokesh*, 137 S. Ct. at 1642 n.3.

[8] Transcript of Oral Argument at 29:16–19, *Kokesh*, 137 S. Ct. at 1635.

[9] Tull v. United States, 481 U.S. 412, 424 (1987).

[10] Vladeck, *supra* note 3, at 94.

[11] 568 U.S. 442, 444 (2013); 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.").

[12] *Kokesh*, 137 S. Ct. at 1641.

[13] *Id.* Similar provisions found in each act provide the SEC with the authority to seek injunctions. *See* 15 U.S.C. 78u(d)(1) (Securities Exchange Act) (providing SEC may bring an action in the district court "to enjoin [certain unlawful] acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond"); 15 U.S.C. 80b-9(d) (Investment Advisors Act) (providing SEC may bring an action in district court "to enjoin [certain unlawful] acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder"); 15 U.S.C. 80a-41(d) (Investment Company Act) (same).

[14] *Kokesh*, 137 S. Ct. at 1640.

[15] *See* Transcript of Motion for Entry of Final Judgment at 22:17–24:13, SEC v. Kokesh, 2015 WL 12670314 (D.N.M. Mar. 9, 2015).

[16] SEC v. Kokesh, 834 F.3d 1158, 1164 (10th Cir. 2016).

[17] *Kokesh*, 137 S. Ct. at 1643.

[18] *Id.* at 1642 (quoting Huntington v. Attrill, 146 U.S. 657, 667 (1892)).

[19] *Id.* at 1643–44.

[20] *Id.* at 1643.

[21] *Id.*

[22] *Id.* at 1643–44.

[23] *Id.* at 1644.

[24] *Id.*

[25] FTC v. Bronson Partners, LLC, 654 F.3d 359, 373 (2d Cir. 2011).

[26] *Id.*

[27] *Id.* (recognizing that the "primary purpose of disgorgement orders is to deter violations of the" FTC laws); FTC v. Gem Merch. Corp., 87 F.3d 466, 469 (11th Cir. 1996) (recognizing "the deterrence function of section 13(b)" disgorgement).

[28] *See* Brief for Respondent at 48, *Kokesh*, 137 S. Ct. at 1635.

[29] *Kokesh*, 137 S. Ct. at 1642 n.3.

[30] *See* Transcript of Oral Argument at 52:18–21, *Kokesh*, 137 S. Ct. at 1635 ("Ms. Goldenberg: There are almost 50 years of precedents on how this should work and I think the way it worked is—; Justice Gorsuch: Not in this Court.").

[31] *Id.* at 52:14-16. For a Supreme Court tracker, Justice Gorsuch's choice of words may be of particular note. The precedents that agencies, like the SEC, rely on to justify disgorgement and restitution remedies as ancillary to injunctive authority—Porter v. Warner Holding Co., 328 U.S. 395 (1946), and Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960)—have been described as relics from an era in which the Supreme Court considered it a "duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," rather than to hone to the statute's text. Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)). Over the last two decades, the Court has cautioned against the judicial crafting of statutory remedial schemes in excess of those Congress carefully delineated, warning that important policy (and thus legislative) judgments are implicated by the choice of remedies available in a given statutory scheme. *See, e.g.*, *Alexander*, 543 U.S. at 286–87.

[32] Transcript of Oral Argument at 33:12-18, *Kokesh*, 137 S. Ct. at 1635 ("They're—they're sort of backing and filling. I mean, this remedy is out there, and yes, [Congress is] saying this. But it does seem to me that we kind of have a special obligation to be concerned about how far back the government can go when it's something that Congress did not address because it did not specify the remedy.").

[33] *Id.* at 7:20–8:2; 9:5–11.

[34] *Id.* at 7:20–8:2.

[35] *Id.* at 9:5–11.

[36] *Tull*, 481 U.S. at 424.

[37] *Kokesh*, 137 S. Ct. at 1644–45.

[38] *Id.* at 1644.

[39] *Id.* at 1644–45.

[40] FTC v. DirecTV Inc., No. 15-cv-01129-HSG (N.D. Cal. 2017); FTC v. J. William Enters., LLC, No. 6:16-cv-2123 (M.D. Fla. 2017); FTC v. Publishers Bus. Servs., Inc., No. 17-15600 (9th Cir. 2017); FTC v. AMG Capital Mgmt., LLC., No. 16-17197 (9th Cir. 2017); FTC v. Credit Bureau Ctr., LLC, No. 17-CV-194 (N.D. Ill. 2017).

[41] DirecTV's Motion for Leave to File Third Amended Answer at 1–3, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. June 20, 2017), ECF No. 323.

[42] Federal Trade Commission's Opposition to DirecTV's Motion for Leave to File Third Amended Answer at 6–8, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. June 30, 2017), ECF No. 330.

[43] *Id.* at 5 (citing Complaint at 14, ¶ 55, SEC v. Kokesh, No. 1:09-cv-01021 (D.N.M. Oct. 27, 2009), ECF No. 1).

[44] *Id.* at 7 n.6.

[45] FTC v. DirecTV Inc., No. 15-cv-01129-HSG, 2017 WL 3453376, at *6 (N.D. Cal. Aug. 12, 2017).

[46] *Id.* at *5.

[47] Defendants' Joint Motion for Partial Summary Judgment at 3–10, FTC v. J. William Enterprises, LLC, No. 6:16-cv-2123 (M.D. Fla. Aug. 2, 2017), ECF No. 146.

[48] Plaintiff's Response in Opposition to Defendants' Joint Motion for Partial Summary Judgment at 2, 7, FTC v. J. William Enterprises, LLC, No. 6:16-cv-2123 (M.D. Fla. Sept. 8, 2017), ECF No. 159.

[49] FTC v. J. William Enterprises, LLC, No. 6:16-cv-2123, 2017 WL 4776669, at *2 (M.D. Fla. Oct. 23, 2017).

[50] Defendants' Motion to Modify Preliminary Injunction at 1–2, FTC v. Credit Bureau Center, LLC, et al., No. 17-CV-194 (N.D. Ill. Nov. 9, 2017), ECF No. 156.

[51] Federal Trade Commission's Memorandum in Opposition to Defendants' Motion to Modify Preliminary Injunction at 5–6, FTC v. Credit Bureau Center, LLC, et al., No. 17-CV-194 (N.D. Ill. Nov. 28, 2017), ECF No. 164.

[52] *Id.* at 7.

[53] *Id.* at 8.

[54] *Id.* at 1, 9.

[55] FTC v. Credit Bureau Ctr., LLC, No. 17-CV-194, 2018 WL 482076, at *1 (N.D. Ill. Jan. 14, 2018).

[56] *Id.* at *2 (internal quotations and citations omitted).

[57] Publishers Business Services has also raised on appeal the argument that Section 13(b) has "common-law foundations," so actions brought pursuant to Section 13(b) are therefore subject to a common-law proximate cause analysis. Initial Brief of Appellants at 32–39, FTC v. Publishers Bus. Servs., Inc., No. 17-15600 (9th Cir. Aug. 30, 2017), ECF No. 13.

[58] Initial Brief of Appellants at 18–26, FTC v. Publishers Business Servs., Inc., No. 17-15600 (9th Cir. Aug. 30, 2017), ECF No. 13.

[59] Brief of the Federal Trade Commission at 22, FTC v. Publishers Business Servs., Inc., No. 17-15600 (9th Cir. Oct. 30, 2017), ECF No. 22.

[60] *Id.* at 38.

[61] Opening Brief of Relief Defendants-Appellants at 84–86, FTC v. AMG Capital Management, LLC, No. 16-17197 (9th Cir. July 21, 2017), ECF No. 14.

[62] *Id.* at 89, 90.

[63] Brief of the Federal Trade Commission at 90–92, FTC v. AMG Capital Management, LLC, No. 16-17197 (9th Cir. Nov. 28, 2017), ECF No. 37-2.

[64] *Id.* at 91–92.

[65] Federal Trade Commission's Opposition to DirecTV's Motion for Leave to File Third Amended Answer at 5, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. June 30, 2017), ECF No. 330; Brief of the Federal Trade Commission at 38, FTC v. Publishers Business Servs., Inc., No. 17-15600 (9th Cir. Oct. 30, 2017), ECF No. 22; Brief of the Federal Trade Commission at 91, FTC v. AMG Capital Management, LLC, No. 16-17197 (9th Cir. Nov. 28, 2017), ECF No. 37-2.

[66] Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2003) [hereinafter FTC 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases], https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular (withdrawn July 31, 2012).

[67] *Id.*

[68] *Kokesh*, 137 S. Ct. at 1643.

[69] *See* FTC 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, *supra* note 66.

[70] *See, e.g.*, FTC v. Febre, 128 F.3d 530, at 535–36 (7th Cir. 1997) ("The Commission must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate."); FTC v. JK Publ'ns, Inc., No. 99-0044, 2000 WL 35594143, at *17 (C.D. Cal. Aug. 9, 2000) (requiring the FTC's restitution amount to "reasonably approximate the amount of consumer loss"). The Ninth Circuit's recent decision in *FTC v. Commerce Planet, Inc.* highlights how approximate the FTC's estimate can be. In Commerce Planet, the defendant contested the amount of the FTC's restitution award of $18.2 million as being "arbitrarily" determined because the FTC failed to account for the fact that "not all of the consumers who purchased [the product at issue] were deceived." FTC v. Commerce Planet, Inc., 815 F.3d 593, 604–04 (9th Cir. 2016). The district court noted that the FTC met its initial burden based on expert testimony that "most" people who saw the advertisement at issue would have been deceived. FTC v. Commerce Planet, 878 F. Supp. 2d 1048, 1092 (C.D. Cal. 2012). The district court accepted ipso facto that 50 percent is the lower bound of "most," and then multiplied the defendant's net revenues of $36.4 million by that fraction to calculate the appropriate monetary remedy. *Id.* The Ninth Circuit specifically affirmed this methodology, which included no specific assessment of how many of the defendant's customers were deceived by the advertising practice the FTC successfully challenged or received some value from the service. *Commerce Planet*, 815 F.3d at 605.

[71] *See* FTC v. Nat'l Urological Group, Inc., 645 F. Supp. 2d 1167, 1212 (N.D. Ga. 2008) (stating that the "primary purpose of restitution in the context of deceptive advertising is to restore victims to their position prior to the deceptive sales" and that "the court looks to the price paid by consumers and does not deduct any value received" when calculating the remedy amount). Notably, the FTC very recently took the position in motions practice in the *FTC v. DirecTV LLC* matter described above that it could have demanded all of DirecTV's net revenues during the applicable time period, even though DirecTV offered "legitimate products that some customers valued." Federal Trade Commission's Opposition to DirecTV's Motion for Partial Findings at 25, FTC v. DirecTV LLC, No. 4:15-cv-01129 (N.D. Cal. Sept. 25, 2017), ECF No. 401.

[72] *See, e.g.*, FTC Office of Claims and Refunds Annual Report (2017), *supra* note 2, at 7 ("As part of its mission to protect American consumers, the FTC works to get money back to people who are harmed by illegal business practices. . . . In all of its activities, the Bureau works to provide consumer refunds whenever feasible, and then develops customized refund programs that are designed to get as much money back to as many injured consumers as possible.").

[73] *See, e.g.*, *Gem Merchandising*, 87 F.3d at 470 ("[B]ecause it is not always possible to distribute the money to the victims of defendant's wrongdoing, a court may order the funds paid to the United States Treasury."); *Febre*, 128 F.3d at 537 (stating that the FTC "often requests orders directing equitable disgorgement of the excess money to the United States Treasury" because "they cannot identify all the consumers entitled to restitution and cannot distribute all the equitable relief ordered to be paid").

Sidley Thought Leadership

SIDLEY THOUGHT LEADERSHIP

- Third Time's a Charm? Privacy Shield Agreement Reached In Principle (April 1, 2022)
- Congress Passes Cyber Incident Reporting for Critical Infrastructure Act of 2022 (March 21, 2022)
- Newly Proposed SEC Cybersecurity Risk Management and Governance Rules and Amendments for Public Companies (March 11, 2022)
- Trying to Tackle Big Data: European Union Launches Draft Data Act (March 7, 2022)
- Newly Proposed SEC Cybersecurity Risk Management Rules and Amendments for Registered Investment Advisers and Funds (March 4, 2022)
- The UK's new International Data Transfer Agreement Released (February 4, 2022)
- EU Council Publishes Changes to Artificial Intelligence Act Proposal (January 18, 2022)
- FTC Announces it May Pursue Rulemaking to Combat Discrimination in AI (December 28, 2021)
- U.S. Federal Bank Regulators Require Notifications For Material Cybersecurity Incidents (November 22, 2021)
- Data: A New Direction or Misdirection? ICO Responds to UK Government Consultation on Its Proposed New Data Protection Regime (October 26, 2021)
- Changes to FTC Rulemaking Procedures Herald More Aggressive Action on Consumer Privacy (October 4, 2021)
- Get Prepared for Data Privacy Compliance Under China PIPL (September 23, 2021)
- UK ICO Opens Consultation on Data Transfer Agreements and Guidance (August 23, 2021)
- West Coast, East Coast, and Now Mountains, Too: Colorado Joins the Comprehensive State Privacy Law Club (July 28, 2021)
- U.S. Supreme Court Tightens Standing Requirements in TransUnion Decision (July 1, 2021)
- European Data Protection Board Issues Final Schrems II Recommendations (June 25, 2021)
- European Commission Adopts New Standard Contractual Clauses (June 5, 2021)
- EU Commission Issues Draft AI Regulation (April 23, 2021)

Privacy and Cybersecurity Roundtable

- Supreme Court Considers Injury and Typicality Questions in Case With Implications for Data Breach and Privacy Class Action Litigation (April 22, 2021)
- EU Council Agrees on Proposed ePrivacy Regulation (March 10, 2021)
- California Privacy Law Overhaul – Proposition 24 Passes (November 4, 2020)
- French Council of State Upholds €50m CNIL Fine against Google (June 25, 2020)
- ICO Delays British Airways and Marriott GDPR Fines (January 9, 2020)
- German DSK Issues GDPR Fining Methodology Guidelines (December 9, 2019)
- Federal and State Authorities Increase Scrutiny and Enforcement of Children's Privacy; Google, YouTube Agree to Pay a Record $170 Million Fine (November 8, 2019)
- Another UK ICO GDPR Privacy Fine of £99m ($123m) Proposed Just One Day After the Largest Ever (July 17, 2019)
- UK ICO Issues Largest Ever GDPR Privacy Fine of £183m ($228m) (July 8, 2019)
- FTC Announces Record-Setting $5.7M COPPA Penalty (March 14, 2019)
- Belgian Privacy Commission Issues Guidance on Data Protection Impact Assessments Under the GDPR (April 5, 2018)
- D.C. Circuit Widens the Split on Standing in Data Breach Cases After Spokeo (August 8, 2017)

Supplemental Reference Materials

Privacy and Cybersecurity Roundtable

SUPPLEMENTAL REFERENCE MATERIALS

CPO Perspectives

Cross Border Data Flows

- FACT SHEET: United States and European Commission Announce Trans-Atlantic Data Privacy Framework (March 25, 2022)
- The CJEU judgment in the *Schrems II* case (September 2020)

Conversations with Commissioner Slaughter and Colorado Attorney General Weiser

Privacy Leadership (or Lack Thereof)

- Prepared remarks: Attorney General Phil Weiser on the way forward on data privacy and data security (January 28, 2022)
- Wait But Why? Rethinking Assumptions About Surveillance Advertising IAPP Privacy Security Risk Closing Keynote 2021: Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery (October 22, 2021)
- Statement of Commissioner Rebecca Kelly Slaughter: Regarding the Report to Congress on Privacy and Security (October 1, 2021)
- Disputing the Dogmas of Surveillance Advertising National Advertising Division Keynote 2021: Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery (October 1, 2021)
- Statement of Commissioner Rebecca Kelly Slaughter: Opening Remarks at PrivacyCon 2021 (July 27, 2021)
- Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter: Before the United States Senate Committee on Commerce, Science, and Transportation Hearing on Strengthening the FTC's Authority to Protect Consumers (April 20, 2021)
- Protecting Consumer Privacy in a Time of Crisis: Remarks of Acting Chairwoman Rebecca Kelly Slaughter As Prepared for Delivery (February 10, 2021)
- Colorado Attorney General: Data Security Best Practices (January 2021)
- A conversation with Colo. Attorney General Phil Weiser (December 1, 2020)
- How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist (September 26, 2020)
- Cybersecurity Summit Delivers Insights From Both Sides of Enforcement (October 7, 2019)
- Colorado Attorney General Data Security Best Practices

Privacy and Cybersecurity Roundtable

FTC and Colorado Privacy and Cyber Policy and Enforcement Priorities

- Dissenting Statement of Commissioner Rebecca Kelly Slaughter: Regarding Ascension Data & Analytics, LLC (December 22, 2021)
- NTIA Listening Session on Privacy, Equity, and Civil Rights: Keynote Address of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery (December 14, 2021)
- Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding Regulatory Review of the Safeguards Rule Commission File No. P145407 (October 27, 2021)

Specific Privacy Themes

- FTC Split Over 'Integrating' Data Privacy And Competition (October 4, 2021)
- Opening Remarks of Acting Chairwoman Rebecca Kelly Slaughter at “Bringing Dark Patterns to Light” Workshop As Prepared for Delivery (April 29, 2021)

Enforcement

- Companies collect and share your online data. Colorado wants to become one of the only states to give consumers more say (May 31, 2021)
- Prepared Statement of The Federal Trade Commission: The Urgent Need To Fix Section 13(B) of The FTC Act Before The Committee On Energy And Commerce Subcommittee On Consumer Protection And Commerce, United States House Of Representatives Washington, D.C. (April 27, 2021)
- Dissenting Statement of Commissioner Rebecca Kelly Slaughter: In the Matter of FTC vs. Facebook (July 24, 2019)

Cybersecurity Update

Russia/Ukraine present legal and logistical challenges

- Russia-Ukraine Cyberattacks (Updated): How to Protect Against Related Cyberthreats Including DDoS, HermeticWiper, Gamaredon, Website Defacement, Phishing and Scams (February 22, 2022)

Ransomware

- Updated Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments (September 21, 2021)
- Executive Order on Improving the Nation’s Cybersecurity (May 12, 2021)
- Cybersecurity and Infrastructure Security Agency Guidance
- FBI Alerts and Statements
- NSA Cybersecurity Advisories and Guidance

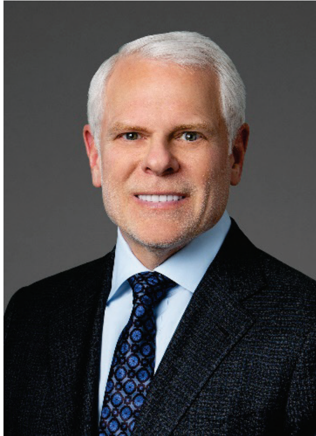
Cyber Incident Reporting for Critical Infrastructure Act

- The Case for Cyber-Realism (January/February 2022)
- A Strategic Intent Statement for the Office of the National Cyber Director

Additional Materials

- Inside the FBI: Decoding the Cyber Threat (February 24, 2022)

Sean Royall Joins Sidley



LEADING ANTITRUST AND CONSUMER PROTECTION LAWYER SEAN ROYALL JOINS SIDLEY

Sidley is pleased to announce that Sean Royall has joined the firm as a partner in the firm's Dallas and Washington, D.C. offices. Sean's practice focuses on antitrust and consumer protection, litigation, and government investigations. He joins Sidley from Kirkland & Ellis, and previously served at the Federal Trade Commission (FTC) as the Deputy Director of the FTC's Bureau of Competition. Sean is a co-leader of the firm's global Antitrust and Consumer Protection and Litigation and Investigations practice.

Sean has a nationally prominent reputation for his work in the consumer protection area, where he has particularly deep experience handling FTC investigations and associated litigation focused on advertising, marketing, privacy, and data security issues. In 2018, for example, Sean served as lead counsel for Facebook in connection with the FTC's extensive, privacy-related investigation and subsequent settlement. He brings to this area of his practice deep knowledge of applicable law and agency practice, as well as the skills of an accomplished litigator.

While in government, Sean was the lead trial lawyer in the FTC's landmark monopolization suit against computer chip maker Rambus Inc., a novel case that established new legal standards applicable to patent disclosure within industry standard-setting consortiums. More recently, Sean played an important role on the trial team for AT&T in the company's victory over the Department of Justice's antitrust challenge to AT&T's US$85 billion acquisition of Time Warner. In addition to his trial-level experience, Sean has successfully argued appeals in courts around the country.

For well more than a decade, he has been given a Band 1 ranking by *Chambers USA* (2007 - 2021), which in the 2021 edition describes him as "top of the field" and "a star in the antitrust world both in counseling and litigation." And in 2022 he was noted by his peers as being an "extremely talented lawyer and exceptional litigator."

Sean's other recognitions include being ranked in *Chambers Global* for "Antitrust – USA" (2020-2021); endorsed as "Highly Recommended (Texas)" by *Global Competition Review* (2022); and named in *Who's Who Legal* in "Competition" (2021); *in The Best Lawyers in America* as "Antitrust Lawyer of the Year" (2015, 2018); and in *The Best Lawyers in America* as "Litigation: Antitrust Lawyer of the Year" (2019). He has also been named to the "All-Star List" by BTI Services (2017); and deemed a "National Antitrust MVP" by *Law360* (2015); a "Mergers and Acquisitions and Antitrust Trailblazer" by *National Law Journal* (2015); and a "Life Sciences Star – Competition and Antitrust" by *LMG Life Sciences* (2018-2019).

Sean has written extensively on a wide range of topics relevant to, among other things, antitrust law and policy, consumer protection, privacy, FTC process and remedies, class action antitrust litigation, pharmaceutical antitrust, and standard setting. Sean previously served as Editorial Chair of the ABA's *Antitrust Law Journal*, and as an editor of the ABA's *Antitrust* magazine and of the Von Kalinowski treatise on *Antitrust Laws and Trade Regulation*. He also was the principal author of an antitrust and consumer protection blog for the Washington Legal Foundation.

Privacy and Cybersecurity Roundtable

Speaker Biographies

SPEAKER BIOGRAPHIES*

Dmitri Alperovitch
Founder and Chairman, Silverado Policy Accelerator

Seth Blinder
Managing Director and Chief Consumer Privacy Officer, Goldman Sachs Bank USA

Francesca Blythe
Senior Managing Associate, Sidley

Colleen Theresa Brown
Partner, Sidley

Bruno Gencarelli
Deputy to the Director – Fundamental Rights and Rule of Law, Head of Unit – International Data Flows and Protection, European Commission

Jim Halpert
General Counsel, Office of the National Cybersecurity Director, The White House

Jane Horvath
Chief Privacy Officer, Apple

Joe Jones
Deputy Director - International Data Transfers Data Policy Directorate, UK Department of Digital, Culture, Media and Sport

William RM Long
Co-Chair and Partner, Sidley

Tom Moore
Chief Privacy Officer, Apple

Sujit Raman
Partner, Sidley

Alan Charles Raul
Co-Chair and Partner, Sidley

Sean Royall
Partner, Sidley

Sam Rubin
Vice President, Palo Alto Networks

Rebecca Kelly Slaughter
Commissioner, Federal Trade Commission

Dale Sunderland
Deputy Commissioner, Data Protection Commission, Ireland

Tonya Ugoretz
Deputy Assistant Director, FBI Cyber

Phil Weiser
Attorney General, Colorado

Thomas Zerdick
Head of Unit - Supervision and Enforcement, European Data Protection Supervisor

*Ctrl+Click on each name to access the biography

Dmitri Alperovitch

Founder and Chairman, Silverado Policy Accelerator, and Co-Founder and Former CTO of CrowdStrike Inc.

Dmitri Alperovitch is the Co-Founder and Chairman of Silverado Policy Accelerator, a non-profit focused on advancing American prosperity and global leadership in the 21st century and beyond. He is a co-founder and former CTO of CrowdStrike Inc., a leading cybersecurity company. A renowned cybersecurity visionary, business executive, and thought leader on cybersecurity strategy, state tradecraft, and great power competition, Alperovitch has served as special advisor to the Department of Defense and currently serves on the Department of Homeland Security Advisory Council and the Cybersecurity and Infrastructure Security Agency's Cyber Safety Review Board.

His writing on cyber and foreign policy issues has appeared in major news outlets, including *The New York Times*, *The Washington Post*, and *Foreign Affairs*, and he is a regular contributor to national broadcast news programs, including *PBS Newshour* and *NBC News*. Alperovitch is also an active angel investor and board member of multiple high-growth technology companies. He has been named as one of *Fortune Magazine's* “40 Under 40” most influential young people in business, and *Politico Magazine* has featured Alperovitch as one of “Politico 50” influential thinkers, doers, and visionaries transforming American politics. In 2013, Alperovitch received the prestigious recognition of being selected as *MIT Technology Review’s* “Young Innovators under 35” (TR35) and *Foreign Policy's* Leading Global Thinkers. In 2021, he launched the Alperovitch Institute for Cybersecurity Studies at Johns Hopkins University's School of Advanced International Studies (SAIS).

Seth Blinder

Managing Director and Chief Consumer Privacy Officer, Goldman Sachs Bank USA

Seth Blinder is Chief Consumer Privacy Officer at Goldman Sachs, where he is responsible for privacy regulatory compliance for Goldman Sachs’ consumer businesses.

Prior to Goldman, Seth was Senior Counsel, Data Protection at MasterCard, where he provided privacy support to global, regional and local business units on privacy compliance, industry best practices, corporate policies, contract drafting and negotiation, and implementing privacy by design for product development and product expansion. Seth also provided data privacy support to MasterCard’s corporate development and M&A team.

Prior to MasterCard, Seth practiced in the New York offices of Gibson Dunn & Crutcher and Cleary Gottlieb Steen & Hamilton, where he focused on M&A and corporate and financial transactions. He also worked in-house at Sony Music Entertainment’s Global Digital Business legal group, where he advised on a range of digital distribution and e-commerce transactions.

Seth graduated from University of Pennsylvania Law School and from New York University’s College of Arts and Sciences.

Francesca Blythe
Senior Managing Associate, Sidley

Francesca Blythe advises international clients on a wide range of data protection, privacy, and cybersecurity issues. Francesca has in depth experience with a number of industries, including asset management and private equity, payments, technology, e-commerce, and manufacturing. She has a particular focus on life sciences, where she advises on a broad range of issues in relation to, for example, real world evidence and secondary research, clinical studies/investigations, digital health, and use of novel technologies (including artificial intelligence).

Francesca was previously in-house counsel at the largest international health and beauty retailer in Asia and Europe. Whilst there, she regularly gave advice on compliance and strategies relating to data protection laws, including subject access requests, Privacy Impact Assessments, direct marketing campaigns, biometrics, and employee monitoring. She also assisted in the planning and delivery of a UK-wide privacy audit and managed a global privacy compliance project.

Francesca has recently been included in *Law.com International's* 2022 "Rising Stars: The UK's Best Up and Coming Female Lawyers" list. The annual feature highlights the "25 women aged under 40 paving ways in the UK legal industry as the next generation of female legal powerhouses." Francesca was named as an "Associate to watch" in *Chambers UK* 2022, where clients comment: "She has a good pulse as to what regulators are thinking, and provides solid advice supported by the requirements of the law and industry best practices." "She is extremely hard-working, diligent and detail-oriented. She anticipates client needs, is highly responsive and deeply knowledgeable about GDPR requirements." In the 2021 edition, sources commented that "she is a joy to work with. She is very responsive and coordinates and synthesises things as needed, giving very practical advice." Clients say that she is "extremely knowledgeable in EU privacy law." She is also recognized in *The Legal 500 UK* 2022 for Data Protection, Privacy and Cybersecurity and *Who's Who Legal: Data Privacy and Protection* 2022.

Colleen Theresa Brown
Partner, Sidley

Colleen Brown focuses on privacy, cybersecurity, data protection, and emerging technology issues for a diverse group of companies, including those in the financial, life sciences, telecommunications, media, retail, and manufacturing sectors. She also serves on the firm's COVID-19 Task Force. Over the past decade, she has focused her practice on global data protection compliance, litigation and regulatory enforcement actions, data breach response, crisis management, and internal investigations. *Washingtonian* magazine named Colleen among its "Top Lawyers" for Cybersecurity in 2019, and *The Lawyer Network* recognized Colleen as Cybersecurity Lawyer of the Year in Washington, D.C. in 2021. In addition, Colleen has been named to *Global Data Review*'s 2022 "Women in Data" list.

Her counseling experience includes cyber risk and data breach management, corporate data protection and privacy compliance programs, international data protection and cross-border transfer, Big Data, Internet of Things, electronic surveillance, trade secrets, social media, cloud computing, and online brand protection. She also has significant experience in counseling and strategy under CAN-SPAM, CCPA, CFAA, COPPA, ECPA, ESIGN, FCRA, FOIA, GDPR, GLBA, HIPAA, the Privacy Act, TCPA, Unfair and Deceptive Trade Practices, state privacy and common law claims including defamation and privacy torts, privacy regulations and enforcement in federal agencies including the Federal Trade Commission and the Federal Communications Commission, and industry self-regulation on privacy matters, including those related to online advertising and PCI DSS compliance. Colleen is a Certified Information Privacy Professional/United States through the International Association of Privacy Professionals (IAPP).

In addition to counseling and litigation related to data protection, her work also includes counseling and negotiation of data-driven agreements, as well as privacy and cybersecurity diligence and integration planning for mergers and acquisitions.

Bruno Gencarelli

Deputy to the Director – Fundamental Rights and Rule of Law, Head of Unit – International Data Flows and Protection, European Commission

Bruno Gencarelli heads the International Data Flows and Protection Unit at the European Commission (DG Justice and Consumers). He led the Commission's work in the area of data protection in the decisive phases of the legislative reform of EU data protection law and the EU-US negotiations. In that capacity, he headed the Commission's delegation in the interinstitutional negotiations with the European Parliament and the Council that resulted in the adoption of the GDPR and "Law Enforcement Directive." He was also one of the lead negotiators of the EU-US Privacy Shield and "Umbrella Agreement." He recently negotiated the mutual adequacy arrangement with Japan that created the world's largest area of free data flows. He currently co-leads for the Commission the negotiations with the UK on all aspects relating to justice and consumers in the context of Brexit. Mr Gencarelli previously served as a member of the European Commission's Legal Service (representing the Commission before courts in antitrust cases) and as a chief of staff of a judge at the European Court of Justice after having practiced law in the private sector. He holds degrees in law and political science, and teaches EU Competition Law at Sciences Po Paris. He is the author of numerous publications on EU law.

Jim Halpert

General Counsel, Office of the National Cybersecurity Director, The White House

Jim Halpert is the first General Counsel of the Office of the National Cyber Director in the Executive Office of the President (NCD), where he advises the Director on legal and policy questions related to the NCD's mission.

Before joining the Biden Administration, Jim helped build and manage DLA Piper's global privacy and cybersecurity practice. He is rated as a *Chambers* Tier 1 and Legal 500 "Hall of Fame" practitioner, a BTI Client Service "All-Star" and a *National Law Journal* Cybersecurity "Trailblazer."

Jim helped to draft the National Association of Corporate Directors Cyber Risk Handbook and more than 200 cybersecurity/privacy laws, supported clients through more than 700 cyber incidents, and advised more than a hundred clients on their cybersecurity programs.

He graduated from Harvard Law School, *cum laude*¸ and Yale College, *magna cum laude*.

Jane Horvath
Chief Privacy Officer, Apple

Jane Horvath is the Chief Privacy Officer at Apple. She has been with the company since September of 2011 and brings more than a decade of information privacy and legal experience to the role. She is responsible for overseeing Apple's compliance with global privacy laws, as well as working internally and externally on developing issues related to privacy. Prior to Apple, Jane was Global Privacy Counsel at Google. Before that, she served as the Department of Justice's (DOJ's) first Chief Privacy Counsel and Civil Liberties Officer. At the DOJ, Jane was a member of the High Level Contact Group and leader of the U.S. delegation of experts tasked with exploring common ground between the EU's Third Pillar data protection principles and U.S. federal privacy laws. Prior to the DOJ, she was the General Counsel of Digital City Inc., an America Online, Inc. (AOL) subsidiary, and Assistant General Counsel at AOL, where she helped draft the company's first privacy policies. Jane holds a Bachelor of Science from the College of William and Mary and a Juris Doctorate from the University of Virginia.

Joe Jones
Deputy Director - International Data Transfers Data Policy Directorate, UK Department of Digital, Culture, Media and Sport

Joe Jones is Deputy Director at Department for Digital, Culture, Media and Sport, leading the UK Government teams working on international data flows and related policies. He is the UK's chief negotiator with international partners, including the EU and U.S., and leads the team considering reforms to existing UK laws on international transfers. Prior to this role, Joe worked in the International Trade department, setting up the new post-Brexit digital trade policy unit. Before that, he worked in private practice as a solicitor, advising on data privacy and cybersecurity issues.

William RM Long
Co-Chair and Partner, Sidley

William Long is a global co-leader of Sidley's highly ranked Privacy and Cybersecurity practice and also leads the EU data protection practice at Sidley. William advises international clients on a wide variety of GDPR, data protection, privacy, information security, social media, e-commerce, and other regulatory matters.

William has been a member of the European Advisory Board of the IAPP and on the DataGuidance panel of data protection lawyers. He is also on the editorial board of e-Health Law & Policy and assists with dplegal ("data privacy" legal), a networking group of in-house lawyers in life sciences companies examining international data protection issues.

William was previously in-house counsel to one of the world's largest international financial services groups. He has been a member of a number of working groups in London and Europe looking at the EU regulation of e-commerce and data protection and spent a year at the UK's Financial Law Panel (established by the Bank of England), as assistant to the Chief Executive working on regulatory issues with online financial services.

William has received acknowledgement from numerous industry ranking guides, including *BTI Client Service All-Stars* 2022, *Chambers UK* 2022, and *Legal500* 2022.

Tom Moore
Chief Privacy Officer, AT&T

Tom Moore is AT&T's chief privacy officer, directly responsible for all of AT&T's privacy programs, policies, and compliance with regulations at the state, national, and international levels.

Tom joined AT&T in 1990. His many leadership roles have included senior vice president - human resources, vice president of corporate strategy, and vice president/CFO of the company's former advertising and Yellow Pages division. He previously worked at Ernst & Young and is an alumnus of Xavier University, where he majored in accounting and played varsity soccer.

Tom serves on the Executive Committee of the Information Accountability Foundation and the advisory boards of the Future of Privacy Forum (FPF) and two early stage startup companies. He also is a member of the Executive Committee of the Board of Directors of the AT&T Performing Arts Center in Dallas.

Sujit Raman
Partner, Sidley

Sujit Raman joined Sidley after nearly a dozen years as a federal prosecutor, culminating in his service as Associate Deputy Attorney General at the DOJ. In that role, he personally advised the Attorney General and Deputy Attorney General in their oversight of the nation's cyber-related criminal and national security investigations and prosecutions. Sujit also led DOJ's policy formulation in a number of critical areas, including cybersecurity, cross-border data transfers and protection, 5G/supply chain security, and emerging technologies, such as facial recognition, cryptocurrency, and encryption. He brings clients a deep understanding of substantive and procedural issues involved in white collar defense, corporate internal investigations, cyber/data protection, and national security matters.

Sujit was a lead U.S. representative in high-profile international data-sharing negotiations with the United Kingdom, Australia, and the EU. He also coordinated DOJ's response to the *Schrems II* decision of the EU Court of Justice and, from 2018–2020, chaired the Attorney General's Cyber-Digital Task Force, leading formulation of DOJ's policy and operational response to transnational cybercrime, nation-state-sponsored malign cyber activity, and online foreign influence operations. Sujit was instrumental in drafting the legislation for the Clarifying Lawful Overseas Use of Data (CLOUD) Act and led the team that worked with industry and Capitol Hill to secure the legislation's bipartisan passage.

Alan Charles Raul

Co-Chair and Partner, Sidley

Alan Raul is the founder and leader of Sidley's highly ranked Privacy and Cybersecurity practice. He represents companies on federal, state, and international privacy and cybersecurity issues, including global data protection and compliance programs, data breaches, consumer protection issues, and internet law. Alan advises companies regarding their cybersecurity and information governance and preparedness, and helps them address crisis management for data security incidents. Alan's practice involves litigation and counseling regarding consumer class actions and investigations, enforcement actions and policy development by the Federal Trade Commission (FTC), State Attorneys General, Securities and Exchange Commission, Department of Justice, and other government agencies.

Alan previously served in government as Vice Chairman of the White House Privacy and Civil Liberties Oversight Board, General Counsel of the Office of Management and Budget, General Counsel of the U.S. Department of Agriculture, and Associate Counsel to the President. He maintains a national security clearance.

Alan is ranked in *Chambers*' first tier of privacy and cybersecurity practitioners and has been named a *BTI Super All-Star* for client service in the privacy and cybersecurity field.

Alan serves as a Lecturer on Law at Harvard Law School, where he teaches a course on "Digital Governance: Privacy and Technology Trade-offs." He is a member of the Technology Litigation Advisory Committee of the U.S. Chamber Litigation Center, the governing Board of Directors of the FPF, and the Council on Foreign Relations.

Sean Royall
Partner, Sidley

Sean Royall has spent his entire career handling complex litigation matters and government investigations and is among the country's most experienced and highly regarded antitrust lawyers. He focuses broadly on antitrust and consumer protection litigation, government investigations, and counseling, and serves as a co-leader of the firm's global Antitrust and Consumer Protection practices. He is a highly experienced courtroom litigator with a stellar track record for winning high-stakes cases. Sean is equally effective navigating complex government investigations and advising clients on the details of a wide range of strategic antitrust and consumer protection issues.

Sean previously served at the FTC as the Deputy Director of the FTC's Bureau of Competition. His antitrust career, both in government and private practice, has included work on many major mergers and acquisitions, as well as lead roles in complex litigation matters that often intersect with other areas of law, including patent law, various federal regulatory regimes, consumer protection, and privacy. Sean has deep experience representing clients across a range of industries, including biopharma, healthcare, e-commerce, telecom, financial services, energy, transportation, software, and semiconductors.

Sam Rubin
Vice President, Palo Alto Networks/Unit 42

Sam Rubin is a Vice President at Palo Alto Networks. His expertise is in cybersecurity risk management, digital forensics, and data breach incident response. Sam has spent his career helping companies respond to cyber threats, ranging from rouge insiders to nation state threat actors. He also maintains an active docket of cases, serving as an expert witness in digital forensics.

Rebecca Kelly Slaughter

Commissioner, Federal Trade Commission

Commissioner Slaughter brings to the Commission more than a decade of experience in competition, privacy, and consumer protection. She builds consensus for a progressive vision and staunchly advocates for our nation's consumers and workers. Commissioner Slaughter believes that the FTC's dual missions of promoting competition and protecting consumers are interconnected and complementary, and she is mindful that enforcement or rulemaking in one arena can have far-reaching implications for the other.

A proponent of greater resources, transparency, and comprehensive use of the FTC's authorities, Commissioner Slaughter is outspoken about the growing threats to competition and the broad abuse of consumers' data. Targeted merger retrospectives, corrective enforcement, and expansion of the Commission's rulemaking authorities are among the approaches that she has championed during her time at the FTC. Along with advocating for consumers, particularly those traditionally underrepresented and marginalized, Commissioner Slaughter strongly supports working families and work-life balance.

Before joining the FTC, Ms. Slaughter served as Chief Counsel to Senator Charles Schumer of New York, the Democratic Leader. She was an associate in the D.C. office of Sidley Austin LLP before entering federal service.

Ms. Slaughter received her B.A. in Anthropology *magna cum laude* from Yale University and her J.D. from Yale Law School, where she served as an editor on the Yale Law Journal.

Dale Sunderland

Deputy Commissioner, Data Protection Commission, Ireland

Dale Sunderland was appointed Deputy Commissioner for Data Protection at Ireland's Data Protection Commission in May 2016.

Dale has responsibility for the Commission's Regulatory Supervision, Guidance and International Affairs functions. Previously Head of Communications and Corporate Secretariat at Ireland's Department of Justice and Equality, he also held various positions at that department working on Irish-British immigration cooperation, EU criminal justice and policing policy, corporate governance oversight, and international, parliamentary, and media affairs.

He holds graduate and postgraduate honors qualifications in Business Studies and Public Management.

Tonya Ugoretz

Deputy Assistant Director, FBI Cyber Division

Tonya Ugoretz is the Deputy Assistant Director in the FBI's Cyber Division where she oversees national-level cyber policy, analysis of cyber-criminal and national security threats, and partner engagement.

Prior to this position, she spent three years at the Office of the Director for National Intelligence as the first director of the Cyber Threat Intelligence Integration Center, for which she received the National Intelligence Distinguished Service Medal.

Ms. Ugoretz began government service in 2001 as a Presidential Management Fellow. In 2003, she became the first analyst to serve as the FBI Director's daily briefer and thereafter served in various roles at FBI and other agencies, including assignments with CIA, Customs and Border Protection, and the National Intelligence Council.

Phil Weiser

Attorney General, Colorado

Colorado Attorney General Phil Weiser was sworn in as the State's 39th Attorney General on January 8, 2019. As the state's chief legal officer, Attorney General Weiser is committed to protecting the people of Colorado and building an innovative and collaborative organization that will address a range of statewide challenges, from addressing the opioid epidemic to reforming our criminal justice system to protecting our land, air, and water.

Attorney General Weiser has dedicated his life to the law, justice, and public service. Before running for office, Weiser served as the Hatfield Professor of Law and Dean of the University of Colorado Law School, where he founded the Silicon Flatirons Center for Law, Technology, and Entrepreneurship and co-chaired the Colorado Innovation Council.

Weiser served as a Deputy Assistant Attorney General in the DOJ and as Senior Advisor for Technology and Innovation in the Obama Administration's National Economic Council. He served on President Obama's Transition Team, overseeing the FTC and previously served in President Bill Clinton's DOJ as senior counsel to the Assistant Attorney General in charge of the Antitrust Division, advising on telecommunications matters.

Before his appointment at the Justice Department, Weiser served as a law clerk to Justices Byron R. White and Ruth Bader Ginsburg at the United States Supreme Court and to Judge David Ebel at the Tenth Circuit Court of Appeals in Denver, Colorado.

The son and grandson of Holocaust survivors, Weiser is deeply committed to the American Dream and ensuring opportunity for all Coloradans.

Thomas Zerdick

Head of Unit - Supervision and Enforcement, European Data Protection Supervisor

Thomas Zerdick, LL.M. (@TZerdick) is Head of the Unit “Technology and Privacy” in the office of the European Data Protection Supervisor, dealing with new technologies and their impact on personal data protection and privacy.

Previously, Mr Zerdick was a Member of Cabinet for the European Commission’s First Vice-President Timmermans with responsibilities in particular for issues relating to the Rule of Law and Fundamental Rights, including personal data protection.

At the European Commission’s Directorate-General for Justice and Consumers, Mr Zerdick was a key member of the team that prepared and negotiated the European Commission’s data protection reform proposals, i.e. the GDPR and the Police Data Protection Directive between 2009 and 2016.