Build Back Better Bill Radically Expands FTC Penalty Power

By **Doug Meal, Hannah Levin and Sulina Gabale** (December 22, 2021)

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The $2 trillion Build Back Better Act passed by the U.S. House of Representatives recently not only covers social programs, climate change and taxes, but also includes language that would dramatically expand the Federal Trade Commission's penalty authority.

Specifically, if the act passes the U.S. Senate and then is signed into law by President Joe Biden, the Federal Trade Commission would for the first time have authority to file lawsuits in federal district court seeking monetary penalties of up to around $43,000 per violation for mere violations of the prohibition of "unfair or deceptive acts or practices," or UDAP, codified in Section 5 of the Federal Trade Commision Act.

After the announcement by Sen. Joe Manchin, D-W.Va., on Dec. 19 that he will not support the act, the act's future remains unknown.[1] The act requires a simple majority vote to pass the Senate.

The new FTC penalty authority that the act seeks to implement would be accomplished by an amendment to Section 5(m)(1)(A) of the FTC Act.

As it currently reads, Section 5(m)(1)(A) empowers the FTC to recover a civil penalty in federal district court against any person, partnership or corporation that violated an FTC rule — e.g., the Children's Online Privacy Protection Rule or the Health Breach Notification Rule — if the party had "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."

Historically, the FTC has been aggressive in seeking civil penalties under Section 5(m)(1)(A).[2] To date, however, Section5(m)(1)(A) has been by its own terms expressly limited to the rule-violation context and thus has created no opportunity for the FTC to seek to impose penalties based on a mere violation of Section 5's UDAP prohibition.[3]

Various FTC commissioners have long urged Congress to grant the FTC penalty authority in the UDAP context, and Congress has long failed to grant these requests.[4] But the act seeks to change that history of congressional resistance to the FTC's efforts on this issue. Specifically, if passed, the act would revise Section 5(m)(1)(A) of the FTC Act as shown below (additions in bold and italic text):

> (m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure
>
> (1) (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which ***violates this Act's prohibition of unfair or deceptive acts or practices or*** any rule under this subchapter respecting unfair or deceptive acts or practices

> (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and ***a violation of this Act or*** is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

This language broadens Section 5(m)(1)(A)'s reach to extend beyond cases involving alleged violations of FTC rules to cases involving mere violations of Section 5's UDAP prohibition.

Importantly, the FTC Act does not define the term "unfair or deceptive acts or practices." As a result, while the meaning of this term has to some degree been shaped by FTC enforcement actions and case law, that meaning is far from certain in the context of many sorts of acts and practices that businesses engage in with respect to consumers.

This lack of definition gives the FTC wide flexibility to argue that a particular consumer-directed act or practice of which it disapproves constitutes a UDAP violation.

The FTC Act also fails to define what constitutes a "violation" for purposes of penalty assessment, creating uncertainty as to whether or when, in the UDAP context, the target company's challenged conduct may be deemed to have resulted in multiple, rather than just one, UDAP violations. Section5(m)(1) entitles the FTC to obtain a civil penalty for "each violation" of a rule, or, in the case of a violation through the continuing failure to comply with a rule, for each day of such failure.[5]

In the rule-violation context, the FTC normally interprets the "each violation" portion of this provision as meaning that the target company's challenged conduct resulted in a separate violation of the rule with respect to each consumer affected by that conduct. In some contexts, the FTC bases this interpretation on the text of the underlying rule it is enforcing.

For example, the Telemarketing Sales Rule states that each illegal call a party causes can constitute a separate violation of the rule.[6] Similarly, because the Children's Online Privacy Protection Act rule prohibits the collection of a child's personal information without parental consent, the FTC regularly alleges that each collection, use or disclosure of a child's personal information constitutes a separate violation for which the FTC may seek monetary penalties, even where the collections, uses, and/or disclosures in question all emanated from one particular act or practice by the target company.[7]

The FTC has applied similar reasoning in analogous scenarios involving enforcement under Section 5(l) of the FTC Act, which provides for civil penalties for "each violation" of an FTC consent order.[8]

For example, in pursuing and obtaining a $22.5 million civil penalty from Google LLC for violating the prohibition against deceptive statements imposed by its 2011 consent order with Google, the FTC necessarily must have employed a "per-consumer" methodology for determining the number of violations claimed and the consequent size of the penalty in order to justify a penalty of that magnitude.[9]

No court decision has ruled on the validity of the per-consumer methodology that the FTC regularly resorts to in the rule- and order-violation contexts to calculate the number of violations being claimed.

In the absence of any clear statutory or judicial definition of what constitutes a "violation" of Section 5's UDAP prohibition for purposes of penalty assessment, businesses should expect that the FTC will carry over to the UDAP-prohibition context the interpretation of "violation" it has advanced in the rule- and order-violation context.

And, accordingly, businesses can expect that the FTC will argue that the target company's challenged conduct can result in many separate violations of the UDAP prohibition with respect to each consumer affected by that conduct.

Under this approach, the FTC could argue, for example, that a single deceptive statement made on a company's website resulted in a separate violation of Section 5's UDAP prohibition with respect to each consumer who viewed such statement.

Viewed in this context, the act's proposed amendment of Section 5(m)(1)(A) would, if enacted, create jaw-dropping penalty exposure for American companies that find themselves in the FTC UDAP enforcement crosshairs.

In the privacy and cybersecurity context, for example, imagine such garden-variety events as a corporate website that the FTC believes deceptively collected personal information from 1 million consumers or a corporate data breach that the FTC believes unfairly put at risk data pertaining to 1 million consumers.

In each case, the fine exposure created by the act's proposed amendment of Section 5(m)(1)(A) would, at least according to the FTC based on its prior practice in enforcing Section 5(m)(1)(A), amount to more than $43 billion.

Not surprisingly, given the enormous risk it poses for American businesses, the U.S. Chamber of Commerce reacted to the act's proposed amendment of Section 5(m)(1)(A) by sending letters to the Federal Trade Commission and certain Senate and House Committees calling these changes a "deeply flawed provision that would dramatically expand the [FTC's] civil penalty authority without any safeguards."[10]

If the act passes, and its proposed amendment of Section 5(m)(1)(A) remains intact, the success of FTC enforcement efforts under the amended version of Section 5(m)(1)(A) will turn heavily on whether the FTC is able to demonstrate that the act or practice being challenged was performed with the knowledge required for Section 5(m)(1)(A) to apply.

The case law interpreting Section 5(m)(1)(A)'s knowledge requirement is limited. But, in the rule-violation context, courts have held that to establish the requisite "actual knowledge or knowledge fairly implied" of the violation in question, the FTC must show that, per the U.S. District Court for the District of Arizona in the 1984 U.S. v. ACB Sales & Service Inc. decision:

> the defendant or its agent ha[d] some knowledge, actual or constructive, of the requirements of the [rule] such that it can be concluded that the defendant or its agent knew or should have known that his conduct was unlawful.[11]

If, as would seem logical, the high bar courts have erected for establishing knowledge in the rule-violation context gets carried over to the UDAP-violation context, the FTC may be hampered in obtaining civil penalties under Section 5(m)(1)(A) in UDAP-violation cases because it will have to show the defendant not only committed the UDAP violation in question but also had actual or constructive knowledge that the act or practice in question violated Section 5's UDAP prohibition.

This latter showing often could be extremely difficult to make because, as noted above and in contrast to the rule-violation context in which the relevant language of the rule is often quite precise, in the UDAP-violation context there is very little clarity as to what does and what does not violate Section 5's UDAP prohibition.

The FTC's ability in an enforcement action to obtain fines of the magnitude described above will also depend on its success in persuading courts to embrace the per-consumer-violation-quantification methodology that the FTC has heretofore advanced in the rule-and order-violation context.

Moreover, even were that methodology to win judicial acceptance as a general matter, efforts by the FTC to invoke the per-consumer violation-quantification methodology in a given case could be challenged on the ground that application of that methodology to the act or practice in question would yield penalties so excessive as to constitute a violation of due process.

In the 2020 U.S. v. Dish Network LLC case in the U.S. Court of Appeals for the Seventh Circuit, for example, Dish Network argued that the penalties allowed by the Telemarketing Sales Rule, the Telephone Consumer Protection Act, and related state laws were so high as to violate the due process clause.[12]

The court rejected this argument because, while Dish Network could have had penalties assessed as high as $660 billion, the district judge awarded $280 million or around $4 per call.[13] The court acknowledged that while that number was large, the amount per violation was a "normal number for an intentional wrong" and

> [s]omeone whose maximum penalty reaches the mesosphere only because the number of violations reaches the stratosphere can't complain about the consequences of its own extensive misconduct.[14]

In contrast, in Golan v. Veritas Entertainment LLC, the U.S. District Court for the Eastern District of Missouri reduced a TCPA damages award of $1.6 billion to $32 million because the higher figure was "obviously unreasonable and wholly disproportionate to the offense."[15]

Companies would therefore have various ways to defend themselves against enforcement actions brought by the FTC under the proposed amended version of Section 5(m)(1)(A). That said, if the proposed amended version of Section 5(m)(1)(A) ultimately becomes the law of the land, the FTC will surely be aggressive in attempting to use the new penalty power created by that amendment.

And the enormous penalty exposure, which the FTC will likely assert the proposed amended version of Section 5(m)(1)(A) creates, will weigh heavily on the companies targeted by the FTC under that amendment.

In particular, such companies may feel pressured by that enormous exposure to agree to substantial monetary settlements with the FTC — even where they have powerful arguments that they committed no violation of Section 5's UDAP prohibition and, in any event, lacked the knowledge of any such violation necessary to sustain a Section 5(m)(1)(A) penalty.

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[1] Manchin Statement on Build Back Better Act, Sen. Manchin (Dec. 19, 2021), https://www.manchin.senate.gov/newsroom/press-releases/manchin-statement-on-build-back-better-act.

[2] See, e.g., Stipulated Order for Permanent Injunction and Civil Penalty Judgment at 1, F.T.C. v. Google, LLC, No. 1:19-cv-02642 (D.D.C. Sept. 10, 2019) (ordering a $170 million civil penalty).

[3] In April 2021, the FTC was stripped of its ability to obtain equitable monetary relief under Section 13(b) when the Supreme Court held in AMG Capital Management, LLC v. Federal Trade Commission that Section 13(b) of the FTC Act does not authorize the Commission to seek equitable monetary relief such as restitution or disgorgement in federal court. 141 S. Ct. 1341, 1352 (2021). After the AMG decision, the FTC's ability to seek monetary relief is limited to seeking restitution and disgorgement using the FTC Act's administrative and consumer redress procedures which apply only for certain violations of particular rules or where the FTC has already entered a cease-and-desist order. In the months since, the FTC has suggested Congress should overrule AMG Capital Management and that the Commission be given broader fining authority. While the Act does not address Section 13(b), the Act's expansion of civil penalty power in Section5(m)(1)(A) is likely in response to building pressure from the FTC.

[4] For example, in remarks to the Senate Committee on Commerce, Science, and Transportation, then FTC Chairman Joseph Simons stated, "From an enforcement perspective, I ask that the legislation give us: (1) the ability to seek civil penalties…." See Hearing on Oversight of the Federal Trade Commission before S. Comm on Commerce, Science, and Transportation (August 5, 2020) (prepared remarks of Joseph J. Simons, Chairman, Federal Trade Comm'n.) https://www.ftc.gov/system/files/documents/public_statements/1578975/simons_-_oral_remarks_hearing_on_oversight_of_ftc_8-5-20.pdf.

[5] "The continual violation provision may apply when a party continues to violate the FTC Rule but the number of violations is unclear." United States v. Dish Network LLC, 256 F. Supp. 3d 810, 942 (C.D. Ill. 2017), aff'd in part, vacated in part, remanded sub nom. United States v. Dish Network L.L.C., 954 F.3d 970 (7th Cir. 2020), citing F.T.C. v. Hughes, 710 F.Supp. 1524, 1529 (N.D.Tex. 1989).

[6] 16 C.F.R § 310.4.

[7] See, e.g., Complaint at 14, F.T.C. v OpenX, No. 2:21-cv-09693 (C.D. Cal. Dec. 15,

2021); Complaint at 18, F.T.C. v. Google, LLC, No. 1:19-cv-2642 (D.D.C. Sept. 9, 2019).

[8] 15 U.S.C. § 45(l).

[9] Complaint at 58, F.T.C. v. Google, LLC, No. 5:12-cv-04177 (N.D. Cal. Aug. 8, 2012).

[10] Letter from Neil S. Bradley, U.S. Chamber of Commerce, to Senators Cantwell, Wicker, Pallone, McMorris Rogers (Nov. 19, 2021), https://www.uschamber.com/assets/documents/211119_FTCFundingProvision_SenateHouseCommerce-SenateHouseJudiciary.pdf.

[11] See, e.g., United States v. ACB Sales & Service, Inc., 590 F. Supp. 561, 575 n.11 (D. Ariz. 1984).

[12] U.S. v. Dish Network L.L.C., 954 F.3d 970, 980 (7th Cir. 2020), cert. dismissed, 141 S. Ct. 729, 208 L. Ed. 2d 508 (2021).

[13] Id.

[14] Id.

[15] Golan v. Veritas Ent., LLC, No. 4:14CV00069 ERW, 2017 WL 3923162, at *4 (E.D. Mo. Sept. 7, 2017), aff'd sub nom. Golan v. FreeEats.com, Inc., 930 F.3d 950 (8th Cir. 2019).