

# Which Agency is Best-Set to Regulate Big Tech?

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### Introduction

In today's extreme political polarization, one issue is becoming more and more bipartisan: regulation of the U.S. technology industry. Tech companies (e.g., Apple, Meta, and Google) are under increasing scrutiny because they lack governmental oversight. Additionally, tech companies' motto "move fast and break things" (coined by Mark Zuckerberg)<sup>1</sup> has led to anticompetitive practices (e.g., monopolies), violations of consumer privacy (e.g., storing & selling consumer data), and the spreading of harmful online content (e.g., misinformation).<sup>2</sup> As a result, this summer, Sen. Elizabeth Warren and Sen. Lindsey Graham called for Congress to create a new regulatory body to oversee the tech industry.<sup>3</sup>

### I. New Federal Agency

Under the bill sponsored by Sen. Warren and Sen. Graham, the new federal agency would have broad jurisdiction covering social media platforms, e-commerce, and artificial intelligence.<sup>4</sup> Large tech companies would be targeted. Specifically, the bill would grant the new agency the authority to (1) set regulations for the tech industry, (2) investigate claims of wrongdoing, (3) pursue enforcement actions, (4) ban certain practices outright, and (5) police any violations.<sup>5</sup> Moreover, the bill provides specific provisions regarding consumer privacy.<sup>6</sup> Under these provisions, the agency would set restrictions on Companies' use of Americans' personal information, such as for targeted advertising.<sup>7</sup>

### II. Current Federal Agencies

However, there are already federal agencies that protect United States consumer data privacy. These agencies include the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC).<sup>8</sup> The DOJ and the SEC have a limited role in the data privacy sphere, but the FCC and FTC have expanding roles in responding to data privacy risks.<sup>9</sup>

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<sup>1</sup> Ece Yildirim, *Harvard-trained expert shares how to 'move fast and break things': It's surprising 'how frequently people actually do it'*, CNBC (Sept. 20, 2023, 2:17 PM), <https://www.cnbc.com/2023/09/20/leadership-expert-anne-morriss-how-to-move-fast-and-fix-things.html#:~:text=Mark%20Zuckerberg's%20five%2Dword%20motto,generation%20of%20Silicon%20Valley%20entrepreneurs>.

<sup>2</sup> Brian Fung, *Elizabeth Warren and Lindsey Graham want a new agency to regulate tech*, CNN (July 27, 2023, 8:10 AM), <https://www.cnn.com/2023/07/27/tech/big-tech-regulation-new-federal-agency/index.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Marc S. Martin & Brandon H. Johnson, *FCC Launches Privacy and Data Protection Task Force To Safeguard Consumer Privacy*, PerkinsCoie (June 28, 2023), <https://www.perkinscoie.com/en/news-insights/fcc-launches-privacy-and-data-protection-task-force-to-safeguard-consumer-privacy.html>.

<sup>9</sup> *See id.*

## A. FCC

In 1934, the Communication Act established the FCC.<sup>10</sup> The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable.<sup>11</sup> Regarding data privacy, the FCC has historically protected Customer Proprietary Network Information (CPNI), which includes data related to the quantity, technical configuration, type, destination, and use of a telecommunications service.<sup>12</sup> More recently, in 2020, Congress passed the Secure and Trusted Communications Networks Act to provide the FCC with enforcement power to protect the nation's communication networks from foreign supplier risks.<sup>13</sup>

More importantly, as of June 2023, the FCC announced the formation of a Privacy and Data Protection Task Force (Task Force).<sup>14</sup> The Task Force is responsible for coordinating rulemaking, enforcing against tech violators, and notifying the public of data breaches.<sup>15</sup> Specifically for data privacy, the Task Force has the authority to protect consumer data, prevent data breaches, and reduce vulnerabilities involving third-party vendors that service regulated communications providers.<sup>16</sup> Moreover, the FCC must coordinate with the FTC, the historically leading federal agency in data protection.<sup>17</sup>

## B. FTC

In 1914, the Federal Trade Commission Act established the FTC.<sup>18</sup> The Act outlaws unfair methods of competition and unfair acts or practices that affect commerce.<sup>19</sup> Moreover, the Act gave the FTC unprecedented investigatory and enforcement tools, which has expanded.<sup>20</sup> In 1994, the FTC brought forward its first internet-related fraud case.<sup>21</sup> Since then, the FTC has brought countless enforcement actions against companies for privacy and data security violations.<sup>22</sup> These cases have involved sharing health-related data with third parties, sharing sensitive television viewing data for targeted advertising, and failing to implement reasonable security measures to protect sensitive personal data.<sup>23</sup> Most recently, the FTC reached a settlement with Facebook, resulting in a \$5 billion fine.<sup>24</sup> Today, the FTC can examine and subsequently sue almost any business.<sup>25</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> FED. TRADE COMM'N, FTC Explores Rules Cracking Down on Commercial Surveillance and lax Data Security Practices (August 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>.

<sup>19</sup> *Id.*

<sup>20</sup> See Chris Jay Hoofnagle et al., The FTC can rise to the privacy challenge, but not without help from Congress, Brookings (August 8, 2019), <https://www.brookings.edu/articles/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>.

<sup>21</sup> *Id.*

<sup>22</sup> FED. TRADE COMM'N *supra* note 19.

<sup>23</sup> *See id.*

<sup>24</sup> *Id.*

<sup>25</sup> Hoofnagle *supra* note 21.

The FTC offers several advantages over other agencies. First, the FTC can adapt to new technologies without Congressional Statutes.<sup>26</sup> Second, the FTC has broad enough jurisdiction to deal with diverse privacy issues.<sup>27</sup> Third, the FTC has decades of experience handling privacy problems.<sup>28</sup> Fourth, unlike other agencies, the FTC is resistant to industry “capture” because the FTC regulates no single, coherent industry (the tech industry is composed of companies with competing and conflicting principal interests).<sup>29</sup> Lastly, the FTC has remained generally bipartisan by avoiding agency politicization.<sup>30</sup>

However, the FTC is not without limitations. Historically, the FTC was limited to regulating the tech industry through antitrust laws.<sup>31</sup> Antitrust law seeks to prevent anticompetitive actions in the marketplace. Unfortunately, antitrust laws only target specific circumstances and cannot protect general consumer issues.<sup>32</sup>

Another limitation of the FTC is its lack of power to develop broad-based industrywide laws.<sup>33</sup> The FTC is limited to one-off proceedings against a singular company for a specific type of abuse, such as penalizing Facebook for deceiving its consumers about using personal information.<sup>34</sup> Additionally, the FTC cannot establish expansive rules protecting general consumers across the digital economy (e.g., broadly policing United States consumer’s private data).<sup>35</sup> Most limiting, the FTC has few resources for data protection since the budget of the FTC is just over \$300 million.<sup>36</sup> Worse, the FTC has only 1,100 employees, of which no more than 50 are tasked with privacy.<sup>37</sup>

The FTC’s lack of power is due to no fault of its own. Historically, Congress has kept the FTC on a short leash.<sup>38</sup> In the 1980s, Congress shut down the FTC twice for being too aggressive.<sup>39</sup> As a result, FTC attorneys must make pragmatic choices in selecting cases.<sup>40</sup> The FTC only brings actions against a small fraction of infringers.<sup>41</sup> On average, the FTC enforces 15-20 privacy settlements per year.<sup>42</sup> Even with these severe limitations, the FTC has sent strong signals to the tech industry.

### **III. Path Forward: New Federal Agency or Current Federal Agencies?**

A new, consumer privacy-focused federal agency is a potential solution to the lack of oversight in the tech industry. However, a new agency is not necessary. Instead, Congress can expand the role of other federal agencies, particularly the FTC. The FTC offers many advantages over a new federal agency: nimbleness, adaptability, broad jurisdiction, experience, resistance to industry “capture,” and is generally bipartisan.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See* Wheeler *supra* note 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Hoofnagle *supra* note 21.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

For the FTC to reach its full potential authority, Congress must take two instrumental actions. First, Congress must allow the FTC to take more ground-breaking and norm-nudging cases.<sup>43</sup> Second, Congress must grant the FTC substantially more resources, allowing the FTC to handle more cases (at least a hundred).<sup>44</sup>

Ultimately, if Congress grants the FTC more resources and tools, a greater shield from political pressure, and a clear Congressional mandate, the FTC will have the capability to adequately regulate the tech industry.

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<sup>43</sup> *See id.*

<sup>44</sup> *See id.*