MAYER | BROWN

August 3, 2022

Looking Ahead at the FTC's Enforcement Agenda

By Christopher Leach

Photo by Andrew Harrer/Bloomberg

Mayer Brown partner Christopher Leach, who formerly worked in the FTC's Division of Financial Practices, looks at enforcement actions taken by the FTC under Lina Khan. He discusses what lies ahead and what companies can do in terms of compliance to stay off the FTC's radar, including reviewing the agency's priorities.

Lina Khan celebrated her one-year anniversary as chair of the Federal Trade Commission on June 15. So what has the agency been up to during her first year in office? What is coming down the pipe? And how should companies think about compliance and enforcement risk? Given the FTC's vast jurisdiction—"commerce"—this article will focus on just a few key areas.

Action to Date

MONETARY RELIEF

Since the US Supreme Court ruled in April 2021 that the agency generally could not obtain money penalties for first-time violations of Section 5 of the FTC Act—the agency's generic authority for unfair and deceptive acts and practices—the FTC has looked for new ways to force companies to pay money in enforcement actions.

This initiative goes beyond simply alleging violations of statutes that expressly authorize penalties (e.g., telemarketing, fair lending, subscription services, and children's data privacy). The agency has expanded its interpretations of little-used statutes, including a successful case against

Christopher B. Leach

cleach@mayerbrown.com

+1 202 263 3443

Christopher Leach *is a litigation partner in Mayer Brown's Washington, D.C., office. He joined from the FTC's Division of Financial Practices, where he focused on fintech and fair lending issues. At the FTC, he investigated and litigated consumer protection enforcement actions and developed enforcement policy.*

small-business lenders alleging that they violated the anti-pretexting provision of the Gramm-Leach-Bliley Act simply by making a misrepresentation in connection with a financing transaction.

The FTC also sent out so-called "notice of penalty offenses" based on authority not used since the 1970s, alerting companies of prior decisions regarding earnings claims, endorsements, and education. And the agency has begun a number of rulemakings (autos, imposter scams, and earnings claims) and finalized others (Made-in-USA Rule) that would give the agency additional paths to monetary relief under the FTC Act.

Of course, money is not everything, and the agency has recently been scrutinizing warranty restrictions as part of the agency's effort to enforce a "right to repair."

DARK PATTERNS

The agency also has focused on so-called "dark patterns"—digital marketing that the FTC thinks is used to trick consumers. Building off of an April 2021 workshop, the FTC voted to pre-authorize dark-pattern investigations, approved an enforcement policy regarding subscription services (aka "negative option plans") intended to curb "illegal dark patterns." It has also put out enforcement notices and enforcement actions regarding fake or manipulated consumer reviews.

And in June the FTC announced that it might revise its influential .com disclosure guidance to clarify its views regarding practices the agency believes amount to dark patterns.

What's Next?

The FTC has more coming, including the following.

ENFORCEMENT AGAINST INTERMEDIARIES

Shortly after taking office, Khan announced that among her priorities was enforcement against "dominant intermediaries," including large tech platforms. This is part of her re-focus of agency resources away from whack-a-mole frauds to larger companies.

Indeed, the agency recently announced one such case against a major retailer offering low-cost payments to customers because, according the FTC's complaint, the retailer didn't have sufficient controls in place to prevent telemarketing fraud.

PRIVACY RULEMAKING

As early as December 2021, the FTC noted that it planned to begin rulemaking on "commercial surveillance" to "curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination." Originally slated to begin in February 2022, and then in June, the agency appears to be still working on that initiative.

PHARMACEUTICAL INDUSTRY

The FTC took several actions in the pharmaceutical industry in June, authorizing a study of the pharmacy benefit management industry and issuing a policy statement regarding pharmaceutical rebates between manufacturers and PBMs. Because the study included subpoenas to six large PBMs, expect that the FTC will look at those documents with an eye to its enforcement priorities.

FAIR LENDING

As part of Khan's focus on "marginalized communities," expect more fair-lending cases. In addition to traditional fair-lending statutes, Khan and Commissioner Rebecca Slaughter have explained their view that discrimination also is an "unfair" practice under Section 5 of the FTC Act, embracing a theory that the CFPB had recently announced.

This theory has the potential to dramatically expand the FTC's antidiscrimination work, as Section 5 lacks many of the limited statutory definitions of the FTC's primary fair lending authorities. It remains to be seen whether Alvaro Bedoya, the third Democratic commissioner, shares that view. But if he does, the FTC may attempt to inject discrimination claims unexpectedly in consumer protection investigations.

How Should Companies Prepare?

With an active regulator, what should companies do?

One key to avoid scrutiny is to review your customer complaints, as regulators often target companies that have spikes in complaints.

Companies looking to prioritize compliance resources also should look at the agency's priorities, especially areas that allow the FTC to obtain monetary relief. That means companies should consider reviewing any of the areas discussed above—including pharmaceutical rebates, telemarketing, subscriptions, and children's privacy—and should consider whether to implement a risk management program so that the business units can adapt with a clear understanding of the FTC's various guardrails.

Thoughtful compliance can hopefully avoid the time and expense of regulatory scrutiny.

This article does not necessarily reflect the opinion of The Bureau of National Affairs, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.