

***Regulatory Oversight* Podcast —
12 Days of Regulatory Insights: Day 11 – FTC Enforcement Trends in a New Age
Speakers: Clay Friedman and Christy Matelis
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Clay Friedman (00:04):

Hello listeners, welcome back to the holiday edition of our *Regulatory Oversight* podcast, the 12 Days of Regulatory Insight. This 12 episode series focused on key highlights and trends in the past year in various areas, and designed to keep our listeners informed and engaged during this holiday season. I'm back again this time as a moderator rather than a speaker. I'm Clay Friedman, co-host of the Firm's Attorney General Practice Group, and a member of the Regulatory Investigation Strategies and Enforcement Practice, otherwise known as Rise and much easier to say as rise. Before I get started, I wanted to remind all of our listeners to visit our blog at regulatoryoversight.com, where you'll be able to listen to other episodes not only this year but past years and also keep up to date on development changes as they occur. Today I'm joined by my colleague Christy Matelis, to discuss recent changes at the FTC and how those are going to influence enforcement, and I think it's kind of timely today as we record this. The FTC is back in session coming back now that the budget has been signed, at least temporarily, so we could talk about what's coming forward in the next year. Christy, it'd be great if you say a little bit about your background.

Christy Matelis (01:26):

Thank you, clay. I am excited to be here and thank you for having me. I am a senior associate and a member of the firm's antitrust practice. I, prior to working here, I was an assistant attorney general for the state of Utah, where I worked on several merger reviews and enforcement actions across various sectors including technology and healthcare. I also serve as an active member of the ABAs Antitrust law section and hold a leadership position there.

Clay Friedman (01:52):

Excellent. Well, glad you could join us today and we can talk about the FTC with a big focus on antitrust issues, but also touch on consumer protection issues. But where I really want to start is who are the commissioners and what are they doing right now?

Christy Matelis (02:09):

Sure, that's a great place to start because it has been a very interesting year. So the FTC is structured as a five member commission with no more than three commissioners from the same political party as the president. Earlier this year, President Trump fired the two Democratic commissioners, Rebecca Slaughter and Alvaro Bedoya, and right now we currently just have three Republican commissioners on the commission. This is a little bit unusual. Usually you have a full commission under operating, and this is a little bit unusual because there's just a lot of value to having a bipartisan commission and just makes the agency's enforcement agenda

look a little bit more robust because you know that enforcement actions are vetted through members of both parties before they go out, and it just makes the commission look a little bit more robust. When you do have that bipartisanship, which it's currently lacking right now,

Clay Friedman (03:12):

Can they still act with just three? Is there anything they can't do as long as they have the three that are in place?

Christy Matelis (03:18):

Oh, absolutely. The commission can still operate. They're still operating now with just three commissioners. It just makes their actions look a little bit more partisan as opposed to when they do have members of the opposing party on the commission with them. But the commission has been operating at full strength really since those Democrats were fired back in March of this year, and it wasn't without controversy of course. So after Bedoya and Slaughter were fired, commissioner Slaughter and Bedoya, actually they both challenged their terminations. Bedoya has since resigned from the commission and he's no longer challenging his, but Commissioner Slaughter, she is still challenging her termination and it is going to be heard before the US Supreme Court in December.

Clay Friedman (04:05):

So who's the current chairperson of the commission and does that person really dictate the agenda or the commission or do the other commissioners still have their own separate and independent authority?

Christy Matelis (04:17):

The current chair is Andrew Ferguson, and he certainly plays the largest role when it comes to setting the agenda. Earlier, I think it was in September, actually not this month, but I think it was a couple months ago, the FTC did issue a draft priorities memo, which the public was able to view and make comments on. I think they had until October 17th to comment on that publicly, but that's where the FTC says, Larry, for the next four years, we've got a new president, here's what our priorities are going to be in terms of enforcement. And that was issued in September, and I think that probably most of the writing was heavily done by the chair by Ferguson as well as the White House. And I think what you're going to see there is, to be honest, I think you're going to see a lot more of the same that we had in the last administration. We're going to see a big focus on technology markets, privacy, data security, and probably a more measured approach to enforcement and rulemaking than the last administration. But in terms of what are the big key areas, what this administration is looking at, definitely looking at technology privacy and data security.

Clay Friedman (05:39):

Before we jump into that, I want to talk about those further. Is there any news or rumors about changes on the current commission with the three that are there?

Christy Matelis (05:50):

There's been some recent news lately. Commissioner Holyoke has since left the Federal Trade Commission, to be the interim U.S. attorney for the District of Utah. And rumor has it that her vacancy on the commission will be filled by Ryan Bash. He currently serves as a member of President Trump's National Economic Council as special assistant to the President for Economic Policy. He is served in that role since January of this year, and he has a major focus on technology policy

Clay Friedman (06:23):

President Trump. He's in his second term after a four year pause with the Biden administration. What are we anticipating as far as enforcement trends and the approach that the FTC is going to take? Let's focus first on antitrust enforcement and what we anticipate seeing.

Christy Matelis (06:43):

Sure. I mean, there was a lot of talk about this administration being different, but so far what we've seen actually is a lot of focus on the same things, and I think that administration to administration really, they're focused on addressing the things that impact everyday Americans. So what is this administration focusing on? They're focusing on things that impact American standard of living, such as healthcare, pharmaceuticals, technology. These remain the big targets of the FTC and this administration doesn't seem to be deviating from those sort of big ticket items.

Clay Friedman (07:22):

In another similar consumer agency, the CFPB, we've seen it get dismantled to some degree or to a large degree and not focusing on much enforcement. You talked about, you just mentioned how under the current Trump administration, some things really haven't changed as it relates to healthcare and technology and pharmaceuticals and stuff like that. Are you seeing size of actual enforcement activity by the commission in those areas? And it is almost business day as usual as you mentioned?

Christy Matelis (07:58):

I think it's too early to say that the volume of enforcement actions has continued. Certainly we thought that the Biden administration would be pretty active, but they were very slow to bring actions. I think they deliberated about which actions maybe too long, and we didn't see nearly as many enforcement actions under the Biden FTC as we thought. In fact, if you measure how many enforcement actions were brought under Trump won versus the Biden FTC, Trump won, actually had more enforcement actions than the Biden FTC. Now this Trump too, I don't know if we're going to see a duplication of Trump won or if this will be more in line with the Biden FTC. Time will tell, but I think for right now we haven't seen many enforcement actions come out only because, look, we just had today is the first day that we're back after a 40, I think a 40 plus day shutdown.

It also takes time for Mark Mader, one of the commissioners on the FTC. He was nominated and took his seat earlier this year. That took time. All of these things delay the FTC getting up and running. Of course, there's transition time to account for, so we haven't really seen any huge enforcement actions yet, but we are seeing, it's interesting that you are looking for a comparison to the CFPB because one thing that was kind of interesting that's come out of the FTC so far is with regard to the non-compete rule, the FTC under the Biden FTC, the commission banned virtually all non-compete agreements and that invalidated most non-competes with the exception of senior executives. And it also required employers to send a notice to affected workers by the ban's effective date that the non-compete would no longer be legally enforced. This was a really big headline out of the Biden FTC.

I think the rule was finalized at the end of 2023 in September, October last year, and Commissioner Holyoke and Ferguson had dissented on the decision to issue this rule. And so what happened after Trump took office, new FTC came in and charged Ferguson is elevated to chair just this September we saw something really interesting. We saw that the FTC, not surprisingly, they voted to dismiss the commission's appeal in federal court to federal courts of fifth and all 11th circuit that prohibited the FTC from enforcing its non-compete rule. So they dropped their dismissals, their appeals, excuse me. But just a day before that happened, the FTC actually filed an enforcement action against a pet cremation company for abusive. So what is the takeaway for employers? They shouldn't interpret the FTC as necessarily retreating from non-competes. I think that it's safe to say that a ban is no longer on the table, that a Trump FTC is not going to look at kind of the sort of blanket approach, wholesale approach to non-competes. I think they're going to take a more targeted approach and bring enforcement actions to enjoying non-competes where they restrict the labor market. So I think that's an example of the change that we're going to see duplicated in other areas where they're just going to take, it's going to be more of a scalpel approach.

Clay Friedman (11:46):

We've talked a lot about the commissioners themselves and their priorities. What about staff? Are they still business as usual, or has there been a significant number of changes in that area?

Christy Matelis (12:00):

Well, that's a great question, clay. I think with regards to the agency downsizing, chairman Ferguson has discussed reducing the size of the commission. I think he has discussed maybe a 10% reduction, and I believe also the agency has experienced maybe a departure of about 60 employees since the change in administration. So I'm not sure how far off we are from where Ferguson envisions the commission and where we are naturally now that folks have left with the change in administration and of course, doge and the fork in the roads that were offered to people in buyouts. And I'm not sure exactly where we're sitting, but I do know that quite a number of people have left the commission. And when I am working with the commission on current investigations, the folks that I knew, a lot of the folks that I knew used to be there, there have just been a lot of changes and a lot of turnover and time will tell what numbers they end up at, but I'm sure we'll find out relatively soon because the commission does report its numbers to Congress when it has to go and request for budget.

So we'll probably be hearing more about that. Certainly on the antitrust side, I haven't seen enforcement actions slow down, even if there has been a change in terms of the staffing levels at the commission, that's not reflected in enforcement actions when I'm dealing with staff, certainly matters still seem to be fully staffed. The one thing that I do note is that they seem to have a lot more younger attorneys who are new to the commission or mid-level, but the number of senior staff seems to have taken a bit of a hit. So I do want to just make that comment because I think it's important for folks to know and how that's going to impact, of course, working with the agency and working through an enforcement action,

Clay Friedman (14:00):

Having dealt mostly on the consumer side of the shop. I'm aware of some departures there, but on the other hand, I've also seen some signs of business as usual. They're still doing consumer protection enforcement, but one that caught my attention recently was the lawsuit that the FTC together with some states brought against Ticketmaster. Of course, as you know, last year under the Biden administration, the FTC did pass a rule that talked about both drip pricing issues from hotels, hospitality places, as well as those selling event tickets. Tell me about the lawsuit brought against Ticketmaster and what that case was about.

Christy Matelis (14:41):

The core allegations in the FTCs and State AGs case against Ticketmaster Live Nation have to do with regards to bait pricing, so advertised ticket list prices that were materially lower than the actual cost after mandatory markups and fees. Another allegation was misleading ticket limits, so public claims of strict limits while brokers allegedly exceeded them, and then coordination with brokers. So brokers allegedly harvested tickets in primary market and then resold them at significant markups on Ticketmaster's platform.

Clay Friedman (15:18):

Yeah, there's a long history the FTC has and the states for that matter of focusing on broker activity and Ticketmaster are used to always hide behind the brokers and say, Hey, it's not us, it's the brokers. They're using techniques or whatever to get ahold of tickets, and then they're the ones that jack up the price so high. What got my attention to this particular case is that now the FTC is, wait a second, hold on. Let's take a look at this relationship you have with the brokers. And also to me, what's significant is while the state penalty ranges, as I've mentioned before on one of these blogs, usually ranges between two and \$5,000 per violation. You violate an FTC rule, which this is involved on the pricing, it's \$50,000 per violation, and that can add up pretty fast. One last question, Christy, is on the consumer protection side, I saw that there was a recent announcement of a settlement of match.com. I know that was pretty acrimonious and it went to litigation for a while. What can you share with us about the settlement?

Christy Matelis (16:22):

Clay, the settlement was for \$14 million and it requires that match basically disclose, and this is a lesson that the commission's been pretty consistent on, which is disclose how a program works and make the methods of cancellation easy for the consumer. If you recall, there was, under the Biden administration, there is the click to cancel rule, which is no longer enforced, but

this is kind of consistent with that. And the commission, even prior to click to cancel, has been really focused on making things easy for consumers, so making it easy for them to cancel and having terms and conditions be clear and prominent and making sure that consumers understand the services that they're accessing and paying for.

Clay Friedman (17:08):

Yeah, it's interesting to me in that particular case that the commission really is making a lot and clear statement, as you mentioned, not only on the disclosure side, but it's got to be easy to cancel. And I know in the lawsuit, so they talk about all the different types of barriers that the allegedly match put in place to stop people from canceling auto renew. It reminds me going back to another century in the 1980s when.com businesses were just beginning to start those that were more shady. And I'm not necessarily saying match.com falls into this group, but they put in place all these different barriers in place to stop reoccurring charges, where to the extent there weren't phone numbers to call, let alone web addresses to go to where you could counsel an online account and obviously the commission and the state just saying, we're not putting up with that type of stuff anymore. Well, Christy, thank you for your time. Listeners, thank you for your attention. And as always, remember to go back to our blog and check us out online as we always do other updates. Thank you very much.

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