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# Federal Trade Commission Takes New Approach to Economic Regulation

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Bold new business regulations and enforcement actions are coming from an unlikely source: the Federal Trade Commission. Under the leadership of its new chair, Lina Khan, the traditionally staid FTC has taken aggressive new positions with respect to rulemaking and enforcement actions that may have serious implications for businesses and commercial litigation.

The 32-year-old Khan rose to prominence while still a law student after publishing a law review article in 2017 arguing that existing antitrust laws were too focused on consumer prices and ignored that companies that have delivered low costs to consumers, such as Amazon, can amass anticompetitive power by making other economic players dependent on the platforms and services they provide, just as railroads did at the dawn of the last century. The article was heralded by some as providing a new framework for antitrust thinking in the 21st century while derided as "hipster antitrust" by others.

But the hipsters' ascension has been swift. President Biden appointed Khan as FTC chair in March 2021 and she took office in June, giving her leadership of the federal agency tasked with policing anticompetitive behavior. Changes have come quickly during her short time in office. Earlier this month, the FTC rescinded Obama-era guidelines that prioritized antitrust enforcement actions for behavior that violated the Sherman Act and Clayton Act. Under the new policy, the FTC can pursue a broader array of allegedly anticompetitive behavior that does not necessarily violate existing statutes. In an interview, Khan stated the change was intended to remedy "a missed opportunity" and "take advantage of the institutional tools that Congress granted the agency."

The FTC is already attempting to flex its new enforcement muscles. Last December, the FTC and 48 state attorneys general filed antitrust complaints against Facebook under theories similar to those first outlined in Khan's law review article. A federal district court dismissed that case in June, but the FTC doubled down and filed an amended complaint this month. Hipster antitrust will face its first serious test as the court considers the motion to dismiss that will inevitably follow.

The FTC is taking a similar approach with rulemaking, and in July it approved new measures designed to streamline its rulemaking process. Shortly thereafter, the FTC began pursuing new "right to repair" rules that would target practices that encourage consumers to have products repaired by the manufacturer or "authorized" dealers and limit repairs by independent shops. This month, the FTC codified standards on when advertisers may state or imply that products are "made in the USA."

And in July, President Biden signed an executive order encouraging the FTC to ban or limit employee non-compete agreements. Non-compete agreements are of course standard fare in agreements for key executives and other skilled employees. Corporate counsel need to be aware of how new FTC measures may further constrict the enforceability of these provisions, and litigators should be looking for ways to further challenge non-compete agreements or the FTC's attempt to rein them in, as the case may be.

The "new FTC" is under attack by critics who claim its enforcement positions, antitrust theories, and rulemaking attempts overstep the agency's authority, and it is impossible to know now how the agency's bold new steps will shake out. But businesses and the attorneys who advise them should keep an eye on the FTC as it attempts to stake out new ground. Obviously the "new antitrust" has potentially huge implications for the Facebooks and Amazons of the world. But the new FTC is asserting itself into all aspects of the economy, as shown by new stances on product repair, product origin labeling, and even employee non-compete agreements, which affect businesses large and small from Silicon Valley to the Iron Range. .

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