BYU Law Webinar #2: The Past, Present, and Future of FTC Rulemaking

[00:00:59] **PROFESSOR AARON NIELSON**: Hello. I am Professor Aaron Nielson from Brigham Young University Law School.

[00:01:34] Thank you for joining us for our webinar this morning, "Understanding FTC Rulemaking." This webinar is part of BYU Law's Future of Antitrust series.

[00:01:44] If you're interested in this topic or any others like it, please check out our website and conferences.

[00:01:49] You can find more about them at futureofantitrust.law.byu.edu.

[00:01:55] Next month we are hosting a conference in Washington D.C. on tech platforms and online retail.

[00:02:01] A few years ago, the FTC invited me to speak on a subject that at the time was relatively under the radar: FTC rulemaking authority.

[00:02:10] It was a great opportunity for me because while I already knew something about the topic, nothing focuses the mind like having to tell the agency its own authority.

[00:02:21] As I'm researching and working on the issue, I went to the FTC, I spoke at a workshop, and I wondered, "Is that the end of this? Was this just an academic exercise, or is something actually going to come of this?" Well, it turns out that something did come out of that. Fast-forward to today, where the FTC's rulemaking authority, it's one of the hottest topics in administrative law thanks in large part to Chair Lina Khan who envisions robust use of FTC rulemaking.

[00:02:49] This development has prompted lots of questions, such as, Does the FTC even have rule-making authority for unfair methods of competition (i.e antitrust)? The D.C. Circuit held in the 1970s that the FTC does have such authority.

[00:03:04] The Supreme Court, however, is not yet weighed in.

[00:03:07] We will see what happens because statutory interpretation has changed a lot in the last 50 years.

[00:03:13] Likewise, in the context of consumer protection, there's no question that the FTC has authority to promulgate rules for consumer protection, but they have to go through a specialized, hybrid rulemaking process.

[00:03:26] What can the FTC do within the confines of the law to speed up that process, if anything? Then as a policy matter, when should the FTC use this rulemaking authority? Historically, the FTC has done a lot of its policymaking through case-by-case adjudication, though there are some examples of FTC rulemaking.

[00:03:47] They haven't done a lot through rulemaking.

[00:03:49] When does it make sense to do it through rulemaking? Then finally, what's happening right now? What are the issues that the FTC is looking at? What rules maybe are coming down the line? To answer some of these questions, we put together a panel of experts.

[00:04:02] I'm really excited for this group.

[00:04:04] We're first going to hear from Henry Su, a partner at Bradley Arant Boult Cummings, who previously served as a competition advisor to the FTC Chair and separately to an FTC commissioner.

[00:04:16] He also served as a trial lawyer in the Competition Bureau unit tasked with anti-competitive merger and conduct cases.

[00:04:23] After Henry, we're going to hear from Svetlana Gans, a partner at Gibson Dunn, who previously served as the Vice President and Associate General Counsel at

NCTA, the Internet and Television Association, and also as Chief of Staff to the acting FTC Chair.

[00:04:38] She also was a litigator in the both the FTC's Competition and Consumer Protection Bureaus.

[00:04:43] Finally, batting clean-up will be Professor Gus Hurwitz, a professor at the University of Nebraska College of Law, where he serves as the Menard Director of the Nebraska Governance and Technology Center.

[00:04:54] He also is a director for law and economics programming with the International Center for Law and Economics.

[00:05:00] After our speakers offer their initial remarks, they'll get a chance to talk back and forth to each other, and then I'll throw some questions out to the group.

[00:05:08] After that point, we'll then open it up for those in the audience to ask questions of our experts.

[00:05:14] With that, Henry, the floor is yours.

[00:05:17] **HENRY SU:** Thank you, Aaron. Thanks for inviting me to be part of this future of antitrust webinar.

[00:05:23] I think part of what I'm going to do my opening remarks is to just set the stage.

[00:05:29] When we talk about FTC rulemaking and really what the debate is today, we're talking about rulemaking authority under the statute that creates the Commission right and empowers Commission to do things to prevent unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.

[00:05:55] Those two things define the Commission's dual missions in competition and consumer protection.

[00:06:04] What we're not talking about would be rulemaking authority that's specifically granted to the Commission by Congress when it passes a statute.

[00:06:14] And perhaps the one that's going to be most familiar to the audience would be the Children's Online Privacy Protection Act.

[00:06:23] In the provisions of that Act, there is a specific direction to the Commission to promulgate rules to implement and enforce that act.

[00:06:34] It requires people who collect information about minors to say what it is that they're collecting and to get parental consent.

[00:06:44] That's not what we're talking about.

[00:06:46] When we're talking about rulemaking authority, we're talking about, What rulemaking authority does the Commission have in order to carry out its mission to prevent unfair methods of competition and to prevent unfair or deceptive acts or practices generally? The way I want to comment this is to talk about it from a historical context, to understand how the Commission came about and what Congress was thinking back in 1913, 1914 when it enacted the Federal Trade Commission Act and created this Commission.

[00:07:24] Back in 1913, 1914, what we have are really two different visions of the Commission, of what the Commission should be.

[00:07:34] One vision was that it would be a successor to what was then called the Bureau of Corporations.

[00:07:39] In that role, it would basically have this job of classifying corporations, gathering data about companies, doing investigations of companies, and filing reports—basically coming out with work product to help Congress or to help the executive branch, to help the President and the Attorney General, that sort of thing.

[00:08:03] Then the other vision of the Commission was this idea that Congress can broadly say that unfair methods of competition are wrong, but let's let this Commission then go out and be essentially a supplemental antitrust enforcer, bring cases and through the case law further define what constitutes an unfair method of competition.

[00:08:29] Essentially, it is an enforcement role for the Commission, using the courts to define or the administrative forum to define what's unlawful.

[00:08:41] What happened was, in the legislative process these two visions of the Commission got smooshed together, and so we have now the statute where you have Section 5, which is the principal statute that defines what the mission is of the Commission.

[00:09:01] It also defines the fact that the Commission's principal tool is adjudication is to go if it has a reason to believe that Section 5 has been violated, if it believes it's in the public interest to bring the issue at complaint against the company or entity that's accused of breaking the law, and to seek a cease and desist order either in its own administrative forum or in a federal court.

[00:09:32] Section 6 of the Act then talks about these additional powers, many of which come from this vision of the Commission as an investigative body with the ability to study, to research, to file reports.

[00:09:48] Among those provisions in Section 6 is Section 6G, which says you can make rules and regulations to carry out the provisions of this subchapter, which would be the statute.

[00:10:02] It's that Section 6G that is the genesis of the FTC's broad rulemaking authority.

[00:10:10] As Aaron alluded to, in 1973 the D.C. Circuit in a case called "National Petroleum Refiners Association v. FTC" took a look at this provision, took a look at the legislative history, decided it's ambiguous.

[00:10:27] It's ambiguous whether Congress meant to give FTC this power.

[00:10:34] In line with that ambiguity, we're going to err on the side of saying that the FTC can do this.

[00:10:40] They basically declined to say that the FTC didn't have this power.

[00:10:47] And then two years later, Congress, in enacting what are called the Magnuson-Moss Warranty and FTC Improvements Act of 1975, reined in the FTC's rulemaking powers as asked to unfair or deceptive acts or practices but left alone (or at least didn't address, was silent about) what the rulemaking authority would be on the unfair methods of competition side.

[00:11:17] That's what we have today.

[00:11:19] We still have a lot of ambiguity, a lot of silence about exactly what the FTC can do on the competition side as far as rulemaking is concerned.

[00:11:30] Obviously on the unfair or deceptive acts or practices side it's much clearer, and I know Svetlana will get into some of this.

[00:11:38] We have a lot of rulemaking that's going through what we call the Magnuson-Moss process, which is much more complicated than the informal notice and common rulemaking that we're used to seeing under the Administrative Procedure Act.

[00:11:55] That's where we are. And my interest has been in, What exactly is the rulemaking authority for unfair methods of competition (or really, antitrust violations)? Given that the D.C. Circuit said that there was such a power and the Supreme Court has not taken it up thus far, let's assume it has that power.

[00:12:24] But then the question becomes, Should it use that power over what it's done for 100 years, which is to enforce the statute through case-by-case adjudication? My

view is that case-by-case adjudication in general is a superior mechanism for enforcing Section 5 as to unfair methods of competition, and I give three reasons.

[00:12:53] The first reason is the fact that when the FTC Act was passed, it was done against the backdrop of what was then developing as the rule of reason and antitrust, this idea that when you look at whether something violates the antitrust laws, you have to look at whether it's reasonable under the circumstances.

[00:13:16] You have to look at the facts of that case.

[00:13:20] That mode of analysis has prevailed to this day. And the FTC, even when it enforces Section 5, essentially adopts this rule-of-reason-like analysis.

[00:13:35] We're looking at things on a case-by-case basis which makes it very difficult to say, "Well, you can generalize in the form of a rule that applies across the board either to a sector or an industry or a market.

[00:13:51] It's just much harder to do that.

[00:13:53] The second reason I would give is the whole idea of due process.

[00:13:58] Companies, entities that are accused of violating a rule are still entitled to due process.

[00:14:04] They're still entitled to present facts to say, Well, I know you have this trade regulation rule that prohibits these unfair methods of competition.

[00:14:16] But either the rule doesn't apply to me and here's why..., or I didn't violate the rule and here's why.... Even with a competition rule, there's still going to be this opportunity for the entity that is accused of violating the rule to have due process, to be able to have its day in court and explain why it doesn't apply.

[00:14:40] Again, from a resources standpoint, it begs the question, Does it really make sense to have the rule and then have adjudication? Why don't you just sue the company without the rule and prove everything in the context of the proceedings? The last point I'll make is, for the most part, when the FTC enforces Section 5 as a competition statute, it is enforcing the same antitrust statutes (the Sherman Act, the Clayton Act) that the Antitrust Division enforces.

[00:15:19] The Antitrust Division of the Department of Justice doesn't have rulemaking authority.

[00:15:25] To the extent that the Commission is thinking about engaging in rulemaking in the competition space, there is this risk of conflict or tension between the Commission's rules and what the Antitrust Division may be doing it in case-by-case enforcement.

[00:15:47] That's the groundwork I wanted to set, and I'll stop there and pass it on to Svetlana.

SVETLANA GANS: Thank you so much, Henry, for that overview. And thank you, Professor Nielson and the BYU Law School for hosting this important discussion today.

[00:16:08] I will pick up where Henry left off, which is to discuss some of the current rules in play at the Commission, both on the consumer protection and the competition side, and then Gus can get into the Media Administrative Law and other issues that those rules raised.

[00:16:26] As Professor Nielson discussed at the beginning, the FTC is seriously considering the promulgation of new rules.

[00:16:35] This fact alone is significant because the FTC has not promulgated new rules in decades.

[00:16:41] This is definitely a sea change in respect to the Commission's activities.

[00:16:46] As Henry mentioned, the FTC is typically in favor of case-by-case enforcement, yet in the FTC's strategic plan that was recently issued the FTC has indicated a preference for rulemaking.

[00:17:00] To understand that, one must consider why the FTC is more engaged in rulemaking than case-by-case enforcement, just as a backdrop.

[00:17:09] The answer to that question is the Supreme Court held in AMG that the FTC lacked the ability to seek equitable monetary relief for consumers, and so the FTC is looking in its tool kit to identify other ways to get money back for consumers.

[00:17:28] One way the FTC is able to do this is to promulgate rules.

[00:17:32] A violation of those rules would allow the FTC to seek civil penalties as well in some cases, consumer redress.

[00:17:41] That is why the FTC in part is seeking to promulgate additional rules, because it feels that it does not have the ability to give consumers money back.

[00:17:52] That is the push in part for rulemaking.

[00:17:55] On the consumer protection side, the FTC has issued three advanced notices for proposed rulemaking, and they really fall in the gamut of the continuum in terms of definitely within the FTC UDAP authority to the other continuum—perhaps not within the FTC authority.

[00:18:16] I wanted to describe and compare and contrast three of these rules.

[00:18:20] The first rule is probably the most tied to the FTC's UDAP authority.

[00:18:26] It was a proposed rule.

[00:18:29] The advanced notice of proposed rulemaking was issued in December of 2021, and then the notice of proposed rulemaking was issued in September of 2022.

[00:18:39] As Professor Nielsen discussed, the FTC for rulemaking under the UDAP authority must follow Section 18 procedures, which is more cumbersome than the APA notice and comment procedures.

[00:18:54] Those include requiring the FTC to issue an advanced notice, sending a copy of the proposed rule to Congress, issuing a notice of proposed rulemaking, seeking public comment there, providing the public an opportunity to have informal hearings.

[00:19:13] There is quite a robust and cumbersome process for UDAP rulemaking, and that is why the FTC in this instance has to first issue an advance notice, and then seek public comment and then issue a notice.

[00:19:26] That's just by way of procedure, but I think Gus will discuss that in his remarks.

[00:19:31] With respect to the first rule, it's an advanced notice and a proposed rule covering government and business impersonation scams.

[00:19:40] The proposed rule in this instance would make it unlawful to falsely pose as or misrepresent directly or by implication, affiliations with including endorsement or sponsorship by a government or business entity or officer.

[00:19:58] Generally, what this proposed rule would ban is they would prohibit anyone from calling, emailing, creating websites, or posing as a business or a government entity.

[00:20:09] That sounds pretty unfair and deceptive that if you pose to be a business or a government that you're not, that's borderline fraud.

[00:20:18] That seems pretty consistent with the FTC's UDAP authority.

[00:20:22] Moving further along in the continuum, the FTC in March of this year, issued an advanced notice of proposed rulemaking covering earnings claims.

[00:20:33] The FTC is considering proposing a rule to address deceptive or unfair earnings claims or income opportunities.

[00:20:42] In its advanced notice, the FTC posed several questions regarding the UDAP authority as to earnings claims.

[00:20:49] Some of the questions FTC posed include how widespread earnings claims deception is, whether deceptive earnings claims are more prevalent in certain industries versus other industries, whether the circumstances in which earnings claims are conveyed are typical, whether lifestyle claims should be included, and so forth.

[00:21:13] The FTC is looking for public comment with respect to all of those questions.

[00:21:19] When you look at the earnings claims rulemaking, some of it could be potentially tied to the FTC's UDAP authority, but some questions the FTC presents could be potentially outside the FTC's UDAP authority.

[00:21:33] For example, if someone lies about the income associated with their opportunity, that's probably borderline fraudulent and should be covered as an unfair deceptive track practice.

[00:21:47] However, the FTC's notice also poses other potential obligations on employers and others subject to their rule.

[00:21:57] For example, in the advanced notice it does not necessarily make it obvious what conduct is covered.

[00:22:04] For example, the FTC states that liability would depend on whether the net impression conveyed by misrepresentations (not merely their expressed terms) is substantiated or misleading.

[00:22:17] That could really be subject to interpretation as to whether a net impression could be deemed misleading or unfair.

[00:22:23] Then FTC's notice also discusses a disclosure document.

[00:22:29] For example, the FTC is considering requiring a disclosure document, substantiation, and record-keeping for any earnings claims, and earnings claims is not necessarily defined.

[00:22:41] The question then becomes, Do the burdens on individuals and small businesses outweigh any potential benefits of the rule to consumers? For example, if I employ a babysitter that is making $15 an hour, do I have to present that babysitter a disclosure document listing all of the ins and outs of the employment agreement? Do I have to tell the babysitter in an ad or in a help wanted sign that taxes and fees are excluded from $15 an hour? These are the types of questions that the FTC notice poses, because what might be a reasonable burden for a large company may not necessarily be a reasonable burden on smaller or other employers.

[00:23:28] The other questions that this specific advance notice poses is, To what extent is the FTC really acting as a de facto labor department? For example, should the FTC be regulating wages? Should the FTC be regulating employee classifications? Should the FTC be regulating independent contractors? Those are some of the questions this notice presents.

[00:23:54] As I mentioned at the intro, it is more in the middle of the continuum with respect to where the FTC's authority lies.

[00:24:02] The third rule on the consumer protection side that is getting the most news right now is the FTC's rulemaking on "commercial surveillance." According to Chair Khan, digital technologies have rapidly evolved with transformations and business models and technical capabilities.

[00:24:22] But these advances, while providing many conveniences, enable entirely new forms of persistent tracking and routinized surveillance.

[00:24:32] It's really corporate surveillance is basically the FTC's privacy and data security rulemaking, but they wanted to have a fancy title and a scary thing, so they deemed it "corporate surveillance." In its rulemaking, the FTC posed 95 questions.

[00:24:48] I will not relay all of the 95 questions on this presentation, but some of the questions relate to how commercial surveillance practices harms children, teens, and consumers; whether the FTC should regulate data security; whether the FTC should regulate remedies and/or automated decision-making, and so forth.

[00:25:14] The FTC has asked all these questions to determine whether or not a rule is necessary, and if it is necessary, what the contours of the rules are.

[00:25:25] In my mind, this rulemaking poses the most significant issues with respect to authority questions.

[00:25:32] For example, in my mind, if someone lies with respect to their terms of service, that could be perceived as deceptive and should be covered.

[00:25:43] There are other facets of the proposed rule in terms of the questions presented that may be deviating from the FTC's UDAP authority.

[00:25:52] For example, the FTC defines "consumer" as including businesses and workers.

[00:25:58] The FTC's rule may limit facial recognition, fingerprinting, and biometric technologies.

[00:26:04] The FTC rule may limit first-party and third-party marketing, it may also restrict automated decision-making.

[00:26:12] Furthermore, the FTC privacy rulemaking also goes into areas of competition law.

[00:26:18] If you read the advance notice, the FTC is considering addressing antitrust remedies via a privacy rule by potentially limiting companies abilities to "own or operate a business that engages in practices like personalized or targeted advertising." These questions really go beyond privacy and UDAP and really go into the competition realm.

[00:26:44] Many of these practices could be perceived as benign, and further have not been found by the FTC or any court to be unfair or deceptive.

[00:26:54] As Henry said, that is the crux of the FTC's UDAP authority.

[00:26:59] They have to show that the practices they're crafting a rule about have been found to be unfair or deceptive, and many practices discussed in the advance notice (such as facial recognition, first-party marketing, targeted advertising) have not been deemed to be unfair or deceptive.

[00:27:18] Those are the questions presented on the consumer protection side.

[00:27:24] Quickly turning to competition, the FTC has indicated that it is interested in promulgating federal competition rules using its UMC authority, one of which is a rule to ban non-compete provisions and employment contracts.

[00:27:39] The FTC held a workshop in 2020.

[00:27:43] Looking at this issue, there has not been a proposed rule issued yet, but we expect it to come down any week.

[00:27:52] Interesting in terms of process, the potential competition rule would most likely follow the APA rulemaking process, whereas the UDAP rules are following the Mag-Moss process.

[00:28:03] But as I think Gus will elaborate in his remarks, the big question presented there is whether the FTC has the authority to promulgate UMC rules in the first place.

[00:28:13] With that, I'll turn it over to Gus. Thank you.

[00:28:16] **GUS HURWITZ**: Great. Thank you, Svetlana, Henry, Aaron, and everyone who's joining us for this discussion.

[00:28:23] UMC and UDAP and adjudication and rulemaking—Oh my, a whole lot of thorny issues on the admin side here.

[00:28:33] Really the big question is whether the FTC can issue substantive UMC rules, anti-trust rules.

[00:28:42] There are a bunch of related questions.

[00:28:45] I'm going to run through a whole lot of issues really quickly.

[00:28:50] Just to tie a bow around one of the points that Svetlana was just making, one of the open puzzling questions is what we call or refer to as hybrid rulemaking (what procedures would govern a UMC antitrust-style rule based to address UDAP-style concerns or consumer issues.

[00:29:18] I'll just say, there's some fascinating questions there, especially when you have the advanced notice of proposed rulemaking on consumer surveillance, having a paragraph expressly discussing there might be UMC concerns in this UDAP issue.

[00:29:34] To simply answer the question, Can the FTC issue substantive UMC rules? My answer is possibly yes, so long as they don't deviate from existing antitrust policy in a substantial way.

[00:29:50] We will unpack what that means a little bit.

[00:29:53] It's worth just framing the entire question here, however.

[00:29:56] There's a background question about the scope of the administrative state and administrative authority generally and the Federal Trade Commission.

[00:30:06] Ever since Humphrey's Executor (you might remember a good old early-20th century case about the constitutionality of independent agencies), the Federal Trade Commission has a way of being at the forefront of a lot of big picture administrative state cases, and this could very easily turn into one of those issues.

[00:30:28] We already have some litigation coming up this term: the Axon case that deals with the ability to challenge agencies like the FTC's constitutional structure.

[00:30:40] Henry and Aaron have given us the key case that starts this entire discussion: 1973 Petroleum Refiners.

[00:30:52] DC Circuit case. Important to emphasize as Henry did, not a Supreme Court case.

[00:30:58] But in that case, Judge Skelly Wright takes very much a legal process approach and says (not in his analysis, but this is my gloss on what's going on), administrative agencies are better than courts when it comes to making rules.

[00:31:15] They can be better than Congress when it comes to making rules because they have expertise.

[00:31:19] If the statute can be read as saying that the agency has rulemaking authority, we should give it a rulemaking authority.

[00:31:28] Two years later (again, as Henry keyed up) we had Congress come in with the Mag-Moss rulemaking authority, the Mag-Moss warranty and FTC Improvement Act.

[00:31:40] This is a fascinating act, especially when you get into the legislative history.

[00:31:47] How this plays out in any judicial challenge is going to be really interesting here.

[00:31:53] The House thought that under National Petroleum Refiners, the FTC clearly has UMC rulemaking authority.

[00:32:02] The Senate thought, "No, it's not quite so clear, we think they probably don't." This was just a one-off case.

[00:32:09] You have two competing bills in committee, they get resolved with an agreement not to say anything about UMC authority even though the two houses disagree about the legal status of their authority.

[00:32:24] There's a fascinating note that on the Senate side, they decided not to do anything on UMC, but to put in place the UDAP Mag-Moss rules as an experiment to see how things play out over the next couple of years, and then they'll come back and adopt one approach to rule-making or the other for the FTC (and possibly more, generally).

[00:32:49] Couple of years later, the FTC gets into a lot of trouble for aggressive advertising rulemaking.

[00:32:56] They're called the "National Nanny." They're actually shut down, or not reauthorized for a period of time, and Congress never really comes back to that.

[00:33:05] There's some fascinating statutory authority questions built in here.

[00:33:11] The most important recent case which is a Supreme Court case (it's worth flagging even though it doesn't mention Petroleum Refiners) is "Iowa Utilities

Board v. FCC." This is a 1999 FCC case that deals with FCC authority vis-a-vis state regulators.

[00:33:31] One of the things that the Supreme Court holds in here is that the FCC's general grant of rulemaking authority in Sections 201 and 202 to do common carrier related stuff, give Communications Commission general rulemaking authority to develop rules to implement the rest of the Communications Act.

[00:33:53] Generally viewed as a outer-limits, rule-making case, it is a Supreme Court case, so it's important to have on the table or in the background as we think about these issues.

[00:34:08] The modern administrative law questions here—We have several.

[00:34:14] Just to queue up one that Svetlana started to address—The procedure questions about Mag-Moss.

[00:34:24] We have seen very little Mag-Moss rulemaking over the years just solely on the UDAP side and almost none that has been litigated.

[00:34:36] There are open questions as to the actual requirements of Mag-Moss (both procedurally and substantively), in particular, what needs to go into an advanced notice of proposed rulemaking.

[00:34:52] Many agencies issue advanced notices of proposed rulemaking as a matter of best practices, but none of those agencies are governed by the specific requirements of Mag-Moss.

[00:35:04] Other judicial discussions of ANPRs really are irrelevant to the substantive requirements of an FTC ANPR.

[00:35:15] A commercial surveillance ANPR in particular really doesn't do anything to suggest what specific rules the agency might be considering adopting. And if you

read Section 18, if you read Mag-Moss, the ANPR is supposed to give some indication of rules potentially under consideration in order to solicit input and feedback on them.

[00:35:42] There could be substantive deficits to the ANPR.

[00:35:48] How that will play out is just a fascinating administrative question.

[00:35:53] On the UMC side, we have a couple of things.

[00:35:57] I've written a couple of articles talking about what I call "administrative antitrust." One thing to add to the discussion is that antitrust law is one of the few areas of federal law that are generally considered to be federal common law, where the courts have really retained authority to say what the law is.

[00:36:19] In the early 2000's, there were a couple of Supreme Court cases ("Trinko and Credit Suisse" in particular) where the court seemed to indicate two things.

[00:36:28] First, a preference to normalize this area of administrative law for regulatory agencies to have control over the development of antitrust law instead of the courts, but also a strong preference for and understanding that antitrust requires some amount of stability over time.

[00:36:49] In fact, that's one of the reasons that the Supreme Court suggested a preference for regulatory approaches to antitrust: so that there would be more frequent and gradual revisions and changes to antitrust law instead of punctuated Supreme Court cases every several years.

[00:37:08] This brings us to the other big-picture question with UMC rulemaking authority, which is the major questions doctrine.

[00:37:17] Hopefully everyone has some awareness; this past term, the Supreme Court in "West Virginia v. EPA" embraced this so-called "major questions doctrine" saying

that questions of best economic or political significance require clear authorization from Congress if an agency is to answer those. And together, the "major questions doctrine" question and the administrative antitrust question play important roles (or I think will play important roles) in how the courts look at FTC UMC (so FTC antitrust rulemaking).

[00:37:55] This is very broad authority, unfair methods of competition.

[00:38:00] It is, I think (and many others have argued as well), a very easy major questions–style case.

[00:38:08] If the FTC makes dramatic changes to existing antitrust norms using this very ambiguous authority, the courts seem likely to say, "Hey, wait a second. That requires clear congressional authority.

[00:38:23] Congress didn't empower you, FTC, to completely rewrite the rules that govern the entire tech sector, a major portion of the economy." Similarly, if this is done on an antitrust basis, that would be a vast departure from existing antitrust law, suggesting that the Court, under cases like "Trinko and Credit Suisse" might prefer to retain judicial control over this area.

[00:38:51] I think so long as the FTC uses its UMC authority in modest ways, in line with existing antitrust principles, the courts are likely to say, "Good job. This is fine." subject possibly to "National Petroleum Refiners" questions, I honestly have no idea how the Court, if it were to address "Petroleum Refiners" today, would come out given the legislative history.

[00:39:23] I think that "Iowa Utilities Board" was a extreme outlier case.

[00:39:28] I think that the statutory interpretation that Judge Skelly Wright did in '73 would not be reused today.

[00:39:38] I think it's unlikely that "Petroleum Refiners" would be upheld.

[00:39:41] That said, I think at some level (from putting my antitrust hat on), so long as the FTC is only making incremental changes or is operating in line with extent antitrust policy, I don't think that there are substantial concerns with its use of that authority, modulo the broader administrative state questions.

[00:40:05] With that, I didn't even talk about "Chevron." Aaron, I'll let you bring that up in the Q&A.

[00:40:12] **NIELSON**: All right. You've all heard each other.

[00:40:15] Reactions? If you want to take a minute or so to respond.

[00:40:19] Henry—Thoughts?

SU: Yeah. I guess reflecting on the recent administrative case law coming out of the Supreme Court (like "Seila" and EPA in "West Virginia v. EPA"), I do think that the FTC having been described as a quasi-legislative, quasi-judicial entity, I don't think suggests that it doesn't have rulemaking power.

[00:40:59] I think it can do its job.

[00:41:02] It can carry out Congress's job as Gus was saying, in modest ways, through rulemaking.

[00:41:11] I don't read, for instance, "Seila" and "Humphreys" as doing any violence to that perspective.

[00:41:21] As for the major questions doctrine under "West Virginia v. EPA," I agree.

[00:41:28] I agree to the extent that if we're talking about really aggressive rulemaking aimed at broad swaths of the economy or at a particular sector that's very important to the economy, I think that would be a question of major economic or political significance, and the commission could be seen as overstepping its balance there.

[00:41:54] Like, for instance, with respect to noncompetes, I think a question is, How broadly do you go? Do to you just target a specific industry (like the use of noncompetes in shipping, or something like warehousing, or something), or do you go broader and target noncompetes in fast food and hospitals and all that? I think there's a question there about, How broadly do you draw that circle?

NIELSON: Svetlana? I'm sorry, I didn't meant to cut you off. Svetlana?

GANS: Thanks. A few responses on the UMC rulemaking point—While the FTC Act did say that the FTC can promulgate rules for the purpose of carrying out the statute, typically the FTC's authority to promulgate rules coincides with an ability to impose penalties.

[00:42:59] There isn't such a penalty provision connected to 6G of the FTC Act.

[00:43:05] In addition, the 6G language is in the section of the FTC Act dealing with investigatory authorities.

[00:43:13] Some of these facts maybe suggest that the FTC may not have rulemaking authority on the UMC side.

[00:43:21] Also query whether a court would really buy the National Petroleum line of argument.

[00:43:30] When Henry was describing it, he mentioned ambiguous, silenced.

[00:43:36] Those are not the key phrases the Supreme Court would necessarily like in terms of having the FTC have these broad rules.

[00:43:47] Interesting we mentioned some Supreme Court cases, but the other interesting Supreme Court cases, "National Federation of Independent Business v. OSHA" where the Supreme Court held that the applicants are likely to succeed on the merits of their claim that the secretary lacked authority to impose the mandate.

[00:44:07] The Supreme Court said, "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." I think this is going to be a significant question presented as to the FTC's powers here.

[00:44:24] And to Gus's point on if the FTC were to promulgate a narrow rule, it could be on-line with FTC's mandate. If it's tied to the Sherman Act and the antitrust laws, I think we're seeing here a real question as to whether FTC rulemaking would be tied to the antitrust laws.

[00:44:42] The FTC has long held that its UMC authority is actually broader than the antitrust laws. And further, the FTC did rescind its UMC policy statement, which at least set some parameters as to the FTC's UMC authority.

[00:45:00] Here without any parameters at all, the question does remain how broad the FTC will go. And perhaps the FTC will try to seek a broad UMC rule as they're doing on the UDAP side with respect to commercial surveillance, for example.

[00:45:15] All of these questions are ripe for discussion and will be closely watched. Thank you.

[00:45:22] **NIELSON**: Gus, you just spoke, but you want to talk about "Chevron"?

HURWITZ: Do I? No. We have (I'll just say really briefly) in the background of all of this, UDAP and UMC are incredibly ambiguous statutes.

[00:45:39] The FTC for many years thought or believed that it would not benefit from Chevron deference in its interpretation of these statutes.

[00:45:48] I've argued that that's actually incorrect, and I think in recent years, the FTC has started to recognize it probably would get Chevron deference.

[00:45:58] But frankly, at this point, the FTC is talking about doing things that are so broad (and not just about getting the benefit of deference, but really pushing the

scope, the outer limits of its authority), that while there might be some interesting Chevron questions in the background, the core questions are really, Does the FTC have the ability to make rules, period? Svetlana raises a couple of the traditional indicia of substantive rulemaking authority, especially, Are there penalties for violating these violations, these rules? Then the broader 800-pound gorilla question of the major questions doctrine issue has, I think, trumped any of the Chevron-style questions because the Chevron-style questions will only be brought up in the context they expect of any major questions doctrine issues.

[00:47:02] The last point that I'll make following up on Svetlana's points about the scope of Section 5—This is one of the long-standing perplexing questions of antitrust law and Section 5, Federal Trade Commission law: What is the scope of Section 5 authority? There's long-standing understanding both amongst the commission of Republican and Democratic commissioners and Supreme Court authority that says Section 5 is broader than the Sherman Act.

[00:47:32] But how so has never really been defined, and that will be one of the important wedges or margins along which these fights are argued.

[00:47:47] **NIELSON**: Audience, if you have questions, put them in the chat and we will ask our experts.

[00:47:52] While we're waiting for some questions, I'm going to throw out some questions for the team.

[00:47:58] Something that seems, I think, strange is, Why now? The FTC has been around more than 100 years.

[00:48:07] These are old statutes.

[00:48:09] National Petroleum is almost 50 years old.

[00:48:12] Why suddenly is this issue so hot when it could have happened anytime before? What's going on now? Whoever wants to go first can have it, but I think a lot of people are wondering what has changed to make the issue now at the forefront.

[00:48:31] **SU**: I'll start. I mean, I think one reason is that there's a frustration with the rule reason approach in antitrust, the fact that it takes so long to get to results under a case-by-case approach under a common law approach and that aren't there are problems, competition problems out there that can be more readily, more quickly addressed with a rule than with just going after companies, businesses one at a time.

[00:49:08] I think that seems to be something that's coming out.

[00:49:13] **NIELSON**: Svetlana, does that make sense to you?

GANS: Yeah, I think it's that question.

[00:49:19] I think it's also the frustration or at least the belief in the Biden Administration that the past 40 years of antitrust enforcement and the FTC have been failures. And I think they want to renew enforcement and maybe look at areas that traditionally are more difficult to show antitrust violation in terms of like free services, for example.

[00:49:41] Then I think they're looking for more deterrence in light of the AMG decision and civil penalties, for example.

[00:49:50] On the privacy side, I think there's just a feeling that Congress is perhaps taking too long to craft national privacy legislation and the FTC needs to bridge the gap and craft a UDAP rule to cover privacy and data security.

[00:50:09] **HURWITZ**: I'll add to that.

[00:50:12] At some level, I think these issues have been percolating up for the last 20 years or so.

[00:50:18] If you look at starting late 1990s, early 2000s, the FTC's efforts on the privacy front, for instance, where the commission was starting to recognize some privacy issues but it used its authority to try and shoehorn solutions and carve out solutions while constantly going back to Congress and asking for more authority that never came, I won't do a full history here, but if you look at this Section 2 report, for instance, a 2007 immediately rescinded 2009, you can see some issues on the margins of the antitrust community that were starting to percolate up and gain traction amongst a more enforcement-focused portion of the academic antitrust community in particular.

[00:51:14] Then the rise of concerns over "big tech" I think has catalyzed in recent years a lot more energy, especially among advocates in the Biden Administration.

[00:51:26] It's all, I think, really unfortunate because as Svetlana notes, the 40 years of antitrust consensus in the United States has been great for the country, for the economy of the consumer welfare standard, is the diamond in the crown of the American economy in many ways.

[00:51:49] There are concerns around the margin, absolutely.

[00:51:52] But those concerns have crescendoed in recent years into a real political force that with the Biden Administration have been put into positions of power with both agencies and in the White House, and that's what has really been holding the reins.

[00:52:13] **NIELSON**: We have a couple of questions from the audience.

[00:52:16] The first question is (and this is going to be to any of you), As a matter of litigation strategy, wouldn't it make sense to have first competition rule be something that bands price-fixing or something? I take the question to be

something that's broadly approved of and not especially aggressive rather than a more esoteric rule, which I understand is what Chair Khan is considering.

[00:52:42] In other words, if you were in the FTC, what rule do you do first if you want to see what your UMC authority is? Maybe Svetlana, do you want to jump in on that one?

GANS: Well, I think the per se rule in litigation is easier to show because you don't have to do the cost-benefit analysis and it's just easier to prove in court.

[00:53:09] I don't think from an FTC standpoint it would be worthwhile from an administrative burden and resources point of view to craft a rule banning per se, because it's basically banned by the case law.

[00:53:27] FTC has an easier way to prove it in court.

[00:53:30] I think where the FTC's leaning now is to figure out as Henry was saying the rule of reason cases and whether there are some parts of a rule of reason case that could be banned by a rule and make it easier for the court to show liability.

[00:53:45] But I defer to Henry on his views here as well.

[00:53:49] **NIELSON**: Henry.

[00:53:50] **SU**: What I would say, I agree that I think with something like price-fixing, which is subject to the per se rule, that it's not really difficult for the courts to adjudicate that and hold it to be unlawful.

[00:54:05] I don't think there's really a need for a rule for that.

[00:54:08] But one thing to think about here (and this goes to this issue about whether Section 5 UMC authority is broader than the antitrust laws, whether it's broader than the Sherman Act and the Clayton Act), it may actually make more sense for the FTC if is thinking about competition rulemaking to look at an area where

Section 5 touches, but the Sherman Act and the Clayton Act don't touch, because then it would avoid the conflicts that are going to come up with the antitrust divisions, antitrust policies.

[00:54:46] For instance, invitations to collude.

[00:54:50] There's actually a recent article coincidentally from a Justice Department employee suggesting a rulemaking on no collusion, saying firms should not be allowed to change your prices solely in response to someone else's price announcement, or something like that.

[00:55:11] Something simple like that maybe wouldn't be touched by Section 1 of the Sherman Act.

[00:55:18] It might be something that would be a good starting point.

[00:55:23] **NIELSON**: Next? Sorry, Gus.

[00:55:25] **HURWITZ**: Yeah. A couple of quick thoughts on this. First, building on what Henry just said, the FTC in 2015 had adopted a UMC policy statement which interpreted UMC authority to go to things like issues to collude, invitations to collude.

[00:55:45] One of the first things that Chair Khan did when she joined the Commission as Chair was to rescind that rule.

[00:55:53] It seems anything that the current commission is thinking about would have to be at least beyond the scope of the 2015 UMC statement, otherwise why would they have rescinded it? I actually took the question to be a little different.

[00:56:10] I just want to respond to a slight variation.

[00:56:15] I took it to mean, As a matter of litigation strategy, wouldn't it be better to have adopted a rule, and then you're litigating the rule that you've adopted instead of proceeding just through adjudication without a rule.

[00:56:28] At some level, sure. Absolutely, if that rule is going to be upheld by the courts.

[00:56:33] If the courts are going to look at that rule and say, "You don't have authority to do this," then you just lost the case. As a matter of litigation strategy, adopting a rule that you don't have authority to adopt might be a great way to lose the case before you even bring it.

[00:56:48] **NIELSON**: We have another question and that is (and this one I'll go to Henry first), Wasn't the whole point of the broadly worded Section 5 to allow the FTC to address the entire economy? The language of Section 5 is broad, it's always been broad.

[00:57:04] This is me paraphrasing the question.

[00:57:06] Congress knew they're enacting broad language.

[00:57:09] Shouldn't we take that seriously? **SU**: Yeah. Absolutely. In terms of the FTC's jurisdiction, (via interstate commerce, right?) it's pretty much anything and everything except for the specific carve-outs in Section 5.

[00:57:24] For instance, banks are carved out, common carriers are carved out, entities under the Packard's and Stockyard's Act are curved out.

[00:57:32] Otherwise, the FTC has broad jurisdiction.

[00:57:35] But I think you should not confuse enforcement jurisdiction with rulemaking that attempts to address just a sweep, under a single rule, entire swaths of the economy.

[00:57:52] Even though the FTC has broad enforcement jurisdiction, it was still contemplated that the FTC would use that jurisdiction on a case-by-case basis to target, for instance, an anti-competitive hospital merger in Texas or some problematic joint venture in Pennsylvania.

[00:58:19] I mean, it's still on a case-by-case basis.

[00:58:22] I think that's the issue for me anyway, is a rule that tries to capture too much.

[00:58:28] Trying to do too much would implicate the major questions stop them.

[00:58:32] **HURWITZ**: When the FTC was created, there was a substantial debate about whether to give the agency any authority at all or whether to merely have them be a research agency that would report back to Congress to support congressional development of statutes.

[00:58:49] Now, the agency was given authority that research approach was ultimately rejected, but I think Henry's answer is really insightful and critical to understanding the ability to act broadly doesn't necessarily mean the ability to impose rules broadly. And beyond that, even if Congress enacted a statute in 1914, that doesn't mean that it's necessarily constitutional if the Supreme Court after 1914 said, "This type of statute is not constitutional."

NIELSON: Svetlana, do you want the final word?

GANS: I agree with everything that's been said.

[00:59:34] Nothing to add on that question.

[00:59:37] **NIELSON**: Well, we're coming to the hour.

[00:59:39] I would like to thank my panelists.

[00:59:40] This was a lot of fun.

[00:59:41] Thank you so much for coming on.

[00:59:44] This is an issue that's going to come up some more.

[00:59:46] Stay tuned for more from us and more from others.

[00:59:51] Everybody have a wonderful day. Thank you so much.

[00:59:53] **SU**: Thank you.