



THE FTC'S AMENDED COMPLAINT AGAINST AMAZON EMPLOYEES RAISES SERIOUS POLICY CONCERNS

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On September 20, 2023, the U.S. Federal Trade Commission (FTC) amended its lawsuit over Amazon Prime's subscription and cancellation process to add three Amazon employees as individual defendants. The FTC's decision to name these employees as individual defendants in a case like this has never occurred in the 109-year history of the agency. This change in FTC policy raises serious questions about when it is appropriate to hold an individual defendant liable for alleged misconduct by its employer, and it risks creating the wrong incentives for corporate executives. Other companies should closely monitor this case as the court and the FTC grapples with these issues.

As an initial matter, there is no dispute that the FTC may pursue individual defendants in appropriate cases. Indeed, throughout its history, "[t]he Commission often names individual defendants in cases against small companies, [but it] rarely — if ever — does so in the case of large, publicly traded companies." Dissenting statement of Commissioner Rebecca Kelly Slaughter, In the Matter of *FTC vs. Facebook* (July 24, 2019). There are three issues with the FTC's decision to sue the individuals in this case.

First, the FTC's complaint suggests that it can hold corporate officials liable even if they did not personally engage in the unfair or deceptive practices. Here, the FTC does not allege that any of the individual defendants personally designed, developed, or created the allegedly illegal Prime signup or cancellation processes. Instead, the FTC repeatedly alleges that the individuals "had the authority to control" these practices. The same can of course be said of any manager, executive, or corporate leader. By definition, managers have the authority to control the conduct of their teams. If mere "authority to control" conduct is sufficient to impose personal liability, then every corporate manager would in effect be *strictly liable* for any violations by their team. That would be a fundamental change in individual liability under the FTC Act.

Second, the amended complaint may create perverse incentives by seemingly criticizing appropriate consumer-friendly corporate behavior. Specifically, many companies that care about the experience of their customers spend significant resources to research, study, and analyze potential customer "pain points" — or as the FTC's complaint suggests Amazon calls them, "customer frustrations" — in order to improve the customer experience. This practice is generally accepted to be appropriate and even commendable corporate behavior. Yet here the

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FTC attempts to recast those efforts as insidious and suggests that Amazon employees who participated in those efforts knew its Prime practices were illegal. This could cause readers of the FTC complaint to conclude that “no good deed goes unpunished” and that they would be better off not engaging in this customer experience analysis and debate for fear that well-intentioned efforts will lead to FTC charges. Courts, and the FTC, should continue to view efforts like these as pro-consumer, even when they do identify that some customers have frustrations or pain points.

Third, the FTC has alleged that Amazon employees must have known the company’s conduct was illegal because they consulted with lawyers. In this regard, the complaint specifically alleges that the individual defendants had “actual knowledge” of illegality because “Amazon ... has extensive legal resources including in-house and outside counsel with expertise in the FTC Act,” and the individual defendants “routinely conferred with [] in-house counsel.” *FTC v. Amazon*, 23-cv-00932-JHC (D. Wash) Amended Compl. ¶¶ 259-60. This argument improperly pressures companies to waive privilege in order to counter the FTC’s inference that counsel advised that the conduct was illegal. More fundamentally, the FTC is arguing that the involvement of counsel is in itself evidence of knowing misconduct. By using Amazon’s legal and compliance resources against these employees, the FTC is discouraging one of the most important tools companies have to stay on the right side of the law. The FTC should be encouraging companies to consult with experienced counsel instead of using the presence of attorneys and compliance experts as evidence that individual employees must have known the company’s conduct was illegal.