Axinn Antitrust Insight: Confirmation of Third Democratic FTC Commissioner Secures Majority, Setting Stage for Aggressive and Unconventional Agenda

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PRACTICE AREAS

Antitrust

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On May 11, 2022, the U.S. Senate confirmed Alvaro Bedoya as a commissioner on the Federal Trade Commission. The confirmation secures a 3-2 Democratic majority on the FTC and sets the stage for Chair Khan to implement her and the Biden Administration's aggressive and unconventional antitrust agenda.

Bedoya, a privacy law specialist, is the founding director of the Center on Privacy & Technology at Georgetown Law and previously served as chief counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology, and the Law. Bedoya is viewed as knowledgeable about tech issues, particularly with respect to privacy and online platforms, but is not considered to have deep antitrust experience. In light of the Administration's focus on a more aggressive antitrust agenda, companies should expect that Bedoya will vote along with the other two Democratic FTC Commissioners (Chair Khan and Commissioner Slaughter) on antitrust matters, providing for a three-vote Democratic majority.

Since October 1, 2021 – when Rohit Chopra left his FTC Commissioner position to become the Director of the Consumer Financial Protection Bureau – the FTC had been tied at 2-2 between the Democrats and Republicans. While the commissioners have publicly sparred about policy goals and priorities (among other things), the agency has continued a robust enforcement record on a bipartisan basis, challenging multiple transactions and causing several deals to be abandoned. For example, the FTC voted 4-0 in favor of two significant vertical merger challenges – NVIDIA/Arm and Lockheed Martin/Aerojet Rocketdyne, both of which were then abandoned.

Against that baseline of robust bipartisan enforcement, Bedoya's confirmation now allows for implementation of a step-change in more aggressive and unconventional enforcement. Chair Khan and the Administration already have steadily telegraphed their agenda, which

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companies now should expect that the FTC will implement.

- The FTC, in partnership with the DOJ, is expected to issue new Merger Guidelines, likely later this year, and has signaled the agencies may attempt to move away from foundational standards and principles of modern antitrust law, including the consumer welfare standard and market definition.
- Chair Khan has outlined her broad vision for the Commission, calling for a strategic approach that, among other things, targets “root causes” of harm, focuses on “structural incentives that enable unlawful conduct,” and implements forward-looking action, particularly with respect to next-generation innovation and nascent industries.
- As her first policy priority, Chair Khan pointed to merger enforcement, asserting that the FTC must “address rampant consolidation and the dominance that it has enabled across markets” and, more broadly, “find ways to deter unlawful transactions.”
- Chair Khan has signaled a commitment to expanding the FTC’s enforcement authority through the agency rulemaking process.
  - Both the Administration and Chair Khan have indicated the FTC will likely curtail the use of non-compete clauses and other restrictive covenants through FTC-promulgated rules.
  - Chair Khan has also articulated a desire to employ rulemaking to strengthen the FTC’s enforcement against “unfair methods of competition” under Section 5 of the FTC Act and criticized prior bipartisan policy statements on Section 5 as too restrictive of the FTC’s authority.

The FTC’s aggressive and emboldened enforcement approach will necessarily be constrained by parties’ rights to contest enforcement actions in U.S. courts. In particular, while the ultimate actions to implement Chair Khan’s agenda remain to be seen, the FTC may face significant obstacles in the courts if the agency attempts to assert unconventional theories of harm that run counter to modern antitrust precedents or seeks to expand its authority through a novel interpretation of its rulemaking powers. Agency resources may also put a practical constraint on what the Commission can achieve, particularly if the FTC’s ability to attract and retain qualified talent is hindered by declining morale at the agency.

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