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The FTC at Full Strength: What to Expect Next

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The Federal Trade Commission (FTC) stalemate ended on Wednesday, May 11, 2022, with Vice President Kamala Harris breaking the 50-50 Senate tie to confirm Alvaro Bedoya. The addition of Commissioner Bedoya establishes the first Democratic majority at the FTC since Commissioner Rohit Chopra left the agency to lead the Consumer Financial Protection Bureau in October 2021 and creates a pathway for Chair Lina Khan's ambitious agency agenda. Commissioner Bedoya, a privacy scholar, brings with him substantial interest in privacy and algorithmic fairness which are issues at the top of the FTC's priorities.

Commissioner Bedoya comes to the FTC from the Center on Privacy and Technology at the Georgetown University Law Center, where he served as the founding director and a professor. At Georgetown, Commissioner Bedoya specialized in digital privacy issues, including on the intersection of privacy and civil rights, biometric software, "algorithmic discrimination," children's privacy, and data aggregation. He previously engaged in advocacy on the regulation and moratoria of law enforcement's use of facial recognition, use of information related to unaccompanied children in immigration proceedings, and automated scanning of social media related to immigration enforcement. Before arriving at Georgetown, Commissioner Bedoya served as Chief Counsel to the Senate Judiciary Subcommittee on Privacy, Technology & the Law, where he worked on the bipartisan transparency provisions in the USA FREEDOM Act, helped run oversight hearings involving large technology companies, and conducted work on so-called "stalking apps."

While less is known about Commissioner Bedoya's stance on antitrust issues, he has expressed concerns over a "consolidated and concentrated technology sector" and likely will be in favor of robust antitrust enforcement. Commissioner Bedoya has also expressed interest in getting the FTC more resources for privacy enforcement, expanding the FTC's technological expertise, combating fraud and abuse related to the COVID pandemic, and curbing certain debt collection practices.

Below we identify key issues that may see more activity in light of the new Democratic majority:

- **Privacy Rulemaking.** The Biden Administration has encouraged the FTC to establish rules on "corporate surveillance" and the accumulation of data. In late 2021, the FTC officially announced interest in crafting a trade regulation rule under Section 18 of the FTC Act "to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination."[1] Both Chair Khan and Commissioner Rebecca Slaughter have been in favor of far-reaching FTC privacy rulemaking, while Commissioners Noah Phillips and Christine Wilson have voiced concerns with the scope of potential privacy rules. We may therefore see more momentum on FTC privacy rulemaking, especially if the Congressional stalemate on federal privacy legislation continues. Chair Khan has expressed a preference for substantive limits on data collection rather than procedural protections, stating that procedural protections "sidestep[]

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> more fundamental questions about whether certain types of data collection and processing should be permitted in the first place."[2]

The FTC's privacy rulemaking activities may also be informed by several petitions to curb corporate data practices—including, for example, the Electronic Privacy Information Center's petition for rulemaking on artificial intelligence, Accountable Tech's petition to deem targeted advertising as an unfair method of competition, the Center for Democracy and Technology's petition for rulemaking to address purported civil rights abuses in data-driven commerce, Athena Coalition's petition to ban corporate use of facial surveillance technology, and the Council on American-Islamic Relations' petition for an FTC investigation of the use of location data. The FTC's activities may also be informed by the addition of new agency staff focused on algorithms, biometrics, and technology platforms.[3]

The agency's authority to craft trade regulation rules covering unfair and deceptive trade practices, known as UDAP rulemaking, may face procedural and substantive questions, such as whether the recent reforms to the Section 18 rulemaking processes align with Congressional intent, and whether the contemplated privacy rules are limited to practices that have been found to be unfair or deceptive. Further, given Chair Khan's interest in the intersection of privacy and competition, especially as to data accumulation, it will be interesting to see whether the FTC pursues data-related rulemakings through a competition or UDAP lens, or whether the FTC takes a hybrid approach.[4]

We also envision the FTC will continue to focus on privacy enforcement, with an emphasis on the intersection of privacy and civil rights, personal autonomy, and vulnerable consumers including children.

- **Competition Rulemaking.** In July 2021, the FTC voted 3-2 to rescind the 2015 guidelines concerning the scope of its authority under Section 5 of the FTC Act, with the majority suggesting that the FTC "will consider whether . . . to propose rules that will further clarify the types of practices that warrant scrutiny under this provision."[5] Although the fact and scope of FTC's authority to engage in competition rulemaking remain open questions, with Commissioner Bedoya confirmed, it is more likely that the FTC will vote to initiate a rulemaking to classify certain conduct as an "unfair method[] of competition" that violates Section 5 of the FTC Act. Agency leadership has stated they will take a thoughtful and energetic approach to rulemaking and prefer rulemaking over enforcement because rules set clear expectations, allow businesses to plan, and proactively deter bad conduct.

In particular, given the increased attention to labor issues,[6] the FTC may consider a rulemaking aimed at addressing labor markets, such as a rulemaking addressing the legality of non-competes under the FTC Act. Agency staff have stated that they believe non-compete rules would lead to higher wages, better working conditions, and increased competition in downstream goods markets. Critics, however, have noted that such rulemaking may exceed the Commission's authority and have unintended consequences, such as disruption of innovation and decreased investment in workforce training. Other potential rulemakings, as itemized in the Biden Competition Executive Order, include "other clauses or agreements that may unfairly limit worker mobility," "unfair anticompetitive restrictions on third-party repair or self-repair of items," and "unfair anticompetitive conduct or agreements in the prescription drug industries."[7]

The FTC's labor focus will likely not be limited to rulemaking. The FTC's enforcement docket will also consider purported harms to employees and small business both in the consumer protection and competition arenas. The FTC will also continue to pursue the administration's key enforcement priorities, including those the agency identified at the July 2021 public meeting, such as large technology companies, the healthcare industry, M&A, and "repeat offenders."[8]

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- **Penalty Offense Authority.** The FTC has shown a renewed interest in penalty offense authority, largely due to its inability to get equitable monetary penalties under Section 13(b) of the FTC Act, in light of the Supreme Court's unanimous holding in *AMG Capital Management v. FTC*.[9] The FTC's Civil Penalty Authority allows the agency to seek civil penalties against nonparties when two conditions are met: (1) the company must have actual notice that the conduct is unfair or deceptive in violation of the FTC Act, and (2) there must be an FTC administrative decision that such conduct is unfair or deceptive. The sheer breadth of the agency's recent efforts – notices to 1,100 businesses regarding "money-making opportunities," notices to 700 businesses regarding endorsements and testimonials, and notices to 70 for-profit higher education institutions – is noteworthy and raises important questions surrounding notice and due process. As agency investigations continue, this is an area to watch.

- **Health and Wellness Apps' Data Practices.** On September 15, 2021, the FTC issued a policy statement that arguably sought to expand the type of entities covered by the agency's Health Breach Notification Rule. The Health Breach Notification Rule requires vendors of personal health records to notify consumers, the FTC, and in some cases, the media, when data is disclosed or acquired without the consumer's authorization. Specifically, the FTC (on a 3-2 vote) found that health and wellness apps that hold consumers' health information are subject to the Rule because they arguably furnish health care services and can draw information from multiple sources, such as through consumer inputs and application programming interfaces. This arguable expansion drew dissents from Commissioners Phillips and Wilson, who objected that the agency exceeded its authority by expanding the coverage outside of the statutory mandate, acted contrary to agency guidance, and curtailed the public input process, among other criticisms. Key factual issues also remain including questions surrounding triggers for "unauthorized access" and "discovery of a breach of security," as noted in these dissents. The FTC's approach on these issues is an area to watch.

- **Individual and Intermediary Liability.** Chair Khan and Commissioner Slaughter have encouraged the FTC to push for individual and intermediary liability in consumer protection investigations. The FTC is also focusing on "gatekeepers" that in the agency's words - "use their critical market position" to "dictate terms," "protect and extend their market power,"[10] and "degrade privacy without ramifications."[11] We expect more activity in this area with the Democratic majority.

- **Merger Enforcement.** Commissioner Bedoya's confirmation provides the FTC with a Democratic majority that may authorize novel theories of harm to challenge alleged anticompetitive mergers. In recent months, Chair Khan has suggested that some mergers may lead to lower wages for workers,[12] conglomerate effects (competitive harm where the merging parties' products are in neither in horizontal competition nor in the same supply chain),[13] or excessive aggregation of data.[14] In a departure from past practice, any or all of these theories of harm may be alleged in future merger challenges by the FTC.

- **Increased Hill Interaction.** Given self-perceived gaps in FTC authority and several of the Commissioners' significant Hill experience,[15] we expect the agency to be more active on Capitol Hill, potentially furthering calls on Congress to act by: amending Section 13(b) to give the agency the authority to obtain monetary relief that the Supreme Court held it lacked in *AMG Capital*, introducing privacy legislation with provisions that increase FTC funding, establish a new FTC privacy bureau, and provide the agency first-time fining authority, and engaging in substantive and procedural antitrust revisions.

The FTC consumer protection and competition dockets may soon be in overdrive, with several of the more controversial items such as far ranging market studies, privacy and

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competition rulemakings, and enforcement actions alleging novel theories and unprecedented remedies, potentially seeing the light of day.

Companies should be mindful of FTC's vast mandate, ambitious agenda, and stated "adjustments in approach," as they navigate compliance counseling, M&A transactions, and the many ongoing agency investigations. Given the sheer breadth of agency initiatives, companies should also consider participating in the agency rulemaking process to offer real-world, empirical evidence to build a fuller agency record.

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[1] Trade Regulation Rule on Commercial Surveillance, Office of Information and Regulatory Affairs (Fall 2021), here.

[2] Remarks of Chair Lina M. Khan as Prepared for Delivery at IAPP Global Privacy Summit 2022 (Apr. 11, 2022), here.

[3] See Press Release, FTC Chair Lina M. Khan Announces New Appointments in Agency Leadership Positions (Nov. 19, 2021), here.

[4] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

[5] Statement of Chair Lina M. Khan and Commissioners Rohit Chopra and Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), here.

[6] See Gibson Dunn Client Alert, Employers Beware: Aggressive and Expansive Labor-Focused Antitrust Enforcement Will Remain the New Normal (Apr. 18, 2022), here.

[7] Executive Order on Promoting Competition in the American Economy (July 9, 2021), here.

[8] Press Release, FTC Authorizes Investigations into Key Enforcement Priorities (July 1, 2021), here.

[9] See Gibson Dunn Client Alert, Supreme Court Restricts Power of the Federal Trade Commission to Seek Monetary Relief in Courts (Apr. 22, 2021), here

[10] Memorandum of Chair Lina M. Khan, Vision and Priorities for the FTC (Sept. 22, 2021), here.

[11] Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), here.

[12] Press Release, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), here.

[13] Chair Khan Remarks, 2022 Antitrust and Competition Conference, Stigler Center (Apr. 22, 2022), quoted here.

[14] Remarks of Chair Lina M. Khan Regarding Request for Information of Merger Enforcement (Jan. 18, 2022), here.

[15] Chair Khan previously served as Counsel to the U.S. House Judiciary Committee on Antitrust, Commercial, and Administrative Law. Commissioner Philips previously served as Chief Counsel to U.S. Senator John Cornyn, of Texas, on the Senate Judiciary Committee. Commissioner Slaughter previously served as Chief Counsel to Senator Charles Schumer of New York, the Democratic Leader. Commissioner Bedoya previously served as Chief Counsel to the Senate Judiciary Subcommittee on Privacy, Technology &

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