

Confirmation Of 3rd FTC Dem Locks In Ambitious Agenda

By **Bryan Koenig**

Law360 (May 11, 2022, 4:53 PM EDT) -- The Senate's vote to confirm Alvaro Bedoya to the Federal Trade Commission on Wednesday gave agency Chair Lina Khan more than just a full roster — it cemented the Big Tech critic's ability to restart a transformative agenda to deter mergers, challenge conduct and push the limits of the agency's rulemaking powers.

The Senate's 51-50 party line vote for confirmation, with Vice President Kamala Harris breaking the tie, once again gives Khan the 3-2 Democratic majority she needs to override Republican opposition, which has likely kept key rulemaking and perhaps merger challenges tabled by an even split on a commission that requires a majority vote for any new action.

"It'll certainly help Chair Khan's agenda in a lot of different ways," said Alexander P. Okuliar, a former deputy assistant attorney general for antitrust and current Morrison Foerster LLP partner.

That agenda includes a fundamental transformation, in conjunction with the U.S. Department of Justice's Antitrust Division, of the merger guidelines that lay out how the agencies consider transactions. Amid a massive backlash against the power of online platforms, manifested in enforcement actions, private suits and proposed congressional legislation, the agencies have indicated they want to completely reshape how they think about markets when analyzing mergers for potential anti-competitive harm, including potentially reducing their dependency on some econometric analysis and perhaps moving away from defining the market in every challenge.

Along with DOJ antitrust chief Jonathan Kanter, Khan has been picked to co-lead a top-down transformation of U.S. antitrust enforcement, an area that President Joe Biden has described as a 40-year failed experiment that has tied enforcers' hands. Khan's ability to forge a more aggressive FTC has stalled since Democratic Commissioner Rohit Chopra left in October to head the Consumer Financial Protection Bureau.

Chopra did, however, leave Khan a parting gift: a handful of banked votes — derided by FTC Republicans



The Federal Trade Commission is once again full with the confirmation Wednesday of Alvaro Bedoya on a 51-50 U.S. Senate vote, with Vice President Kamala Harris breaking the tie. (Law360)

as "zombie votes" — that afforded the majority needed to restore a policy imposing "prior approval" requirements for future transactions carried out by parties that accept merger consent decrees.

But Chopra could only bank so many votes, and Khan in recent months hasn't had the votes for major initiatives or to file less-traditional merger challenges. The commission deadlocked in February on a proposal to study the business practices of pharmacy benefit managers and their effect on competition. Exactly how much litigation Khan may want to bring has been muddied in part by the fact that the FTC has seen a marked drop in new merger cases since Biden took office.

The most controversial move Khan's FTC has been able to make with the 2-2 split was the January joint request with the DOJ Antitrust Division requesting public input for the guidelines overhaul. The FTC's Republicans supported that request only to a point, while urging caution on questions with a sharper anti-merger bent. Any actual vote on new guidelines could easily see a 3-2 split if the GOP members feel they make too many assumptions disfavoring mergers.

The FTC's Republican minority has been girding for a return of a Democratic majority. In early April comments during the American Bar Association's spring antitrust meeting, Commissioner Noah Joshua Phillips said that once Bedoya was confirmed he anticipated significant progressive movement in both rulemaking and merger control, including challenges of "marginal cases" where deals previously would have been allowed to close.

Phillips called Bedoya "a terrific person" and noted that the two had worked together as Senate staffers. He also said there would still be many 5-0 votes on a commission that has long touted its bipartisanship. Even with the political divide, the four commissioners managed unanimous votes in enforcement actions over allegedly false "Made in the USA" labeling and false marketing, among other consumer protection cases. They also agreed on challenges and merger clearance deals in a variety of transactions that included some aggressive theories of vertical integration, connecting companies on different points on the supply chain.

"For an aggressive rulemaking, she would need a third vote. But the Republicans have supported some more limited consumer protection rulemakings," said Maureen K. Ohlhausen, a Baker Botts LLP partner who served as acting FTC chair at the beginning of the Trump administration.

Ohlhausen noted that the Republican commissioners in February voted with the Democrats in favor of kick-starting rulemaking that would ban deceptive and false promises of how much money consumers can make from an enterprise. Companies that violate the ban could find themselves subject to fines.

That bipartisanship has its limits on a commission where Republicans have frequently argued they're being cut out of the loop, railing against a series of 3-2 votes before Chopra's exit, including one to ditch vertical merger guidelines finalized in 2020 and another nixing a statement that put guardrails on FTC power.

Facing the prospect of a renewed liberal majority, Phillips raised concerns at the ABA meeting that Democrats, animated by a general belief that big is bad, will shift dramatically from the court-driven enforcement that for decades has undergirded U.S. antitrust policy to policy based around regulations adopted by a "bare majority" of commissioners in all kinds of industries beyond those in which Congress gave the commission express rulemaking power.

Khan is one of the most important shapers of the belief in the FTC's power to regulate "unfair methods of competition" under Section 5 of the FTC Act, stemming from her days as a legal fellow working for Chopra at the FTC. Together, Khan and Chopra in 2020 penned "The Case for 'Unfair Methods of Competition' Rulemaking," published in the University of Chicago Law Review.

"Antitrust litigation and enforcement are protracted and expensive, requiring extensive discovery and costly expert analysis. In theory, this approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies," they wrote. "But in practice, the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules."

During her own confirmation process, Khan, then a Columbia Law School professor, said that she didn't have "a philosophical view" on whether the FTC should avoid rulemaking in areas where it hasn't been expressly authorized by Congress. However, in her view, the FTC's power to expand competition regulation is clear.

The true limits of the FTC's rulemaking powers remain untested and its ability to regulate unfair methods of competition has gone essentially unused. Instead, most FTC rules are in areas where Congress has expressly required commission regulation. But the commission's Democrats have signaled a desire to change that.

With a third Democratic vote alongside Khan and Commissioner Rebecca Kelly Slaughter, Ohlhausen said she would expect the commission to move "rather quickly" on new rulemaking, with at least some movement in a matter of months. Staffers have likely been working on advanced rulemaking notices, Ohlhausen said.

Phillips, for his part, warned during the ABA conference that he didn't believe such rulemaking would be legal. And he predicted pushback from federal judges, especially the U.S. Supreme Court, which he said has increasingly stressed a desire to return federal agencies to only those powers expressly granted by Congress.

The FTC, the Republican said, has neither the foresight nor the resources to adequately regulate the breadth of the U.S. economy.

"This is incredible power. And I think it's illegal," he said at the time.

One of the biggest question marks overhanging the immediate future of a Democratic-controlled FTC is Amazon.com Inc.'s \$8.45 billion purchase of MGM Studios. The 2-2 split meant that Khan — who skyrocketed to antitrust fame with a landmark law review article assailing Amazon — likely didn't have the votes to challenge the deal even if she wanted to. So when the companies closed their transaction in March, soon after obtaining European Commission clearance, the FTC could only issue a statement noting that U.S. enforcers had the authority to challenge mergers after they close.

Warnings of post-closing challenges have become an important feature of Khan's FTC, which began issuing letters last year telling certain merging companies that while the waiting period that had prevented their transaction from closing had ended, that closing was "at their own risk."

With a 3-2 vote now allowing Khan to bring challenges the commission's Republicans may have balked

at previously, Okuliar of Morrison Foerster said he would expect the chair to consider revisiting those deals. The FTC, he said, may also "become even more aggressive in challenging new deals that come before the agency."

For all his implications for Khan's agenda, Bedoya will also be a commissioner with his own vote and his own ambitions, which may translate into a greater push into his area of expertise as a privacy advocate and former Georgetown University Law Center scholar who by his own admission has no experience with antitrust law.

"You might see more of a focus on data privacy," said Geoffrey Kozen, a Robins Kaplan LLP attorney and former Senate staffer.

There may be room on the commission for bipartisan privacy work, given GOP Commissioner Christine Wilson's staunch advocacy on privacy.

Khan herself also stressed, in an April 11 speech, FTC efforts to look at data collection and security practices through both antitrust and consumer protection lenses, while calling for rulemaking that would set "substantive limits rather than just procedural protections," on how companies can collect and use consumer data.

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