

Lina Khan's Appointment as FTC Chair Reflects Biden Administration's Aggressive Stance on Antitrust Enforcement

Skadden

06 / 18 / 21

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

As anticipated, on June 15, 2021, the U.S. Senate confirmed Lina Khan's appointment to the Federal Trade Commission (FTC). Unexpectedly, within hours of her confirmation, President Joe Biden named her FTC chair. Ms. Khan graduated from law school four years ago, but in that short span she has gained notoriety with her calls for a new approach to antitrust and her vocal criticism of Big Tech. Her appointment as FTC chair likely signals that the Biden administration will not only be more aggressive in antitrust enforcement than the two prior administrations, but that it also may push for more significant antitrust reform.

Lina Khan's Experience

In 2017, while a law student at Yale University, Ms. Khan rose to prominence following the publication of a note she authored in the *Yale Law Journal* criticizing antitrust enforcement as being unequipped to address market power in the digital economy and calling for a new framework. In her article, Ms. Khan questioned the long-prevailing consumer welfare standard and its focus on price effects. She advocated for the use of antitrust to address a range of policy concerns — including, for example, protecting labor interests by blocking mergers that result in a reduced work force or stagnation of worker pay.

Following law school, in 2018, Ms. Khan worked as legal director of the Open Markets Institute, an organization that, according to its online mission statement, “uses research and journalism to expose the dangers of monopolization” and advocates for changes to policy and law to address those dangers. In 2019, she served as a legal fellow in the office of FTC Commissioner Rohit Chopra and counsel to the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. She helped prepare the October 2020 U.S. House Judiciary Antitrust Subcommittee report that recommended legislation to, among other things, break up large technology firms and place the burden on dominant firms to prove that a merger is necessary to serve the public interest. In July 2020, Ms. Khan joined Columbia Law School as an associate professor.

What Does Ms. Khan's Appointment as Chair Mean for US Antitrust Enforcement?

Ms. Khan's selection to lead the FTC was a surprise to many. The two current democratic commissioners who served during the Trump administration — Rebecca Slaughter and Rohit Chopra — have proved to be aggressive enforcers and even more progressive in their stances than their predecessors in the Obama administration. For example, both have called for increased scrutiny of vertical mergers, dissenting in two commission votes not to challenge vertical mergers and criticizing the June 2020 updated Vertical Merger Guidelines for continuing to include the view that vertical mergers are almost always procompetitive. Commissioner Chopra has been awaiting a potential appointment to the Consumer Financial Protection Bureau, and many expected President Biden to use that vacancy to fill the FTC chair with a less progressive voice. Instead, Ms. Khan will now drive FTC policy and no doubt use her leadership position as a platform to advocate for antitrust reform, including passing some of the proposed bipartisan bills to strengthen enforcement. Moreover, the combination of President Biden's appointment of Ms. Khan as FTC chair and his prior appointment of Tim Wu — another progressive antitrust voice and Big Tech critic — to the National Economic Council, sheds more light on the administration's antitrust priorities. Still, there will be some limitations on just how aggressive the administration can be in bringing about radical change to antitrust in the United States.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

Lina Khan's Appointment as FTC Chair Reflects Biden Administration's Aggressive Stance on Antitrust Enforcement

First, a long history of court precedent provides a consistent legal framework for assessing potentially anticompetitive conduct and mergers. Although Ms. Khan and other progressives criticize the consumer welfare standard and advocate for a new, more expansive framework, courts have been applying the same standards under the current antitrust laws for decades. This precedent will be difficult for the FTC to overcome in the near term. She may also be banking on Congress to amend the laws, but it is far from clear whether some of the more radical antitrust bills will pass.

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

Third, the FTC shares its federal antitrust enforcement jurisdiction with the Antitrust Division at the Department of Justice (DOJ). When it comes to reviewing mergers and potentially unlawful civil conduct, the agencies split jurisdiction based on

previous experience in an industry and an agreement to let one agency take the lead. As we saw in the Trump administration with investigations over Big Tech companies, the agencies can fight over which one will take on a particular matter. The FTC and DOJ typically also coordinate on antitrust policy matters, including merger guidelines, proposed legislation and other key positions. Accordingly, who the Biden administration appoints to the vacant antitrust assistant attorney general position at the DOJ will impact Ms. Khan's agenda to a degree. If President Biden appoints a more moderate enforcer at the DOJ, this could dampen how much antitrust policy shifts. A more progressive DOJ head, similar to Ms. Khan at the FTC, could of course lead to more change. We expect President Biden to make the DOJ nomination soon.

Conclusion

Following Ms. Khan's appointment as FTC chair, we expect continued aggressive enforcement at the FTC and some attempts at change. However, Ms. Khan's ability to achieve fundamental reforms of the nature she has previously advocated is dependent on a multitude of factors, including whether Congress significantly amends the U.S. antitrust laws, what additional resources the FTC is granted to bring cases and who President Biden appoints to head antitrust enforcement at the DOJ.

Contacts

Tara L. Reinhart

Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

Steve Sunshine

Partner / Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

David P. Wales

Partner / Washington, D.C.
202.371.7190
david.wales@skadden.com

Julia York

Partner / Washington, D.C.
202.371.7146
julia.york@skadden.com

Bre Jordan

Associate / Washington, D.C.
202.371.7205
bre.jordan@skadden.com