

ANTITRUST TRADE AND PRACTICE

Privacy Expert Bedoya To Bring Fresh Perspective to FTC

On Sept. 13, 2021 President Biden nominated Alvaro Bedoya as a Commissioner to the Federal Trade Commission (FTC). If confirmed, Bedoya would replace the recently departed Commissioner Rohit Chopra who now heads up the Consumer Financial Protection Bureau. As a privacy expert, Bedoya will provide a fresh perspective to the agency charged with antitrust enforcement and consumer protection.

Bedoya was born in Peru and grew up in upstate New York. He earned his B.A. from Harvard College and his J.D. from Yale Law School where he received the Paul & Daisy Soros Fellowship for New Americans. After graduating from law school, he spent two years as an associate at Wilmer-



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Hale before departing to work in the U.S. Senate. A long-time aide to Sen. Al Franken, Bedoya was the first chief counsel for the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. During his tenure he worked on the USA FREEDOM Act and other privacy and surveillance issues related to biometrics and location tracking. Those who worked with Bedoya on Capitol Hill characterize him as willing to engage with industry and to maintain an open dialogue. See Margaret Harding McGill, *Privacy Advocate Will Be New Big Tech Threat at FTC*, Axios (Sept. 14, 2021).

Currently, Bedoya serves as the founding director of the Center

on Privacy and Technology at Georgetown Law, a think tank focused on privacy and surveillance and their impact on civil rights. He is also a visiting professor at Georgetown Law. His nomination to the FTC comes at a time when data privacy and data security—and their impact on competition and civil rights—have emerged as pressing issues in Washington. In a statement that congratulated Bedoya on his nomination and touted his expertise, FTC Chair Lina Khan noted that Bedoya’s “expertise on surveillance and data security and his longstanding commitment to public service would be enormously valuable to the Commission as we work to meet this moment of tremendous need and opportunity.” See Press Release, Fed. Trade Comm’n, Statement of FTC Chair Lina M. Khan on the Nomination of Alvaro Bedoya to Serve as a Commissioner (Sept. 13, 2021).

Bedoya on Privacy

In 2016, Bedoya and a team from the Georgetown Center on Privacy and Technology released a report studying police use of facial recognition programs across America and proposing policy recommendations. See Alvaro Bedoya et al., *The Perpetual Line-Up: Unregulated Police Face Recognition in America*, Ctr. on Priv. & Tech. (Oct. 18, 2016). According to the report, one in two American adults—or 117 million people—are in a police facial recognition database. *Id.* The report exposed the existence of few guardrails to prevent the programs' misuse or to ensure the accuracy of the databases, and highlighted the disproportionate impact facial recognition programs have on people of color, particularly African Americans. *Id.*

Bedoya's academic writings have focused on the intersection of civil rights and privacy, primarily the impact that privacy and surveillance have on marginalized communities. Bedoya has been critical of the way in which data collection and tracking have a disparate impact that "varies greatly by race, class and power." Alvaro Bedoya, *A License to Discriminate*, N.Y. Times (June 6, 2018). He has argued that privacy is a civil right because it is about "human dignity." Alvaro Bedoya,

Privacy as a Civil Right, 50 N.M. L. Rev. 301, 306 (2020). Bedoya has also criticized the U.S. Immigration and Customs Enforcement's (ICE) use of surveillance to track immigrants, cautioning that "[s]urveillance of immigrants has long paved the way for surveillance of everyone." Alvaro Bedoya,

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Deportation Is Going High-Tech Under Trump, The Atlantic (June 21, 2017).

Capitol Hill and Digital Privacy

Privacy advocates have long called on Congress to enact a federal privacy law. Despite decades of discussions and proposals, there is no federal law protecting consumer privacy. With 6 in 10 Americans believing data collection is impossible to avoid in daily life, see Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, Pew Rsch. Ctr. (Nov. 15, 2019), consumers are taking an interest in how their data is handled. Technology companies

and the data they control have received a renewed focus.

Lawmakers on Capitol Hill and the enforcement agencies have increasingly questioned whether and to what extent digital platforms' use and control of data impacts privacy and competition. The House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, on which Chair Khan served prior to joining the FTC, conducted a 16-month investigation of digital markets, culminating in a lengthy report, entitled *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations (Staff Report). The report drew a link between privacy and antitrust laws: "The persistent collection and misuse of consumer data is an indicator of market power in the digital economy." Staff Report at 51 (citing Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1687 (2013)).

The Staff Report led to a legislative effort to crack down on technology companies and ultimately resulted in a bipartisan rollout of a package of bills squarely aimed at large technology companies. The package advanced through committee in the House but is still awaiting a vote. See Press Release, House Comm. on the Judiciary,

Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation (June 24, 2021). Recently, House Democrats released a proposal as part of President Biden's Build Back Better agenda that would provide the FTC with \$1 billion to set up a bureau dedicated to privacy and data protection. While its future is uncertain amid budget reconciliation negotiations, it underscores Congress's renewed focus on and commitment to data privacy-related issues.

FTC and Privacy

The FTC regulates consumer privacy and data protection under §5 of the FTC Act, which gives the agency authority to bring enforcement actions against unfair and deceptive practices. 15 USC §45(a). In the early days, unfair and deceptive practices typically involved false or misleading claims as to how a company handled consumer data, but privacy enforcement has evolved into "a body of standards that seek to protect consumers' reasonable expectations of privacy." Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, Yale L.J. Forum, 647, 652 (Jan. 18, 2021) (Douglas). In addition to §5, the agency is charged with enforcing a number of privacy laws, including the Gramm-Leach Bliley Act, CAN-SPAM Act, Children's Online

Privacy Protection Act, and the Fair Credit Reporting Act. One provision of President Biden's wide-ranging July 2021 executive order, which outlined a "whole of government" approach to promoting competition, encourages the FTC to crack down on "unfair data collection and surveillance practices that may damage

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competition, consumer autonomy, and consumer privacy" in order to "address persistent and recurrent practices that inhibit competition." Executive Order on Promoting Competition in the American Economy, WhiteHouse.gov, §5(h) (i) (July 9, 2021).

A New Direction

In the recently issued FTC Report to Congress on Privacy and Security, the FTC indicated a shift in how the FTC views—and plans to approach—privacy issues moving forward. See Fed. Trade Comm'n, Report to Congress on Privacy and Security (Sept. 13, 2021) (Privacy Report).

The Privacy Report highlights four areas in which the FTC plans to focus its efforts, including "integrating competition concerns" into privacy and data security issues, remedies, digital platforms, and algorithms. *Id.* at 3-6.

Speaking specifically to the intersection between antitrust and privacy issues, the Privacy Report warns that "violation of consumer protection laws may be enabled by market power, and consumer protection violations, in turn, can have a detrimental effect on competition." *Id.* at 4. Chair Khan is expected to use §5's unfair competition clause to turn up the heat on antitrust enforcement, but a new perspective under which the FTC views its privacy enforcement role raises some interesting issues and implications for antitrust law, particularly where the FTC seeks "competition-based remedies" in consumer protection cases. *Id.* Unsurprisingly, the Commissioners disagree over this approach. Chair Khan's statement highlighted the connection, emphasizing that "concentrated control over data has enabled dominant firms to capture markets and erect entry barriers." Press Release, Fed. Trade Comm'n, Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021). But on the other side of the political spectrum, Commissioner Phillips

explained that the report “overstates the synchrony between competition and privacy.” Press Release, Fed. Trade Comm’n, Dissenting Statement of Commissioner Noah Joshua Phillips (Oct. 1, 2021). Though we do not know much about Bedoya’s approach to antitrust enforcement, we can expect that his privacy background will shape how he views competition issues and appropriate remedies.

Privacy and Antitrust

With a renewed emphasis on the overlap between these two policy areas, we can expect to see privacy concerns and considerations raised more often in enforcement actions. But just how privacy applies to antitrust enforcement in practice remains to be seen. Tension between antitrust and privacy can arise when their goals do not align. Privacy goals often seek to limit the sharing and use of consumer data, for example, while the goals of increased competition may seek to expand such information sharing. See Douglas, *supra*, at 660-61, 668.

The Staff Report states that “[a] firm’s dominance can enable it to abuse consumers’ privacy without losing customers,” Staff Report at 52, but efforts to protect consumer privacy to the detriment of other companies have faced setbacks in court. In *hiQ Labs v.*

LinkedIn, 938 F.3d 985 (9th Cir. 2019), LinkedIn sent hiQ a cease and desist letter to prevent hiQ from collecting and using data from “publicly available LinkedIn member profiles.” 938 F.3d at 989, 992. In response, hiQ sued LinkedIn alleging violations of California’s Unfair Competition Law. See Complaint, *hiQ Labs v. LinkedIn*, No. 3:17-cv-03301-EMC (N.D. Cal. June 7, 2017), ECF No. 1. Though LinkedIn’s stated intention was to protect its customer’s data, the court was not persuaded by this privacy justification and ordered a preliminary injunction to restore hiQ’s access. See *hiQ*, 938 F.3d at 994.

Regulators have also started using diminished privacy as an example of consumer harm in antitrust enforcement actions. For example, in *United States v. Google*, 1:20-cv-03010-APM (D.D.C. 2021), ECF No. 94, the DOJ alleges that the anticompetitive effects of Google’s purported monopolization of internet search and search advertising include reduction in quality of privacy and data protection. Privacy considerations are being used both to criticize and justify conduct in antitrust issues.

Conclusion

While we expect Bedoya to be more vocal on consumer protection issues, particularly facial recognition and artificial intelligence,

he joins an FTC that has proven motivated to use the antitrust laws to crack down on big tech companies. If confirmed (as expected), Bedoya will join two Democratic appointed commissioners, Chair Khan and Commissioner Rebecca Kelly Slaughter, in pursuing an aggressive enforcement agenda from all corners of the agency. Chair Khan has been hard at work laying some of the groundwork, from agency structural reforms to the FTC’s recent commitment to approaching enforcement with the overlap between privacy and competition in mind. We can expect to see privacy considerations make their way into more antitrust enforcement actions and, though Bedoya has been relatively quiet on competition issues, his privacy-focused background could impact where the FTC ends up on some of these questions.