

June 16, 2021

Lina Khan is Confirmed to FTC and Named Chair

- The FTC now has a Democratic majority and the ability to take Commission action without Republican votes.
- The confirmation of Chair Khan brings to the FTC another voice for re-examining existing standards underlying U.S. antitrust law.
- Chair Khan and the two other Democratic commissioners have expressed support for the FTC to engage in antitrust rulemaking in addition to conducting adjudicative proceedings. This could result in a significant regulatory expansion.

Following a vote by the Senate on June 15 to confirm Lina Khan to be a commissioner of the Federal Trade Commission (FTC), President Biden designated her as chair of the Commission. This development has several near-term practical implications for the operation of the FTC and will likely have a longer-term impact on the FTC's substantive enforcement agenda.

An affirmative vote of the majority of commissioners is required to commence a formal action (such as an administrative proceeding or the filing of a complaint in federal court) and to take certain actions in ongoing investigations (such as issuance of compulsory process or approving a settlement). With Chair Khan's confirmation, there are now three Democrats and two Republicans on the Commission. Therefore, the FTC can avoid deadlocking along party lines if all five commissioners participate in a vote. (Prior to Chair Khan's confirmation, the Commission had two Democrats and two Republicans.) This means that the FTC will be able to initiate and advance matters which might have previously been held up had the commissioners split two-to-two. Indeed, in one notable [recent matter](#), the FTC was unable to take action to either block or modify by settlement a proposed merger due to a disagreement between the Democratic and Republican commissioners even though all of the commissioners believed the transaction was competitively problematic.

It should be noted that there may be a period in the medium term during which the Commission will again be evenly split along party lines. Commissioner Chopra, a Democrat, has been nominated to be Director of the Consumer Financial Protection Bureau but has not yet been confirmed by the Senate. He continues to serve on the FTC. Any gap between Commissioner Chopra's departure from the FTC and the confirmation of his successor could therefore result in a deadlocked Commission. In addition, there may be situations in which a commissioner may be recused from Commission votes.

The designation of Commissioner Khan as chair may result in personnel changes at the FTC. It is the Chair's prerogative to name bureau directors (whose appointments are voted on by the Commission) and make other staff appointments. The bureau chiefs oversee the career staff who run specific reviews and investigations. These positions are currently held by acting directors.

Chair Khan comes to the FTC from Columbia Law School, where she was an associate professor specializing in antitrust and competition law. Before that, she was counsel to the Subcommittee on Antitrust, Commercial and Administrative Law of the United States House of Representatives Committee on the Judiciary. While in this position, she was involved in the subcommittee's investigation of competition in digital markets. The 2020 [majority staff report](#) of this investigation made numerous legislative recommendations in addition to calling for "forceful antitrust enforcement." Among the recommendations

were: enacting restrictions on certain business practices of platforms found to be dominant, presumptive prohibitions against allowing dominant platforms from engaging in mergers or acquisitions, general merger-related provisions establishing “bright-line rules,” provisions “protecting nascent competitors” and provisions “overriding problematic precedents in the [antitrust] case law.” Some of these topics are addressed in [recently introduced legislation](#). Chair Khan had earlier [argued](#) in the *Columbia Law Review* for “structural separations” of platforms as a potential remedy for competitive harms that could, according to her, arise when companies “both operate a platform and market their own goods and services on it.” Such remedies – which, she notes, come with “challenges” and may have “costs and tradeoffs” – would generally prohibit this conduct.

Prior to her work in Congress, Chair Khan was legal adviser to Commissioner Chopra. In 2020, she and Commissioner Chopra published an [article](#) in *The University of Chicago Law Review* calling for the FTC to engage in antitrust rulemaking to supplement the development of antitrust law through judicial decisions. (Indeed in her *Columbia Law Review* article about separating platforms and commerce she suggested that the FTC could “implement a separations principle through rulemaking.”) Commissioner Slaughter has also [expressed support](#) for the FTC to engage in antitrust rulemaking and during her time as acting chair, the FTC began taking steps to increase the use of rulemaking. The arrival of Chair Khan may serve to accelerate these efforts, which could be a significant regulatory expansion.

More fundamentally, Chair Khan has [argued](#) that the focus of antitrust law on consumer welfare, which she says is “typically measured through short-term effects on price and output,” misses certain potential harms to competition including, she argues, “whether a company’s structure creates certain anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the structure of the market incentivizes and permits predatory conduct.” She made this argument in an influential *Yale Law Journal* note published in 2017 examining “market power in the modern economy” with a particular focus on platform economics. This article, which she wrote as a law student, gained her a great deal of prominence in the antitrust community.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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