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On May 16, 2022, eight months after President Joe Biden announced his intention to nominate Alvaro Bedoya to serve as a commissioner of the Federal Trade Commission, Bedoya was sworn in. The FTC includes five commissioners – only three of which can be from the same political party – and had been split 2-2 since October 2021.

During that time, FTC Chair Lina Khan had been limited in her ability to move her competition and consumer protection agendas, as she needed a third Republican commissioner to bring enforcement actions, issue new regulations and even commence studies.

Bedoya's arrival brings a likely reliable third vote to support Khan and could be a harbinger of a more aggressive FTC. Bedoya brings extensive experience in privacy issues at a time when the Democratic commissioners have signaled a deep interest in expanding the FTC's privacy enforcement and rulemaking. On the competition docket, Bedoya's vote could allow the majority to bring more aggressive cases based on novel theories of harm and potentially issue competition rules.

Bedoya primed to lead on privacy issues

Bedoya is an expert on digital privacy. Prior to his nomination, he served as the founding director of the Georgetown Law Center on Privacy and Technology, focusing on digital privacy issues, including facial recognition, disparate impact, and government surveillance. Bedoya also has considerable government experience, having served as chief counsel of the US Senate Judiciary Subcommittee on Privacy, Technology and the Law.

As a privacy, cybersecurity and civil rights expert, Bedoya is set to leverage his long history crafting policy and researching these topics to help dictate the FTC's consumer protection agenda and enforcement priorities. He has made clear that he believes privacy is a civil right. As Biden noted in his nomination statement, Bedoya's "research and advocacy focus on the idea that privacy is for everyone." Bedoya echoed this sentiment in his opening remarks before the Senate Commerce Committee, explaining that he sees privacy "not in terms of data, but in terms of people" who may be helped or harmed by companies' decisions around privacy. He brings a unique perspective to the FTC through his research on surveillance technology and algorithmic discrimination, including facial recognition, and may push the commission to expand enforcement in these arenas.

Khan recently provided a high-level road map for the FTC's approach to privacy issues, and Bedoya is likely to be tasked with implementing this road map. John Davisson, counsel at the Electronic Privacy Information Center, analogized that "what Chairman Khan is to antitrust, Alvaro Bedoya is to privacy, data protection, and civil rights."

Bedoya's impact on the FTC's privacy agenda

To date, the Biden administration's FTC has lacked a commissioner with Bedoya's privacy expertise, and that may have impacted the extent of privacy-related enforcement. There are signs that this could now shift. In just the first week after Bedoya's confirmation, the FTC issued a Children's Online Privacy Protection Act Rule Policy Statement, which made clear that education technology providers are under scrutiny. The Biden administration also issued an executive order in July 2021 pushing for rulemaking around private surveillance practices, a topic Bedoya has focused on in the past and could lead on at the FTC.

Perhaps most significantly, the reconstituted commission may soon embark on a project that would further strengthen the FTC's role as one of the nation's most active privacy and cybersecurity regulators. In December 2021, the commission signaled official interest for the first time in writing data privacy rules under Section 18 of the FTC Act. This would memorialize the commission's authority to enforce privacy and cybersecurity issues before Congress enacts a privacy law, and could add to the penalties available to the FTC for privacy infractions.

While noteworthy, rulemaking attempts are not surprising, given public advocacy by Khan and former

Commissioner Rohit Chopra to advance long-dormant FTC rulemaking processes. These efforts have redoubled since last year when the commission was stripped of its ability to obtain equitable monetary relief under Section 13(b) of the FTC Act. The privacy rulemaking notice cited the need "to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination." These are all issues where Bedoya has deep experience, and his confirmation makes it more likely that FTC privacy rules will move forward.

While Bedoya comes with a depth of experience on privacy law, his record is less established in other areas of the commission's consumer protection purview, such as credit and financial protection issues. Given his predecessor's progressive stance on most issues, Bedoya's vote may provide balance to the FTC's position on these issues. Indeed, Bedoya has been praised on Capitol Hill for his bipartisan approach, with former Hill colleague and current Republican-appointed FTC Commissioner Noah Phillips supporting Bedoya's appointment, describing him as "bright and thoughtful." Bedoya's extensive Beltway experience and connections could prove useful as the FTC determines a path forward.

Bedoya anticipated to support Khan's aggressive antitrust agenda

Bedoya's antitrust record is even less established, but early signals point to his support for Khan's robust antitrust enforcement agenda. He has already named veteran antitrust lawyers as attorney advisers who have been active in the FTC's merger challenges and in state attorneys general technology investigations, another sign that he agrees with broader enforcement.[1]

A third vote with Khan and Commissioner Rebecca Kelly Slaughter would break the deadlock of the past seven months. Under the last Democratic majority on the FTC, a number of policy initiatives moved forward over the dissents of the Republican commissioners. By contrast, in recent months, few votes appear to have occurred on major policy initiatives, and an effort to move forward with a study of contracting practices by pharmacy benefit managers failed. Merger challenges, which would have required at least three votes, have largely proceeded on 4-0 votes, signaling that close decisions did not proceed.

Perhaps the most significant action undertaken in this period has been the launch of merger guideline revisions. A Democratic majority will control the content and ultimate approval of these revisions, and could expand the FTC's antitrust enforcement efforts in a number of ways, including:

1. Increased merger and conduct challenges under novel theories of harm.
2. Increased post-closing challenges.
3. Section 5 rulemaking.

Both Khan and Slaughter have expressed more concern with preventing "Type 2 errors" at the commission – i.e., failing to block transactions that might harm competition – than blocking transactions that may not ultimately harm competition. The majority likely will approve more aggressive challenges to deals, and consider impacts on labor markets and privacy, as well as nascent and potential competition. As a result, the FTC staff is likely to find itself in court more often, particularly since Khan has said she is not afraid to lose some cases.

While the commission has issued pre-closing "warning letters" since soon after Khan became chair, actual post-closing challenges to deals have been limited to a select few firms. With a new majority, additional post-closing challenges may follow, including mergers that the Republican commissioners reportedly would not support challenging.

With Bedoya giving the Democrats a majority, they may also use rulemaking to classify certain conduct as an unfair method of competition. Under the last Democratic majority, the FTC withdrew its 2015 Section 5 Enforcement Principles, stating that the principles "abrogate[] the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute."

Bedoya's vote will be critical if the agency decides to issue competition-based regulations using the agency's Section 18 rulemaking. For example, Bedoya's vote may allow the commission to answer the call from Biden's July 2021 executive order directing the agency to use its rulemaking authority to declare unlawful noncompete

and other agreements that may limit worker mobility, corporate data collection and surveillance practices, and other industry-specific practices that some believe inhibit competition.

While the exact impact Bedoya will have on consumer protection and antitrust enforcement remains to be seen, one thing is clear: Bedoya's arrival positions the FTC to start making good on several policy promises and bring more aggressive enforcement actions across the board.

Cooley law clerk Kira Hessekiel and paralegal Nick Girard also contributed to this alert.

Notes

1. "Bedoya Selects Max Miller, Catherine Sanchez as Attorney Advisors," The Capitol Forum Vol. 10, No. 223 (May 16, 2022).

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