

## FTC Commissioner Bedoya confirmed; completes installation of Biden-appointed antitrust leadership

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Today, the Senate confirmed Alvaro Bedoya as the fifth FTC Commissioner, reinstating the agency's Democratic majority and setting the stage for increased antitrust enforcement and policymaking. Congress separately continues to evaluate a range of additional antitrust legislative measures on a bipartisan basis.

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Today, May 11, the Senate voted 51-50 to confirm Alvaro Bedoya as a Commissioner of the Federal Trade Commission, with Vice President Kamala Harris breaking the party-line tie. Commissioner Bedoya's confirmation reinstates the Democratic majority at the FTC and will likely accelerate agency enforcement and policymaking efforts by providing a crucial third swing vote.

Prior to joining the Commission, Commissioner Bedoya was the founding director of the Center on Privacy & Technology at Georgetown University, where he was also a Visiting Professor of Law. He also served as the Chief Counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. Commissioner Bedoya is a well-known critic of widespread digital surveillance, particularly the use of facial recognition software. He has asserted that privacy is a civil right, and his addition to the FTC will likely lead to increased scrutiny and new regulations concerning digital surveillance.

Commissioner Bedoya's confirmation is likely to have a wide-reaching impact. Since last October, the FTC has been in a 2-2 party-line deadlock, which has stalled action on a variety of competition issues. For example, many believe that the FTC would have challenged Amazon's acquisition of MGM, if the Democrats had the three votes necessary to challenge the merger. The Commission likely also would have voted out a market study of pharmacy benefit managers (PBMs). With the anticipated votes of three Democrats, the Commission is now expected to challenge more acquisitions, approve the PBM study, and engage in a number of additional market studies impacting a range of other industries, as FTC Chair Lina Khan indicated during the March 17, 2022 FTC Open Meeting. These studies, conducted under the Commission's Section 6(b) statutory authority,<sup>1</sup> allow the Commission to subpoena companies for information on certain business practices in order to inform agency decision-making and the broader public.

Commissioner Bedoya is also expected to provide the swing vote on Chair Khan's competition rulemaking initiatives, where the Chair has expressed interest in exploring "whether rules defining certain 'unfair methods of competition' prohibited by section 5 of the FTC Act would promote competition and provide greater clarity to the market."<sup>2</sup> In particular, the Commission is expected to explore competition rulemakings related to, "non-compete clauses, surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition."<sup>3</sup> The FTC's expansive competition rulemaking agenda will face significant hurdles, including likely court

challenges to agency authority.<sup>4</sup> If successfully adopted, however, competition rules are expected to increase Commission challenges to alleged anticompetitive behavior.

## Antitrust enforcers are optimistic that new antitrust legislation will be adopted on a largely bipartisan basis later this year

U.S. antitrust enforcement officials express optimism about the possibility of new antitrust legislation at both the federal and state levels. Assistant Attorney General for the Antitrust Division Jonathan Kanter recently supported the American Innovation and Choice Online Act, a bipartisan bill [introduced in 2021](#) which would create a cause of action against platforms that unfairly preference their own products. In a recent speech at the Charles River Associates' Conference in Brussels, AAG Kanter discussed the power of dominant digital platforms to discriminate against businesses that rely on them and to "self-preference"—behaviors that he argued function as exclusionary tools and discourage innovation by potentially competitive businesses. He expressed optimism that the law, if passed, would help "clarify the illegality of discriminatory tactics by dominant digital platforms."<sup>5</sup> The U.S. Commerce Department also announced its support for the bill. Representative Ken Buck (R-CO), who is one of the bill's sponsors and the ranking member of the House Judiciary Committee's antitrust subcommittee, believes the bill is nearly ready for a floor vote in the House and could be ready for President Biden's signature by the end of the summer. Another bill that was passed by the Senate Judiciary Committee—but still awaiting a full floor vote in both chambers—is the Open App Markets Act, which addresses discrimination in digital app stores. This bill also has strong support and was passed by the House Judiciary Committee in a bipartisan 20-2 vote in February. Nevertheless, the prospect of any legislation passing is unclear given political dynamics, particularly in an election year.

At the ABA's Antitrust Law Section's Spring Meeting ("Spring Meeting") last month, Terrell McSweeney (a former FTC Commissioner) and Slade Bond (the Chief Counsel for the House Judiciary Committee's antitrust subcommittee) both confidently predicted that Congress would pass legislation to raise merger filing fees. The current proposal, which has already passed the Senate and has been introduced in the House,<sup>6</sup> would substantially increase the filing fee on mergers valued above \$1 billion, which is currently \$280,000, according to the following schedule:

Current HSR fees		Proposed HSR fees	
Transaction value	Filing fee	Transaction value	Proposed filing fee
\$101 – 202 million	\$45,000	\$92 – 161.5 million	\$30,000
\$202 million – \$1.0098 billion	\$125,000	\$161.5 – 500 million	\$100,000
Above \$1.0098 billion	\$280,000	\$500 million – \$1 billion	\$250,000
		\$1 – 2 billion	\$400,000
		\$2 – 5 billion	\$800,000
		Above \$5 billion	\$2,250,000

At the Spring Meeting, Chair Khan outlined a "wish list" of additional legislative requests for Congress. These included a congressional override of a 2021 Supreme Court decision holding that the Commission does not have the ability to seek monetary redress in federal court,<sup>7</sup> a bill to establish more presumptions and bright line rules in antitrust law, and laws enhancing whistleblower protections for those who report antitrust violations. The likelihood of this further legislative action is uncertain.

State efforts to adopt new antitrust and privacy legislation add further complexity to this changing regulatory landscape. Most notably, the New York State Senate may soon vote on the Twenty First Century Antitrust Act.<sup>8</sup> This bill would substantially lower the pre-merger notification requirement in New York (capturing acquisitions valued as low as approximately \$10 million), which we expect will add costs and delays for even relatively small transactions. The law would also introduce a European-style “abuse of dominance” standard for assessing marketplace conduct, which would increase the risk of liability for companies that have 30-40% market share, and would significantly restrict the use of non-compete clauses.

State enforcers attending the Spring Meeting expressed support for the federal State Antitrust Enforcement Venue Act of 2021,<sup>9</sup> which has bipartisan support and is predicted by Rep. Buck, the bill’s sponsor in the House, to pass before the upcoming fall elections. If passed, the bill would prevent state antitrust enforcement actions from being joined in multidistrict litigation outside of their home state, with the result that companies could face duplicative lawsuits brought in multiple different jurisdictions.

State legislatures also continue to advance privacy legislation. California, Colorado, Virginia, and Utah were the first four states to pass legislation aimed at protecting consumers’ privacy rights, and another 12 states are actively considering comprehensive privacy legislation. Should states continue to legislate actively in these areas, companies will face increased regulatory complexity, additional compliance costs, and uncertainty about future enforcement by states, including in ways that may diverge from federal enforcement practices.

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- <sup>1</sup> These studies, conducted under the Commission's Section 6(b) statutory authority, allow the Commission to subpoena companies for information on certain business practices in order to inform agency decision-making and the broader public. FTC Act § 6(a), 15 U.S.C. § 46(a).
- <sup>2</sup> Federal Trade Commission, *Statement of Regulatory Priorities*, Dec. 10, 2021, available at [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FTC.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf).
- <sup>3</sup> *Id.*
- <sup>4</sup> Dissenting Statement of Commissioner Christine S. Wilson, Annual Regulatory Plan and Semi-Annual Regulatory Agenda, Dec. 10, 2021 ("After the passage of Magnuson-Moss, it is unclear whether the FTC even has substantive competition rulemaking powers."), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1598839/annual\\_regulatory\\_plan\\_and\\_semi-annual\\_regulatory\\_agenda\\_wilson\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf).
- <sup>5</sup> Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference (Mar. 31, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference>.
- <sup>6</sup> United States Innovation and Competition Act of 2021, S.1260, 117th Cong. (2021); Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021).
- <sup>7</sup> *AMG Capital Management, LLC v. FTC*, 910 F. 3d 417 (2021). See also Davis Polk's previous [Client Update](#) on the case.

<sup>8</sup> Twenty First Century Antitrust Act, S.933A, 2021 State S., 2021-2022 Leg. Sess. (N.Y. 2021).

<sup>9</sup> State Antitrust Enforcement Venue Act of 2021, S.1787, 117th Cong. (2021).