

5 Issues a Biden-Era FTC is Likely to Prioritize

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With Inauguration Day less than a month away, President-elect Joe Biden has the opportunity to quickly change the trajectory of enforcement in tech, privacy and consumer protection throughout the economy.

Biden will be able to name a new chairperson of the Federal Trade Commission by designating one of the FTC's two Democrats as the chair.

The FTC chair has enormous ability to direct the FTC's investigations and policy work, without the necessity of a formal FTC vote.

As a result, enforcement priorities will shift quickly. And two candidates – Commissioners Rohit Chopra and Rebecca Kelly Slaughter – have been outspoken in the changes they would like to make.

As outlined below, five key areas illuminate likely changes at the FTC under a new chairperson.

What Happens on Process?

The president has the ability to name the chair^[1] of the FTC from among the commissioners, who serve staggered terms.

Currently, Republicans have a 3-2 majority, led by FTC Chairman Joseph Simons, though there has been speculation that Simons will step down, which would leave the agency with a 2-2 split.

The chairperson has authority over administration of the FTC as a practical matter, picking bureau directors and certain other key positions, and directing priorities on investigations and policy

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initiatives.

While any enforcement action or settlement ultimately requires a majority FTC vote, plenty of activity can occur prior to that final vote.

Top Five Changes We'll See in the Biden Administration

The current FTC under Simons has been aggressive in bringing enforcement actions, but even so, the Democratic commissioners have signaled that they will push the FTC in new areas.

1. A Push for Monetary Relief, Even in Privacy Cases

The FTC does not usually seek monetary relief for first-time privacy and data security violations, outside of specific areas like children's privacy. But that could change in the next administration.

Commissioners Slaughter and Chopra have indicated they will be more aggressive in trying to find legal theories to support monetary relief, such as disgorgement of gains from allegedly deceptive business practices.[2]

There are hurdles to this approach, including challenges to the FTC's authority to seek this kind of relief at the U.S. Supreme Court;[3] the difficulty in quantifying any consumer harm in many cases particularly those on privacy, and the departure of this approach from decades of previous practice.

Yet signs point to a new chair instructing staff to at least pursue these legal theories in hopes of a majority of the commission will eventually support greater monetary relief.

2. Seeking Individual Liability

Chopra and Slaughter have been outspoken in arguing that individual corporate leaders should be held liable in cases involving alleged misconduct by their companies.[4]

Even under a Republican FTC, there has been a trend of naming individuals in cases involving relatively smaller entities.

Moreover, staff can push for discovery from corporate individuals even if they are not ultimately named – though arguably it often does not advance the investigation.

While insisting on individual liability is likely to be a lightning rod and impediment to settlement of matters that might otherwise be resolved, a new FTC may demand more focus on whether individuals and even large, sophisticated companies should be personally named.

3. Pushing the Limits of Platform Liability

The current FTC has been aggressive in holding tech platforms liable for third-party activity. In the YouTube kids' privacy settlement for example, the chairman and a fellow Republican, Commissioner Christine Wilson, touted that the settlement "will change YouTube's business model going forward" and the FTC-ordered "obligation exceeds what any third party in the marketplace currently is required to do."^[5]

At least in the area of tech, commissioners on a bipartisan basis have been willing to push the boundaries of the law to impose obligations on companies. And notably, the Democratic commissioners dissented because they believed that settlement did not go far enough.^[6]

Under a new chair, the FTC is likely to continue to pressure companies it believes should be policing misconduct, particularly fraudulent conduct, that the agency believes a company should be able to control.

4. Raising Privacy Issues With Ad Targeting

In the past, the FTC has generally conceded that consumers benefit often from targeted advertising based on analysis of their online behavior, while emphasizing that consumers should have "notice and choice" about what kind of data they are sharing.

However, both Slaughter and Chopra have been much more skeptical of these benefits.

Slaughter has argued that consumers do not really meaningfully consent to wide data sharing because they are essentially unable to read lengthy and complex privacy policies, and Chopra has compared behavioral advertising models to mass surveillance.^[7]

Indeed, the current FTC just issued orders for documents and information from a number social media companies, with three commissioners noting that "[n]ever before has there been an industry capable of surveilling and monetizing so much of our personal lives."^[8]

A new chair may push for development of a theory of consumer harm in this area, and stakeholders will need to be more explicit and forward-thinking in arguing that they are using consumer data in ways that consumers understand and provides benefits.

5. Scrutiny of Algorithms and AI

Both Democratic commissioners have been skeptical of algorithms that use consumer data to choose what kind of content consumers see, whether it be advertising or other kinds of content.

One potential issue is whether use of these algorithms results in certain kinds of discrimination, Slaughter has characterized as data abuses. Indeed, earlier this year Slaughter wrote:

Threats to consumers arising from data abuse, including those posed by algorithmic harms, are mounting and urgent. I think it is imperative for the FTC to take all action within its authority right now to protect consumers in this space.^[9]

And the use of algorithms is a key subject of the commission's latest inquiries to social media companies. Investigating use of algorithms will require a creative interpretation of existing FTC law – but more scrutiny is surely coming, and stakeholders will need to engage on the benefits of the technology while avoiding potential pitfalls in implementation.

Conclusion

The FTC faces an uncertain future in the near term, as there is significant congressional support for expanding its power in federal privacy legislation, though that remains at an impasse, even as its authority is being challenged in courts around the country.

Undeniably, the switch in FTC chairpersonship with the Biden administration will lead to a new trajectory in many important ways.

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[1] 15 U.S. Code § 41; FTC, Commissioners, Chairwomen, and Chairmen of the Federal Trade Commission: 1915-2018 (November 2018), available at https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart_november_2018_0.pdf. For example, President Trump designated then-Commissioner Maureen Ohlhausen as the Acting Chair in late January 2017.

[2] Dissenting Statement of Commissioner Rebecca Kelly Slaughter, Regarding the Matters of Sandpiper/PiperGear and Patriot Puck (April 17, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1514780/sandpiper_patriot_puck_slaughter_dissenting_statement-4-17-19.pdf; Dissenting Statement of Commissioner Rohit Chopra, Regarding Zoom Video Communications, Inc. Commission File No. 1923167 (November 6, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf.

[3] See *AMG Capital Management, LLC v. Federal Trade Commission*, Docket No. 19-508 (Supreme Court of the United States), docket available at <https://www.supremecourt.gov/docket/docketfiles/html/public/19-508.html>.

[4] Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.* (July 24, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *Regarding FTC v. Progressive Leasing* (April 20, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1571915/182_3127_prog_leasing_-

_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_0.pdf.

[5] Statement of Joseph J. Simons & Christine S. Wilson Regarding FTC and People of the State of New York v. Google LLC and YouTube, LLC (September 4, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_youtube_statement.pdf.

[6] Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Google LLC and YouTube, LLC (September 4, 2019), available at <https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rebecca-kelly-slaughter-regarding-youtube>; Dissenting Statement of Commissioner Rohit Chopra, In the Matter of Google LLC and YouTube, (September 4, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf.

[7] Dissenting Statement of Commissioner Rohit Chopra, In re Facebook, Inc. (July 24, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf;

[8] *Id.*

[9] Remarks of Commissioner Rebecca Kelly Slaughter, Algorithms and Economic Justice, UCLA School of Law (January 24, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf.