

Khan Goes From Commissioner To Chair In Under 6 Hours

By **Bryan Koenig**

Law360 (June 16, 2021, 9:22 PM EDT) -- In a single afternoon, Lina Khan was confirmed to the Federal Trade Commission, sworn in, and made its chair in a surprise move that sets up the Big Tech critic for a role she was not anticipated to play and has left observers wondering what to expect.

President Joe Biden didn't need to nominate Khan, a former Columbia Law School professor and U.S. House staffer, with the express declaration that she would be taking over from acting Chairwoman Rebecca Kelly Slaughter. But it is customary for presidents naming their first FTC chief to do so, and in going against that common practice, experts say Biden dramatically changed how lawmakers approached her confirmation process.

"There's a long tradition of incoming presidents deciding who they'd like as FTC chair and nominating that person as chair, and they have a hearing as chair, and they become chair," said Stephen Calkins, a former FTC general counsel who is now a professor at Wayne State University Law School.

Khan's U.S. Senate confirmation hearing in April, Calkins said, may have been very different had lawmakers known they were talking to the future chief of the agency, who not only votes with her fellow commissioners on whether to bring cases or settle them but also hires and shifts personnel, prioritizes projects, and steers the FTC on a day-to-day basis. If lawmakers, especially Republicans, feel they were hit with a bait-and-switch, observers say, it could create trouble for future nominations to the agency, as well as legislative reforms the FTC says are badly needed.

It's not clear if even Khan herself knew at the confirmation hearing that Biden would be naming her as chair, or that the president had made the decision to do so at the time. The White House had been all but silent on Khan after her nomination was announced in March and did not respond to a request for comment Wednesday. Khan also did not respond to an interview request.

The only certainty is that hours after the Senate tallied a 69-28 vote to confirm Khan a little after noon Tuesday, Sen. Amy Klobuchar, D-Minn., surprised attendees at a hearing of the Senate antitrust subcommittee by revealing that Khan would be serving as FTC chair. The agency itself made it official a little before 6 p.m. in a statement announcing Khan had been sworn in as chair.

The posting is a boon for longtime critics of an FTC that they say has been too permissive of potentially anti-competitive mergers and too forgiving of anti-competitive conduct. At least for the moment, there are now three reliably liberal Democrats on the five-member commission, expected to push a highly aggressive enforcement agenda and efforts for a broader overhaul of U.S. antitrust law that coincides with sweeping reform proposals in Congress.

"Lina Khan has proven herself as one of the fiercest and most effective critics of Big Tech. She not only understands the threat these monopolies impose, but how to utilize the tools of government to hold them accountable and break them up," Demand Progress Executive Director David Segal said in a statement welcoming Khan's designation as chair.

The expectations are also high for consumer protection under Khan.

"An FTC under Chair Khan will certainly pursue an aggressive consumer protection enforcement agenda (perhaps focused on tech and emerging marketing tactics) and, I suspect, will feel less burdened by existing precedent than under previous leadership," Christopher A. Cole, co-chair of the advertising and media group at Crowell & Moring LLP, said in an email.

As an example, Cole said Khan would likely steer the FTC "towards alternative penalty authorities" if lawmakers don't restore its ability to seek financial restitution in federal court, a power recently nixed by the U.S. Supreme Court.

"The potential is there for the commission to make a fairly dramatic leftward turn," Cole said.

FTC alumna Janis Claire Kestenbaum, now a partner with Perkins Coie LLP's privacy and security practice, said in an email that she anticipates Khan would make "greater effort to look for linkages between the agency's historically distinct competition and consumer protection missions."

Khan's rise to prominence started while she was still in law school with her "Amazon's Antitrust Paradox," published in the Yale Law Journal in January 2017. From there, Khan went on to posts in the office of fellow FTC Democrat Rohit Chopra — where the two wrote an article calling for the FTC to dust off its essentially unused rulemaking power for "unfair methods of competition" — and to the House antitrust subcommittee. While counsel to the committee, Khan helped pen a landmark report last year by Democratic staffers that was deeply critical of the dominance of Amazon, Apple, Facebook and Google.

"One of the positives for the antitrust practitioners (and the business community) is that at least the leadership's approach and decisions will be more predictable," Zarema A. Jaramillo, a Lowenstein Sandler LLP antitrust partner and managing partner of its Washington, D.C., office, said in an email.

But while Khan's views are well-known, she's just 32 years old, making her the youngest FTC chair in history, and is only four years out of law school with minimal executive branch or enforcer experience.

That means her leadership style remains a mystery that observers say creates considerable uncertainty on what to expect from the commission with her at the helm.

"There's really no history. We don't know what she's going to do," Constantine Cannon LLP partner and former FTC attorney Henry C. Su said.

Observers say they'll be watching in particular for the personnel decisions Khan makes, especially in naming chiefs for the FTC's bureaus of competition, economics and consumer protection.

Lisa Kimmel, a senior counsel in Crowell & Moring's antitrust group and an FTC alumna, said she is also looking for any actions that may have been held up by the 2-2 split between commission Democrats and Republicans before Khan broke the tie.

"It will be interesting to see if there is a flurry of activity over the next short period," Kimmel said.

When it was down a member after Trump-era FTC Chair Joseph Simons stepped down, the commission took a number of unanimous votes on consumer protection and antitrust enforcement actions, as well as merger challenges. But the split between Democrats and Republicans has also led to at least one instance of internecine gridlock when the commissioners issued competing statements at the close of 7-Eleven's purchase of Speedway, apparently unable to decide what action to take.

How long the new FTC majority will last is unclear. Chopra has been nominated to head the Consumer Financial Protection Bureau, although the Senate Banking Committee deadlocked on his confirmation in March.

His nomination isn't the only question mark hanging over federal U.S. antitrust enforcement: Almost five months into his administration, Biden still hasn't named a new chief for the U.S. Department of Justice's Antitrust Division, the longest any modern president has gone without nominating an assistant attorney general to run the unit.

Former FTC Chairman William E. Kovacic, now a professor at George Washington University Law School, said chances for a broad antitrust overhaul will now depend heavily on the peer Khan ends up with at the DOJ Antitrust Division.

At the FTC, whomever Biden picks to replace Chopra if and when he leaves will also determine whether Khan has the two supporting votes she needs to push for the kind of aggressive enforcement agenda the chair has called for, Kovacic noted.

"That's the crucial question that determines more than anything else your effectiveness," he said.

Despite being relegated back to a role as one commissioner out of five, Slaughter has so far shown no sign of leaving. After Khan was sworn in as chair, Slaughter said in a tweet Tuesday that she is "truly looking forward to a strong collaboration with [Khan] and the critical work ahead for the agency."

"It has been an enormous honor to lead the agency through this period of transition. I'm grateful to the dedicated staff for their hard work and very proud of what we have accomplished," Slaughter continued, pointing to initiatives such as a reexamination of how antitrust officials review pharmaceutical mergers as well as a review of the FTC's rulemaking powers, including in the antitrust arena.

The fate of those initiatives now fall to Khan, who also picks up responsibility for things like the FTC's case against Facebook — part of a much broader agency and legislative pushback against the power of online technology companies — and expected efforts to sharpen the commission's antitrust and consumer protection talons.

Kimmel said those sharpening efforts could prove a major test of what to expect from Khan as she encounters the practical realities that help constrain some of the FTC's enforcement actions and contributed to several recent high-profile losses in cases against Qualcomm and 1-800 Contacts.

"The FTC is ultimately constrained in what it can do by what the courts will allow," she said.

Kimmel said she will be watching how Khan balances her desire for more enforcement with practical constraints.

Congress too will likely be watching, eager to see the kind of Big Tech enforcement Khan's nomination promised, a promise that helped push through her confirmation as commissioner with broad bipartisan support. Sen. Roger Wicker, R-Miss., the Senate Commerce Committee's ranking Republican, specifically supported Khan in the committee largely because of her concerns about tech companies' expansive power. While Wicker said he remained concerned about an "overregulatory approach," he was nevertheless satisfied with Khan's focus on reining in major social media platforms.

If the last-minute switch a month later from commissioner to chair has ruffled feathers, congressional Republicans haven't said so yet, and no member of the Senate antitrust subcommittee responded to press inquiries Wednesday.

If lawmakers are upset by the change, there's nothing they could do directly. According to Kovacic, naming the agency's chair is entirely up to the purview of the president. While it's customary for presidents to pick a fresh nominee to serve as their first FTC chair and then pick subsequent chairs from among the commission's existing ranks, that tradition is not obligatory.

"The announced plans are completely within the authority of the president," Kovacic said.

Biden could even designate each commissioner as chair for a day, so long as they've already been confirmed by the Senate, Kovacic noted, adding, "It just takes signing a letter."

If lawmakers are incensed, however, there are ways they can make FTC enforcement difficult, and some long-standing ire for the agency has already spurred legislative proposals to strip the agency of its

antitrust powers and make the DOJ the country's sole competition enforcer.

Calkins of Wayne State noted that the FTC is currently pressing lawmakers to restore its ability to seek financial restitution in court, seeking a fix that is "broad and unconstrained" with plenty of discretion as to how the agency could use that authority. Congressional wrath could also compromise the confirmation of future nominees, Calkins noted.

"Having ill will doesn't help anybody," he said.

--Additional reporting by Christopher Cole and Andrew Kragie. Editing by Breda Lund.

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