



July 29, 2021

WHAT YOU NEED TO KNOW ABOUT **Lina Khan's FTC**

PRO POINTS

- **Progressive antitrust advocate Lina Khan now chairs the Federal Trade Commission** — the youngest person ever to hold the position.
- **Democrats hope to pursue more aggressive antitrust and privacy enforcement, and propose rules targeting unfair or deceptive business conduct such as non-compete agreements and illegal restrictions on repairs.**
- **The agency is likely to face a 2-2 deadlock after Democrat Rohit Chopra departs.** That may hamper some enforcement and rulemaking as the agency's two Republicans have opposed more aggressive cases, such as the antitrust suit against Facebook.
- **While Khan has lofty plans for the agency, the FTC faces significant constraints to its budget and personnel.**

HOW WE GOT HERE

When President Joe Biden nominated Lina Khan to the Federal Trade Commission in March, the 32-year-old antitrust advocate and Columbia Law professor was already on track to be among the agency's youngest ever commissioners — and one with an aggressive agenda for how the FTC should toughen its oversight of major tech companies like Amazon.

On June 15, hours after her Senate confirmation, the White House surprised many in Washington by announcing that Biden would elevate her to FTC chair. That made her the youngest ever to helm the 106-year-old agency.

In the weeks since, Khan has shaken up the agency, holding its first public commission meetings in decades while outlining an aggressive enforcement and rulemaking agenda.

Khan has identified several priorities for enforcement, including digital platforms and health care businesses such as pharmaceutical companies, pharmacy benefits managers and hospitals. She has also shown herself willing to buck the FTC's tradition of bipartisanship, moving forward with 3-2 party line votes to repeal what the Democrats view as outdated policies that limited the agency's ability to challenge mergers and problematic conduct.



The FTC's in-house court

Federal Trade Commission Chair Lina Khan and fellow Democratic Commissioner Rohit Chopra have called for the FTC to make greater use of its in-house administrative court when bringing antitrust or consumer protection cases, rather than filing suit in traditional federal courts. This process, which within the FTC is called a Part 3 proceeding, can give the commissioners a greater voice on the cases' legal issues. Here's how the in-house options works:

IF THE FTC SUSPECTS CORPORATE WRONGDOING:

1 Investigation

The FTC's staff investigates potentially illegal business conduct. The lawyers and economists conducting the probe often send subpoenas, document requests or interview employees to gather evidence.

Then the staff makes recommendations to the FTC's five commissioners, with the agency's lawyers outlining the evidence and legal considerations while the economists offer economic data. The commissioners vote on whether to file a complaint — and if so, where. A majority of commissioners must vote in favor before the agency files a complaint.



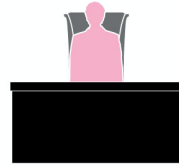
INVESTIGATION



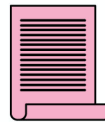
COMMISSIONERS VOTE ON WHETHER TO FILE COMPLAINT

2 Administrative trial

If the commissioners opt for an in-house case, FTC Administrative Law Judge D. Michael Chappell will hold a trial that is limited to 210 hours. As in a standard federal trial, the FTC staff will prosecute the case and the company can offer defenses. Chappell has 70 days to issue an initial written decision, which either side can appeal to the commission.



ADMINISTRATIVE LAW JUDGE
D. MICHAEL CHAPPELL

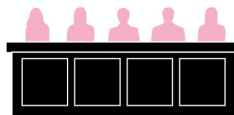


WRITTEN DECISION

AFTER THE JUDGE'S WRITTEN DECISION:

3 Appeal to the FTC

The commissioners hear oral arguments from FTC staff and the company on any disagreements with the initial decision, then issue their own written decision within 100 days.



COMMISSIONERS

4 Federal court appeal

A company can appeal the FTC's decision to a federal appellate court of its choice. Either the FTC or the company can further appeal that court's ruling to the Supreme Court.



FEDERAL APPELLATE COURT



SUPREME COURT

Sources: Federal Trade Commission, POLITICO reporting

WHAT'S NEXT

Khan and her Democratic colleagues have quickly put in place procedures that would make it easier for the agency to begin rulemakings and investigations.

The Democrats have pushed for the FTC to outline specific practices that violate the FTC Act's prohibition on unfair or deceptive business conduct — a step that would reshape the agency from its current mode of case-by-case enforcement to a more regulatory body. Khan has suggested that the FTC



target non-compete clauses in employment contracts, which prevent workers from switching jobs within the same industry, and illegal restrictions that manufacturers impose on customers' ability to repair their own equipment.

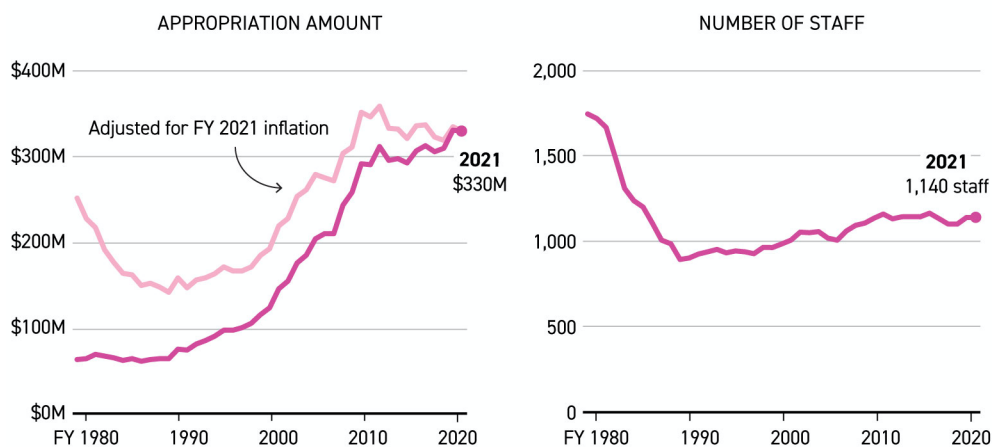
The FTC has also moved to make it easier for the agency's employees to open investigations into mergers or conduct by allowing them to seek permission from a single commissioner instead of requiring a vote from the full commission. That procedural change will make it easier for Khan and the Democrats to continue pursuing their priorities after the departure of Democratic Commissioner Rohit Chopra, who has been nominated to head the CFPB.

Biden has yet to nominate a fifth commissioner, which will leave the FTC deadlocked 2-2 once Chopra leaves, and the agency's two Republicans have opposed agency rulemakings and some of the FTC's more aggressive actions, such as its decision in December to file an antitrust suit against Facebook.

While Khan has aggressive plans for the agency, the FTC faces significant constraints to its budget and personnel. The agency has asked Congress for more funding, citing a growing need to take on privacy and antitrust issues raised by today's digital economy. The agency has fewer staffers to investigate and prosecute cases than it did in 1980, and its budget has increased only slightly since then, when accounting for inflation.

FTC budget, staffing haven't kept up

The Federal Trade Commission has seen its inflation-adjusted budget rise by only about a third since before the Reagan era, despite taking on huge new challenges like digital privacy and data security. The FTC — the United States' primary consumer protection agency and one of its two antitrust enforcers — also has fewer employees than in 1980.



Note: After 2003, staff include reimbursable employees.

Sources: Federal Trade Commission, Bureau of Labor Statistics



POWER PLAYERS

- **Lina Khan:** A progressive antitrust advocate and former aide to the House Judiciary antitrust panel, Khan took over as the FTC chair on June 15.
- **Rebecca Kelly Slaughter:** A former aide to Senate Majority Leader Chuck Schumer (D-N.Y.), Slaughter served as the FTC's acting chair for six months, during which time she pushed the agency to start new rulemakings and take aggressive action on mergers.
- **Noah Phillips:** A former aide to Texas Republican Sen. John Cornyn, Phillips is a stickler for process. He has dissented on a number of FTC enforcement cases, both alone or in conjunction with his fellow Republican commissioner Christine Wilson.
- **Christine Wilson:** A Republican and former vice president for Delta, Wilson takes a conservative view on merger challenges and antitrust cases but is a strong supporter of privacy enforcement.
- **Jen Howard:** The chief of staff to FTC Chair Lina Khan, Howard previously worked for Democratic Commissioner Rohit Chopra after stints at other federal agencies.