

Lina Khan's Privacy Priorities – Time for a Recap

March 16, 2022



LISTEN TO THIS BLOG POST ON THE
AD LAW ACCESS PODCAST

Rumors suggest that Senator Schumer is maneuvering to confirm Alvaro Bedoya as FTC Commissioner sooner rather than later, which would give FTC Chair Khan the majority she needs to move forward on multiple fronts. One of those fronts is consumer privacy, for which Khan has announced ambitious plans (discussed [here](#) and [here](#)) that have stalled for lack of Commissioner votes. With Bedoya potentially on deck, now seems like a good time to recap those plans, as they might provide clues about what's in the pipeline awaiting Bedoya's vote. We focus here on three priorities Khan has emphasized in statements and interviews since becoming Chair.

Privacy Rulemakings

At the top of the list are privacy rulemakings, which could create baseline standards for the entire marketplace and enable the FTC to obtain monetary relief in its cases. (Recall that the FTC has limited authority to obtain money in its cases, especially post *AMG*, but that it can seek penalties or redress when it's enforcing a *rule*.) Last December, Khan issued a [Statement of Regulatory Priorities](#) detailing the privacy rulemakings she wants to initiate or complete, including:

- New rules to halt “abuses stemming from surveillance-based business models,” which could curb “lax security practices” and “intrusive surveillance,” “ensur[e] that algorithmic decision-making does not result in unlawful discrimination,” and potentially limit the use of “dark patterns” to manipulate consumers. (Yes, this is an ambitious one.)
- Possible amendments to existing privacy rules – including the Children’s Online Privacy Protection Act (COPPA), the Health Breach Notification Rule, the Safeguards Rule (breach notification requirements), and the FACTA Identity Theft Rules (including the Red Flags Rule).
- Possibly other new rules to “define with specificity unfair or deceptive acts or practices.”

Of note, absent Congressional legislation, any new privacy rules would need to follow the arduous process detailed in Section 18 of the FTC Act (referred to as “Mag-Moss” rulemaking). With Bedoya on board, the FTC can start these rulemakings, but they could still take years to complete, as we discuss [here](#).

By contrast, the FTC can amend its existing privacy rules under the more manageable Administrative Procedures Act. Further, it's already in the midst of rule reviews for all of the rules listed above (including COPPA's, which started back in 2019). As a result, the FTC could act on these rules relatively quickly once Bedoya is on board.

Focus on Platforms

Khan has also made clear that she intends to focus on the tech platforms – which she has described as “[gatekeepers](#)” that use their critical market position to “dictate terms,” “protect and extend their market power,” and “[degrade privacy without ramifications.](#)” In a [statement](#) and accompanying [staff report](#) last September, Khan stated that such efforts would include:

- Additional compliance reviews of the platforms currently subject to privacy orders (Facebook, Google, Microsoft, Twitter and Uber), followed by order modifications and/or enforcement as necessary.
- As resources permit, examining the privacy implications of mergers, as well as potential COPPA violations by platforms and other online services – COPPA being of special importance as children have increasingly relied on online services during the pandemic. (Relatedly, report language accompanying the omnibus budget just signed into law directs the FTC to prioritize COPPA enforcement.)
- Completion of the pending Section 6(b) study of the data practices of the [social media companies and video streaming services](#), which was initiated in December 2020.

So far, we’ve seen limited action from the FTC on platforms (at least on the consumer protection side). Last October, the FTC issued a 6(b) report on the privacy practices of [ISPs](#), but largely concluded that the topic should be addressed by the FCC. Then, in December, the FTC announced a settlement with online ad platform [OpenX](#) for COPPA violations. Given Khan’s bold plans in this area, it seems likely that there are matters in the pipeline awaiting Bedoya’s vote.

Stronger Remedies

The third major area that Khan has highlighted is obtaining stronger remedies in privacy cases – that is, considering “[substantive limits](#)”, not just procedural protections that “sidestep[] more fundamental questions about whether certain types of data collection and processing should be permitted in the first place.” By this, Khan is referring to deletion of data and algorithms, bans on conduct, notices to consumers, stricter consent requirements, individual liability, and monetary remedies based on a range of theories post *AMG*.

As to this priority, the FTC has moved ahead where it can (even prior to Khan’s tenure), often using strategies that have been able to garner unanimous votes. For example, its settlements with photo app [Everalbum](#) (for alleged deception) and [WW International](#) (for alleged COPPA violations) required deletion of consumer data and algorithms alleged to have been obtained illegally. Its settlement with fertility app [Flo Health](#) (for alleged deception about data sharing) required the company to notify affected consumers and instruct third parties that received their data to destroy it. The FTC also has alleged rule violations where possible, and partnered with other agencies to shore up its ability to obtain monetary relief.

But we’ve also seen signs of a more combative approach that could increase when Khan has the votes to push it forward. Of note, last September, the FTC issued an aggressive [interpretation](#) of the Health Breach Notification Rule, purporting to extend the rule’s reach (and thus its penalties) to virtually all health apps, even though a rule review was already underway. Further, FTC staff are making strong, often unprecedented demands for penalties, bans, and individual liability in consent negotiations. It’s even possible, based on an article written by former Commissioner Chopra and now-BCP Director Sam Levine, that the agency could attempt to use penalty offense notice letters

(explained [here](#)) to lay the groundwork for penalties in privacy cases under Section 5(m)(1)(B). However, given the paucity of administratively litigated privacy cases (a key requirement under 5(m)(1)(B)), this would be very aggressive indeed.

* * *

For more on Khan's privacy plans, you can read our earlier blogposts ([here](#) and [here](#)), as well as the various FTC statements and reports cited in this post. Or, if you like surprises, you can simply wait for Bedoya to be confirmed and see what happens. Needless to say, things should speed up at the FTC when he arrives.



Privacy Priorities for 2022: Tracking State Law Developments

Thursday, March 24, 2022 at 4:00pm ET/ 1:00pm PT [Register Here](#)

In the absence of a federal privacy law, privacy has been at the forefront of many states' legislative sessions this year:

- Utah is poised to be the fourth state to enact comprehensive privacy legislation
- Florida came close to passing legislation when the State House advanced privacy legislation by a significant margin
- Other state legislatures have privacy bills on their calendars

Against this backdrop, state attorneys general continue to initiate investigations into companies' privacy practices, and state agencies continue to advance privacy rulemakings under existing law.

Please join us on Thursday, March 24 at 4:00 pm ET for this webinar to learn about the latest developments in state privacy law, make sense of these developments and understand their practical impact.