

What to Expect at the FTC Pre and Post-Inauguration

John E. Villafranco, Donnelly L. McDowell

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With the election decided, the speculation has begun. In our area of the law, that means a number of things, including what will happen at the FTC – with the current Commission and Chair Khan, with recently announced rules and those forthcoming, and with pending and future investigations, amongst other issues. Here are some of the questions that we have been fielding:

When Will Lina Khan be Replaced? Will She Hold Over? While Chair Khan’s commissioner term expired in September 2024, she could remain on the Commission until a replacement commissioner is confirmed (even after a new acting chair has been named), or until Trump attempts to remove her for “inefficiency, neglect of duty, or malfeasance in office.” That said, historically, the chair resigns before inauguration and it seems likely that Chair Khan will do the same. It is possible that she resigns before then to return to Columbia University for the Spring semester, although we think it is more likely that she stays on closer to inauguration to see through as much of her agenda as possible.

Some are speculating that Chair Khan will stay on and remain as a commissioner after inauguration and until a new commissioner is seated. This speculation likely stems from comments made by Vice President-Elect JD Vance, who has taken a critical stance on big tech and expressed support for Khan’s efforts to rein in the power of large technology companies. While possible, this seems unlikely, given the hostile reception that Khan has received from some Republican Members of Congress and staffers. Even if Khan did attempt to holdover into the new administration, given that her term has expired, President-Elect Trump and the Republican-controlled Senate could remove her by appointing and confirming a new commissioner, or far less likely, by attempting to remove her for cause.

Who’s Next? And When? Once Trump is sworn in on January 20, he will have the authority to designate a new chair among one of the sitting commissioners, either as acting chair or as permanent chair. That is an important step because the chair holds executive authority over FTC staff and operations. Most of the Commission’s day-to-day activities, including opening and closing investigations, may be done without a vote of commissioners.

Post-inauguration, Trump will also have the authority to nominate a new commissioner to fill Khan’s current expired slot, who would need to be confirmed by the Senate. That commissioner could or could not be the new chair. Republican control of the Senate means that confirmation of a new commissioner to replace Khan will likely move quickly. In his first term, Trump did not nominate Joe Simons until October 2017 and he was not sworn in until May 1, 2018 – almost 15 months post-inauguration. We do not expect the Trump administration to wait that long this time. Regarding possible chairs, there are rumors that both current Republican Commissioners (Melissa Holyoak and Andrew Ferguson) are under consideration, as well as Gail Slater (an economic advisor to Vance),

former Commissioner Christine Wilson, and former Congressman Mark Jamison, who has advocated for less regulation in the tech sector. Of course, it would not be surprising if the eventual Chair is someone no one expects at this point.

What About the Bureau Directors? Historically, the Bureau Directors also resign prior to or shortly after the inauguration of a newly-elected President from the opposing political party. This may happen at the same time or before or after the Chair resigns. For example, Chair Edith Ramirez resigned on January 13, 2017 and BCP Director Jessica Rich left on February 17, 2017 and was replaced by Thomas Pahl as Acting Bureau Director the next day. Similarly, Joseph Simons and his Bureau Director Andrew Smith resigned on January 19, 2021, and Rebecca Slaughter and Daniel Kaufman were named Acting Chair and Acting Bureau Director, respectively, the same day. This means that it is likely that Sam Levine will be replaced with an Acting Bureau Director around the same time that Khan steps down.

Is it Possible the FTC Will Become Part of DOJ? There is some speculation that President Trump might try and do away with the FTC as an independent agency and roll it into the Department of Justice. Senator Mike Lee and the House Judiciary like the idea, but they have limited their push to antitrust, and it would require legislation. While it is again possible that this could occur, there is likely to be opposition in Congress, given how a move like this would divest certain committees of their oversight authority. An easier path would be to shift the FTC's enforcement priorities, or for competition matters, direct the DOJ's Antitrust Division to handle a greater share of industries in the agencies' overlapping jurisdiction.

How Will the Change in Administrations Affect Ongoing Investigations? Given Trump's focus on deregulation, and the current Republican commissioners' focus on ensuring that the FTC does not exceed its authority, ongoing investigations may be re-evaluated. The new administration may also seek to halt or modify the course of investigations that are perceived as overly aggressive. Additionally, the leadership shift could result in a re-evaluation of the way investigations are conducted, which could affect outcomes and timelines.

As far as what is currently in the pipeline, it is possible that the current FTC majority may attempt to accelerate investigations that are nearing completion prior to the inauguration, especially for cases that reflect policy priorities. The objective would be to complete priority initiatives before a potentially deregulatory administration takes office. We saw a similar push at the end of Obama's second term. There also are logistical and other challenges with such an approach, and not all investigations, even if they involve priority issues, will follow that path.

What about Proposed and Pending Rules? It is possible, if not likely, that the current FTC will attempt to accelerate to the finish line certain rules that are nearing completion. Others likely have too much ground to cover to complete prior to inauguration and thus may be put on ice until Staff can determine how best to proceed under a new administration (if at all). The current FTC's strategy is complicated by the Congressional Review Act, which allows Congress to nullify rules promulgated within a "lookback period" that is likely to date back to around August 1 (the date is TBD based on the number of days that Congress is in session). We plan to cover recently proposed and pending rules in a separate post soon.

What Can We Expect from a Trump FTC? While new leadership is likely to support traditional enforcement avenues, they will be less likely to test novel theories of statutory interpretation and expanded regulation through rules and guidance. We have seen this signaled in dissents from the two sitting Republican Commissioners as we previously discussed [here](#). We expect the FTC under

Trump to prioritize rolling back or revising regulations that are viewed as exceeding the Commission's authority and/or are burdensome to businesses. Work on proposed rules will likely be delayed, modified, or even scrapped altogether.

As a point of reference, while Trump has attempted to distance himself from Project 2025 at times, it outlines specific proposals aimed at reforming the FTC to align with a deregulatory agenda. It emphasizes "streamlining the regulatory process" and aims to "rein in the excesses of the administrative state," which includes reducing the FTC's enforcement powers. The project suggests limiting the agency's authority to investigate companies, arguing that "excessive regulation stifles innovation and economic growth." It also advocates for a focus on "promoting competition without overreach," indicating a shift away from aggressive enforcement.

It would be a mistake, however, to expect the agency to go dark these next four years. During the last Trump administration, the FTC was active, but the focus shifted to fraud prevention and core deception cases. Expect the Division of Marketing Practices to remain very much engaged. We also expect the FTC to continue to be aggressive in regulation of tech and social media companies, particularly in connection with content moderation and deplatforming, as well as telemarketing and certain privacy initiatives.

We hope that you will join our privacy team for a webinar on **Privacy and AI in the Trump 2.0 Era** on Wednesday, November 13, from 2:00 - 3:00 p.m. ET. You may register [here](#). We will also have a lot more to say on all of these topics at a soon-to-be announced co-sponsored event with BBBNP on January 29, 2025, on consumer protection and privacy in the new administration.