

NEW FTC COMMISSIONER'S POTENTIAL IMPACT ON HEALTHCARE ANTITRUST REVIEW



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Alvaro Bedoya's confirmation has restored a Democratic majority on the Federal Trade Commission. Under a Democratic majority, FTC Chair Khan has the ability to continue to further test novel theories of harm in both merger and non-merger matters generally and in healthcare in particular. Additionally, Commissioner Bedoya's background in privacy and technology could further broaden the scope of both merger and non-merger investigations. We consider the potential scope of these novel theories of harm as applied to healthcare transactions and conduct.

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I. INTRODUCTION

On May 11, 2022, Alvaro Bedoya was confirmed by the U.S. Senate to the Federal Trade Commission. He was sworn in as a Commissioner on May 16. Commissioner Bedoya joins the Commission from Georgetown Law, where he was a professor and the Founding Director of the Center on Privacy & Technology. He previously served as Chief Counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology, and the Law. Commissioner Bedoya is widely recognized as an expert on technology and privacy issues and has written extensively about the racially disparate effects of surveillance and data collection, including the impact of police facial recognition technology.

The addition of Alvaro Bedoya to the Commission likely will empower FTC Chair Khan to pursue even more aggressive antitrust enforcement in the healthcare industry and to further develop and utilize novel theories of harm in healthcare markets.

II. POTENTIAL EXPANDED THEORIES OF ANTITRUST HARM

Since the departure of Commissioner Rohit Chopra on October 12, 2021, the Commission had been operating with two Republican and two Democratic Commissioners. While cases that were subject to tie votes and, therefore, ultimately not brought by the Commission are not reliably reported publicly, the lack of a majority likely prevented the Commission from pursuing at least some claims that it could have pursued with a Democratic majority.

For example, in February 2022, the FTC voted 4-0 to issue a complaint challenging the proposed merger of Lifespan and Care New England. By way of background, Lifespan and Care New England are the two largest general acute care hospital systems in Rhode Island. The FTC alleged that the combination would result in market shares in excess of 70 percent for inpatient general acute care and behavioral health services in Rhode Island and certain surrounding Massachusetts counties.² The parties abandoned the transaction shortly after the FTC filed its suit to block the proposed transaction.³

The face of the complaint outlines the typical allegations of reductions in product and service line competition we have seen in hospital mergers for years. What makes this case particularly illustrative, however, is the Commissioner statements accompanying the issuance of the complaint. Concurring statements issued alongside the complaint, however, demonstrate how the two Democratic Commissioners would have filed a case with expanded theories of harm, but lacked the votes to obtain a majority to do so. The then-two Democratic Commissioners — Chair Khan & Commissioner Slaughter — wrote separately to explain that they also “would have supported an allegation that the effect of the proposed transaction may be to substantially lessen competition in a relevant labor market in violation of the Clayton Act.”⁴ The two Republican Commissioners — Commissioners Phillips & Wilson — explained their view that the evidence did not support the labor market allegations.⁵ Given this 2-2 divide within the Commission, the complaint was issued without the labor market allegations.

This *Lifespan/CNE* complaint and accompanying Commissioner statements provides a potential glimpse into the future of hospital mergers at the FTC. With the addition of Commissioner Bedoya last week, Chair Khan has the Democratic majority and accompanying votes to include these labor market and other novel theories of harm in Commission enforcement actions.⁶

This tie vote deadlock has also extended into Commission industry studies. On February 17, 2022, the Commission deadlocked on a vote to study the impact of pharmacy benefit managers (“PBMs”) on independent and specialty pharmacies.⁷ PBMs are companies that communicate be-

2 Complaint ¶15, *In the Matter of Lifespan Corp., et al.*, F.T.C. Dkt. No. 9406 (Feb. 17, 2022), at https://www.ftc.gov/system/files/ftc_gov/pdf/d_9406_lifespan-cne_p3_complaint_public_redacted.pdf.

3 See Statement Regarding Termination of Attempted Merger of Rhode Island's Two Largest Healthcare Providers (Mar. 2, 2022), at <https://www.ftc.gov/news-events/news/press-releases/2022/03/statement-regarding-termination-attempted-merger-rhode-islands-two-largest-healthcare-providers>.

4 Concurring Statement of Commissioner Slaughter and Chair Khan Regarding *FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System* (Feb. 17, 2022), at https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

5 Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding *Lifespan Corporation and Care New England Health System* (Feb. 17, 2022), at <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/concurring-statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-lifespan>.

6 See Amanda Wait & Mark Angland, Data Privacy Expert Confirmed to Federal Trade Commission, <https://www.nortonrosefulbright.com/en-us/knowledge/publications/404a-ca20/data-privacy-expert-confirmed-to-federal-trade-commission>.

7 See Samantha Liss, FTC Fails to Get Enough Votes to launch study into PBM Practices (Feb. 17, 2022), at <https://www.healthcarediver.com/news/ftc-fails-to-get-enough-votes--study-pbm-practices/619060/>.

tween insurance companies, pharmacies, and drug manufacturers. PBMs are typically used to secure lower drug costs for insurers by negotiating with pharmacies and drug manufacturers. Pharmacy and patient advocacy groups, however, claim that some PBM practices contribute to prescription price increases and less competition in the market for prescriptions.⁸ Republican-appointed Commissioners Noah Phillips & Christine Wilson voted against the study, citing concerns about the study's design and questioning process.⁹ Although the claim was blocked when there were only four commissioners, we expect Commissioner Bedoya's confirmation to allow the Commission to pursue more healthcare investigations such as this going forward.

Importantly, we believe staff likely will include and expand upon innovative theories of harm in the review of hospital and other healthcare transactions, such as theories relating to vertical restraints, cross-market theories, and labor market theories.

A. Vertical Foreclosure

Vertical restraint theories of harm are based on the potential harms that may arise when mergers or agreements involve firms at different levels of a chain of production or distribution. Historically, antitrust enforcers have focused on so-called "vertical foreclosure" theories — i.e. could a firm foreclose competitors from a segment of either the upstream market for inputs, the downstream market for customers, or both. Since the 1982 Merger Guidelines, very few vertical mergers have been deemed anticompetitive. The 2020 Vertical Merger Guidelines reflected this lenient stance on vertical restraints. But on September 15, 2021, shortly after Chair Khan was confirmed, the Commission withdrew its approval of the Vertical Merger Guidelines. In the statement withdrawing the Vertical Merger Guidelines, Chair Khan and Commissioners Slaughter and Chopra suggested that the 2020 guidelines allowed for courts to give too much credit to the elimination of double marginalization and other procompetitive benefits of vertical mergers.¹⁰ On January 18, 2022, the Commission and the Antitrust Division of the Department of Justice ("DOJ") announced that the agencies would be drafting new horizontal and vertical merger guidelines.¹¹ These new guidelines will likely be more critical of vertical mergers.

B. Cross-Market Theory

Cross-market theories of harm arise from the merger of two companies in separate geographic markets. In healthcare antitrust, a cross-market merger would include a merger between hospitals that are located far enough away from each other that their service areas do not overlap. Under current antitrust jurisprudence, a merger must have an anticompetitive effect within the relevant geographic market to be deemed to violate Section 7 of the Clayton Act. While neither antitrust agency has ever challenged a merger on a cross-market theory, the cross-market theory of harm alleges that these mergers may increase hospitals' bargaining power when negotiating with health insurers that operate on a larger geographic market. We understand FTC investigating staff have pursued cross-market theories in multiple non-public healthcare investigations.

C. Labor Market Implications

Labor market theories of harm are a recent development that focus on the potential anticompetitive effects of wage-fixing and no-poach agreements. Wage-fixing agreements are agreements among employers to not compete for employees on terms of compensation, and no-poach agreements are agreements among employers to not recruit certain employees. Some of the earliest no-poach investigations were in healthcare contexts. The DOJ filed its first criminal charges for wage-fixing and no-poach agreements in late 2020 and early 2021 and there has been an increase in the number of investigations and criminal indictments concerning alleged wage-fixing or no-poach agreements in recent years. The Commission's September 15, 2021 statement explains that revised Merger Guidelines "should consider harms in labor markets, a topic not previously addressed in merger guidelines."¹²

Our antitrust team is seeing these theories appear in questions that are being asked in Second Requests and other investigations. While we have not yet seen many enforcement actions under these theories, these types of claims are more likely with a Democratic majority on the Commission.

8 See The Commonwealth Fund, Pharmacy Benefit Managers and Their Role in Drug Spending (April 22, 2019), at <https://www.commonwealthfund.org/publications/explainer/2019/apr/pharmacy-benefit-managers-and-their-role-drug-spending>.

9 See Samantha Liss, FTC Fails to Get Enough Votes to launch study into PBM Practices (Feb. 17, 2022), at <https://www.healthcarediver.com/news/ftc-fails-to-get-enough-votes--study-pbm-practices/619060/>.

10 Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

11 Statement of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.

12 *Id.* at 8.

D. Novel Theories Relating to Data Use and Rights

Chair Kahn has also suggested that the Commission should fully exercise all the legal authorities granted by Congress by using substantive rulemaking.¹³ The Commission has rarely used rulemaking as an enforcement tool, relying on the adjudication process to bring claims on a case-by-case basis. A Democratic majority on the Commission will likely broaden theories of harm and rulemaking powers.

Commissioner Bedoya's background in privacy and data may broaden the scope of both merger and non-merger investigations even further. In his confirmation statement, Bedoya focused on antitrust law enforcement against potential privacy concerns, such as smartphone geolocation technology.¹⁴ While his statement focused on privacy, he also suggested that the Commission should use enforcement to eliminate product and treatment scams related to COVID and opiate addictions.

Technology has become a vital part of all industries and companies, including healthcare industries. Commissioner Bedoya's confirmation will likely lead to a stronger focus on technology in antitrust reviews of healthcare industries. The focus on technology could have a different effect depending on the type of antitrust investigation. In a merger review investigation, the merging parties could see more questions regarding technologies used in their healthcare practices. The Commission staff could ask whether those technologies are also used by third-parties and how the merger might impact the parties' incentives to continue to allow third-party access to these technologies. The Commission will likely investigate how a merger may foreclose third-party or competitor access to healthcare technology and/or data.

In fact, we have already seen allegations relating to the use of data rights in a recent DOJ merger challenge. On February 24, 2022, the DOJ challenged UnitedHealth Group Inc.'s acquisition of Change Healthcare Inc. According to the DOJ's complaint, UnitedHealth operates "the largest health insurance company in the United States; a large network of physician groups, outpatient surgical centers, and other healthcare providers [...]; a pharmacy benefit manager (PBM) [...]; and a healthcare technology business that facilitates [...] the transmission, analysis, and review of health insurance claims."¹⁵ Change is an "independent supplier of technologies used by healthcare providers to submit health insurance claims."¹⁶ The complaint alleges that the acquisition is anticompetitive because it would give UnitedHealth access to rival health insurer's information on insurance claims and also questioned what UnitedHealth could do with "secondary data rights" to impact competition.¹⁷

In a non-merger investigation, the Commission could ask more questions about the use of technology as a tool to facilitate collusion in healthcare industries. Complex algorithms, artificial intelligence, and other technological advances could be used in stealthy attempts to fix prices or restrict the services offered by healthcare providers.

III. CONCLUSION

Commissioner Bedoya will bring a different perspective to the Commission based on his strong background in privacy and technology. Because Commissioner Bedoya does not have much experience in merger review, we expect that his confirmation will empower Chair Khan to expand the Commission's theories of both merger and non-merger antitrust enforcement that may ultimately make healthcare investigations more comprehensive and more expensive.

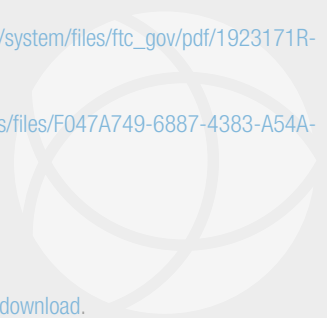
¹³ Statement of Chair Lina M. Khan In the Matter of R360 Network Commission File No. 1823171 (May 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/1923171R-360StatementKhan.pdf.

¹⁴ Opening Statement of Alvaro M. Bedoya, Nominee to the Federal Trade Commission, at <https://www.commerce.senate.gov/services/files/F047A749-6887-4383-A54A-7DA1459DC10B>.

¹⁵ Complaint ¶12, *United States v. UnitedHealth Group Inc., et al.*, at <https://www.justice.gov/opa/press-release/file/1476676/download>.

¹⁶ Complaint ¶12, *United States v. UnitedHealth Group Inc., et al.*, at <https://www.justice.gov/opa/press-release/file/1476676/download>.

¹⁷ See, e.g. Complaint ¶11, *United States v. UnitedHealth Group Inc., et al.*, at <https://www.justice.gov/opa/press-release/file/1476676/download>.



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