

Presidents And Precedents May Direct Khan's Future Course

By **Richard Dagen** (September 24, 2024)

Correction: Due to a Law360 editing error, a previous version of this article included incorrect first names for Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya. The errors have been corrected.

Federal Trade Commission Chair Lina Khan's term as a member of the commission technically expires on Sept. 25. This does not mean she has to pack her bags. Instead, several scenarios could unfold.

It is conceivable that President Joe Biden, during the last months of his term, or Vice President Kamala Harris, if elected, will nominate Khan for a new term as commissioner and keep her in her role as chair. Or, if former President Donald Trump is reelected, Khan could carry over for months as a commissioner, or even chair.

Or, of course, Khan could simply leave the commission when her term ends. There is precedent for these and other scenarios.

To understand the various possibilities, here is a short primer on how the FTC works and some history.

A Closer Look at Some Key FTC Operations

Bipartisan Makeup

There are a maximum of five FTC commissioners, no more than three of whom may be from one party. Currently, there are three Democrats and two Republicans. The latest two Republicans were nominated by Biden.

Commissioners must be confirmed by the U.S. Senate. The choice of a nominee, followed by the confirmation process, can take many months. For example, it took over a month for President Bill Clinton to nominate Robert Pitofsky, a Democrat, to fill an empty commissioner slot as chair, then an additional six months until confirmation.

And the spot currently held by Commissioner Andrew Ferguson, a Republican, was empty for a year and a half.

While the appointment of a new commissioner is subject to Senate confirmation, the selection of the chair from among the sitting commissioners is up to the president.

Term Lengths

Each of the five commissioner slots is associated with a staggered seven-year term. Each new commissioner may fill one of those slots for the entirety of the seven years if confirmed at the beginning of a commissioner term, or some part of the term if confirmed later.

A commissioner can serve all or part of a commissioner's term as chair. Commissioners can be renominated to a subsequent term, again, subject to Senate confirmation.



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In 2023, Biden renominated Commissioner Rebecca Kelly Slaughter, a Democrat, who, on March 7 was confirmed to a new term ending Sept. 25, 2029. Her initial term had expired on Sept. 25, 2022.

Removals

The president cannot remove a sitting commissioner except for cause. The president can nominate someone when a commissioner leaves early, for an expired term or for a slot where a commissioner is "holding over."

A commissioner can hold over beyond the expiration date of their term until a new commissioner is confirmed. One commissioner who held over for quite some time was Commissioner Andrew Strenio, a Democrat, who served the remaining three and a half years of his predecessor's term, then continued to serve for almost another two years.

This holdover period consisted of nearly one and a half years before President George H.W. Bush nominated a successor, plus another five months for Commissioner Dennis Yao, a Democrat, to be confirmed.

Strenio, coincidentally, held the same so-called seat as Khan. More recently, Slaughter held over for one year and seven months until her reconfirmation.

Resignations

Often, a chair resigns from the commission upon the inauguration of a president from a different party, although this is not always the case.

Reasons a chair might remain include that the new president has higher priorities than nominating a new commissioner to the FTC, or because the sitting chair is viewed as sufficiently compatible to continue for a limited period.

Janet Steiger, a Republican selected as chair by President George H.W. Bush, continued as chair for over two years after Clinton was inaugurated.

And then, after the inauguration of President George W. Bush on Jan. 20, 2001, Pitofsky continued as chair for four months until May 31, 2001, when his successor, Chair Timothy Muris, a Republican, was confirmed.

Chair William Kovacic, a Republican, continued as chair for over a month after President Barack Obama was inaugurated.

Change of Parties

Notably, even after a change of party and loss of the chair, the former chair sometimes stays on as a commissioner for a prolonged period. For example, Kovacic stayed as a commissioner for two and a half years after losing his chairmanship when Obama was elected.

And after Pitofsky was confirmed as chair, Steiger continued as a commissioner for over two more years. Regarding Steiger, Pitofsky noted that "everything at the Commission depends on being able to count to three," and observed that Steiger was a strong "ally in all the controversial cases."

Presidency and Policy

Some chairs do leave when a new president of the opposite party takes office. This has happened twice in recent years. Chair Edith Ramirez left the commission around the time Trump was inaugurated in early 2017. And on Jan. 29, 2021, Chair Joe Simons, a Republican, resigned shortly following Biden's inauguration.

On the same day that Simons resigned, Biden appointed Slaughter, then a sitting commissioner as acting chair.

The Biden Era FTC

On March 22, 2021, Biden announced Khan's nomination. On June 15, Khan was confirmed to finish Simons' term, consisting of a little over three years. Note that there was a nearly five-month gap from when Simons resigned as chair to when Khan was sworn in as a commissioner, the period in which Slaughter served as acting chair.

Upon confirmation, Biden immediately — and unexpectedly — appointed Khan to be chair. Slaughter resumed her tenure as commissioner.

Given all of this procedural and historical background, what might occur next as Khan's term comes to an end?

What if Biden Renominates Khan?

If Biden renominates Khan in the very near future, she, hypothetically, could be quickly confirmed again, or, more likely, her nomination could languish until after the November election.

Regardless, Khan could continue as chair until the president appoints a new chair, or until a new commissioner is confirmed.

What if Harris Is Elected President?

If Harris is elected president, and in the likely event that Khan has not already been confirmed to a new term, Harris would decide whether to nominate Khan to a new term and also decide whether to keep her on as chair.

If a President Harris decided to name a new chair but not renominate Khan to a new commissioner term, then Khan could continue to serve as commissioner until a new commissioner is confirmed.

In the unlikely event that Khan has already been confirmed to a new term, then Harris could decide to keep Khan as chair, or instead name one of the other Democrats — Slaughter or Alvaro Bedoya — as chair.

What if Trump Is Elected President?

If Trump wins, he could name a new chair immediately upon inauguration from, presumably, the Republican commissioners — Ferguson or Melissa Holyoak — on a permanent or acting basis.

If Khan has not been confirmed to a new term, Trump could nominate a new commissioner

to serve a full term.

Theoretically, but quite unlikely, this could be Khan insofar as Republican Sens. Josh Hawley of Missouri and Trump running mate J.D. Vance of Ohio — have expressed some support for actions she has taken.

If Trump does not want to keep Khan at the FTC in any capacity, she could nonetheless stay until a new commissioner is confirmed, presumably as a commissioner rather than chair.

And Khan could decide not to holdover and the seat would be empty until a new Republican commissioner is nominated, perhaps to be chair, and confirmed.

An important point should be considered. Khan has followed an aggressive and new agenda, one that does not always have the backing of the two Republican appointees. Indeed, a Republican appointee even resigned over the direction of the FTC under Khan.

Should Khan remain as commissioner as a holdover, the FTC would remain 3-2 with a Democratic majority until her replacement is confirmed. As a result, although the new chair might have different enforcement priorities, FTC staff complaint recommendations in the pipeline would likely continue to be issued as the Democrats maintain their majority until Khan leaves the commission.

However, should Khan leave, the commission would be divided 2-2 until a new commissioner is confirmed, whether Harris or Trump is elected.

Because the issuance of a complaint, with or without a settlement, requires a majority of the commissioners to support it, at least one Republican would be needed to vote to issue, or recuse. As a result, the Khan agenda would likely be slowed or discontinued.

Conclusion

To sum up, the history discussed above indicates Khan could continue as chair for a short period, or longer period if renamed; could continue as commissioner for a potentially longer period pending confirmation of a new commissioner; or she could leave the commission upon or shortly after the inauguration.

Her decision has significant implications for the direction of the commission over at least several months after the next inauguration. Given the evenly split Senate, and historical precedent, any holdover period could last many, many months, and possibly over a year. Stay tuned.

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