

May 30, 2018

THE FTC GETS A NEW COMMISSION

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President Trump has appointed an entirely new five-member Commission to head the Federal Trade Commission.¹ This is the first time since the FTC was established in 1914 that the entire Commission has been appointed at one time. In addition, the agency has been operating with a less-than-full Commission for nearly three years.² This all-new leadership will now have an opportunity to shape the FTC's operation and enforcement of the antitrust and consumer protection laws.

The New Commission

The new Commissioners bring a diverse background to the agency:

- **Joseph Simons (R):** Chairman Simons was sworn in on May 1, 2018. He previously served at the FTC as the Director of the Bureau of Competition ("BC") and as assistant to the Director of BC before that. His focus has been on antitrust, and he has been credited for his involvement in developing and implementing more sophisticated economic analyses into antitrust enforcement, including critical loss analysis and raising rivals' costs analysis.
- **Rohit Chopra (D):** Commissioner Chopra was sworn in on May 2, 2018. His focus has been on consumer protection, and he brings with him his experience as the former Assistant Director of the Consumer Financial Protection Bureau.
- **Noah Phillips (R):** Commissioner Phillips was sworn in on May 2, 2018. He joined from Senator John Cornyn's office, where he was Chief Counsel, working on issues relating to antitrust, civil justice, constitutional law, intellectual property, and privacy.
- **Rebecca Slaughter (D):** Commissioner Slaughter was sworn in on May 2, 2018. She joined from Senator Chuck Schumer's office, where she was Chief Counsel, involved in antitrust, consumer protection, and telecommunications policy.
- **Christine Wilson (R):** Wilson will be sworn in once Commissioner Maureen Ohlhausen vacates her position.³ She is currently serving as Senior Vice President – Legal, Regulatory & International at Delta Air Lines. She will be the only other Commissioner aside from Chairman Simons who has already served at the FTC, having previously served as Chief of Staff to former Chairman Timothy Muris.

The New Commission's Unusual Start

As is customary, Chairman Simons appointed new General Counsel and Directors of the agency's three bureaus shortly after he was sworn in:

- **Alden Abbott – General Counsel:** Alden Abbott served at the FTC previously as the Deputy Director of the Office of International Affairs, Associate Director of BC, Assistant Director of BC, and Attorney Advisor in the Office of Policy Planning. He rejoined the FTC most recently, from the Heritage Foundation, as the Acting General Counsel before Chairman Simons made the position permanent.
- **D. Bruce Hoffman – Director, Bureau of Competition:** D. Bruce Hoffman joined the FTC from private practice, where he was an antitrust partner, and brings his prior FTC experience as BC's Deputy Director and Associate Director for Regional Litigation. He served as the Acting Director of BC until Chairman Simons made the appointment permanent.
- **Bruce Kobayashi – Director, Bureau of Economics:** Bruce Kobayashi joined the FTC from the George Mason University Antonin Scalia Law School, where he was a professor, as well as the Associate Dean for Research and Faculty Development. He brings his experience as a senior economist in the FTC's Division of Economic Policy Analysis and economist in the Department of Justice's Antitrust Division.
- **Andrew Smith – Director, Bureau of Consumer Protection:** Andrew Smith joined the Bureau of Consumer Protection ("BCP") from private practice, where he was a partner serving the financial services industry. His FTC experience includes his work as lead staffer on the agency's efforts to procure enactment of the Fair and Accurate Credit Transactions Act and as a leader in the rulemaking and research efforts required by Congress. He also serves as the Chair of the American Bar Association's Consumer Financial Services Committee and a Fellow of the American College of Consumer Financial Services Lawyers.

The Commission voted unanimously in favor of the appointments of Abbott, Hoffman, and Kobayashi, but Commissioners Chopra and Slaughter voted against the appointment of Andrew Smith as Director of BCP.⁴ Both Commissioners issued statements explaining their concerns that Smith may not be suited to lead BCP in light of his recusal from significant ongoing investigations,⁵ including the FTC's investigation into data breaches at Equifax, which affected millions of American consumers. Smith recently testified before Congress on behalf of the Consumer Data Industry Association, whose members include Equifax. The Commissioners limited their criticism to the concern that Smith may, in Commissioner Chopra's words, end up "spending too much time on the sidelines."⁶ Chairman Simons responded to the "unprecedented opposition" to the appointment, stating that "it is impossible to attract high caliber professionals to the FTC without encountering some conflicts" and that the dissents "overlook[] the critical role of the Commission's talented career staff," who typically step in to make recommendations to the Commission when bureau leaders are recused.⁷ A party-line vote on this kind of personnel issue is unusual and highlights the significant amount of attention privacy issues, and thereby the FTC, have garnered of late.⁸ It is too early to predict whether this early disagreement is a sign of things to come. At this time, it is limited to the FTC's involvement in privacy protection, which is just one part of the agency's consumer protection mission and remains largely separate from its competition mission.

What to Expect from the New Commission

The current political climate and Commissioners' backgrounds shed some light on the courses the Commission might take.

Privacy. Privacy breaches were top of mind for senators during the Commissioners' confirmation hearings,⁹ and, as discussed above, the FTC is currently investigating Equifax relating to this issue. Each

of the Commissioners repeatedly promised, during their confirmation hearings, to engage in vigorous enforcement to hold companies accountable for privacy breaches.

Further, in his first public statement, Commissioner Chopra issued a memorandum to Commission Staff and the Commissioners explaining that he will take a hard line on punishing repeat offenders.¹⁰ Although the memorandum applies broadly to all repeat offenders the FTC may encounter, some have speculated that Commissioner Chopra was thinking specifically of companies that have been accused of violating existing consent decrees relating to BCP investigations into potential privacy breaches.

Net Neutrality. The Federal Communications Commission (“FCC”) has been in the spotlight for repealing its Open Internet Order, better known as its “net neutrality” order, which would have more strictly regulated the internet. However, less understood is the fact that the repeal would return jurisdiction to the FTC to oversee many of the practices the net neutrality order covered. Prior to the FCC’s repeal of the order, then-Acting Chairman Ohlhausen and then-Commissioner Terrell McSweeney testified before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law regarding the implications of repeal.¹¹ Chairman Ohlhausen spoke in favor of returning jurisdiction to the FTC, while Commissioner McSweeney explained her view that the FTC does not have the technical expertise to be an effective regulator in this area. Senator Ed Markey, quoting Commissioner McSweeney, asked, during the confirmation hearings, whether the FTC is equipped to use its authority to ensure that networks are open and free of discrimination.¹² Commissioner Chopra agreed that the FTC does not have the expertise or tools to address the issues. Commissioner Slaughter explained that she would work to enforce the FTC’s authority to its fullest extent and that she would work with Congress to identify its jurisdictional limits and potential resolutions.¹³ Chairman Simons promised that the FTC would use the full extent of its authority to address the issues. Given the uncertainty concerning how the net neutrality debate will end,¹⁴ it is likely the Commission and individual Commissioners will continue to weigh in on the appropriate rules for regulating the internet.

Consumer Welfare Standard. Another topic of debate relates to the proper standard for determining whether certain practices harm competition. Though much of the debate has remained academic, Congressional Democrats have proposed significant changes to antitrust enforcement under their “A Better Deal” plan, which would incorporate consideration of traditionally non-competition issues, such as wages, employment, and small business, into merger analysis at the FTC and the Department of Justice’s Antitrust Division.¹⁵ Senator Schumer has been an outspoken advocate of the plan, and Commissioner Slaughter may have played a key role in drafting the plan as his Chief Counsel. It will be interesting to see if Commissioner Slaughter will bring any of her former boss’s policy positions with her to the Commission.

Merger Enforcement. Given that Republicans are generally viewed as skewing toward less regulatory intervention, the shift from a majority-Democrat Commission to a majority-Republican Commission could mean that borderline mergers that would have been challenged over the past eight years will not be challenged now. Nevertheless, President Trump has indicated a desire to engage in tougher merger enforcement than previous Republican administrations, and the actions of his appointees could reflect that position. For example, the Antitrust Division, under Assistant Attorney General Makan Delrahim,¹⁶ sued to block the proposed vertical integration of AT&T and Time Warner, a merger of the type that the Antitrust Division has not challenged in litigation in 40 years. Chairman Simons, during his confirmation hearing, promised to conduct a merger retrospective to determine whether the FTC’s enforcement has been too lax. The nominees referred to the initiative repeatedly throughout their confirmation hearings, indicating their interest in assessing and strengthening the FTC’s effectiveness. Should weaknesses be identified, the Commission may take action to rectify those weaknesses, including by increasing the FTC’s merger enforcement activity.

Conclusion

It is still too early to tell whether the new Commission will change the FTC's course significantly. What is certain is that the new Commissioners bring a diverse background that will continue to shape the agency's antitrust and consumer protection missions in the new administration.

- ¹ See Diane Bartz, *Senate Confirms First Trump Picks for Federal Trade Commission*, REUTERS, <https://www.reuters.com/article/us-usa-ftc-congress/senate-confirms-first-trump-picks-for-federal-trade-commission-idUSKBN1HX3HZ> (Apr. 26, 2018).
- ² Commissioner Joshua Wright resigned in August 2015, Commissioner Julie Brill resigned in March 2016, Chairwoman Edith Ramirez resigned in February 2017 (shortly after the Trump Administration commenced), and Commissioner Terrell McSweeney resigned in April 2018. President Obama did not nominate replacements for Commissioners Wright or Brill, and President Trump did not nominate any replacements until a year after he took office. See Diane Bartz, *White House Nominates Wilson, Phillips to FTC*, <https://www.reuters.com/article/us-usa-ftc/white-house-nominates-wilson-phillips-to-ftc-idUSKBN1FE31I> (Jan. 26, 2018).
- ³ Commissioner Ohlhausen was the sole remaining Obama Administration holdover as of April 28, 2018. President Trump nominated her to the Court of Federal Claims in January 2018, and she plans to vacate her position at the FTC upon confirmation. Commissioner Ohlhausen served as Acting Chairman of the Commission from January 2017 until Chairman Simons was sworn in.
- ⁴ Joe Simons, Chairman, Fed. Trade Comm'n, Statement of Chairman Joe Simons on the Appointment of Senior Staff Leadership (May 16, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1379503/simons_-_senior_staff_appts_public_statement_5-16-18.pdf [hereinafter Simons Statement]; Rohit Chopra, Comm'r, Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra Regarding the Commission's Votes to Appoint Senior Leadership (May 16, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1379515/chopra_-_statement_on_senior_leadership_picks_5-16-18_1.pdf [hereinafter Chopra Statement]; Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Appointment of the Director of the Bureau of Consumer Protection (May 16, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1379509/commission_slaughter_dissenting_statement_on_vote_for_bcp_director.pdf [hereinafter Slaughter Statement]. Reorganization Plan No. 8 of 1950 vests the Chairman with the authority to appoint the heads of major administrative units within the FTC, "subject to the approval of the Commission." Reorganization Plan No. 8 of 1950, 15 F.R. 3175 (May 24, 1950), available at <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-app-reorganiz-other-dup26.pdf>.
- ⁵ Chopra Statement, *supra* note 4; Slaughter Statement, *supra* note 4.
- ⁶ Chopra Statement, *supra* note 4.
- ⁷ Simons Statement, *supra* note 4.
- ⁸ Equifax testified in Congress following the reported privacy breaches, and Senators Elizabeth Warren, Richard Blumenthal, and Brian Schatz sent a letter to Chairman Simons raising their concerns with his appointment of Smith, not just relating to his recusals, but also their view that someone who has represented companies "accused of hurting consumers" is "unfit and unable to function as the FTC's top consumer advocate." Letter from Elizabeth Warren et al. to Joseph Simons (May 14, 2018).
- ⁹ Joe Simons, Rohit Chopra, Noah Phillips, and Christine Wilson had their hearing on February 14, 2018. Rebecca Slaughter's confirmation hearing was held on April 11, 2018.
- ¹⁰ Rohit Chopra, Comm'r, Fed. Trade Comm'n, Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioners re Repeat Offenders (May 14, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.
- ¹¹ Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Net Neutrality and the Role of Antitrust: Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Judiciary Committee (Nov. 1, 2017), available at https://www.ftc.gov/system/files/documents/public_statements/1268943/mko_oral_testimony_11-1-17.pdf; Terrell McSweeney, Comm'r, Fed. Trade Comm'n, Oral Statement of Commissioner Terrell McSweeney: House Judiciary Committee (Nov. 1, 2017), available at https://www.ftc.gov/system/files/documents/public_statements/1268963/mcsweeney_oral_testimony_to_us_house_of_representative_s_committee_on_the_judiciary_11-1-17_.pdf.
- ¹² Video of the February 14, 2018, hearing, which includes Commissioner Chopra's and Chairman Simons's responses, is available at <https://www.c-span.org/video/?440971-1/federal-trade-commission-nominees-testify-confirmation-hearing>, with Senator Markey's questions beginning at approximately 1:33:00.

¹³ *FTC Nominee Slaughter Says US Data Privacy Law Should Be “Enforced to Its Fullest Extent,”* MLEX WATCH, <https://www.mlexwatch.com/articles/3097/ftc-nominee-slaughter-says-us-data-privacy-law-should-be-enforced-to-its-fullest-extent> (Apr. 23, 2018).

¹⁴ Congress also has taken steps toward re-implementing the FCC’s order.

¹⁵ For more information on “A Better Deal,” see Laura A. Wilkinson & Angela Diveley, *Democrats’ “Better Deal” Policy Statement Proposes Significant Changes for Antitrust/Competition Enforcement*, WEIL (July 27, 2017), <https://www.weil.com/articles/democrats-better-deal-policy-statement-proposes-significant-changes-for-antitrustcompetition-enforcement>.

¹⁶ President Trump appointed Delrahim in September 2017.

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