

CLIENT ALERT

New Full Slate of FTC Commissioners Will Face Unique Challenges and Opportunities

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Introduction

For the first time since President Woodrow Wilson appointed the first Federal Trade Commission over a century ago, one president has secured the nominations of five new Commissioners, who will soon replenish a Commission that has served for more than a year with just two. This complete overhaul of the FTC's composition injects added uncertainty about the direction of U.S. antitrust and consumer protection policies, but also presents opportunities as the five Commissioners establish their priorities and shape their views of the many pressing issues now facing the agency. In this Client Alert, we consider the issues likely to be at the forefront of the FTC's enforcement agenda.

On April 26, 2018, the Senate confirmed five nominees (three Republicans, two Democrats) to the FTC, four of whom will join the agency as soon as they are sworn in:

- **Joseph Simons**, a highly regarded and experienced antitrust practitioner with prior FTC service, was confirmed as the new Chairman of the FTC.
- **Christine Wilson**, also an experienced antitrust practitioner, will join the Commission when the term of current Acting FTC Chair Maureen Ohlhausen ends in September or when Ohlhausen is confirmed to a seat on the U.S. Court of Federal Claims, for which she has been nominated, whichever is sooner.
- **Noah Phillips**, a long-time aide to Senator John Cornyn, will fill the third Republican seat.
- **Rohit Chopra**, whose background is in consumer financial protection issues, will serve in one of the non-majority-party seats.
- **Rebecca Slaughter**, a long-time aide to Senate Minority Leader Charles Schumer, will serve in the other non-majority-party seat.

With respect to the FTC's antitrust mission, the new Chair will be taking his place alongside Assistant Attorney General Makan Delrahim, who has already staked out positions on a wide range of important antitrust policies since he became head of the Antitrust Division last fall. While conventional wisdom predicts that Republican-led Commissions will be somewhat more restrained in antitrust enforcement than Democratic-led Commissions, there are already some indications that the current antitrust environment and Simons's appointment as Chairman may confound that prediction.

The appointment of a completely new Commission comes at an important time when antitrust enforcement and consumer protection issues, especially data security, are in the spotlight. Although there is a general consensus around antitrust enforcement and its consumer-welfare goals among practitioners, some antitrust commentators are advocating for more vigorous antitrust enforcement within now-accepted legal and economic principles, whereas others argue for broader objectives. This latter group is calling for antitrust agencies to pursue ends that go beyond the consumer-welfare standard's concern for the effect of mergers and conduct on consumers, to address broader social goals such as employment levels, income

disparities, and wage stagnation. It is unlikely that a majority of the new Commission will move the FTC in that extreme direction, but, as has already been the case with the Antitrust Division, the new Commissioners will likely be pressed to engage with these evolving views of antitrust. As discussed below, these debates may also affect particular antitrust enforcement decisions.

The appointment of five Commissioners at once also presents certain institutional challenges and issues:

- Commissioners will confront a busy docket of pending Commission matters, including those already in litigation and under investigation. Here, career FTC staff can be valuable and influential. Recent practice has been for Commissioners to meet with FTC management and staff in each Division and Office after joining the Commission to hear about current matters and to become familiar with agency personnel, potentially elevating the importance of staff and their enforcement and policy views, at least in the near term.
- The incoming Chairman will also need to complete appointments to a host of positions, including “Front Office” management in the Bureau of Competition (BC), Bureau of Consumer Protection (BCP), Bureau of Economics (BE), Office of General Counsel (OGC), and Office of Policy Planning (OPP). Acting BC Director Bruce Hoffman is expected to stay in this role, which he has held since last August. Reports indicate that Andrew Smith, a law firm partner, will be appointed Director of BCP, and that Bruce Kobayashi, an Associate Dean and Professor at George Mason University’s Antonin Scalia Law School, will become the Director of BE. Alden Abbott was recently appointed Acting General Counsel. Finally, Bilal Sayyed, currently in private practice and a former attorney advisor to FTC Chairman Muris, has just been appointed the next Director of OPP.
- The new Chairman will quickly be called upon to make speeches and respond to press inquiries to express his priorities, including whether he concurs with positions already expressed by Makan Delrahim at the Antitrust Division. And he will have to work with his fellow Commissioners from both political parties to establish productive working relationships in the hope of building consensus on his priority issues.
- Each new Commissioner will need to hire staff, typically consisting of three or four attorney advisors (AAs), and the Chairman will need to select a Chief of Staff. Current FTC staff often serves as transitional AAs until Commissioners make permanent hires, which provides a level of experience and continuity, again elevating the importance of staff during the initial stages of the Commissioners’ tenure, especially those without prior FTC experience.
- Commissioners may have much to learn about FTC procedures, as well as the many substantive areas that they will face. Some Commissioners arrive with antitrust experience but little consumer protection experience and vice versa. Moreover, while Simons and Wilson have previously served at the FTC, the others have not. Even for these FTC veterans, however, there will be challenges in coming to terms quickly with the wide range of legal and economic issues that can arise given the FTC’s broad antitrust and consumer protection portfolio of statutes, regulations, and guidelines, some of which have only surfaced since they last served at the Commission.
- Although Acting Chairman Ohlhausen will no longer be chair, and it is unclear how much longer she will serve, there will be important institutional benefits to her overlapping with the new Chairman and the other Commissioners. She has extensive knowledge of the institution, its pending matters, and its staff, and so her continued presence may aid the transition.

Commissioner Profiles

Joe Simons will serve as Chairman for a term that runs through 2024. Simons has extensive antitrust experience, and has twice served at the FTC: as the Director of the Bureau of Competition from 2001 to 2003 under Chairman Tim Muris, and earlier as associate director for mergers and assistant director for evaluation in the 1980s. His statements since his nomination have emphasized the high level of merger and non-merger enforcement activity at the FTC during his time as BC Bureau Director, and his intent to vigorously police anticompetitive conduct. He has also expressed an intention to take a multi-pronged approach to assessing the effectiveness of the FTC’s antitrust enforcement by: (1) reviewing the current merger-investigation process, which he noted has grown to an average of 12 months per significant investigation; (2) assessing whether recent antitrust merger and non-merger enforcement has been too permissive and fixing any “failures” that are identified; (3) systematically evaluating the effectiveness of merger and non-merger enforcement using regular retrospective studies; and (4) reviewing and potentially reforming merger remedies, including a look at the recent FTC study that concluded that divestitures of assets that did not constitute a stand-alone business failed 30 percent of the time. He has also expressed an interest in examining the impact of technology on consumers, balancing consumer protection with firms’ use of technology and data to enhance competition. He emphasized that “big is not always bad,” but that concerns arise when companies use anticompetitive means to get big or stay big. Simons testified that healthcare and pharmaceutical industry competition will be a priority, noting the possibility of a drug price monitoring task force to see if high prices are caused by anticompetitive conduct and an evaluation of retail pharmacy enforcement practices. Simons has also expressed an intention to aggressively pursue the FTC’s consumer protection mission, challenging deceptive and unfair acts or practices, including with respect to privacy and data security. Finally, Simons emphasized a bipartisan approach to his leadership of the FTC.

Christine Wilson will replace acting chair Maureen K. Ohlhausen once Ohlhausen’s term ends in September or when Ohlhausen resigns following her anticipated confirmation to a seat on the U.S. Court of Federal Claims. Wilson will then serve a complete seven-year term ending in 2025. She earned her undergraduate degree from the University of Florida and her J.D. from Georgetown Law Center in 1995. At Georgetown, she worked as a research assistant to Professor Steven Salop. From 2001-2002 she served as FTC Chairman Muris’s Chief of Staff. She has worked over 17 years in private practice on antitrust and consumer protection issues, and since 2016 has served as the Senior Vice President of Legal, Regulatory & International at Delta Air Lines. Since her nomination, she has identified the need for a continued focus on the healthcare industry—citing to a changing landscape, escalating costs, and misuse of sensitive data—as well as international competition advocacy and cooperation to combat fraud, and enforcement issues arising from technological advances. Regarding antitrust in the technology sector, she voiced a willingness to hear concerns and take action, but emphasized that existing antitrust laws suffice to address these issues and that in some instances consumer welfare may be most effectively promoted when the FTC does not intervene. During her confirmation hearing, she stated that the FTC should continue its role as a “referee” of markets rather than as a manager or star player, and supported Simons’s call for retrospective studies to examine the effectiveness of merger enforcement.

Noah Phillips will take a seat with a term that expires in 2023. Phillips earned his undergraduate degree from Dartmouth College in 2002 and a J.D. from Stanford Law School in 2005. He began his legal career with a Fifth Circuit Court of Appeals clerkship, after which he was a litigation associate at Cravath, Swain & Moore and at Steptoe & Johnson, working on cases that covered antitrust topics and merger review. In 2011, he became Counsel to Senator John Cornyn, Republican from Texas, and has served as Chief Counsel to Senator Cornyn since 2013. In that role, he has advised Senator Cornyn on topics related to the FTC, including antitrust, consumer protection, fraud, intellectual property, and privacy. Phillips also has advised Cornyn on policy issues and has worked on legislation and oversight relating to antitrust and these other areas. In his Senate confirmation

questionnaire, Phillips noted the changing landscape of technology, healthcare, and data privacy, pledging his commitment to protect consumers in the face of these challenges.

Rebecca (Becca) Kelly Slaughter will take over the remainder of a seat that expires in September 2022. She attended Yale University, where she earned her B.A. in 2004 and her J.D. in 2008. She was also an editor of the Yale Law Journal. She was an associate at Sidley Austin, LLP in Washington, DC, before joining Senator Schumer’s staff as counsel in May 2009. Slaughter has been Senator Schumer’s Chief Counsel since 2014. As Chief Counsel, Slaughter has developed an interest in telecommunications, Internet of Things, and other tech policy. In that role, she has advised Senator Schumer on key consumer protection issues such as net neutrality, broadband privacy, and privacy policies for emerging technologies such as Internet of Things devices and Home DNA kits. She also played a role in drafting legislation such as the Moran-Schumer Better Online Ticket Sales (BOTS) Act of 2016, which cracks down on ticket bots.

Rohit Chopra, the only non-lawyer among the new Commissioners, will take over a seat to fill out a term that expires in September 2019, potentially making him the shortest serving new Commissioner unless he is re-nominated next year. After earning his undergraduate degree from Dartmouth, he earned an MBA from the Wharton School at the University of Pennsylvania in 2004. After business school, he held various positions, including positions at Booz, Allen & Hamilton and McKinsey & Co. Chopra has spent the bulk of his career, however, in public service. From 2010-2015, he was an Assistant Director at the Consumer Financial Protection Bureau (CFPB) where he focused on student financial services. In 2011, he was appointed Student Loan Ombudsman, a position created by Dodd-Frank and the Consumer Protection Act. In that position, he testified in Congress numerous times regarding the private student loan industry and released a [report](#) regarding the impact on young people of high levels of student debt and default. After leaving the CFPB, Chopra became Special Advisor to the Secretary of Education. In 2016, he joined the Clinton-Kaine pre-election transition team. Since the election, Chopra has been a Senior Fellow at the Consumer Federation of America, focusing on issues related to young people and military families.

Key Issues for the New Commission

The Chair of the FTC sets the direction and tone of the Commission, but has to contend with four colleagues who may or may not share the Chair’s views and priorities on a wide range of issues. High profile—and hot button—matters also can arise unexpectedly, forcing the Commission to address new issues. There are, however, several antitrust and consumer protection issues that the FTC likely will have to take on, either to continue or change current FTC enforcement and policy positions.

Antitrust

- **Healthcare Enforcement.** Merger and non-merger healthcare enforcement has represented approximately 50 percent of FTC enforcement actions for years. This includes suits to block hospital mergers and challenges to pharmaceutical patent settlement agreements.
 - FTC healthcare enforcement is very likely to remain active and aggressive, particularly with respect to hospital-merger enforcement. In that area, the FTC has been on a winning streak in court; has brought its cases on a unanimous, bi-partisan basis; and new Chair Simons was BC Director when the FTC revitalized its hospital merger enforcement program in the 2000s. The FTC also has invested substantial resources for years to advance its pharmaceutical conduct-enforcement agenda. Although the new Commission could decide to proceed more slowly on newer or novel theories, we expect that its emphasis on healthcare markets will continue.

- *Technology Enforcement Generally.* The Commissioners are taking office at a time of vocal debate from otherwise conflicting ends of the political spectrum about whether the agencies have been sufficiently aggressive in policing technology firms. Much of that attention has focused on the largest and most successful consumer-facing firms, and has included comparisons to the more aggressive enforcement policies of the European Commission. These firms, however, have varying business models, products, and services. From an antitrust perspective, it is questionable whether they can fairly be described as a single “technology” sector or even as like “digital platforms”—their market positions and characteristics can differ widely. But both agencies will be under a great deal of pressure to “do something” about big tech.
 - Although it is likely that the actions (especially proposed acquisitions) by large tech firms will be carefully scrutinized, we do not expect to see any pronounced up-tick in monopolization challenges to these firms absent revelations about specific, harmful conduct. We also don’t expect to see any significant change of philosophy and approach from current legal and economic standards for judging exclusionary conduct. It is likely that Chairman Simons’s view will be similar to that recently expressed by AAG Delrahim that the law and economic tools available are adequate, and that the agencies ought to be cautious in these areas, respect success, and avoid interventions that could inhibit innovation.
- *Technology and Intellectual Property Enforcement.* One of the last major enforcement actions brought by the outgoing FTC leadership just prior to the Presidential inauguration concerned the antitrust treatment of SEPs (Standard Essential Patents) and FRAND (Fair, Reasonable & Non-Discriminatory) commitments. As was evident from then-Commissioner Ohlhausen’s dissent, the views of the Commission on these issues was already divided. In addition, AAG Delrahim has already indicated his views that antitrust ought to play a far more limited role in this area.
 - This is an area that will be important to watch. Chairman Simons is well-acquainted with these issues and was the FTC’s Director of the Bureau of Competition when it commenced the *Rambus* case in 2002. We will be watching for early indications of whether he will share AAG Delrahim’s views, or stake out a different position.
- *State Action and Regulations Affecting Competition.* The FTC’s suits (ending in success at the Supreme Court) in *NC Dental* and *Phoebe Putney* challenged state-sanctioned limitations on competition. Additionally, outgoing Acting Chair Ohlhausen made “Economic Liberty” and combating state occupational licensing requirements a key feature of her tenure.
 - The FTC is likely to continue to pursue policy advocacy and antitrust enforcement in cases where state regulations significantly restrain competition. State Certificate of Public Advance (COPA) laws have recently stymied FTC efforts to stop allegedly anticompetitive hospitals mergers, so look for the FTC to devote resources to studying the effects of these laws and trying to prevent more states from passing such laws and from approving hospital mergers under them. We also expect to see even greater interest in examining anticompetitive conduct by nominally “state” boards made up of private industry participants, and perhaps stepped-up efforts to erode the *Noerr-Pennington* (First Amendment) protections for anticompetitive petitioning activity directed at courts and governments that impede markets.
- *Remedies Generally.* The FTC’s recent retrospective study of its merger remedies concluded that its remedies were always successful when a complete, ongoing business was divested, and effective 70 percent of the time when a partial divestiture was required. Others have noted that the FTC experienced significant merger-remedy failures not captured by the study and have called for more merger challenges rather than settlements.
 - Incoming Chair Simons has said that the 30 percent failure rate of partial divestitures is too high. The implication of his statement, combined with the three remedy failures, is likely to be a demand for greater diligence,

additional assets to be included in divestiture packages, and a marginally greater inclination to challenge mergers when the viability of a divestiture remedy is in doubt.

- *Behavioral Remedies.* The FTC and DOJ have a longstanding preference for structural remedies to resolve merger concerns, especially in horizontal mergers. Previously, both agencies generally accepted behavioral remedies to resolve vertical-merger concerns. Now, however, AAG Delrahim has made it clear that DOJ will be disinclined to accept a behavioral remedy. He has characterized them as excessively regulatory in nature and questioned their effectiveness. The question remains whether the FTC will be more open to behavioral remedies in vertical cases or will take DOJ's stricter approach.
 - In January, Acting BC Director Hoffman gave a speech explaining that the FTC, too, preferred structural relief in vertical mergers, but also noted that economic theory does not generally predict harm from vertical mergers and that efficiencies are "much more intrinsic" in vertical mergers. While the FTC will likely seek to maintain a public posture aligned with DOJ that structural remedies are preferred even in vertical cases, the FTC may be more open than DOJ to behavioral remedies in vertical cases.
- *Common Carriers.* If the Federal Communications Commission succeeds in its efforts to repeal most of the existing net neutrality rules, oversight and enforcement involving Internet Service Providers could revert to the FTC. A February 2018 *en banc* [Ninth Circuit decision](#) held that the "common carrier" exception to the FTC Act only applies to the extent a common carrier is engaging in common carrier services, and leaves open the possibility of FTC enforcement with respect to privacy issues.
 - The Ninth Circuit ruling may portend increased enforcement of non-telephone activities of common carriers by the FTC. In her confirmation hearing, Commissioner Slaughter indicated that there were net neutrality enforcement concerns at the FTC and she would bring telecom expertise to the agency.
- *Other Issues.* The Commissions is also likely to face a range of other issues, including antitrust and net neutrality; international competition advocacy; and perhaps the SMARTER Act, which would align the FTC's merger-litigation process and standard with DOJ's.

Consumer Protection

- *Data Security.* The news is rife with stories about recent high-profile data breaches involving companies such as Ashley Madison, Equifax, Hyatt, and Uber. The Commission's interest in data security has been largely bi-partisan, and with significant additional breaches likely to occur, that support is likely to continue.
 - We expect continued FTC scrutiny of data security; continued business education to provide companies with strategies to implement effective data security; and ongoing enforcement activity. It is clear that the FTC expects marketers to take reasonable steps to secure consumer data and that is unlikely to change. We will, however, be watching for changes in approach to the design of remedies.
- *Privacy.* Similarly, privacy concerns have been magnified by the recent Cambridge Analytica scandal and other well-publicized incidents. In December 2017, the FTC held two privacy-related workshops: Student Privacy and Ed Tech, and Informational Injury resulting from privacy and data breaches. In February 2018, the FTC held PrivacyCon, an annual collaboration among privacy and security researchers, consumer advocates, industry, and the government to explore the key privacy and security implications of emerging technologies.
 - We expect the FTC to devote considerable resources to privacy enforcement as well as consumer and business education. The FTC may look to improve consumers' control over their data. Senator Maria Cantwell asked

Slaughter for her views on the new European Union General Data Protection Regulation (GDPR), and she reportedly stated that the United States can learn from Europe about giving consumers more control over their data. This is an area, however, where we might also see significant differences of opinion emerge among the Commissioners, both as to substantive coverage and remedies. The anti-regulatory agenda of the Administration, which has been embraced by AAG Delrahim, could dampen interest in additional privacy-related regulations. We will also be watching for developments in remedies for privacy-related violations, an area where economic analysis might be invoked to support less-invasive interventions.

- *COPPA*. There has been ongoing enforcement of the Children’s Online Privacy Protection Act (COPPA). In 2017, the FTC released an Enforcement Policy Statement regarding the applicability of COPPA to the collection and use of voice recordings.
 - We can expect enforcement activity in this area to continue. Children are increasingly using connected devices and toys. Only a few days ago, the FTC sent warning letters to two companies based in China and Sweden that market electronic devices and apps that appear to collect geolocation data from children, warning them that their products may be violating the COPPA Rule. Moreover, Commissioner Chopra’s interest in vulnerable populations, an increasing number of IoT devices targeting children, and recent data breaches all suggest that the FTC will look closely at COPPA compliance and will increase consumer outreach to vulnerable population—parents of children, the military, and senior citizens.
- *Internet of Things*. The FTC has been increasingly focused on the Internet of Things due to the rapid proliferation of Internet of Things devices. The FTC has been focused on improving transparency and has begun to initiate enforcement cases against companies for failure to adequately inform consumers about their use of personal information collected through IoT devices.
 - Commission interest in monitoring the development of the IoT has been bipartisan and we expect that it will continue. Commissioner Slaughter’s stated interest in the intersection of privacy/data security and the Internet of Things also suggests that she will likely continue to focus on IoT privacy issues.
- *Student Loans and For-Profit Education*. The FTC has been scrutinizing student loans and for-profit education, recently settling charges with entities such as Stratford Career Institute, DeVry University, and others. The FTC has been targeting student loan debt relief organizations through Operation Game of Loans.
 - We can expect this scrutiny to continue. Chopra’s ongoing interest in this issue may signal that the student loan industry will be a growing priority for him as a Commissioner.
- *Telemarketing Sales Rule and Do Not Call*. The FTC has been active in enforcing the Telemarketing Sales Rule (TSR) for years, bringing hundreds of cases since 2003. In March 2018, the FTC and FCC hosted a joint policy forum regarding the regulatory challenges they face when confronting illegal robocalls and ID spoofing. In addition, on April 23, the agencies hosted the Stop Illegal Robocalls Expo, designed to identify technology and devices that would limit robocalls and spoofing.
 - The partnership between the FTC and FCC likely signals a move towards future regulatory action in this area. Moreover, the incoming Commissioners have cited ongoing interest in enforcement of the TSR and Do Not Call, and we can expect enforcement to continue. Do Not Call was one of Chairman Muris’ “signature programs” during his tenure as FTC Chairman, reinforcing the likelihood that the issue will remain important to Chairman Simons and Commissioner Wilson.
- *Scams*. Combating fraudulent scams is a core enforcement activity for the FTC.

- The FTC is engaged in enforcement actions against companies using deceptive pop-ups and technical support scams through Operation Tech Trap. This enforcement will likely continue. Notably, Commissioner Slaughter was active in drafting legislation to target online ticket buyers—the BOTS Act of 2017.
- *Other Issues.*
 - *Endorsements and “Influencers”.* The FTC has been actively cracking down on deceptive influencer marketing practices for several years, revising its Endorsement and Testimonial Guides FAQs, sending warning letters, and bringing numerous cases against companies, ad agencies and now, influencers. None of the new Commissioners specifically cited an interest in endorsements or social media, but we do not expect that the FTC’s interest in endorsement practices will wane.
 - *Credit Bureaus.* We may see increased enforcement of credit reporting under the Fair Credit Reporting Act (FCRA). Commissioner Chopra has expressed concerns with respect to limited oversight of credit reporting agencies in Washington, particularly in light of the substantial impact credit reporting agencies have on consumers’ lives and the amount of data they own—but only offering consumers limited visibility to the data they collect and the proprietary algorithms they use. The Equifax breach may increase FTC attention to this issue.
 - *Other Areas of Deceptive Advertising.* While none of the incoming Commissioners referenced deceptive health claims, greenwashing, or unsubstantiated Made in USA claims as key issues, we believe the FTC will stay the course and will continue to pursue enforcement actions in these areas.

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