CONSUMER PROTECTION

THE FCC AND FTC MOVE INTO CLOSER ALIGNMENT

Look for the Trump administration to significantly relax the pro-consumer stance of the Obama administration, particularly when regulating businesses that collect and use consumer data and provide the backbone of the rapidly evolving digital economy.

Nowhere is this changed approach more apparent than at the Federal Communications Commission. Because former telecommunications industry attorney Ajit Pai has been an FCC commissioner since 2012, the Trump administration didn't need Senate confirmation to elevate Pai to chair of the politically bipartisan, five-member FCC.

Under Chairman Pai, the FCC has already canceled, suspended, or stayed a long list of Obama-era regulations affecting broadband services, telecommunications, video content, and customer privacy rights. And in an act with both immediate business impact and potentially far-reaching ramifications, Pai announced in February that the agency would take a hands-off approach to the proposed $85 billion merger between AT&T and Time Warner, a megadeal between a content distributor and a content producer that could reshape both industries. Thus far, the Trump administration has not indicated it will oppose the merger.

All of this is just a preamble, however, to anticipated corrective action by the new FCC leadership in the arena of "net neutrality." President Obama counted as one of his administration's signature tech achievements the FCC's 2015 net neutrality rules that, among other things, prevented internet service providers from blocking or discriminating against otherwise lawful internet use, and from assessing mandatory fees for "fast lane" access to consumer devices for businesses that provide data-driven content and services such as streaming video, music, and interactive online games.

"It's not clear whether Pai will reverse the FCC's jurisdiction over ISPs or rescind net neutrality, but it's certainly not going to be implemented or enforced in the same way," says Chris Cole, co-chair of Crowell & Moring's Advertising & Product Risk Management Group. "It'll be interesting to see if the Trump administration believes, for instance, that it can just withdraw parts of the rules."

Pai's rationale is that the FCC's tide of regulations under previous Chairman Tom Wheeler has suppressed broadband investment in the U.S.—leading with the net neutrality rule that reclassified broadband service as a utility—and thereby created concerns about equity, fairness, and access to internet usage similar to those for phones and electricity.

On March 1, the new FCC chair also suspended part of the agency's broadband-privacy rules that required companies to take "reasonable measures" to secure consumer information such as financial data and web browsing histories. Additional rules, scheduled to take effect later this year but whose future is now uncertain, would prevent ISPs from sharing sensitive customer data with third parties without permission—information ranging from financial data to browsing history and app usage, says Kristin Madigan, counsel in Crowell & Moring's Commercial Litigation and Privacy & Cybersecurity groups and a former attorney at the Federal Trade Commission.

Among other things, this change raises questions about "earlier settlements in terms of what obligations remain—and what will be the legacy of the short life" of the privacy rules, Madigan says. "This move could swing power back to the FTC as the primary regulator in this space."

Peter B. Miller, senior counsel in Crowell & Moring's Advertising & Product Risk Management and Privacy & Cybersecurity groups and former chief privacy officer at the FTC, adds that "Pai has sent strong signals that the FCC will

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"[The change in the FCC's broadband-privacy rules] could swing power back to the FTC as the primary regulator in this space." *—Kristin Madigan*

be shifting from its prior, more draconian approach to privacy and data security regulation to a practical one that more closely aligns with that of the FTC."

A MORE BUSINESS-FRIENDLY FTC?

The FTC, currently led by Acting Chairman Maureen Ohlhausen, is expected to be more circumspect and accommodating of business concerns than was true in the Obama administration. Ohlhausen, a Republican, has served as an FTC commissioner since 2012 and has advocated for "regulatory humility" in the agency's exercise of its policy and enforcement authority.

"She'll look not only at evidence of harm to consumers, but also at the impact on business and on innovation," predicts Miller. "You'll be seeing much more of a focus on very traditional areas of fraud and deception."

Cole says that in practice, the Republican-led FTC "will be more likely to act only where there's real evidence of injury such as monetary loss, versus the previous standard in which the agency reached out to address conduct that could have caused harm even though there was no concrete evidence of harm."

CFPB IN TRUMP'S CROSSHAIRS

President Obama and the Democrat-controlled Congress created the Consumer Financial Protection Bureau in the wake of 2008's financial collapse as a safeguard against financial defrauding of American consumers. Since its inception, the agency has grown to more than 1,500 employees and recovered nearly $12 billion for consumers.

Under the Trump administration, however, a double whammy could cripple or even wipe out the CFPB: a court case (currently on *en banc* appeal at the D.C. Circuit) that could put the highly independent agency and its single director under the control of the president rather than the indirect control of the Federal Reserve, and vocal criticism by Republicans on the Hill and elsewhere who say that the CFPB needs at least a drastic structural overhaul, if not outright elimination.

Crowell & Moring's Chris Cole believes that, one way or another, the CFPB "is likely to undergo substantial change" under the Trump administration. The Department of Justice entered an appearance in the D.C. Circuit and, contrary to the position of the CFPB and the DOJ under Obama, supported the prior panel's ruling that the CFPB director structure is unconstitutional and advocated for either direct presidential power to hire and fire the CFPB director at will or a finding that the agency itself is unconstitutional.

In addition to the court case and the Trump administration's skepticism about federal regulation generally and CFPB enforcement actions in particular, pending bills on the Hill would reform or eliminate the CFPB. "One would do away with CFPB entirely and allocate all of its enforcement authority to the FTC and other agencies," Cole says. "Others would create a commission structure giving the president the right to appoint or nominate all of the CFPB commissioners. Somewhere in between is likely where all this will land."

"[FTC Acting Chairman Maureen Ohlhausen] will look not only at evidence of harm to consumers, but also at the impact on business and on innovation." *—Peter Miller*