

## Under New Chair, FTC Aims To Up Its Game For 21st Century

By **Matthew Perlman**

*Law360 (July 9, 2018, 7:28 PM EDT)* -- In his first major initiative since becoming chairman of the Federal Trade Commission, Joseph Simons is aiming to make sure the agency's approach to protecting competition and consumers is keeping up with tectonic forces reshaping the economy, including the rise of big data and dominant technology platforms, a resurgence in vertical mergers and complaints that employers in some industries have the market power to keep wages low.

Through a series of public hearings, Simons is launching a wholesale assessment of the agency's competition and consumer protection policies and enforcement practices. In announcing the so-called Hearings on Competition and Consumer Protection in the 21st Century last month, Simons said that while there has been a general consensus around the FTC's efforts over the last 30 years or so, some are now beginning to ask whether increasing industrial concentration, technological advances and other developments in the economy warrant changes at the FTC. To help assess these needs, the hearings will allow the public and business community to share thoughts and empirical data on a range of topics affecting competition and consumers.

Simons' approach copies a page from the playbook used by FTC chairmen of the not-so-distant past — including ex-President Bill Clinton appointee Robert Pitofsky and former President George W. Bush's first FTC chief Tim Muris — who ushered in important changes to agency enforcement and policy after taking a step back to assess how things were going and where they were heading.

Simons, a Republican who was sworn in as chairman at the beginning of May, is not a newcomer to the agency, having previously served as director of the FTC's Bureau of Competition from June 2001 to August 2003 as well as in other roles at the agency in an earlier stint. Simons noted that Muris, chairman from 2001 to 2004, promised continuity when he took over at the beginning of the Bush administration. Simons said he agreed with Muris then, but that now, "it would be a mistake to adopt a policy of continuity without some serious reflection and evaluation."

Despite his nod to continuity, Muris did conduct his own assessment of FTC policies, particularly in health care, that eventually bolstered the agency's effectiveness.

While Simons has yet to say much about his specific priorities and approach, he mentioned that a major topic for the hearings is expected to be how to handle big data and technology platforms, such as Facebook, Google and Amazon. While there's no telling what will come out of the hearings, Alexis J. Gilman, a partner with Crowell & Moring LLP and a former assistant director of the Mergers IV Division

at the FTC, said that all five of the commissioner nominees expressed during the nomination process that these should be areas of focus for the agency.

The review is also coming at a time when some people are questioning basic antitrust principles and asking if new laws or statutes need to be created to address emerging problems, said Richard Parker, a partner with Gibson Dunn & Crutcher LLP who previously served as director of the FTC's Bureau of Competition.

"It's a transitional time, and an important time in antitrust where people are debating fundamental premises," Parker told Law360. "There are a lot of things bubbling around antitrust right now, and I think it's very helpful for somebody to systemically take a look at it, and the FTC is perfectly positioned to do that."

Jon Leibowitz, a partner with Davis Polk & Wardwell LLP, who served as an FTC commissioner starting in 2004, and as chairman under former President Barack Obama from 2009 through 2013, told Law360 that Simons' approach will allow the agency to formulate its policy and better inform its enforcement efforts.

"It's a good way to figure out how the agency, which has to prioritize, can do the greatest good for the greatest number of people, perhaps forge a consensus among commissioners, and certainly get a sense about where the agency should go," Leibowitz said. "It's a very bold approach."

The project is actually modeled after a Pitofsky project, the FTC's Global Competition and Innovation Hearings, launched in 1995 to address economic changes that were resulting from increasing globalization and the emergence of the internet, Simons said in his announcement of the hearings. Leibowitz said making a connection to the FTC's past is a good way for the agency to project a degree of continuity even while it assesses potential changes in direction.

"By linking it to Chairman Pitofsky, he's reminding people that at the FTC, there has long been a bipartisan consensus, and that bipartisan consensus continues even as the issues evolve," Leibowitz said.

Andrea Agathoklis Murino, partner and co-chair of Goodwin Procter LLP's antitrust and competition law practice, who served as an attorney adviser to former FTC Commissioner and Chairman William Kovacic, said the project is in line with the agency's "intellectual mandate" — committing to being a true expert agency by understanding the economic landscape as it continues to evolve.

"On some level, that's what you want as a practitioner," Murino said. "From my perspective, you want people to understand the latest and greatest developments that are actually happening in business and hearings like this allow the agency to have those insights."

In addition to Simons, the FTC also has three other new commissioners — Republican Noah Joshua Phillips and Democrats Rebecca Kelly Slaughter and Rohit Chopra — who were sworn in a day after the new chairman. Former Acting Chairman Maureen Ohlhausen, a Republican, remains on the commission, but has been named to a judicial post at the Court of Federal Claims and has said she plans to depart once that nomination moves ahead. Republican Christine Wilson, who once served as chief of staff to Muris, has been confirmed to take Ohlhausen's seat on the FTC once Ohlhausen leaves.

The hearings will give all of the new commissioners an early opportunity to interact with market

participants and to engage in discussions about the issues that matter to them.

“All of that contributes to commissioners who will be informed and who can collectively help determine the agency's priorities,” Leibowitz said.

The FTC often runs workshops and roundtables on narrow issues, like recent events on competition in residential real estate brokerage and cryptocurrency scams, but the hearings Simons announced last month are much broader in scope and forward looking. In addition to big data and technology platforms, the proposed topics include vertical merger enforcement, the role of intellectual property and competition policy in promoting innovation and the exercise of monopsony power in labor markets. They also include consumer protection topics related to artificial intelligence and predictive analytics.

Gilman said the topics, in part, reflect criticisms from some lawmakers that antitrust law is not doing enough or that it may need to be amended to fill gaps in enforcement.

“The commissioners during the nomination process seemed open to considering whether there needs to be a change or a significant revamping of how the FTC does antitrust enforcement,” he said.

He likened the project to a retrospective study launched by Muris while both Simons and Wilson were at the agency, which looked at a string of hospital merger cases that the agency had lost. He said that study helped revitalize the FTC's enforcement program for the hospital industry after a string of defeats in hospital merger challenges.

“This is in that sort of vein,” Gilman said. “A broader look at how the FTC's been enforcing antitrust laws, whether that's been adequate.”

There's not been a dramatic shift in policy so far, Murino said, noting that the FTC seems to be as active it was under former Chairwoman Edith Ramirez, a Democrat who stepped down in early 2017 as the new presidential administration took office. Murino said the FTC staff also provides a level of continuity.

“They're perennials, so they are always there,” she said. “They're the first line of defense, or first line of attack, depending on how you want to look at it.”

--Editing by Alanna Weissman.