

With Leadership Change, FTC Enforcement 'Full Speed Ahead'

By **Bryan Koenig**

Law360 (January 19, 2021, 8:44 PM EST) -- The tenure of Federal Trade Commission Chairman Joseph J. Simons, who announced his departure from the agency Tuesday, was marked by active FTC enforcement, and his successor is likely to be even more aggressive, antitrust professionals told Law360.

Simons is leaving the FTC after more than two and a half years atop an agency he previously served in the early years of the George W. Bush administration and in the 1980s. By the FTC's own calculus, his legacy will be one of "vigorous enforcement of U.S. competition and consumer protection laws," including intense scrutiny of online platforms that yielded a landmark case against Facebook and an ongoing investigation of a decade's worth of small mergers.

Those efforts, however, remain unfinished. It will be up to a new commission — headlined by a Democrat with a new Democratic three-member majority — to shape the FTC for the next four years, likely driven by a belief that antitrust enforcement in recent years has been too lax in the technology space and beyond.

"I believe we're about to embark on a period of very aggressive antitrust enforcement," said Kevin Arquit, co-chair of the antitrust group at Kasowitz Benson Torres LLP and a former FTC official.

Arquit characterized the Trump administration FTC as a "relatively cautious" enforcer. The agency's two Democrats, Commissioners Rebecca Kelly Slaughter and Rohit Chopra, frequently criticized their three GOP colleagues for not going far enough in consumer protection and competition matters.

When the FTC cut a deal permitting AbbVie to go ahead with its planned \$63 billion buyout of pharmaceutical giant Allergan PLC, for instance, the Democrats raised concerns about the suitability of the buyers for medications that would be divested. When the commission cleared Eldorado Resorts' planned \$8.58 billion purchase of Caesars Entertainment, provided the casino operators unload three properties, Chopra criticized his peers for "risky, complicated settlements with delayed divestitures." And both Democrats blasted the commission's \$5 billion fine against Facebook for privacy violations as too light.

Chopra argued in February 2020 that the FTC has focused too much on bringing enforcement actions against smaller companies while shying away from applying its full weight against national players, instead inking deals with little or no real punishment. The FTC, he said at the time, should focus more of its energy on big firms with nationwide anti-competitive or other conduct, and with a greater emphasis

on "punitive" measures. While those cases may be harder, "that's not a bad thing," he said.

At least two of the FTC's five commissioners must now be replaced thanks to Simons' planned departure and President-elect Joe Biden's intention to nominate Chopra to head the Consumer Financial Protection Bureau.

Slaughter, meanwhile, is a reliably progressive vote on the FTC and is likely to be named commission chair, at least on an acting basis, antitrust professionals said.

"The process does not require Senate confirmation, and it ensures that the agency will be led by a Democrat after Chairman Simons resigns. Commissioner Slaughter is well known on the Hill, of course, and she may well be nominated to the chair position, depending on her plans and interests and whether President Biden has other candidates in mind," Constantine Cannon LLP partner Henry C. Su, an FTC alum, told Law360 in an email.

That leaves two more spots that Duane C. Pozza, a co-chair of Wiley Rein LLP's FTC regulation practice and a former assistant director in the agency's Division of Financial Practices, says to watch.

"It's important to look at the priorities of the people he nominates, because they'll be able to change the focus of the commission," said Pozza, who noted that FTC commissioners come with a variety of interests and backgrounds, from Chopra's consumer protection background to focuses on privacy or the antitrust implications of algorithms used to dictate corporate behavior.

Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group and an FTC alum, said she'll be watching to see if the two new commissioners come from the liberal end of the Democratic party or its more moderate wing. Regardless, Kimmel said the incoming Biden administration "seems to be an administration so far that cares a lot about competence."

Moving forward, the conservative-leaning Trump FTC is no longer there to temper the agency's approach, Arquit told Law360.

"Those roadblocks are no longer in place," Arquit said.

Simons' FTC brought a dizzying number of enforcement actions, including merger challenges contesting deals between hospitals, razor companies, real estate listing platforms, prosthetics manufacturers, police equipment firms and more.

Su characterized Simons' approach as more about consensus than constraint.

"His capable and thoughtful stewardship ensured that the FTC continued to carry out its dual missions with mostly bipartisan support, and without being embroiled in political fights that can distract or derail," Su said.

Going forward, Arquit said FTC enforcement, and also that of the U.S. Department of Justice's Antitrust Division, is likely to be driven at least in part by the bipartisan chorus of voices critical of the power wielded by tech giants. The only constraints, Arquit said, will be the judges who weigh any cases, including the ones already filed against Facebook and Google.

"But in terms of policy initiative," Arquit said, "I think it's going to be full steam ahead."

The train is still partially loaded with Simons' cargo. The FTC has yet to issue the final work product from one of his core initiatives: a series of public hearings taking a broad look at modern antitrust and consumer protection realities. Given that project's importance to Simons, Pozza said to watch for any updates in the last 10 days of Simons' tenure.

Also unfinished is the study of a decade's worth of Google, Amazon, Apple, Facebook and Microsoft transactions that came in below merger reporting requirements based on deal size. The FTC demanded the tech giants hand over documents on those deals using its research authority under Section 6(b) of the FTC Act, which obligates companies to comply with the agency's requests for internal documents.

"Joe has been a good strong enforcer. But there's a lot of unfinished work," said Kimmel, who said he will be watching how the new FTC handles the 6(b) study going forward.

For all that's been left undone, Simons' most immediate predecessor said he leaves behind a strong legacy.

"He continued the FTC's active enforcement agenda and, in recognition of the growing importance of technology to the economy, created the Technology Enforcement Division, which took its place alongside other specialty divisions that focus on health care and energy markets," said Maureen K. Ohlhausen, a Baker Botts LLP partner who served as acting chair from the beginning of the Trump administration until Simons was confirmed the following May.

The digital platform unit, which started as a task force and has evolved to a permanent FTC apparatus, reflects the agency's focus on technology platforms, which has only increased since the unit was established in early 2019.

Ohlhausen also pointed to the first new guidelines for how enforcers approach vertical mergers in more than 30 years, a joint effort between the FTC and the DOJ's Antitrust Division. Those guidelines, she told Law360 in an email, "provide a valuable update on how the agencies analyze such mergers."

In announcing his departure Tuesday, the FTC said that under Simons' leadership, the agency has "brought record numbers of cases challenging anti-competitive mergers and business conduct, as well as many cases cracking down on fraud and deception against consumers."

The agency specifically pointed to the 2019 privacy settlement with Facebook as well as a new antitrust case against the social media giant, which will be moving forward for years to come.

--Additional reporting by Matthew Perlman. Editing by Alanna Weissman.