

Trump's Nominees for the FTC

October 19, 2017

Today President Trump announced the intent to nominate two individuals to the Federal Trade Commission (“FTC”): Joseph Simons (as Chairman) and Rohit Chopra. Senate confirmation hearings are expected to occur this fall, with the possibility of confirmation before the end of the year. The White House also stated today that President Trump intends to subsequently nominate Noah Phillips for another seat on the FTC.¹

Mr. Simons, who previously served as Director of the Bureau of Competition at the FTC, has promoted economic-based antitrust review and has expressed enforcement views similar to those of prior Republican appointees. But his background also suggests he is willing to pursue enforcement actions. Rohit Chopra, the Democratic nominee, was previously the Assistant Director of the Consumer Financial Protection Bureau (“CFPB”), where he focused in particular on education and student loan issues, and has strong consumer protection views but minimal antitrust exposure.

Today’s announcement and the expected nomination of Mr. Phillips reflects a balance between the antitrust and consumer protection missions of the FTC. While the views of the Republican nominees are clearly aligned with a traditional less-interventionist perspective on antitrust, their litigation experience combined with the likely pro-enforcement inclination of Democrats suggests that the FTC will be willing and able to litigate cases when doing so will protect competition or consumers.

Joseph Simons

Mr. Simons—President Trump’s nominee to serve as Chairman of the FTC—has a long career as an antitrust attorney, including previous service at the FTC as Director of the Bureau of Competition from June 2001 to August 2003, and as the Associate Director for Mergers and the Assistant Director for Evaluation in the 1980s. Simons, currently in private practice, received his law degree from Georgetown and his undergraduate degree from Cornell.

Simons’ views are generally in line with previous Republican-appointed Chairs, particularly his belief in the importance of a flexible, industry-specific approach with a focus on empirical economic analysis.² Indeed, as Director of the Bureau of Competition, he recommended closing an investigation of a transaction combining three of the top four cruise ship lines in an already highly concentrated market and despite a large post-transaction increase in concentration.³ Further, during his tenure, the FTC approved

¹ Mr. Phillips, currently Chief Counsel for Senator John Cornyn on the Senate Judiciary Committee and a graduate of Dartmouth College and Stanford Law School, has a background in general civil litigation and has developed a focus in intellectual property, specifically with respect to “patent trolls.” Mr. Phillips would bring to the FTC experience within Republican politics and with the Trump Administration. We will update this client alert when Mr. Phillips is formally nominated.

² Mr. Simons is considered to be one of the developers of applying so-called “critical loss” theory to antitrust, which was incorporated in the FTC and Department of Justice’s own Horizontal Merger Guidelines. This theory analyzes at what point a price increase would lead to a large enough loss in sales to make such a price increase unprofitable.

a four-to-three merger between AmeriSource Health and Bergen Brunswig without remedies, due largely to the FTC's evaluation of the parties' efficiency claims.⁴

Mr. Simons' previous work suggests, however, that he is not instinctively averse to bringing enforcement cases. During his approximately two-year tenure as Director of the Bureau of Competition, the agency initiated more than 70 enforcement cases (including settlements and divestitures). That willingness to bring cases may also hold true in the context of vertical mergers,⁵ an area where Republicans have often expressed anti-enforcement views.⁶ Further, Mr. Simons had a particular focus on non-merger enforcement, claiming to have launched more conduct investigations in any one year of his tenure than in any other year in the prior two decades under previous Directors.

During Mr. Simons' tenure as Director of the Bureau of Competition, the FTC initiated an industry-wide study of hospitals (which came not too long after the FTC's similar study of pharmaceutical drug companies).⁷ These studies became a central part of the FTC's subsequent reinvigoration of enforcement in the hospital and pharmaceutical spheres after years of losses in these areas, culminating in multiple successful hospital merger victories in district courts as well as several in courts of appeals (*St. Luke's Health System/Saltzer Medical Group* (9th Cir. 2015) and *ProMedica Health System/St. Luke's Hospital* (6th Cir. 2014)) and a Supreme Court victory in the *Actavis* pay-for-delay litigation. These undertakings signal a willingness to use the FTC's broad resources and authority, and to take risks, in pursuing potentially anticompetitive mergers and conduct. Relatedly, during Mr. Simons' tenure, the FTC began to more actively utilize its internal ("Part III") adjudicative process to litigate anticompetitive conduct.⁸ As Chair, we expect that he would continue this effort,⁹ whereas Part III proceedings were disfavored by former Chairwoman Edith Ramirez.

Mr. Simons has strongly supported international coordination between antitrust authorities, particularly in the context of merger analysis, stating that "[w]here there are true differences in enforcement approaches that can result in incompatible outcomes across jurisdictions, it is our duty to try to address them in order to try to eliminate the difference or minimize its impact."¹⁰ These views complement those expressed by

(cont.)

³ See Statement of the Fed. Trade Comm'n, In the Matter of Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041 (Oct. 4, 2002). A dissenting statement issued by two Commissioners noted that the transactions at issue would reduce the industry to only two major competitors, which would account for over 80% of the market post-transaction (while the top three would account for over 95%). Dissenting Statement of Comm'rs Sheila F. Anthony & Mozelle W. Thompson, In the Matter of Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041 (Oct. 4, 2002).

⁴ Statement of the Fed. Trade Comm'n, In the Matter of AmeriSource Health Corporation and Bergen Brunswig Corporation, FTC File No. 011 0122 (Aug. 24, 2001).

⁵ For instance, Mr. Simons oversaw the investigation of the *Cytyc/Digene* merger (involving the combination of a leading producer of a particular medical test with its key supplier), which the FTC ultimately sued to enjoin and the parties ultimately abandoned.

⁶ Interestingly, the FTC's current Acting Director of the Bureau of Competition recently announced that "[t]here certainly is no institutional reluctance to investigate or bring vertical merger cases." David Hatch, [Trump FTC prepared to litigate 'harder' vertical mergers, agency official says – Global Antitrust Enforcement Symposium](#), PARR (Sept. 12, 2017).

⁷ Press Release, Fed. Trade Comm'n, [FTC Chairman Announces Public Hearings on Health Care and Competition Law and Policy to Begin in February 2003](#) (Nov. 7, 2002).

⁸ Joseph J. Simons, Dir., Bureau of Competition, Fed. Trade Comm'n, [The 51st Annual ABA Antitrust Section Spring Meeting: Report from the Bureau of Competition](#) (Apr. 4, 2003). In Part III litigation, the agency brings the case before an FTC Administrative Law Judge ("ALJ"), whose ruling can be appealed to the Commissioners and, if adverse, to the federal appeals court in any circuit. The alternative to this in-agency approach for the trial and initial appeal is to file cases in federal court.

⁹ See *id.* (discussing benefits of Part III litigation).

¹⁰ *Id.*

the Trump Administration's Assistant Attorney General for Antitrust at the Department of Justice ("DOJ"), Makan Delrahim.¹¹ With the heads of the two U.S. antitrust agencies holding strong views on the importance of and need for international conformity, we expect that there will be a significant push towards further international coordination, aiming to protect American companies from perceived unfair treatment by ex-U.S. antitrust agencies.

With respect to the FTC's consumer protection mission, Mr. Simons has a less defined philosophy and background and may be more likely to defer to his staff as he gets up to speed. Nonetheless, his experience in FTC leadership means that he will have an understanding of how the Bureau of Consumer Protection operates and will be supportive of its activities.¹²

Rohit Chopra

Mr. Chopra, the Senate Democrats' recommendation for an open Commissioner seat,¹³ is considered to be a forceful consumer protection advocate. Currently a senior fellow at the Consumer Federation of America (and formerly at the Center for American Progress), Mr. Chopra has also served in government as Assistant Director of the CFPB and Special Advisor to the Secretary of the Department of Education. He has also worked in the private sector for management consultant firm, McKinsey & Co. Mr. Chopra, who received an MBA from the Wharton School and an undergraduate degree from Harvard, is considered an ally of Senator Elizabeth Warren, for whom he worked at the CFPB. Notably, if confirmed, Mr. Chopra would be the first non-attorney to serve as a Commissioner since 2005.

Mr. Chopra's government career has focused on consumer protection issues, and he has developed a particular focus and expertise on student loans. He was a key player in the CFPB's lawsuits against for-profit universities ITT Tech and Corinthian Colleges, two of the CFPB's high-profile enforcement matters. While at the CFPB, he oversaw the agency's program on students and young consumers and was appointed to be the first Student Loan Ombudsman, a position created by the Dodd-Frank Wall Street Reform and Consumer Protection Act. In that context, he also dealt with some consumer data protection and privacy issues.

Interestingly, Mr. Chopra has criticized Democratic officials when he believed that they were not properly fulfilling their obligations to consumers, particularly with respect to management of the federal student loan program and student debt. Specific instances include criticisms of former Education Secretary Arne Duncan for the continuously rising costs of college education and the level of student loan defaults; Education Department student loan contractors for steering borrowers to loan packages which enhance the bottom line of lenders rather than promote the educational needs of students; and more generally of the federal government for not doing more to disclose deceptive practices by Sallie Mae ("the worst-ranking loan specialist").¹⁴

¹¹ For more information on Makan Delrahim, please see Davis Polk's Client Memorandum, [President Trump Appoints Makan Delrahim to Lead the Antitrust Division](#) (Mar. 27, 2017).

¹² Mr. Simons is being nominated to assume the seat currently held by Commissioner Terrell McSweeney, a Democrat. Commissioner McSweeney's term expired on September 25, 2017. As a result, following confirmation of both Mr. Simons and Mr. Chopra, the FTC would be composed of two Republicans (Mr. Simons and Maureen Ohlhausen, the current Acting Chair) and one Democrat (Mr. Chopra). The dynamic to replace a Democratic Commissioner with a Republican one could complicate the nomination process and may account for President Trump's decision to hold off formally nominating Mr. Phillips, whose nomination could then make the composition of the FTC three Republicans and one Democrat.

¹³ The nomination of Mr. Chopra continues President Trump's pattern of accepting Senator Schumer's recommendations for Democratic commissioner slots at federal agencies.

Mr. Chopra does not have significant antitrust experience. However, he does have an understanding of law and economics and his affiliation with Senator Warren suggests he may be vigilant in merger enforcement matters. It is nonetheless expected that he will bring the same aggressive focus he demonstrated in prior government roles to antitrust matters at the FTC. Mr. Chopra is known to be highly detail-oriented and will seek to gain an in-depth understanding of matters prior to taking a position.

Conclusion

Mr. Simons and Mr. Chopra (as well as Mr. Phillips) have an array of diverse experiences covering both the antitrust and consumer protection missions of the FTC. Taken as a whole, these nominations suggest that the FTC will likely adopt a more conservative approach to enforcement and policy matters than during the Obama Administration but that it will still challenge transactions or other conduct deemed harmful under the antitrust and consumer protection laws.

¹⁴ See Shahien Nasiripour, [The Obama Administration Just Hired One Of Its Biggest Critics](#), *Huffington Post* (Jan. 13, 2016).

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