

ANTITRUST TRADE AND PRACTICE

Expert Analysis

What to Expect From a Democratic Majority at Federal Trade Commission

Now that Terrell McSweeney has been confirmed as the fifth Federal Trade Commission (FTC) commissioner, there is a lot of public talk of bipartisanship and private talk of a Democratic-controlled FTC. Certainly, of course, we take each of the commissioners at his or her word about working cooperatively together; at the same time, however, one cannot ignore the assumption of many that deadlocks often may break along “party lines.”

Yet, the more productive inquiry for FTC practitioners—as well as their clients—is to assess the circumstances in which commissioners have found reasons to cross perceived “party lines.” Indeed, as we describe here, looking at each commissioner individually (and predictively for McSweeney), there is no reason to assume that any of them will invariably decide matters as party alignment may suggest. Instead, what we see is that, along the spectrum of antitrust policy, substantive principles and evidentiary standards, there in fact are instances where each commissioner has crossed the aisle on enforcement matters at one time or another.

Hence, the key for practitioners is to understand where these possibilities lie and where they do not. Only through that exercise do we have an informed insight into what a Democratic majority does and does not mean going forward and, more importantly, how to approach the commission on an informed basis.

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Accordingly, set forth below is a brief summary of what we can glean about each commissioner’s policy hot spots, core antitrust principles and perspectives on proof, while paying particular attention to instances where the political divide was crossed.

Edith Ramirez

Given the commission’s revitalized enforcement against “pay-for-delay” arrangements, and its planned critical study of patent assertion entities (PAEs), Chairwoman Edith Ramirez’s continued focus on maintaining competition in health care and high-technology markets is expected.¹ However, the FTC’s decisions to close two particular investigations provide examples of Ramirez’s rigorous approach to assessing the evidentiary underpinnings necessary to support enforcement.

In January 2013, the commission voted unanimously to close its investigation into whether Google violated Section 5 of the FTC Act by manipulating its search algorithms and introducing other key changes that may preference its own content in search results.² In response to critics who insisted that Google’s design changes reduced consumer choice and competition, Ramirez concluded, “[P]articularly in fast-paced technol-

ogy markets, condemning legitimate product improvements risks harming innovation and consumers. The evidence in this case simply did not support taking that drastic step.”³

Also, in April 2012, Ramirez joined the majority in a 3-1 vote to close the investigation of Express Scripts, Inc.’s proposed acquisition of Medco Health Solutions based on evidence developed about the pharmacy benefit manager (PBM) market.⁴ First, neither unilateral nor coordinated effects were likely, post-merger, because the parties faced fierce competition from large and small competitors who were strongly incentivized to continue competing vigorously. These competitors also had made substantial investments in additional capacity and were increasingly winning bids. Second, the merger was unlikely to enhance monopsony power for the retail dispensing of prescription drugs in large part because the economic data revealed little correlation between PBM service providers and the reimbursement rates they paid to retail pharmacies.⁵

Julie Brill

Not surprisingly, Commissioner Julie Brill’s background in the offices of the attorney general of Vermont and North Carolina left her as well with a strong interest in competition issues within the health care and technology-related markets.⁶ However, two decisions in which she joined her Republican counterparts are particularly instructive in assessing Brill’s receptiveness to arguments against enforcement.

By joining the commission’s unanimous vote against challenging Google’s proposed acquisition of AdMob in 2010, Brill demonstrated her willingness to take full account of the practical business implications of

changing competitive dynamics in high-tech markets.⁷ The proposed transaction risked eliminating direct competition between Google and AdMob in the mobile advertising networks market, where advertising space on smartphones is sold to mobile application developers and publishers.

However, during the pendency of the commission's investigation, Apple acquired Quattro Wireless, the third largest mobile ad network and introduced iAd, its own mobile advertising network. Consequently, this mitigated the commission's competition concerns. Apple's extensive relationship with mobile application developers, and its ownership of iPhone development tools gave Brill and her colleagues comfort that Apple would quickly become a significant competitor in the mobile advertising market and that AdMob's pre-merger success on the iPhone platform was not likely an accurate predictor of its post-merger competitive significance.⁸

Separately, although the commissioners' 4-0 vote to settle their challenge to Grifols' proposed acquisition of Talecris Biotherapeutics was a "close call" for Brill, it indicates her willingness to consider, and in this instance accept, a consent decree that falls short of full divestiture of stand-alone business lines.⁹ The commission alleged that the proposed transaction would likely substantially lessen competition in the markets for three blood plasma-derived products. The order required Grifols to sell three U.S. facilities to Kedrion S.p.A, a European manufacturer of plasma-derived products, to enter into a manufacturing agreement with Kedrion to supply three plasma-derived products for seven years and to permit a monitor to oversee its compliance.¹⁰

Notwithstanding her concern about whether the remedies in the order went far enough to allay her competition concerns, Brill approved the order because it facilitated the rapid entry of product into the U.S. market by a new entrant that would then develop an independent capacity to manufacture its own product in the United States within a few years. In sum, "it provide[d] some degree of immediate, sure relief to consumers."¹¹

Maureen Ohlhausen

Most observers are not surprised that Commissioner Maureen Ohlhausen, a Republican, has urged the commission to issue a clear policy statement on the scope

and application of its authority to proscribe unfair methods of competition under Section 5 of the FTC Act; nor are practitioners surprised that Ohlhausen strongly objected to the commission's withdrawal of its Policy Statement on Monetary Equitable Remedies ("Disgorgement Policy Statement").¹² Nevertheless, FTC practitioners should take note of Ohlhausen's independence when assessing certain theories of consumer harm and related proof.

There is no reason to assume that any of the commissioners will invariably decide matters as party alignment may suggest.

For example, in 2013, the commission challenged Ardagh Group's proposed acquisition of Saint-Gobain Containers, Inc. based on concerns that it would likely substantially lessen competition in the U.S. markets for glass containers for beer and spirits.¹³ Based on its *prima facie* showing of competitive harm, the agency found that the parties' evidence failed to meet the requisite proof of "extraordinary efficiencies" that would offset competitive harm.¹⁴

Commissioner Joshua Wright strenuously opposed the commission's finding, arguing that the likely anti-competitive effects were small and that the agency imposed a disproportionately high evidentiary burden on the parties to prove cognizable efficiencies.¹⁵ Crossing the aisle on this issue, Ohlhausen effectively disagreed with her fellow Republican's assertion that the parties improperly bore an asymmetrical evidentiary burden, and therefore joined the Democrats in a 3-1 vote approving the consent order.

In the FTC's recent order against McWane, Ohlhausen once more joined her Democratic counterparts in the agency's interpretation of the standard of proof for harm to competition in exclusive dealing cases.¹⁶ In January 2012, the commission issued a seven-count administrative complaint alleging, *inter alia*, that McWane violated Section 5 of the FTC Act by unlawfully maintaining its monopoly in the domestic pipe fittings market by excluding competitors (Count 6). In January 2014, the commissioners voted 4-0 to approve the FTC's opinion

and final order, with only Wright dissenting to finding McWane liable on Count 6.

While agreeing that McWane's implementation of its Full Support Program harmed its rival Star Pipe Products, Wright argued that the commission erred in finding that it harmed consumers based on mere indirect evidence of foreclosure. However, Ohlhausen joined the majority's finding that sufficient evidence of harm to consumers existed because McWane's program limited Star's access to distributors, raised Star's costs, inhibited Star's ability to compete effectively and thereby denied McWane's customers a meaningful choice of potential suppliers of pipe fittings.¹⁷

Joshua Wright

Wright's dissents in the Grifols and McWane matters certainly are consistent with perceived "conservative" orthodoxy. Even so, practitioners should pay particular attention to his views on the lack of efficiencies evident in a recent price-fixing case, and on the standard the FTC should apply to loyalty discounts matters.

Recently, in the Blue Rhino matter, Wright joined his Democratic counterparts in a 3-1 vote to issue an administrative complaint alleging that Blue Rhino violated Section 5 by acting in coordination with AmeriGas, its rival in the distribution and sale of propane gas tanks, effectively to raise the per pound price of tanks.¹⁸ The alleged evidence showed that both competitors independently notified retailers of their intent to decrease the volume of gas in tanks without a corresponding decrease in price, agreed that persuading Walmart to accept the change was key to implementing their plan, and kept each other apprised of developments in this effort until Walmart ultimately relented.

Most notably, Wright voted to issue this complaint which charges that no legitimate, procompetitive efficiency justifications outweigh the anticompetitive effects present.

Additionally, Wright's advocacy for the use of the exclusive dealing paradigm for analyzing loyalty discounts by a supplier with monopoly power—instead of the price-cost model—could provide a broader basis for potential FTC challenges to such conduct. In a June 2013 speech, he recognized that antitrust experts and courts have debated whether the legality of such loyalty discounts should be evaluated narrowly

based only on potential below-cost pricing or more broadly as a form of exclusive dealing where procompetitive benefits must be weighed against their potential for raising rivals' costs and foreclosing competition.¹⁹ While Wright acknowledges that the price-cost approach may be easier to administer, he concludes that the exclusive dealing analysis more accurately measures potentially anticompetitive effects of loyalty discounts offered by monopolists.

Terrell McSweeney

Commissioner McSweeney was only recently sworn in on April 28, but her background suggests that her approach to antitrust enforcement may complement the commission's enforcement interests in key areas. As chief counsel in the U.S. Department of Justice Antitrust Division, McSweeney was involved in enforcement and advocacy in various health care and high-technology industries. As such, she is likely to support the commission's ongoing opposition to "pay-for-delay" arrangements in the pharmaceutical industry, and its planned study of PAEs, for example. McSweeney also was involved at the Justice Department in merger enforcement, including on Section 7 challenges against American Airlines and Anheuser-Busch.

Several of McSweeney's former Justice Department colleagues have highlighted her pragmatic and open-minded approach to enforcement, and at her confirmation hearing she emphasized that she "hope[d] to continue the tradition of collegiality and consensus-oriented decision making that has been a hallmark of the FTC."²⁰ While this is what we would hope for from all of the commissioners, practitioners should carefully assess McSweeney's opinions going forward to determine in practical terms where she stands on particular issues and standards of proof.

Looking Forward

Our brief review of the commissioners' interests and predilections suggest that the future may be much more subtle than some predict or privately suppose. Certainly, we will see many matters in which a case or investigation appears to be voted out along "party lines." But it would serve practitioners well to understand the underlying policies, principles and evidentiary standards that support those outcomes. In fact, from this more principled perspec-

tive, one can see plenty of room where one or more commissioners will cross "party lines" on any number of topics, theories or evidentiary assessments.

Wright's dissents in the Grifols and McWane matters certainly are consistent with perceived 'conservative' orthodoxy. Even so, practitioners should pay particular attention to his views on the lack of efficiencies evident in a recent price-fixing case, and on the standard the FTC should apply to loyalty discounts matters.

This is not to ignore a potential manifest increase in "Republican" dissents—an area where Wright has been somewhat more prolific—on matters where the three Democrats align. Instead, it is to highlight that a practitioner is much more likely to achieve a desired consensus outside traditional "party lines" if he or she focuses on how each commissioner assesses particular industries and theories rather than on their party affiliation.

Finally, as a practical matter, it is fair to predict that the speed with which investigations are opened could substantially increase going forward. As many have observed, this is where having five commissioners instead of four simply makes it easier to reach majority consensus on the need to investigate certain matters or industries. But on the full merits, and in particular on any vote for administrative or judicial relief, we should not simply assume a bias found in political affiliation or block voting; antitrust principles and evidence—no doubt personalized to a large extent—are still likely to carry the day.



1. See, e.g., Interview with FTC Chairwoman Edith Ramirez, ABA Mergers & Acquisitions Committee Newsletter (Vol. XIV, No. 2, Spring 2014), available at http://www.ftc.gov/system/files/documents/public_statements/294181/140326t_hresholdspringissue_0.pdf.

2. *In re Google*, No. 111-0163, Statement of the Commission (F.T.C. Jan. 3, 2013), http://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf.

3. Address by Commissioner Ramirez, "Looking Back to Move Forward: Preserving the Progressive Tradition at the FTC," New York State Bar Association Antitrust Law Section Dinner (Jan. 24, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/looking-back-move-forward-preserving-progressive-tradition-ftc/130124nysba.pdf.

4. See Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., No. 111-0210, Closing Statement (F.T.C. April 2, 2012), http://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf.

5. *Id.*

6. See, e.g., Interview with FTC Commissioner Julie Brill, The Antitrust Source (February 2012), available at <http://www.ftc.gov/public-statements/2012/02/interview-ftc-commissioner-julie-brill>.

7. See Proposed Acquisition of AdMob by Google, No. 101-0031, Closing Statement (F.T.C. May 21, 2010), http://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf.

8. *Id.*

9. *In re Grifols*, No. 101-0153, Concurring Statement of Commissioner Julie Brill Regarding the Complaint and Proposed Consent Order (F.T.C. June 1, 2011) ("Grifols Concurrence"), <http://www.ftc.gov/sites/default/files/documents/cases/2011/07/110601grifolsbrillstatement.pdf>.

10. *In re Grifols*, No. 101-0153, Decision and Order, (F.T.C. Jul. 20, 2011).

11. *Grifols Concurrence*, supra note 9.

12. See, e.g., Maureen K. Ohlhausen, "Section 5 of the FTC Act: Principles of Navigation," Journal of Antitrust Enforcement (October 2013); Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases, (July 31, 2012), available at http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf.

13. *In re Ardagh Group S.A.*, No. 131-0087, Administrative Complaint ¶¶32-41 [Provisionally Redacted Public Version], (F.T.C. June 28, 2013).

14. *In re Ardagh Group S.A.*, No. 131-0087, Statement of the Commission (F.T.C. April 11, 2014), http://www.ftc.gov/system/files/documents/public_statements/298111/140411ardaghcommstmt.pdf

15. *In re Ardagh Group S.A.*, No. 131-0087, Dissenting Statement of Commissioner Joshua D. Wright (F.T.C. April 11, 2014), http://www.ftc.gov/system/files/documents/public_statements/298101/140411ardaghstmt.pdf.

16. FTC Press Release, "FTC Issues Opinion and Final Order Finding McWane Unlawfully Maintained Its Monopoly in Domestic Pipe Fittings by Excluding Competitors," (Feb. 6, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/02/ftc-issues-opinion-final-order-finding-mc-wane-inc-unlawfully>.

17. *In re McWane*, No. 9351, Opinion of the Commission at 26, [Provisionally Redacted Public Version], (F.T.C. Jan. 30, 2014).

18. *In re Ferrelgas Partners, Ferrelgas, d/b/a Blue Rhino*, Administrative Complaint ¶61, (F.T.C. March 27, 2014). See also, FTC Press Release, "FTC Charges Two Leading Suppliers of Propane Exchange Tanks with Restraining Competition," (March 27, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/03/ftc-charges-two-leading-suppliers-propane-exchange-tanks>.

19. Remarks of FTC Commissioner Wright, "Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts," Bates White 10th Annual Antitrust Conference (June 3, 2013) available at http://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bates-white.pdf.

20. Statement of Terrell McSweeney, Nominee for Commissioner, FTC (Sept. 18, 2013), available at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=70154ba4-50f3-4934-9715-19b65a35144c.