

McSweeny Confirmed by Senate to Fill Vacancy at FTC, Will Give Democratic Majority to Commission

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The Federal Trade Commission will soon be back to having a full complement of five commissioners. Today, the U.S. Senate, by a vote of 95 to 1, confirmed Terrell McSweeny to fill a vacancy at the agency created by the departure of Jon D. Leibowitz more than a year ago. The term runs through September 26, 2017.

The White House announced the nomination of McSweeny in June 2013. Although her nomination was not controversial, her confirmation was delayed because the Senate failed to take a vote before year's end. In November 2013, the Senate Commerce, Science, and Transportation Committee had voted to report the nomination to the full Senate; however, the nomination needed to be reconsidered by the Commerce Committee this year. In January, the Commerce Committee once again approved McSweeny.

McSweeny is currently Chief Counsel for Competition Policy and Intergovernmental Relations at the Department of Justice Antitrust Division. She has been at the Antitrust Division since 2012. Prior to that, she served as Deputy Assistant to the President and Domestic Policy Advisor to the Vice President at the White House.

Before working in government, McSweeney was an associate in 2005 with O'Melveny & Myers. She received an A.B. from Harvard University and a J.D. from Georgetown University Law School.

McSweeney's arrival at the FTC will provide the agency with a Democratic majority that should avoid two-to-two deadlocks and enable Chairwoman Edith Ramirez to pursue her agenda.

The FTC recently described itself as "collegial, bipartisan, and consensus-driven." However, there has certainly been some disagreement among the four current commissioners.

Earlier this year, there was a split between the four commissioners on two of the counts in an antitrust action against McWane, Inc.—a supplier of ductile iron pipe fittings. As a result, those counts were dismissed in the public interest, although McWane was found liable on other counts.

Some cases also have been brought over a dissent from one of the two Republican commissioners—Maureen K. Ohlhausen and Joshua D. Wright.

In addition, both Ohlhausen and Wright have questioned the agency's use of its unfair methods of competition (UMC) authority to address conduct that falls outside of traditional antitrust laws. At the American Bar Association Section of Antitrust Law Spring Meeting last month, Wright suggested that the Commission's approach to standalone FTC Act, Section 5 enforcement varies with the makeup of the Commission. He has called on the Commission to issue a policy statement or guidance for business.

During questioning by the Commerce Committee last year, McSweeney discussed the need for offering guidance to business. Noting that the FTC was primarily a law enforcement agency dealing with issues on a case-by-case basis, she said that it was incumbent on agency leaders to clearly articulate their reasoning, to apply the law as written, and to follow the caselaw. She committed to doing just that if confirmed.

It remains to be seen whether a Commission policy statement on the Commission's UMC authority will be forthcoming.