

5 Things to Expect from the Ohlhausen Commission

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Steven J. Cernak (Schiff Hardin LLP)

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On January 25, 2017, the Trump administration designated Commissioner Maureen Ohlhausen as Acting Chairman of the Federal Trade Commission. Because Ohlhausen has been a Commissioner since 2012 (and held other FTC positions before that), she certainly left plenty of tea leaves for antitrust practitioners to read as they tried to guess how she would act as Chairman. But she made it even easier for us: In a series of statements and speeches in the last two weeks, Ohlhausen highlighted the points she will emphasize as Acting Chair. While all three are worth reading in their entirety, here are the main points.

“Regulatory Humility”

In what she calls her lodestar, Ohlhausen says she will lead the FTC with “regulatory humility.” She has used this as her catchphrase for years and explained what she meant by it in a 2015 presentation. In brief, the detailed and up-to-date knowledge necessary for a regulator to do her job is always difficult to attain and can become nearly impossible to gather the more prescriptive the regulation and complex the industry. Given that, she would wield the power of the antitrust laws carefully, acknowledging the risk and potential costs of getting it wrong.

Belief in the Power of Markets

Ohlhausen explicitly stated her belief in the power of markets—when they are free of restraints and unnecessary regulation. She thinks that markets in which firms

face competitive pressure will yield the best outcomes for consumers, at least in the long run. She sees the job of antitrust law and its enforcers as protecting the competitive process, not dictating market outcomes. “In short, antitrust is not regulation.”

Action Based on Economic Evidence

Combining those first two points, Ohlhausen would have the FTC step in when evidence—that is, “rigorous application of economic theory”—would give her confidence that the competitive process is being harmed and FTC intervention can improve it. That conclusion does not mean that she never favors FTC intervention. In the most recent speech, she singled out for praise the FTC’s actions on hospital mergers, pay-for-delay contracts, and the state action doctrine. She did, however, criticize as empirically unsupported some of the Commission’s actions regarding purported hold-up actions by standard essential patent holders. More broadly, she criticized the rush to judgment (and suggested government action) from incomplete or misleading information regarding concentration and divestiture remedies in merger investigations.

Reducing Excessive Costs on Business

Ohlhausen has made statements similar to the ones above before as a Commissioner; however, she recently added a desire to try to reduce the burden on businesses while still gathering the information necessary for the FTC to protect the competitive process. She suggested a meeting with the FTC’s Bureaus of Competition and Consumer Protection to discuss the potentially overbroad discovery, especially of third parties. She did not mention Hart-Scott-Rodino reform in these recent speeches; however in 2015, she and former Commissioner Wright did suggest an expansion of the “solely for investment purposes” exemption that would reduce the number of HSR filings for small, minority investments.

State Occupational Licensing

Finally, like many FTC leaders before her, Ohlhausen recognizes that local government regulation, especially occupational licensing, can harm the smooth operation of the competitive process. She continues to support the FTC’s recent court successes narrowing the state action exemption to the antitrust laws and the FTC staff’s efforts to help local governments regulate with consumers in mind. While respecting federalism, she suggested going beyond those steps and creating

a task force with states and others to identify and remove unnecessary barriers to entrepreneurship and innovation. Maybe she will help the FTC win hearts and minds, not just legal battles?

Conclusion

How long Ohlhausen will lead the FTC is not clear. The Trump administration can name two more Commissioners to fill current vacancies and designate one of those selections as Chairman. But even if that happens, the lengthy nominating and confirmation process means that Ohlhausen will be at least Acting Chairman for some time. And she has hit the ground running.