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FTC Nominees Pledge Bipartisan Cooperation in Senate Commerce Committee Hearing

Jeffrey May (Wolters Kluwer) · Saturday, February 17th, 2018

All four of President Trump's nominees to serve on the FTC envision continued bipartisan cooperation at the Commission if they are confirmed. The pledges of bipartisanship were made by Joseph Simons, the FTC Chairman Designate, Rohit Chopra, Noah Joshua Phillips, and Christine S. Wilson at a nomination hearing before the Senate Committee on Commerce, Science, and Transportation on February 14. The nominees also expressed their hopes that, if confirmed, they will maintain close relationships with state attorneys general and other parts of the federal government.

Senate lawmakers were encouraged by the prospect that the nominees would continue the agency's reputation for working above politics. Of course, there were some differences of opinion among the nominees. In particular, Simons expressed support for the Federal Communications Commission's Restoring Internet Freedom order that revives the FTC's ability to combat unfair and deceptive business practices by broadband providers. Meanwhile, on the topic of net neutrality Chopra noted his concerns about the FTC's ability to protect broadband consumers. In his opening statement, Ranking Member Bill Nelson (D-Fla.) [stated](#) unequivocally that FTC was not the agency for net neutrality.

Sen. John Thune (R-S.D.), chairman of the Senate Commerce Committee, expected the nominations to move quickly to the floor for consideration. Senator Orrin Hatch (R-Utah), who introduced Simons, [spoke](#) highly of all of the nominees and suggested that the four were an "excellent package that deserves bipartisan support."

Currently, there are only two commissioners serving on the five-member Commission. The four nominees will replace both Maureen K. Ohlhausen, the current acting chairman of the FTC, and Terrell McSweeney. Ohlhausen has been picked by President Trump to serve as a judge on the U.S. Court of Federal Claims. McSweeney continues to serve, even though her term expired in September 2017. Simons has been nominated to serve the remainder of the seven-year term that began in September 2017. Wilson was nominated for the seat held by Ohlhausen, which expires in September 2018 and for the seven-year term that follows.

It is unclear whether the FTC might be operating with a full cadre of five commissioners any time soon. Senator Richard Blumenthal (D-Conn.) pointed out the president has named only four possible commissioners. Blumenthal asked Simons whether he agreed with him that the Commission should have five members. Simons, who will lead the agency if confirmed, agreed. Senator Chuck Schumer (D. N.Y.) has reportedly recommended his chief counsel, Rebecca Slaughter, for a seat on the Commission.

“TeamFTC”. Simons, who is Trump’s pick to head the agency, was the first of the nominees to speak. He continued the bipartisan theme, suggesting that he envisioned a “TeamFTC,” making use of the other commissioners’ complimentary expertise. Simons said that his first priority is going to be ensuring vigorous enforcement on the consumer protection and competition sides where the agency can get the biggest bang for the taxpayer’s dollar. He will focus on where the harm is greatest. This could possibly include large technology companies.

In his opening statement, Simons said that he feels as if he had spent his entire professional life preparing to lead the Commission. He worked at the agency in the 1980s in the Bureau of Competition and later returned to lead the Bureau. If he is confirmed to lead the agency, Simons intends to undertake a merger retrospective to determine the effectiveness of the agency’s merger enforcement program. He suggested that an analysis of past mergers could help with future mergers in the pharmaceuticals and agriculture sectors that Senators pointed out as areas of concerns.

In response to questions about high drug prices, Simons said that he was contemplating a drug pricing monitoring task force. The task force would be able to see in real time what is going on with pricing and to act as quickly as possible when high prices are caused by anticompetitive conduct or something regulatory in nature, he noted.

On the topic of industry consolidation and the growth of large tech companies, Simons said that big was not bad. He noted, however, the importance of monitoring carefully places where there is market power, such as the tech sector.

With respect to the agency’s consumer protection mission, Simons and the other nominees said that data breaches were a high priority and that they would look into the practices of consumer reporting agencies. Simons said that there was a need to create incentives for companies to take better care of data.

Blumenthal suggested that the FTC needed to reinvent itself when dealing with data breaches. He called for a close look at the Equifax breach.

Simons seemed to plan on taking a cautious path. In response to questions about possible amendments to the Contact lens rule, Simons said “if it ain’t broke don’t fix it.” He also spoke of keeping the ship steady. He did, however, reiterate the call for the repeal of the common carrier exemption from the FTC Act.

“Advocate for personal liberty”. Wilson is also a veteran of the FTC. If confirmed, this would be her third job at the agency. In her opening [statement](#), Wilson described herself as “an ardent advocate for personal liberty and market economies.” In response to questions about corporate consolidation, particularly in the tech sector, Wilson said that the antitrust laws as written today were broad and flexible and capable of adapting to new technologies. The nominees seemed in agreement that there was no company beyond the reach of the law.

Consensus builder. Thune described the impending departure of Philips from the Senate staff—after serving six years as chief counsel to Senator John Cornyn (R. Tex.)—as the Senate’s loss and the FTC’s gain. In his opening [remarks](#), Philips said that, as a commissioner, he would work with staff to keep the agency abreast of developments in technology and business. Cornyn, who introduced Philips, said that the nominee had shown a knack for building consensus while working on the Hill.

Lone Democrat. The lone Democrat nominee, Chopra, also discussed the importance of having

adequate talent at the agency and engaging in constant learning. Chopra, a Consumer Federation of America senior fellow, also noted the importance of looking back at past actions to see if enforcement efforts were effective. Chopra remarked that shortening the duration of orders in FTC enforcement actions, as recommended by the American Bar Association Section of Antitrust Law, might be worth considering. In his opening [statement](#), Chopra said: “I look forward to working cooperatively with my fellow Commissioners, the Commission’s staff, this Committee, and the public to advance the agency’s mission to protect consumers and competition with openness, transparency, and humility.” Chopra was nominated for the unfinished term of former Commissioner Joshua Wright, which ends next year.

Merger enforcement process. Senator Mike Lee (R. Utah), chairman of the Senate Judiciary Committee’s antitrust subcommittee, took the opportunity to get a sense of the nominee’s views on the proposed “Standard Merger and Acquisition Reviews Through Equal Rules Act” or “SMARTER Act.” The legislation would eliminate differences in the procedures used by the FTC and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. Lee asked the nominees if there was a good reason for having different standards for FTC and Justice Department to block a merger. Lee sees no reasons for the differences.

Simons said that as a matter of practice the standard was the same. However, he expressed his view that an agency should only get one bite at the apple, and that if the FTC loses on a motion for a preliminary injunction, it should not move on with administration litigation to challenge a proposed merger. Wilson also said that seeking a preliminary injunction in federal court was the right way to go for an unconsummated merger. Chopra said that as a general matter the issues were likely best suited for federal court. Philips also commented that companies should not be faced with different standards based on different agencies.

Past commissioners have split on the wisdom of the proposal, which has been introduced numerous times in recent years.

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