

Democrats Gain Control of FTC With Terrell McSweeney Confirmation

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Steven C. Sunshine
Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

Sharis A. Pozen
Washington, D.C.
202.371.7555
sharis.pozen@skadden.com

Clifford H. Aronson
New York
212.735.2644
clifford.aronson@skadden.com

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1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

On April 9, 2014, the U.S. Senate confirmed the nomination of Terrell McSweeney to the Federal Trade Commission. Commissioner McSweeney's appointment creates a Democratic majority on the five-member commission, sparking anticipation of more aggressive enforcement by the FTC going forward.

Commissioner McSweeney's Policy Background

Terrell McSweeney comes to the FTC from her position as chief counsel for competition policy and intergovernmental relations in the Antitrust Division of the Department of Justice. Commissioner McSweeney was appointed to her DOJ post during Sharis Pozen's tenure as head of the Antitrust Division. While in the Antitrust Division's "front office," Commissioner McSweeney participated in many of the division's high-profile enforcement actions, including *United States v. Apple, Inc.*,¹ *United States v. Bazaarvoice, Inc.*,² *United States v. Anheuser-Busch InBev SA/NV*³ and *United States v. US Airways Group, Inc.*⁴ Before that, Commissioner McSweeney served as domestic policy adviser to Vice President Joe Biden.

Commissioner McSweeney's statements during her confirmation hearing underscore her policy background; she expressed her view that the FTC's mission — to protect consumers — is a bipartisan one and emphasized her desire to maintain the commission's collegial and bipartisan tradition.

The End of Deadlock

The FTC has been operating with only four commissioners for the 14 months since Chairman Jon Leibowitz's departure in February 2013. Because the decision to take enforcement action requires a majority vote, during this period any enforcement decision (absent a recusal) required at least one Republican vote in favor of a complaint. Some antitrust observers expected that the four-person commission, made up of two Democrats and two Republicans, would err on the side of non-enforcement due to deadlock along party lines. For example, in the commission's opinion in *In the Matter of McWane, Inc.*,⁵ the FTC dismissed in part an administrative complaint alleging restraint of trade, due to the commission's failure to reach a majority position in favor of enforcement. Democratic Commissioners Edith Ramirez and Julie Brill found that McWane had engaged in a price-fixing conspiracy, while Republican Commissioners Maureen K. Ohlhausen and Joshua Wright found the evidence insufficient to establish liability. Only as to one of the complaint's seven counts did the commission hold by a 3-1 majority that McWane's exclusive dealing program was unlawful.

Commissioner McSweeney's confirmation not only numerically eliminates the possibility of non-enforcement due to a tie vote absent a recusal, her appointment also shifts

- 1 Complaint, *United States v. Apple, Inc.*, No. 1:12-cv-02826-UA (S.D.N.Y. Apr. 11, 2012).
- 2 Complaint, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO (N.D. Cal. Jan. 10, 2013).
- 3 Complaint, *United States v. Anheuser-Busch InBEV SA/NV*, No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013).
- 4 Amended Complaint, *United States v. US Airways Group, Inc.*, No. 1:13-cv-01236-CKK (D.D.C. Sep. 5, 2013).
- 5 Opinion of the Commission, *In the Matter of McWane, Inc.*, No. 9531 (F.T.C. Jan. 30, 2014).

the commission's party-line voting blocks in favor of her Democratic counterparts, all three of whom are Obama appointees. Because President Obama has expressed an intent to step up antitrust enforcement, this particular majority has fueled speculation that we may now see more aggressive enforcement by the commission.⁶ Indeed, having participated in a number of high-profile antitrust matters, Commissioner McSweeney is unlikely to shy away from enforcement where warranted.

In reality, however, it is not clear whether the voting blocks materially lessened the commission's overall enforcement zeal. The commission pursued a number of cases, including *In the Matter of Ardagh Group, S.A.*,⁷ *In the Matter of Pinnacle Entertainment, Inc.*,⁸ *In the Matter of Solera Holdings, Inc.*⁹ and *In the Matter of Motorola Mobility LLC*.¹⁰ Even in *McWane*, Republican Commissioner Ohlhausen joined Democratic Commissioners Ramirez and Brill to hold that *McWane's* exclusive dealing program unlawfully monopolized the domestic fittings market. Commissioner Wright dissented, arguing in favor of the pro-consumer efficiencies created by vertical restraints. Commissioner Wright found the evidence supported only that the program harmed *McWane's* rival, not the competitive process.

As with the actual record of the four-member commission, the path of the now five-member commission may very well be more nuanced than a simple split along party lines. Between her policy experience and her stated commitment to bipartisanship, Commissioner McSweeney is likely to bring a pragmatic, policy-based perspective that favors consideration of a broader, intergovernmental context when contemplating an enforcement action. All five commissioners share a commitment to reasoned and principled antitrust enforcement. Should her appointment ultimately lead to stepped up enforcement, it does seem likely that more dissents from Commissioner Wright, who has historically been the commissioner most critical of government intervention, will be forthcoming.

6 See Barack Obama, Sen., Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), available at http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

7 Decision and Order, *In the Matter of Ardagh Group, S.A.*, No. 9356 (F.T.C. Apr. 10, 2014).

8 Decision and Order, *In the Matter of Pinnacle Entertainment, Inc.*, No. 9355 (F.T.C. Dec. 4, 2013).

9 Decision and Order, *In the Matter of Solera Holdings, Inc.*, No. C-4415 (F.T.C. Oct. 22, 2013).

10 Decision and Order, *In the Matter of Motorola Mobility LLC*, No. C-4410 (F.T.C. Jul. 23, 2013).

Additional Contacts in the Antitrust and Competition Group

Simon Baxter	Brussels	32.2.639.0310	simon.baxter@skadden.com
Jess Biggio	New York	212.735.2060	jessica.biggio@skadden.com
Alec Y. Chang	New York	212.735.4142	alec.chang@skadden.com
C. Benjamin Crisman, Jr.	Washington, D.C.	202.371.7330	benjamin.crisman@skadden.com
Frederic Depoortere	Brussels	32.2.639.0334	frederic.depoortere@skadden.com
Paul M. Eckles	New York	212.735.2578	paul.eckles@skadden.com
Shepard Goldfein	New York	212.735.3610	shepard.goldfein@skadden.com
Peter E. Greene	New York	212.735.3620	peter.greene@skadden.com
Matthew P. Hendrickson	New York	212.735.2066	matthew.hendrickson@skadden.com
Ian G. John	New York	212.735.3495	ian.john@skadden.com
James A. Keyte	New York	212.735.2583	james.keyte@skadden.com
Karen Hoffman Lent	New York	212.735.3276	karen.lent@skadden.com
John H. Lyons	Washington, D.C.	202.371.7333	john.h.lyons@skadden.com
Gary A. MacDonald	Washington, D.C.	202.371.7260	gary.macdonald@skadden.com
Jeffrey A. Mishkin	New York	212.735.3230	jeffrey.mishkin@skadden.com
John M. Nannes	Washington, D.C.	202.371.7500	john.nannes@skadden.com
Neal R. Stoll	New York	212.735.3660	neal.stoll@skadden.com
Ingrid Vandenborre	Brussels	32.2.639.0336	ingrid.vandenborre@skadden.com
James S. Venit	Brussels	32.2.639.0300	james.venit@skadden.com