

# With McSweeney Confirmed, What To Expect From FTC

Law360, New York (April 18, 2014, 3:44 PM ET) -- 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 U.S. 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.*,<sup>[1]</sup> *United States v. Bazaarvoice Inc.*,<sup>[2]</sup> *United States v. Anheuser-Busch InBev SA/NV*<sup>[3]</sup> and *United States v. US Airways Group Inc.*<sup>[4]</sup> 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 nonenforcement due to deadlock along party lines.

For example, in the commission's opinion in *In the Matter of McWane Inc.*,<sup>[5]</sup> 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 nonenforcement due to a tie vote absent a recusal, her appointment also shifts 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 SA,[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.

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[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).

[6] See Barack Obama, Sen., Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), available here.

[7] Decision and Order, In the Matter of Ardagh Group SA, 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).

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