

February 16, 2018

## Antitrust and Consumer Protection Alert

### Federal Trade Commission Update: Senate Hearings Reveal No Obvious Hurdles for Commissioner Nominees

The Senate Commerce Committee held a hearing on Wednesday on the nominees to serve on the Federal Trade Commission (FTC). The nominees are Joseph Simons (Chairman Designate), Christine Wilson, Noah Phillips and Rohit Chopra. The hearing covered a range of antitrust and consumer protection issues before, or potentially before, the Commission, including healthcare competition and pharmaceutical pricing; competition in technology and telecommunications sectors; industry concentration; cybersecurity breaches and privacy; and online or telemarketing deception and scams.

The general tone of the hearing was positive. No member of the Commerce Committee raised concerns with any specific nominee or suggested opposition. Chairman John Thune (R-SD) indicated his intention to seek a floor vote quickly on the nominees. The committee shortened the period for additional written questions from members to one week, from the typical two weeks. Senator Shelly Moore Capito (R-WV) indicated that the chair hopes to schedule the nominees for a committee vote during the Commerce Committee's next executive session.

A detailed summary of the hearing is linked below, along with links to member opening statements and witness testimony.

#### Links to Written Statements and Testimony

- [Chairman John Thune \(R-SD\)](#)
- [Ranking Member Bill Nelson \(D-FL\)](#)
- Nominees: [Joseph Simons \(Chairman Designate\)](#), [Rohit Chopra](#), [Noah Phillips](#), [Christine Wilson](#)

#### Opening Statements

Chairman John Thune (R-SD) said he has appreciated the FTC's increased focus on the technology sector and that he hopes the agency will continue that focus. Ranking Member Bill Nelson (D-FL) said he hopes the FTC will continue to work in a bipartisan and independent manner.

- **Introductions.** Senator Orrin Hatch (R-UT) introduced Joseph Simons, the nominee for FTC Chairman. He said the FTC will be facing complex challenges in the next few years and that Mr. Simons is "just the man this moment requires." Senator John Cornyn (R-TX) introduced Noah Phillips, formerly of his staff. He said Mr. Phillips is an expert in IP, antitrust

and technical issues, and has a gift for building consensus across the aisle. Senator Shelley Moore Capito (R-WV) introduced Christine Wilson. She said Ms. Wilson is motivated by her view that competition is the best protection for consumers and the strongest prescription for a robust economy.

- **Nominee Opening Statements.** Mr. Simons said that he intends to continue to lead the FTC in a bipartisan way. He said the agency will focus on protecting and improving consumer welfare. Ms. Wilson said that the FTC should wield its authority appropriately and cautioned against the commission trading its role as referee in the market for the role of manager or star player. Mr. Phillips said in his opening statement that he believes the mission of the FTC is to protect consumers and competition, maintain predictability, and keep abreast of advancements in technology. Mr. Chopra said in his opening statement that he sees challenges ahead for the FTC in handling data breaches, sophisticated scams targeting seniors and veterans, and a large volume of upcoming M&A activity. He said it is the FTC's responsibility to protect consumers as well as honest businesses.

## Question and Answer

The hearing covered the FTC's enforcement priorities and its antitrust and consumer protection missions.

### Enforcement Priorities

- Senator Tom Udall (D-NM) asked how the commission will prioritize all of the issues currently pending. Mr. Simons said he intends to focus resources on areas where the potential for harm is the greatest. Senator Udall asked Mr. Simons for several commitments. Mr. Simons agreed to examine the FTC's budget and identify any concerns for the committee; he also agreed to examine the issue of bots in public comment systems, false labeling of sports equipment, and internet connectivity of children's toys. Mr. Chopra said the collection of data on children and service members warrants very specific attention. Mr. Phillips said consumer education is a crucial tool to get the word out to parents about data collection risks. Senator Udall said he hopes the FTC will work with state attorneys general to amplify that message.
- Senator Amy Klobuchar (D-MN) asked if merger enforcement should be a priority of the FTC. Mr. Chopra said there are barriers to entry in many industries, and that it is very important that the commission is sufficiently flexible to adapt its resources to keep up with the enforcement challenges presented by rapidly changing markets.

### Antitrust

- **Injunction Standard.** Senator Mike Lee (R-UT) mentioned his legislation, the SMARTER Act, which would align the standards that the DOJ and FTC must meet to obtain preliminary injunctions and which would require the FTC to litigate merger cases in federal court (rather than in administrative proceedings). He asked the nominees if there is any good reason for different injunction standards to govern DOJ and FTC merger challenges, and if they would ever authorize the filing of an administrative complaint without seeking a preliminary injunction in federal court. Mr. Chopra said he believes market participants should not have to navigate multiple standards whenever possible, but one concern is the overall speed of the proceedings. Mr. Phillips said he does not believe there is any good reason to have different standards. Ms. Wilson said she believes businesses should have predictability and clarity when considering potential transactions, and that there is no good reason for different standards. She said she would be inclined to seek a preliminary injunction in federal court

for unconsummated mergers. Mr. Simons said he believes in practice that the two standards lead to the same results, but agrees that that should be made more clear. He said litigation should be in federal court and there should only be one bite at the apple. Senator Lee said he was encouraged by those comments and that the fate of a litigant should not be determined by a coin toss determining which agency reviews the merger.

- **Competition in Technology Sector.** Senator Thune (R-SD) asked about the state of competition in the technology sector. Mr. Simons said big is not necessarily good or bad, but he has concerns that big and influential companies could use anticompetitive means to stay big. Ms. Wilson said she believes the antitrust laws as written are sufficiently broad and flexible to adapt to new technology. Mr. Phillips said technology companies have a large impact on our lives, and he sees the FTC playing a role in ensuring competition. Mr. Chopra said large tech companies compete not only with each other but with several other sectors of the economy also, and that creates interesting challenges for the Commission.

Senator Ted Cruz (R-TX) asked about the scope and size of big tech and how the FTC should approach the rapid growth. Mr. Simons said he believes the sectors most likely to face antitrust problems are those in which firms have the most market power, and he intends to pay particular attention to those areas.

- **Competition in the Healthcare and Pharmaceutical Industries.** Senator Richard Blumenthal (D-CT) questioned the nominees about drug pricing and whether they agree the FTC needs to vigorously enforce against anticompetitive conduct in the pharmaceutical industry. Mr. Simons said he is very concerned about drug pricing and would like to explore the possibility of creating a task force that could monitor drug price increases and identify cases where anticompetitive conduct has played a role. Mr. Chopra said the FTC needs to focus on sectors in which enforcement can have the greatest effect on consumer pocketbooks, and the healthcare and pharmaceutical industries must be a top priority.

Senator Capito (R-WV) asked the nominees about prescription drug pricing and consolidation in the Pharmacy Benefit Manager (PBM) industry. She raised concerns about retail competition in the healthcare industry and asked how the FTC will deal with these issues. Mr. Simons said he strongly agrees with that concern and hopes to establish a program to retrospectively examine mergers and determine if past enforcement has been effective. He said the healthcare industry may be part of that initiative. Mr. Phillips said the FTC should be focusing on this issue because healthcare costs may be the number one issue for many American households. Ms. Wilson said this is an area where the FTC has spent a lot of time, and she expects they will continue to do so.

Senator Roger Wicker (R-MS) asked Ms. Wilson about protecting consumers in the face of consolidating healthcare markets. In particular, he raised concerns about PBMs lacking transparency and abusing market leverage. He asked what role transparency should play in ensuring competition in the pharmaceutical segment. Ms. Wilson said she firmly believes transparency is crucial for free and efficient markets. As to PBMs, she agreed with Mr. Simons that merger retrospectives would be important to determine whether the FTC has achieved the right enforcement balance. Senator Wicker said that pharmacists are often frustrated by the regulatory burdens placed on them.

Senator Klobuchar (D-MN) asked about reverse payments—i.e., where a branded pharmaceutical supplier is alleged to have paid a generic company to drop a patent challenge and stay out of the market—and pointed out that pharmaceutical prices have continued to rise. Mr. Phillips said the FTC has a long bipartisan tradition of policing

anticompetitive actions in the pharmaceutical industry and said he looks forward to continued FTC focus there.

- **Competition in the Telecommunications Sector.** Senator Ed Markey (D-MA) read a statement from FTC Commissioner Terrell McSweeney about gaps in the FTC's authority and expertise in the telecommunications sector over privacy and data security. Mr. Chopra said he shares the concerns Commissioner McSweeney raises. Mr. Simons said he believes if the FTC's authority to enforce in this sector is restored, the FTC will be a vigorous enforcer. Senator Markey said the FTC lacks sufficient rulemaking authority in this area; Mr. Simons said the FTC and FCC both have rulemaking authority but of different types. Mr. Simons said that he would like to consult with the FTC's general counsel's office before reaching firm conclusions regarding these issues.
- **Competition in Agriculture.** Senator Jon Tester (D-MT) asked about concentration in the agricultural industry. Mr. Simons said he would likely include agriculture in the merger retrospective program. Senator Tester asked if the review could affect the Syngenta/ChemChina merger. Mr. Simons said a retrospective would have implications for every merger going forward, but that generally past mergers are a done deal. The other nominees agreed.
- **Competition in the Airline Industry.** Senator Richard Blumenthal (D-CT) expressed concerns about the airline industry. He said he hopes the commissioners will use their platform and bully pulpit to advocate for competition there, even if the FTC lacks jurisdiction. Mr. Phillips said he would like to make the Commission a resource for other agencies seeking expertise on the topic. Senator Blumenthal said beyond the FTC being a resource, he would like to see it "be a champion."

#### Consumer Protection

- **Consumer Protection Policy.** Senator Catherine Cortez-Masto (D-NV) asked for all nominees to make a commitment that the FTC will be an active consumer protection agency on their watch. Each of the nominees agreed. Senator Cortez-Masto asked what they see as the biggest challenge the commission will face. Mr. Simons said data breaches, and Ms. Wilson agreed. Mr. Phillips agreed as well, but added that those topics should not distract from the bread-and-butter issues of the agency like protecting children and the elderly. Mr. Chopra said the FTC should make enforcement against credit reporting agency misconduct a paramount priority.
- **Data Protection and Data Breaches.** Senator Blumenthal (D-CT) inquired about protecting consumer data in cyber breaches. Each of the nominees expressed concerns about whether the FTC has sufficient authority to create incentives for companies to protect consumer data.

Senator Maria Cantwell (D-WA) asked whether there should be more rigorous guidelines regarding notification about data breaches and whether, for example, waiting five weeks to disclose a breach was too long. Mr. Simons said it was worth examining the possibility of new guidelines, but that he does not yet have a good basis to reach a conclusion on whether five weeks is too long. Mr. Chopra said as a general matter and not specific to any one case, several weeks does not sound fast enough to him. Mr. Phillips said data breach notifications raise serious issues that he is looking forward to working on. Ms. Wilson agreed this area raises serious issues and said she anticipates the FTC will spend a great deal of time on these questions.

- **Credit Reporting.** Senator Brian Schatz (D-HI) asked the nominees if they believe the FTC has the authority to do more in the credit reporting industry. Each of the nominees said they were interested in exploring whether the commission would benefit from more authority. Mr. Chopra said the industry is an example of one where consumers cannot vote with their feet and the commission needs to “amp up” its work in the field. Senator Schatz raised predictive algorithms and asked if the FTC would commit to looking into that issue. Mr. Chopra said he would.

Senator Klobuchar (D-MN) asked about a recent data breach in the credit reporting industry. Mr. Simons said he expects the commission to be “all over” any major issue involving data breaches.

- **Student Loans.** Senator Maggie Hassan (D-NH) asked about student loan scams and what the FTC can be doing at the federal level. Mr. Chopra said the situation resembles the foreclosure crisis. He said he knows the FTC has been criticized for being late on the issue, but believes the staff has done good work that they need to amplify and not allow history to repeat itself.

Senator Tammy Baldwin (D-WI) asked about student debt relief scams and how the FTC should work with the Department of Education and other agencies to address them. Mr. Chopra said there is no question the FTC, Consumer Financial Protection Bureau and DOE must tackle the problem by working together, along with state attorneys general. He said the debt relief scams are the symptom, and that the authorities also need to address the underlying cause, which he believes to be subpar student loan servicing.

- **Child Privacy.** Senator Markey (D-MA) asked what the nominees will do to ensure child-directed applications are fashioned to protect privacy and asked each of the nominees to pledge to promote pro-child privacy policies. Each of the nominees agreed. Mr. Chopra said the market has evolved very quickly with technology and pledged to notify the committee if he feels the FTC lacks the authority it needs.
- **Online Gaming.** Senator Hassan (D-NH) asked about violent video games and “loot boxes” (a form of reward in online gaming). Each of the nominees agreed that children becoming addicted to gaming is a problem that warrants the FTC’s attention and agreed to examine issues with loot boxes.
- **Telemarketing.** Senator Capito (R-WV) asked about the new age of telemarketing. Ms. Wilson said the Do Not Call initiative was initially successful but technology has now outpaced that effort. She said the FTC must evolve on the issue.

Senator Tester (D-MT) asked about telemarketers. Mr. Simon said he expects there is a technological solution to the problem. Mr. Phillips said a solution must be a priority for the Commission. Mr. Chopra agreed it should be a priority but expressed concern that the agency does not have the resources and tools to solve it.

- **FTC Telecommunication Authority.** Senator Blumenthal (D-CT) asked about the Ninth Circuit’s recent panel decision *FTC v. AT&T Mobility*, which overturned an FTC enforcement action against AT&T Mobility for allegedly “throttling” data usage for certain customers. He said the decision creates a major gap in the FTC’s jurisdiction. Mr. Simons said he expects the *en banc* Ninth Circuit will reverse the panel decision. He said he would support eliminating the common carrier exception from the FTC Act entirely. Senator Blumenthal expressed concerns about “mobile cramming” (including third-party charges in bills for telecommunication services).

- **Other Topics.** Senator Wicker (R-MS) asked the nominees specifically about proposals to change the FTC’s “contact lens rule,” expressing skepticism about whether a rule that is currently working well should be changed. Mr. Simons said he believes that if it “ain’t broke, don’t fix it.” Ms. Wilson agreed. Mr. Chopra said the agency should be careful about imposing unnecessary burdens on the smallest industries.

Senator Baldwin (D-WI) asked about travel-rating websites and the potential that they may be incentivized to promote positive reviews to collect click-based compensation. Each of the nominees agreed to look into that issue.

Senator Capito (R-WV) asked about the role the FTC plays in addiction issues. Mr. Chopra said addiction can create conditions where consumers are susceptible to serious scams and fraud, including body brokering in the opioid epidemic.

Senator Jerry Moran (R-KS) asked about deceptive and unfair marketing practices surrounding the use of fake bots and social media followers. Mr. Chopra said sales and marketing are often more effective with more trust, and said he looks forward to addressing that trust problem. Senator Moran asked about ticket bots, saying someone needed to be made an example of. Ms. Wilson agreed to vigorously enforce the BOTS Act and make sure violators are held up as examples.

#### Other

- **Federal vs. State Enforcement.** Senator Cortez-Masto (D-NV) asked how the nominees expect to interact with state attorneys general. Each of the nominees said they plan to work very closely with state attorneys general to use them as a “force multiplier.” Senator Cortez-Masto asked Mr. Simons how he will incorporate other commissioners into everyday decision making. He said he foresees it being “Team FTC,” and each nominee has significant expertise that he intends to make use of.
- **Influence of Former Chairman Muris.** Senator Cruz (R-TX) asked Mr. Simons and Ms. Wilson what lessons they learned from working with former FTC Chairman Muris. Mr. Simons said he learned to set clear priorities and communicate them well. He said he values high staff morale and intends to follow former Chairman Muris in promoting morale. Ms. Wilson said she learned the value of having a positive agenda to implement rather than just reacting.
- **Appropriations.** Senator Moran (R-KS) asked about the Commission’s appropriations and if Mr. Simons had anything on which he would like the Appropriations Committee to focus. Mr. Simon said he didn’t know enough yet to say whether they might need more or less money in certain areas, but his bias at this point would be to “keep the ship steady.”

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Senator Capito closed the hearing on behalf of Chairman Thune. She said that given the committee’s intention to get the nominations on the next committee markup, the record would remain open until Tuesday, February 20, and responses would be due by Monday, February 26.

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