

President Obama Appoints Jon Leibowitz Chairman of the FTC

Multiple media outlets have reported that President Obama plans to name Jon Leibowitz – a Democrat who is currently a Commissioner of the Federal Trade Commission (“FTC”) – to serve as the Chairman of the FTC. Commissioner Leibowitz was appointed to the Commission by President George W. Bush in 2004. Since he is a sitting Commissioner and has previously received the Senate’s approval, no confirmation hearings will be required. This memorandum provides an overview of both his professional background and publicly expressed views on specific consumer protection and antitrust issues, with an eye towards predicting several of his primary enforcement goals as FTC Chairman.

FTC COMMISSIONERS IN GENERAL

The Commission is headed by five Commissioners who are nominated by the President and confirmed by the Senate, each for a term of seven years. To preserve balance, at most three Commissioners can be of the same political party. The other Commissioners are William E. Kovacic, a Republican; Pamela Jones Harbour, an Independent; and J. Thomas Rosch, a Republican. There is one unfilled vacancy. While each Commissioner has one vote on issues of substantive policy, the Chairman exercises more influence in charting the FTC’s course.

PROFESSIONAL BACKGROUND

Commissioner, Federal Trade Commission

During his tenure as a Commissioner at the FTC from 2004 to the present, Commissioner Leibowitz has con-

curred or dissented 15 times from the issuance of FTC complaints, orders, or reports, reflecting his perspective that in many instances the FTC did not go far enough in its enforcement efforts.

Vice President for Congressional Affairs, Motion Picture Association of America

From 2000 to 2004, Commissioner Leibowitz lobbied on behalf of the Motion Picture Association of America.

Chief Counsel and Staff Director, U.S. Senate Antitrust Subcommittee

From 1997 to 2000, Commissioner Leibowitz served as the Democratic chief counsel and staff director for the U.S. Senate Antitrust Committee, where he focused on competition policy and telecommunications matters.

Chief Counsel and Staff Director, Senate Subcommittee on Terrorism and Technology (1995-96)

Chief Counsel and Staff Director, Senate Subcommittee on Juvenile Justice (1991-94)

Chief Counsel, Senator Herb Kohl (1989-2000)

Staff, Senator Paul Simon (1986-87)

Private Law Practice (1984-86)

Education

Commissioner Leibowitz is a 1984 graduate of the New York University School of Law. He received his bachelor’s degree from the University of Wisconsin in 1980.

VIEWS ON CONSUMER PROTECTION

Online Privacy

Commissioner Leibowitz has been called “a leader on privacy issues” by the Internet Advertising Bureau. In reviewing the Google/DoubleClick acquisition, he advo-

cated a requirement that consumers must “opt in” for websites to share consumer information across web-based services, and cautioned that failure to self-regulate would risk “a far greater response from government.” With a new Democratic administration in place, Commissioner Leibowitz may persuade a like-minded Congress to establish tough general privacy legislation that extends to online marketing. In a concurring statement issued this month in connection with the release of the FTC Staff Report on Online Behavioral Advertising Principles, Commissioner Leibowitz stated that “this could be the last clear chance to show that self-regulation can – and will – effectively protect consumers’ privacy in a dynamic online marketplace.” The implication is that the Commission is close to proposing or supporting legislation governing the behavioral advertising industry.

Civil Penalties, Disgorgement, and Consumer Redress

Commissioner Leibowitz has issued a number of concurring and dissenting statements expressing his view that the amount of money paid by defendants in consumer protection cases has been inadequate to compensate victims of the unlawful behavior and deter bad actors from violating the law. For example, in a dissenting statement in connection with the settlement in Adteractive, Inc., a case involving offers of “free gifts” such as laptop or flat-screen television displays through unsolicited emails and banner advertisements, Commissioner Leibowitz lamented the “downward departure” in civil penalties obtained by the FTC in settlements. Similarly, in a settlement with Kmart to resolve charges that Kmart misrepresented material aspects of its gift cards by failing to disclose “dormancy fees” and monthly charges, Commissioner Leibowitz suggested that the Commission should have required Kmart to disgorge its “ill-gotten profits” since many consumers had lost the opportunity for reimbursement because they had discarded their seemingly worthless gift cards in frustration long ago.

In his new role, Commissioner Leibowitz can influence the staff to seek larger financial contributions by those who violate the Federal Trade Commission Act.

Secondary Liability/Affiliate Marketing

Commissioner Leibowitz has indicated that he favors increasing the agency’s law enforcement efforts to target those companies who assist or facilitate others to violate the law. As Commissioner, Leibowitz has said it is a “dirty little secret” that legitimate companies too often “fuel the problem” of spyware that bugs consumers and may even cripple computers. As Chairman, it is expected that he will seek amendments to expand the FTC’s authority to pursue those who assist and facilitate unfair or deceptive acts or practices. These powers will be used as part of the agency’s tools to police those who contract with individuals or companies that engage in Internet fraud, have insufficient procedures to guard against data security breaches, or otherwise invade a consumer’s privacy. Rather than pursue the fraudsters (many of whom are located overseas and virtually untraceable), the FTC will seek to hold U.S. companies liable upon proof that they aided those bad actors through the expansion of so-called “secondary liability” theories.

Marketing to Children and Adolescents

Commissioner Leibowitz has advocated that full-calorie soft drink marketers curtail television and Internet advertising, and that fast food companies offer healthier low-cost menu items. Look for Commissioner Leibowitz to seek closer regulation of food and beverage advertising and more enforcement to ensure adequate disclosures of nutritional content.

VIEWS ON ANTITRUST

Pharmaceuticals

Commissioner Leibowitz has displayed special concern for anticompetitive conduct that harms consumers of pharmaceutical products. For example, while the Commission has focused more on the role of brand-name pharmaceuticals, Commissioner Leibowitz has taken generic drug companies to task for agreeing to delay bringing their low-cost products to market.

Monopolization

One can also expect that Commissioner Leibowitz will continue the FTC’s disagreement with the Bush-era

Department of Justice's report on monopolization, which in his view places "a thumb on the scales in favor of firms with monopoly or near-monopoly power." Thus, even though neither the FTC nor the Department of Justice has brought a major monopolization case in eight years, one can expect the FTC to look more closely at unilateral behavior by dominant companies. He has advocated greater use of the FTC's authority to prohibit unfair methods of competition that the other antitrust laws may not reach.

Mergers

Merging companies can expect the FTC with Leibowitz at the helm to remain in the mainstream of theory, but to give closer scrutiny to the deals that come before the agency. As Commissioner, he has been known to ask hard questions of merging parties and to confirm for himself the results of the staff's investigations.

KELLEY DRYE & WARREN LLP

The attorneys in Kelley Drye & Warren's Advertising Law Practice Group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

Kelley Drye is recognized as a premier antitrust and trade regulation firm. Our national reputation stems from our proven track record of successfully representing clients in complex competition issues arising under federal and state antitrust laws. Our professionals include officials from the ABA Antitrust Section, and former officials of the United States Department of Justice Antitrust Division and the FTC. Our firm is also supported by Georgetown Economic Services, an economic consulting firm.

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