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Can A Single FTC Commissioner Constitute A Quorum?

By **Stephen Calkins and John Villafranco** (April 20, 2018, 3:55 PM EDT)

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Federal Trade Commissioner Terrell McSweeny recently announced that she would resign effective April 28. While it is possible that the Senate may act in the next eight days on the five nominees for the commission, it may not, leaving acting Chairman Maureen Ohlhausen as the sole commissioner and many of us wondering: can the FTC take formal action by a 1-0 vote? When does a commission cease being a commission?

Last month, the FTC made its views on this issue clear when, by a vote of 1-0 (with Commissioner McSweeney recused), it voted to modify a 2014 consent order.[1] Apparently, it is the FTC's view that there can be a quorum of one.

We are not so sure.

Congress created the FTC in 1914 as a five-member commission, with seven-year staggered terms for commissioners, on which no more than three commissioners could hail from the same political party.[2] The statute did not expressly address how many commissioners constitute a quorum for the conduct of business, but as the FTC chair stated in 2015, "[t]he FTC's architects believed that decisions made by consensus through a collective body, rather than by a single agency head, would make for better policy."[3] In the words of Humphrey's Executor, the FTC was established as "a body of experts 'appointed by law and informed by experience.'"[4]

Under this legislative structure and these guiding principles, for many years the FTC's internal quorum rule adhered to what the Supreme Court described as "[t]he almost universally accepted common-law rule," namely, that "a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."[5] On a past occasion when the FTC anticipated being temporarily reduced to four commissioners, two of whom were not participating in a proceeding, the commission announced its intention not to take a significant action until at least a quorum of three commissioners could participate: "Whether or not Commissioners might properly exercise certain decision-making authority under these circumstances, the Commission believes that, if at all reasonably possible, it is in the public interest that Commission decisions of significance with respect to this proceeding be taken with the participation of no fewer than three Commissioners."[6]

It was only in September 2005 that the FTC acted — on its own — to lower its quorum threshold. It adopted a new quorum rule providing that "[a] majority of the members of the Commission in office and not recused from participating in a matter ... constitutes a quorum for the transaction of business in that matter."[7] In doing so, however, the FTC declared that its "new rule, like its predecessor, protects against 'totally unrepresentative action in the name of the body by an unduly small number of persons.'"[8]

In adopting its new quorum rule, the FTC relied principally upon a case upholding the U.S. Securities and Exchange Commission's quorum rule,[9] and noting that the FTC's previous rule had reflected the common-law rule, as explained and upheld in Flotill). The SEC is apparently the only other federal regulatory agency, aside from the FTC, whose enabling statute is silent on the issue of a quorum. The SEC's rule sets a quorum at three commissioners; "provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter ... or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter."[10]

The Falcon court upheld an action taken by the two commissioners then in office, holding that "[i]f not otherwise constrained by statute, an agency sufficiently empowered by its enabling legislation may create its own quorum rule."[11] The Falcon court broadly construed the SEC's general rulemaking authority under 15 U.S.C. § 78w(a)(1) to include authority to determine how many members of the SEC constitute a quorum.[12]

Less than a month earlier, a district court had taken a different approach. In SEC v. Feminella,[13] the court held that the rulemaking provision later relied upon in Falcon "[is] generally cited as authority to make substantive rules prohibiting certain acts under the statutes, not as authority to establish the agency's own internal procedures" such as determining how many commissioners constituted a quorum. The Feminella court determined that it was necessary to examine the SEC's enabling statutes to determine whether Congress granted the SEC specific authorization to set aside the common law quorum rule.[14] The court found such authority in 15 U.S.C. § 78d-1, which authorizes the SEC "to delegate to a single Commissioner a decision whether or not to commence an enforcement action."[15] Accordingly, the court held that "Congress envisioned circumstances under which the [SEC] would find it necessary to carry out is functions, other than rulemaking, on the authority of fewer than three Commissioners."[16] The FTC Act, by contrast, contains no such language (although as discussed below delegation is permitted by the 1961 Reorganization Plan).[17]

Although the FTC's 2005 rule has been in effect for more than a decade, we believe that only now has it been employed to allow a single commissioner to cause the agency to take official action. In our view, this step is not appropriate and likely not lawful.

Does Rule 4.14 Allow a Single Commissioner to Act?

Rule 4.14 authorizes action by "[a] majority of the members of the Commission in office and not recused ... ." This "majority of members" who are "not recused ... constitutes a quorum" according to Rule 4.14. This does not seem to authorize action by a single commissioner. How can you have a "majority" of a single member? Note that Rule 4.14 refers to "members," not "member(s)." And the notice announcing revised Rule 4.14(b) specifically noted that "Rule 4.14(c) continues to require, for commission action, 'the affirmative concurrence of a majority of the participating Commissioners ... ."[18] Again, the

reference is to “participating Commissioners,” not “Commissioner(s)” or some wording appropriate were the commission contemplating empowering a single commissioner.

Had the commission really been contemplating empowering a single commissioner, wouldn’t it have mentioned that?[19] Instead, the agency wrote reassuringly that its “revised rule, like its former rule, also enables Commissioners who oppose an agency action to try to change the minds of their colleagues who are inclined to support it.”[20] If multiple commissioners participate there can be some such effort; not so if there is only one.[21] The agency also set forth its “understanding” that the new quorum rule “does not necessarily mean that the participating Commissioners would reach the same result that the full complement of sitting Commissioners would have reached if they were all able to participate[,]” thereby acknowledging, at least implicitly, that a quorum must consist of more than one participating commissioner.[22]

The only hint that the commission might have been contemplating a truly tiny quorum is in a footnote observing that the SEC’s rule “would not find a quorum in every situation where the FTC’s new rule would ... .”[23] It is not known what the commission meant by that footnote. Perhaps the agency really had in mind — in spite of the commission’s other statement —-a situation such as in CoreLogic where there were two commissioners but one was recused: The SEC rule would prescribe a quorum of two, not one. But it is also possible that the agency had in mind a situation with three commissioners, which would result in a quorum of three (for the SEC) but only two under the FTC’s new rule).

Presumably the CoreLogic commission believes that Rule 4.14 authorizes a quorum of one—but maybe not. The commission recently issued a new rule delegating functions to an individual commissioner or, if no commissioner is available, to the general counsel.[24] But — here is the oddity — “[t]his delegation is only authorized for those instances in which the Commission lacks a quorum as set forth in Commission Rule 4.14(b) ... .”[25] Of course, if Rule 4.14 is being interpreted to mean that a single commissioner constitutes a quorum, there would never be a situation where the commission both lacks a quorum and yet has a participating commissioner. Thus, the commission must doubt that Rule 4.14 actually calls for a quorum of one.

Could a Commission Rule Allow a Single Commissioner to Act?

The U.S. Supreme Court in Flotill upheld the commission’s quorum rule when that rule was viewed as corresponding with the common law rule. As explained by two leading administrative law scholars, “[a]bsent statutory requirements, a multi-member agency may, within reason, use its other statutory powers to determine how its quorum requirements will be satisfied.”[26] But would the FTC be acting “within reason” if it allowed for a quorum of one?

Nothing in the commission’s history, structure or purpose suggests an intention to allow a single commissioner to act for the commission. Thus, FTC Act Section 1 provides: “A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.”[27] It is quite a stretch, to say the least, to read that to mean that four vacancies should not impair the right of a single remaining commissioner to exercise power.

When the Commission was defending its original quorum rule in Flotill, it pointed to the 1961 Reorganization Plan as protecting bipartisanship: Delegation was permitted even to a single commissioner, provided that “the vote of a majority of the Commission less one member thereof shall be sufficient to bring any such action before the Commission for review.”[28] In its Flotill brief, the commission wrote that President John F. Kennedy explained that the provision for recalling a delegation

"was done to "maintain the fundamental bipartisan concept explicit in the basic statute creating the Commission."[29] Of course, a process of recalling delegation, and an interest in a bipartisan decision, is nonexistent if decisions are taken by a single commissioner.

More generally, "quorum" is a plural concept. In New Process Steel LP v. NLRB,[30] the court prevented the NLRB from circumventing a statutory quorum requirement, and as part of its decision defined "quorum" and quoted three other definitions. All four definitions referred to the required "number of members" — a plural wording.[31] The New Process dissent, too, explained that a quorum rule "provides a minimum number of participants" (again, plural).[32] The current version of Black's Law Dictionary too, defines a quorum as "[t]he smallest number of people who must be present at a meeting so that official decisions can be made; specif., the minimum number of members (a majority of all the members, unless otherwise specified in the government documents) who must be present for a deliberative assembly to legally transact business."[33] The definition refers to the smallest number of "people" present at a meeting — it does not contemplate a single person, and a single person cannot meet with himself or herself.

Most Fundamentally, Can a Decision by a Single Individual be a Decision by a Commission?

The Federal Trade Commission is, at its core, a bipartisan, collegial body. Although the FTC Act does not by its terms require a president to appoint commissioners from the other political party — Section 1 merely provides that "[n]ot more than three of the commissioners shall be members of the same political party." — it would be seen as clearly wrong, if not illegal, to refrain from appointing commissioners from the other party. The bipartisan, collegial nature of the FTC would not prevent it from employing a quorum of three, since the Supreme Court so held in Flotill, 389 U.S. at 187 (reasoning that since Congress has prescribed similar quorums for other bipartisan, collegial agencies, it could not object to the FTC having one). But allowing for a quorum of three is very different from allowing a quorum of one.

The ordinary definition of "commission" is "a group of people officially charged in a particular function."[34] One of the common law cases cited by the Supreme Court in Flotill wrote that the term "committee" (and presumably "commission") "is a collective word, or, as grammarians would say, a noun of multitude, and indicates a pluralilty of persons."[35]

The importance of collective decision-making underlies rules about quorums. As explained by a 19th century expert, "quorum requirements 'prevent matters from being concluded in a hasty manner, or agreed to by so small a number of the members as not to command a due and proper respect."[36] Professor Jonathan Remy Nash explains that Cushing accords to quorum rules three goals: to "encourage deliberation and collegiality;" to require a minimum number of voters and thus increase the odds that the decision will accord with what the full body to have acted;[37] and "to affirm the legitimacy of the decision reached, the decision-making process, and the body itself."[38] In New Process Steel, the court, applying a quorum of three, referred to "the possible inferiority of two-member decision-making."[39] How much more inferior is decision-making by one?

The virtues of collective decision-making have been highlighted recently by the contrast between the relative stability of the FTC and the dramatic swings of the Consumer Financial Protection Bureau. Three judges on the DC Circuit — although not the en banc majority — were sufficiently concerned about the CFPB's structure to consider it unconstitutional.[40] Judge Brett Kavanaugh wrote as follows: "Multi-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members. The multi-member

structure thereby reduces the risk of arbitrary decision-making and abuse of power, and helps protect individual liberty."[41] The majority was not persuaded, but it found comfort in Congress's having "created a multi-member body of experts to check the CFPB Director: the Financial Stability Oversight Council (FSOC). See 12 U.S.C. § 5321."[42]

If it is controversial whether the Constitution would permit Congress to create a commission of one, it is that much more dubious whether a five-member commission can issue a rule allowing itself to become a commission of one.

Since Falcon upheld the SEC's rule, that rule may well be lawful even today. The holding of the case, however — the facts that were found to be lawful — concerned a two-commissioner situation and the SEC's statute differs from the FTC's. Even by its terms, moreover, the SEC's rule does not allow for a single commissioner to act when another commissioner is in office but recused. Current FTC Rule 4.14 is more permissive than the SEC rule and should not be upheld.

Isn't a Potential Quorum of One Important, Just in Case?

The short answer to whether the FTC needs to allow a quorum of one, just in case, is no. The agency functioned without major incident with a traditional quorum from 1914 until 2005. Most agencies have a statutorily-imposed, meaningful quorum. Just recently the FTC invoked its delegation authority to address what it apparently saw as a potential problem in achieving a quorum. Another solution — suboptimal, of course — is to rely on the ancient rule of necessity and, where essential, to allow an official to participate in a matter in which he or she is interested.[43] Thus, although the SEC's rule does not allow a recusal to reduce a quorum below two, another (admittedly imperfect) solution is available.

Is there any real difference between functioning through extraordinary steps and through reducing the quorum to one? Yes. If nothing else, the message to the president and Senate that a single resignation will leave the FTC without a quorum is a powerful cry for action and compromise. But imagine the difference between a single commissioner with nonmainstream views when one commissioner makes a quorum, compared to when the agency can function only through delegation (with possible review) or some other extraordinary step. If new commissioners were on their way — for instance, as they are as of this writing — a single commissioner might invoke extraordinary measures to address a critical, time-sensitive matter, while refraining from taking actions that are not time-sensitive. But if a quorum is one, there is no reason why a single commissioner, even one with views outside the mainstream and no need for urgent action, should not enter a consent order approving a merger, vote out a federal court complaint, terminate a decree or do whatever might seem appropriate to his or her way of thinking. A quorum would be one.

The new Trump FTC will have a full plate. But it should add to that plate revising Rule 4.14(b). As it exists today it may not be lawful and it certainly is not wise.

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Disclosure: John Villafranco is counsel for the defense in Federal Trade Commission et al v. Quincy Bioscience Holding Company, et. al., in which the quorum issue was raised but not addressed in a 2017 motion to dismiss.

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[1] FTC Adds Requirements to 2014 Order to Remedy CoreLogic Inc.'s Compliance Deficiencies (March 15, 2018).

[2] See 15 U.S.C. § 41.

[3] See Edith Ramirez, The FTC: A Framework for Promoting Competition and Protecting Consumers, 83 Geo. Wash. Law R. 6, at 2052-53 (Nov. 2015) (citing social science research supporting collective decision-making)

[4] Humphrey's Executor v United States, 295 U.S. 602, 624 (1935) (quoting Illinois Central RR v ICC, 206 U.S. 441, 454 (1907)).

[5] FTC v. Flotill Products Inc., 389 U.S. 179, 183 (1967) (upholding 16 C.F.R. 1.7 (1967) ("A majority of the members of the Commission constitutes a quorum for the transaction of business.")).

The court noted that "[i]n its original version the quorum provision was stated: 'Three members of the Commission shall constitute a quorum for the transaction of business.' 1 F.T.C. 595 (Rule adopted June 17, 1915)." The rule upheld in Flotill was restated in 1977 when 16 C.F.R. § 4.14 was added: "(b) Quorum. A majority of the members of the Commission, duly appointed and confirmed, constitutes a quorum for the transaction of business. (c) Any Commission action ... may be taken only with the affirmative concurrence of a majority of the participating Commissioners ... ." 42 Fed. Reg. 13540 (March 11, 1977). The words "duly appointed and confirmed" were deleted without explanation in 1985. 50 Fed. Reg. 53302 (Dec. 31, 1985).

[6] In the Matter of Children's Advertising, 93 F.T.C. 323, 323, 1979 FTC Lexis 509 (Mar. 7, 1979).

[7] See 70 Fed. Reg. 53296; 16 C.F.R. 4.14(b).

[8] 70 Fed. Reg. 53296 (quoting Robert's Rules of Order § 3 (10th Ed. 2001)).

[9] See 70 Fed. Reg. at 53296 (citing Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579, 582 (D.C. Cir. 1996)

[10] 17 C.F.R. § 200.41.

[11] 102 F.3d at 582 (citing, e.g., Flotill and LaPeyre v. FTC, 386 F.2d 117, 122 (5th Cir. 1966))

[12] 102 F.3d at 582.

[13] 947 F. Supp. 722, 726 (S.D.N.Y. 1996)

[14] 947 F. Supp. at 726-27

[15] Feminella, 947 F. Supp. at 726.

[16] Feminella, 947 F. Supp. at 726-27.

[17] One of us believes that without statutory authorization at least such as that enjoyed by the SEC, any FTC rule authorizing a quorum smaller than that permitted by the common law is ultra vires and invalid, but we are not pursuing that issue in this commentary.

[18] 70 Fed. Reg. at 53,296 note 1.

[19] Two contemporaneous legal commentaries take different approaches. Compare Toby G. Singer, Recent Antitrust Developments, The Metropolitan Corporate Counsel (October, 2005, Northeast Edition) ("As a result of the amendment, it will be possible for two Commissioners who agree on a particular course of action to authorize an enforcement action when other commissioners are not participating in a matter.") with Kelly M. Falls, A Quorum of One: Redefining Recusal Standards in the Federal Trade Commission, 19 Geo. J. Legal Ethics 705, 710 (2006) ("This means in extreme situations that a single commissioner could constitute a quorum if the other four commissioners are recused."). A half dozen years ago FTC Commissioner Tom Rosch expressed his relief that in 2005 "the FTC promulgated a rule ... that provides that a two-member FTC can serve as a quorum if circumstances require," without specifically addressing whether the rule also empowered single commissioners. J. Thomas Rosch, Three Questions about Part Three: Administrative Proceedings at the FTC, at 10 (available at https://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf).

[20] 70 Fed. Reg. at 53296 note 2

[21] As discussed, the commission also wrote that its "new rule, like its predecessor, protects against 'totally unrepresentative action in the name of the body by an unduly small number of persons.'" 70 Fed. Reg. at 53296 (quoting Robert's Ruled of Order (10th Ed.) § 3. The commission said that it understood Robert's words "to mean that the rule protects against totally unrepresentative actions in the name of the Commissioners able to participate in a matter." Id. at note 2. It did not discuss Robert's recommendation that a specified quorum "should approximate the largest number that can be depended on to attend any meeting except in ... extremely unfavorable conditions," or that when bylaws are silent "the quorum is a majority of the entire membership." Robert's Rules of Order § 3 (11th ed. 2011)

[22] 70 Fed. Reg. at 53,296 note 2.

[23] 70 Fed. Reg. at 53296 note 3.

[24] 83 Fed. Reg. 7,110 (Feb. 20, 2018) (revising 16 C.F. R. § 0.7). "In actions in which at least one Commissioner is participating, this delegation is to the participating Commissioner or to the body of Commissioners who are participating." Id.

[25] Id.

[26] Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1183 (2000)

[27] 15 U.S.C. § 41.

[28] Flotill, Brief for the Federal Trade Commission, at 25 (citing Reorganization Plan No. 4 of 1961, 75

Stat. 837, note following 15 U.S.C. § 41).

The Plan "became operative when not disapproved by Congress within 60 days of its submission by the President." Flotill, 389 U.S. at 187 n.10.

[29] Brief at 25 (citing H. Doc. No. 159, 87th Cong., 1st Sess. 2 (1961), transmitting the Plan for Reorganizing the Federal Trade Commission).

[30] 130 S. Ct. 2635, 2642 (2010)

[31] Id. at 2642 (quoting Black's Law Dictionary (9th ed. 2009), Oxford English Dictionary (2d ed. 1989), and Webster's New International Dictionary (2d ed. 1954 (which referred to the "number of the officers or members")

[32] 130 S. Ct. at 2649 (Kennedy, J., dissenting)

[33] Black's Law Dictionary (10th ed. 2014).

[34] New Oxford American Dictionary (3d ed. 2010)

[35] Martin v. Lemon, 26 Conn. 192, 194 (1857), cited at 389 U.S. 183 n.6.

[36] Jonathan Remy Nash, The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requiurements, 58 Emory L.J. 831, 840-41 (2009) (quoting Luther S. Cushing, Rules of Proceeding and Debate in Deliberative Assemblies 20 (1879))

[37] Accord Dan S. Felsenthal, Averting the Quorum Paradox, 36 Behav. Sci. 57, 57 (1991) ("Underlying the requirement for a quorum is the intuitive assumption that the larger the quorum the higher will be the probability that the voting body will reach a 'correct decision,' i.e., the same decision that would have been reached if the body were fully assembled.").

[38] Id. at 841.

[39] 130 S. Ct. at 2641 n.2.

[40] PHH Corp. v. CFPB, 881 F.3d 75, 137 (2018) (Henderson, J., dissenting); id. at 164 (Kavanaugh, J., dissenting (w. Randolph))

[41] 881 F.3d at 165 (Kavanaugh, J., dissenting)

[42] 881 F.3d at 98.

[43] See United States v. Will, 449 U.S. 200 (1980); see also Center for Auto Safety v. FTC, 586 F. Supp. 1245 (D.D.C. 1984) (FTC Commissioner has great discretion on whether to recuse himself)