



October 10, 2017

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

I am the Chairman of the Bar Association of the District of Columbia's Antitrust Law Committee. I write to urge that the vacancies on the Federal Trade Commission be filled as soon as possible. For the first time in its more than 100-year history, the FTC has been operating for several months now with only two sitting Commissioners. As discussed below, this unusual situation is creating problems for the institution, for businesses, and for consumers. On behalf of the Committee, I hope that you will soon nominate qualified individuals to fill those vacancies, and that the Senate will promptly confirm the nominees.

Congress established the FTC as an independent agency consisting of five voting members: a Chairman and four Commissioners. The FTC is the primary federal agency responsible for consumer protection. Its consumer protection mission extends to online privacy and data security, two areas of high importance today. The FTC also shares responsibility with the Department of Justice for civil antitrust enforcement. Its antitrust mission extends to mergers and acquisitions including mergers in the health care area.

For more than six months, the FTC has been operating with only two sitting Commissioners. One of those Commissioners, Republican Maureen Ohlhausen, has been serving as Acting Chairman while awaiting the nomination and confirmation of a permanent Chairman. The other Commissioner is Democrat Terrell McSweeney, whose term expired at the end of last month.

The FTC cannot take positive action without an affirmative vote of the Commissioners. When the FTC is at full capacity there are times when all five Commissioners agree but there are also times when they do not, in which case the majority rules. However, when there are only two sitting Commissioners, any decision requires both to agree; otherwise there is a stalemate. As former FTC Chairman William Kovacic put it, with only two Commissioners "you can't block a merger, you can't [approve] a settlement, you can't take positive steps without a consensus." Unfortunately, this concern is not merely hypothetical.

The fact that there are only two Commissioners and no permanent Chairman likely has impaired the FTC's ability to move forward on policy matters. Some

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organizations have complained that the current stalemate leaves in place policies that, in their view, are holdovers from the last Administration and should be changed. Others have noted that there are important policy initiatives that are not being pursued. In the words of Kovacic, “If the expectation is that you are there for a few months or there is an inevitability that you will be displaced by somebody else coming in, it does limit what you can do as everyone in the world waits for your successor.”

Finally, the absence of a full complement of Commissioners means that important decisions lack a variety of perspectives and this, too, is likely having a negative impact. As former FTC Bureau of Competition Director Richard Feinstein observed, “When you have five well-qualified commissioners, the ultimate decisions benefit from multiple perspectives.”

From the standpoint of business, the current situation is far from ideal. Businesses reportedly have put plans on hold, including mergers and acquisitions, because of uncertainty about the composition of the agency. As former FTC Chairman Jon Leibowitz put it, “A lot of companies are trying to sort through how to deal with a two-person commission.” Businesses value predictability and stability, but the current environment deprives them to a degree of both.

Last but not least, consumers do not benefit when the FTC is firing on less than all cylinders. The FTC describes its mission as “Working to protect consumers by preventing anticompetitive, deceptive, and unfair business practices, enhancing informed consumer choice and public understanding of the competitive process, and accomplishing this without unduly burdening legitimate business activity.” Without taking anything away from the commendable jobs that Acting Chairman Ohlhausen and Commissioner McSweeney have been doing to make the best of a bad situation, it bears repeating: the FTC is set up to operate with five members, not two. American consumers deserve a fully-staffed FTC.

On behalf of the Bar Association of the District of Columbia’s Antitrust Law Committee, thank you for your consideration.

Sincerely



Allen P. Grunes
Chairman, Antitrust Law Committee

cc: The Honorable Donald F. McGahn II, White House Counsel
The Honorable John Thune, Chairman, U.S. Senate Committee on
Commerce, Science & Transportation
The Honorable Bill Nelson, Ranking Member, U.S. Senate Committee on
Commerce, Science & Transportation