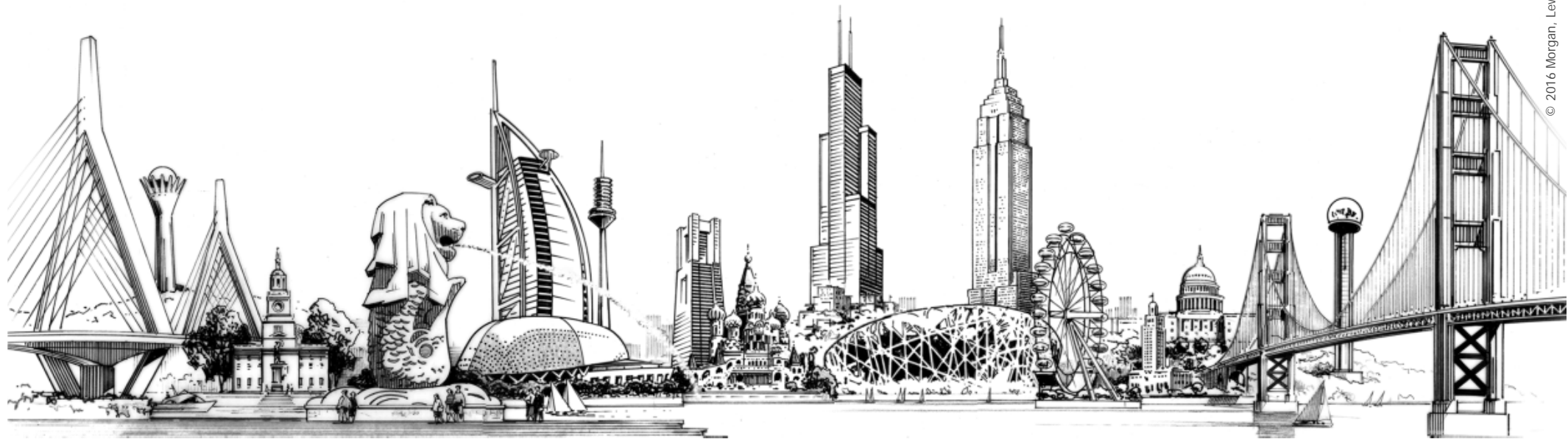


Morgan Lewis

POST-ELECTION LANDSCAPE: ANTITRUST ENFORCEMENT

Presenters: Frank Lamancusa, Gary Slaiman, Richard Taffet,
and Darren Tucker

December 16, 2016



Presenters



Frank Lamancusa
Partner, Washington, DC



Gary Slaiman
Partner, Washington, DC



Richard Taffet
Partner, New York



Darren Tucker
Partner, Washington, DC

Topics

- Agency appointments
- Changes in enforcement priorities at FTC, DOJ, and FCC
- Effect of the transition on pending investigations and rulemakings
- Transition and priorities on Capitol Hill

TOPIC 1

AGENCY APPOINTMENTS

FTC

- Commissioners nominated by the President and confirmed by the Senate
 - No more than 3 Commissioners may be from the same party
 - A person chosen to fill a vacancy is appointed only for the unexpired term of the prior Commissioner
- Commissioners have 7 year terms
- A Commissioner can continue to serve after expiration of his/her term until a successor is confirmed
- The President designates the Chair from among the Commissioners; no need for Senate confirmation
- Commissioners can be removed by the President only for cause

FTC

- Current Commission
 - Chairwoman Edith Ramirez (D) – Term expired in 2015. Replacement's term will run through September 2022
 - Maureen K. Ohlhausen (R) – Term expires September 2018
 - Terrell McSweeney (D) – Term expires September 2017
 - Vacancy created by Josh Wright's departure – Term expires September 2019
 - Vacancy (Julie Brill's former position) – Term expires September 2023
- Josh Wright (George Mason Law, former FTC Commissioner) leading FTC transition team.

DOJ Antitrust Division

- The Assistant Attorney General (AAG) is nominated by the President and confirmed by the Senate
 - The President may not install the AAG nominee as a DAAG while his/her nomination is pending
- The Assistant Attorney General is assisted by a number of Deputy Assistant Attorneys General (DAAGs) who may be either career or noncareer employees; the DAAG for Criminal Enforcement traditionally has been a career employee
 - The President can appoint all of the DAAGs on Day 1 without Senate approval
- The Division's DAAGs are of equal rank; however, the AAG may designate one as the "Principal Deputy," who is, in effect, "first among equals" among the Deputies and typically will assume the powers of the AAG in his absence
- If a vacancy occurs in the AAG position, one of the deputies will be designated to serve as Acting AAG until a new AAG is nominated by the President and confirmed by the Senate

DOJ Antitrust Division

- Current leadership:
 - Renata B. Hesse, Acting Assistant Attorney General
 - Juan A. Arteaga, Civil Enforcement
 - Sonia K. Pfaffenroth, Operations
 - Nancy L. Rose, Economic Analysis
 - Jonathan B. Sallet, Litigation
 - Brent C. Snyder, Criminal Enforcement
- Key members of DOJ transition team
 - Mike Pence
 - Jeff Sessions
 - Brian Benczkowski (Kirkland & Ellis)
 - David Higbee (Hunton & Williams)
- Numerous groups are providing input into antitrust transition including Heritage Foundation, Federalist Society, and former Republican AAGs

FCC

- Similar structure as FTC
 - Governed by five Commissioners
 - Five year terms
 - Commissioners nominated by the President and confirmed by the Senate
 - No more than 3 Commissioners may be from the same party
- Current Commission
 - Tom Wheeler (D), chair, term expires 6/30/2018
 - Announced will leave on Inauguration Day
 - Mignon Clyburn (D), term expires 6/30/2017
 - Potential future political interest
 - Jessica Rosenworcel (D), term expired 6/30/2015
 - Not reconfirmed by Senate; will leave by January 3
 - Ajit Pai (R), term expired 6/30/2016
 - Can serve until end of 2017 unless renominated by new President (expected)
 - Michael O’Rielly (R), term expires 6/30/2019

- Wheeler departure confirmed
 - Had he remained, a 2–2 split would have delayed Republican initiatives for a few months until a new GOP Commissioner was confirmed to fill vacant seat (no Senate filibuster on executive nominations)
 - Republican and Democratic replacement nominations likely paired
- New President can designate any Commissioner as Chair on Day One
 - Most new Presidents have designated interim Chairs and nominated an outsider to fill a vacant seat as new permanent Chair
 - Pai is senior Republican member
 - Neither current GOP Commissioner has particularly strong ties to President-elect, but both have Hill supporters
- Eisenach reportedly advising on transition, but that does not necessarily mean he will be FCC nominee

TOPIC 2

CHANGES IN ENFORCEMENT PRIORITIES

FTC/DOJ

- Unlikely to see significant changes in criminal enforcement
 - Josh Wright has called current antitrust criminal sanctions insufficient for optimal deterrence
- Modest changes in merger enforcement
 - Greater reliance on economic analysis
 - Greater willingness to consider efficiencies
 - Greater skepticism of non-traditional theories of harm (e.g., future competition)
- Greatest changes likely to be in the area of single firm conduct (monopolization/dominance cases)
 - Section 5
 - Intellectual property
- Greater promotion of international procedural due process

FCC

- Reviews transfer of FCC licenses or authorizations
 - Uses “public interest test”
- Builds off of DOJ’s competition analysis for most telecom mergers
 - FTC had reviewed cable transactions but not always and not recently because of broadband focus
 - Still relevant in certain media and tech combinations
- Still will play a role in transactional review but may limit the scope of its review on pending and future deals
- Both Pai and O’Rielly have been critical of FCC’s “mission creep” of using merger review to institute public policy initiatives
- Expected to rely more heavily on DOJ/FTC competition review and economic evidence of harm

TOPIC 3

EFFECT OF THE TRANSITION ON PENDING INVESTIGATIONS AND RULEMAKINGS

FTC/DOJ

- FTC
 - Because of time required to appoint new Commissioners, Democratic Commissioners will likely maintain a 2 to 1 advantage on the Commission for some time (unless Ramirez resigns)
 - The new Chair will need time to fill other leadership positions
 - November 22 letter from Thune and Upton to Ramirez
- DOJ
 - Leadership may continue to consist of Democratic appointees until replacements are seated
 - AAG is only position requiring Senate confirmation
- Both agencies: New agency leadership will have limited ability to intervene in ongoing investigations or litigation until key decision points, e.g., staff completing their investigation and making an enforcement recommendation

- Wheeler unable to complete major proceedings before end of 2016 even though he has a solid majority through January 3
 - Only one large transaction currently pending before the FCC that is sufficiently through the regulatory review process to be concluded prior to end of term
- Controversial proceedings (e.g., business data services, set-top boxes) shelved for the immediate future
- Republican-majority FCC may be able to reverse many of these actions
 - If a petition for reconsideration is pending on Jan. 20, the FCC can just grant it
- Otherwise, can start a new rulemaking, although this process is slower

TOPIC 4

CAPITOL HILL

Senate

- Senate Judiciary Committee
 - Chairman Grassley (R-Iowa) – Just re-elected to new 6 year term
 - Ranking member Feinstein (D-CA) – Up for election in 2018
- Antitrust Subcommittee
 - Chairman Mike Lee (R-UT) – Just re-elected to new 6 year term
 - Ranking member Amy Klobuchar (D-MN) – Up for election in 2018
 - Lee and Klobuchar have continued the recent history of the leadership of this subcommittee working in a cooperative fashion

Senate

- Greater likelihood of committee hearings and inquiries into mergers from the Senate Antitrust Subcommittee than its counterpart in the House
- Priorities
 - Full Committee Chairman Grassley has expressed interest in large agricultural sector mergers
 - The Antitrust Subcommittee recently (Dec 7) held a hearing on the AT&T-Time Warner merger
 - In the past Lee and Klobuchar have held hearings on other consumer facing companies such as beer and airlines
- The Senate committee and subcommittee will also play an important role reviewing the nominations for Attorney General and the new Assistant Attorney General for the Antitrust Division as well as any newly nominated FTC Commissioners.

The House

- House Judiciary Committee
 - Chairman Goodlatte (R-VA)
 - Ranking member Conyers (D-Mich)
- Regulatory Reform, Commercial and Antitrust Law Subcommittee
 - Chairman Marino (R-PA)
 - Ranking member Johnson (D-GA).
- Priorities
 - The House Subcommittee has recently focused on the regulatory reform aspect of its jurisdiction, which will likely draw particular attention with the new Administration and a unified Republican legislature.
 - Full Committee Ranking member Conyers has complained loudly about the lack of adequate antitrust enforcement, even from the present Democratic Administration and can be expected to continue to make his case in the new Congress.

Contacts



Frank Lamancusa

Partner, Washington, DC

frank.lamancusa@morganlewis.com



Gary Slaiman

Partner, Washington, DC

gary.slaiman@morganlewis.com



Richard Taffet

Partner, New York

richard.taffet@morganlewis.com



Darren Tucker

Partner, Washington, DC

darren.tucker@morganlewis.com

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	Los Angeles	Philadelphia	Silicon Valley
Astana	Dubai	Miami	Pittsburgh	Singapore
Beijing	Frankfurt	Moscow	Princeton	Tokyo
Boston	Hartford	New York	San Francisco	Washington, DC
Brussels	Houston	Orange County	Santa Monica	Wilmington
Chicago	London	Paris	Shanghai	



Morgan Lewis

THANK YOU

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. Attorney Advertising.

© 2016 Morgan, Lewis & Bockius LLP