McDermott Will & Emery

President-Elect Trump Has Once-in-a-Century Opportunity to Substantially Revise the FTC's Law Enforcement and Regulatory Agenda

By Bilal Sayyed

December 21, 2016

McDermott Will & Emery

For more information, please contact your regular McDermott lawyer, or:

Bilal K Sayyed
+1 202 756 8449
bsayyed@mwe.com

For more information about McDermott Will & Emery visit www.mwe.com

Table of Contents

3 Regulatory Reform Is the "Cornerstone of the Trump Administration"
5 New Leadership and New Majority: What Might It Look Like?
7 The FTC's New Democratic Minority: What Might It Look Like?
8 Some Expectations Regarding the FTC's Enforcement and Regulatory Policy Agenda
- 8 A More Restrained Interpretation of a Proper Competition Case Consistent with Section 5 of the FTC Act
- 9 A More Tempered Pursuit of Monetary Relief in Competition Cases
- 10 A Requirement for a Stronger Evidentiary Showing of Harm to Competition Before Challenging a Transaction or Practice as Inconsistent with the Antitrust Laws
- 11 Acceptance of a Stronger Legal Standard for Obtaining Preliminary Injunctions in Merger Challenges, Consistent with the Standard Faced by the Antitrust Division
- 12 Merger (and Non-Merger) Investigation Process Reform That Reflects Improvements Sought by All Interested Parties, Not Just Those Identified by Agency Staff
- 13 Expect a Comprehensive Review of Health Care Markets
- 14 A Shift in Balancing the Benefits of Intellectual Property Rights with Concerns of Competitive Harm from Exclusionary Conduct
- 15 More Focus on a Requirement to Show Harm, Rather than Fraud or Misrepresentation, in Data Security and Privacy Enforcement Matters
- 17 A Significantly More Cautionary Approach to Restricting the Promulgation of Health Claims for Products Generally Recognized as Safe
- 18 Competition Advocacy to Increase

19 Conclusion

SUMMARY: Regulatory reform is the "cornerstone of the Trump administration," and incoming President Donald Trump has a unique opportunity to quickly and substantially influence Federal Trade Commission (FTC) policy through his nomination of new commissioners and designation of the agency's chair. Two existing commissioner vacancies and two likely departures make it probable that by this time next year, the agency will have at least four new commissioners—an unprecedented turnover in the FTC's 100-year history. This article identifies significant enforcement and regulatory policies likely to differentiate the Trump FTC from the Obama FTC. ~ Bilal Sayyed©

Regulatory Reform Is the "Cornerstone of the Trump Administration"

Regulatory reform is the "cornerstone of the Trump administration," [1] and the incoming administration has promised to conduct a "thorough review to identify and eliminate unnecessary regulations that kill jobs and bloat government." [2] The Federal Trade Commission (FTC or Commission[3]) regulates a substantial part of the US economy through its promulgation and enforcement of many rules and regulations.[4] In addition, its broad authority to define "unfair methods of competition" and "unfair or deceptive acts or practices" gives it the power to regulate the conduct of almost all businesses and industries operating in the United States.

Incoming President Donald Trump[5] has a once-in-a-century opportunity to quickly and substantially influence FTC policy through his nomination of new commissioners and designation of the agency's chair. Two existing commissioner vacancies[6] and two likely departures[7] make it probable that by this time next year, the agency will have at least four new commissioners—an unprecedented turnover in the FTC's 100-year history.[8] President-Elect Trump's current cabinet and White House personnel selections indicate that he understands the Washington, DC, maxim that "personnel is policy." President-Elect Trump can, through well-considered appointments to the FTC, influence its likely adoption of

[1]President-Elect Donald Trump, *Regulatory Reform.*

[2]*Id.*

[3] This paper refers to the FTC when referring to the agency, and Commission when referring to the five member commissioners of the agency, including when they act in their adjudicative role.

[4]The FTC exercises enforcement and administrative authority under the Federal Trade Commission Act (15 USC §§41–58), the Clayton Act (15 USC §§12–27), the Robinson-Patman Act (15 USC §§13–13b, 21a), the Webb-Pomerene (Export Trade) Act (15 USC §§61–66), the Packers and Stockyards Act (7 USC §§181–229), the Wool Products Labeling Act of 1939 (15 USC §§68–68j), the Lanham TradeMark Act (15 USC §§1064), the Fur Products Labeling Act (15 USC §§69–69j), the Textile Fiber Products Identification Act (15 USC §§70–70k), the Federal Cigarette Labeling and Advertising Act (15 USC §§1331–1340), the Fair Packaging and Labeling Act (15 USC §§1451–1461), the Truth in Lending Act (15 USC §§1601–1667f), the Fair Credit Reporting Act (15 USC §§1681–1681u), the Fair Credit Billing Act (15 USC §§1666–1666j), the Equal Credit Opportunity Act (15 USC §§1691–1691f), the Fair Debt Collection Practices Act (15 USC §§1692–1692o), the Electronic Fund Transfer Act (15 USC §§1693–1693r), the Hobby Protection Act (15 USC §§2101–2106), the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act (15 USC §§2301–2312), the Energy Policy and Conservation Act (42 USC §§6201–6422, 15 USC §§2008), the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 USC §§18a), the Petroleum Marketing Practices Act (15 USC §§2801–2841), the Comprehensive Smokeless Tobacco Health Education Act of 1986 (15 USC §§4401–4408), the Telephone Disclosure and Dispute Resolution Act of 1992 (15 USC §§5701–5724), the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 USC §§6101–6108), the International Antitrust Enforcement Assistance Act of 1994 (15 USC §§46, 57b-1, 1311–1312, 6201 & note, 6202–6212), the Credit Repair Organizations Act (15 USC §§1679–1679j), the Children's Online Privacy Protection Act (15 USC §§6501–6506), the Identity Theft Assumption and Deterrence Act of 1998 (18 USC §§1028 note), and the Gramm-Leach-Bliley Act (15 USC §§6801–6809). See 16 CFR § 0.4.

[5]This paper refers to President-Elect Trump, rather than President Trump, because at the time of writing Mr. Trump has not been inaugurated as president.

[6]Democratic appointee Julie Brill resigned from the FTC as of March 31, 2016. Republican appointee Joshua Wright resigned from the FTC as of August 24, 2015.

[7]The term of Democratic appointee Edith Ramirez, presently serving as FTC chair, expired in September 2015; although President Obama nominated her for a second term in December 2015, the Senate has not confirmed her to this second term, and she is expected to depart the FTC within the first year of President-Elect Trump's term. (A commissioner whose term has expired may remain as a commissioner until the Senate confirms his or her successor. *Id.*) The term of Democratic appointee Terrell McSweeny expires in September 2017. The term of Republican appointee Maureen K. Ohlhausen expires in September 2018.

[8]With the exception of the first five appointees to the FTC on March 16, 1915, in no calendar year have four persons been appointed as commissioners.

policies consistent with his "cornerstone" policy of reforming the expanding "regulatory state." [9] In addition, the FTC, through its strong competition advocacy program, can be an effective and bipartisan advocate for common-sense, pro-consumer regulatory reform throughout the federal and state government landscape.

The president's influence over the FTC is limited to his selection and appointment (with Senate consent) of the commissioners. Oversight of the FTC, like that of all independent agencies, belongs to Congress. The president has no tools to unilaterally influence or constrain the decisions of the FTC, even those of his nominees once they are appointed as FTC commissioners.[10] He can hire (with Senate consent), but he cannot fire. And, because no more than three of the FTC's five commissioners can be of the same political party, the FTC's leadership will include two commissioners chosen by Senate Minority Leader Chuck Schumer, who will likely consult with Senator Elizabeth Warren on the recommended nominees. Thus, President-Elect Trump may look to identify and designate as FTC chair, and select as his Republican appointees, only those with strong, consistent records indicating that they will be very cautious in imposing additional regulatory and legal burdens on businesses and industries within the FTC's jurisdictional reach, and who will support a rethinking of the FTC's current regulatory regime.

This article identifies significant enforcement and regulatory policies likely to differentiate the Trump FTC from the Obama FTC. President-Elect Trump has more experience with antitrust law than any incoming president since William Taft.[11] In addition to drawing on his own experiences and expertise,[12] he may draw on the substantial expertise, energy and free-market framework of current Commissioner Maureen Ohlhausen and former Commissioner Joshua (Josh) Wright in selecting FTC leadership and nominees committed to achieving regulatory reform. Both Ohlhausen and Wright were strongly supported and recommended to President Barack Obama for appointment to the FTC by Senator Mitch McConnell.[13] Their efforts at the FTC resisting the expansion of the regulatory state are consistent with the policy goals of Senator McConnell and of the incoming Trump administration. Commissioner Ohlhausen adheres to, and former Commissioner Wright adhered to, a legal and economic framework consistent with the president-elect's regulatory reform agenda.[14]

President-Elect Trump's choices for FTC commissioners may also be influenced by the Heritage Foundation,[15] which is playing a "significant role" in the president-elect's transition effort.[16] Professor Thom Lambert, writing for Heritage, argues that "the [Supreme] Court under Chief Justice John Roberts has done an admirable job in attempting to maximize antitrust's social value," but that:

[9] On the expansion of the regulatory state under President Obama, see, *e.g.*, James L Gattuso and Diane Katz, *Red Tape Rising 2016: Obama Regs Top $100 Billion Annually*, HERITAGE FOUNDATION BACKGROUNDER NO. 3127 (May 23, 2016).

[10] A commissioner can only be removed from his or her office under the most extreme conditions, and, like Article III judges, for their term of office they are largely immune from the vagaries of executive branch and legislative branch policy preferences.

[11] President Taft was the drafter of the famed appellate court opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) *aff'd*, 175 US 211 (1889) (introducing the concept of "ancillary restraints" to the proper review of a Section 1 Sherman Act claim).

[12] See Emre N. Ilter, *Election 2016: Trump on Antitrust*, NATIONAL LAW REVIEW (October 11, 2016).

[13] It is customary for the Senate leadership of the party opposite to the party of the president to recommend persons for the president to nominate to the minority party FTC commissioner designees.

[14] Press reports indicate that former Commissioner Wright, who now heads the Global Antitrust Institute at George Mason University's Antonin Scalia Law School, is leading President-Elect Trump's FTC transition team. See *US: Former FTC Commissioner to Lead Trump Transition on Antitrust*, COMPETITION POLICY INTERNATIONAL JOURNAL (November 16, 2016).

[15] The Heritage Foundation has a strong interest in antitrust and consumer protection policy and, in addition to the work cited throughout this paper, hosts a highly regarded annual antitrust policy conference. See *Antitrust Policy for a New Administration* (January 24, 2017); *Antitrust Policy for a New Administration* (January 26, 2016); and *Obama Administration Antitrust Policy: A Report Card* (January 29, 2015).

[16] See Katie Glueck, *Trump's Shadow Transition Team*, POLITICO (November 22, 2016).

> [R]ecent enforcement agency policies are in severe tension with the philosophy that informs Supreme Court antitrust jurisprudence, and if the agencies do not reverse course, acknowledge antitrust's limits, and seek to optimize the law in light of those limits, consumers and the competitive process will suffer.[17]

Alden Abbott, deputy director for legal studies at Heritage, recently criticized President Obama's Antitrust Division head for "reject[ing] . . . the mainstream American understanding . . . that promoting economic efficiency and consumer welfare are the antitrust lodestar, and that non-economic considerations should not be part of antitrust analysis." Such arguments, he stated, "could undermine longstanding efforts to advance international convergence toward economically sound antitrust rules." [18] Abbott recently advocated that President-Elect Trump's antitrust agencies:

- "[P]ursue advocacy initiatives whose goal is to dismantle or lessen the burden of excessive federal regulations";
- "[E]mphasize sound, empirically based economic analysis in merger and non-merger enforcement;"
- "[I]ssue clear statements of policy on the great respect that should be accorded the exercise of intellectual property rights, to correct Obama antitrust enforcers' poor record on intellectual property protection"; and,
- "Accord greater respect to the efficiencies associated with unilateral conduct by firms possessing market power."[19]

President-Elect Trump may also look to nominate as commissioners persons who are familiar with and supportive of the "positive agenda" of former FTC Chairman Tim Muris.[20] Muris was the most recent Republican FTC chair appointed after eight years of a Democratic administration (under President Bill Clinton); he also was a key player in the transformation of the FTC during the Reagan administration away from the FTC's "national-nanny" agenda under the Carter administration.

New Leadership and New Majority: What Might It Look Like?

Commissioner Ohlhausen is likely to be designated acting chair of the FTC shortly after Trump's inauguration; she is the only Republican appointee among the three sitting commissioners. [21] Ohlhausen, a commissioner since April 2012, is also likely a candidate to be designated FTC chairman. She has issued strong, substantive dissents and critiques of the Obama-era FTC's enforcement and policy decisions when she felt it was pursuing unwarranted policy

---

[17] Thomas A. Lambert, Respecting the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies, THE HERITAGE FOUNDATION LEGAL MEMORANDUM (January 28, 2015).

[18] Alden Abbott, *Acting AAG's Policy Speech Sends the Wrong Signals on Antitrust (or 'a* Wild *Ride Back to the Fifties and Sixties')*, HERITAGE Foundation COMMENTARY ON PROPERTY AND ECONOMIC RIGHTS, CIVIL JUSTICE REFORM (November 29, 2016). See also Alden Abbott, *Attorney General Lynch Demonstrates a Misunderstanding of American Antitrust Law, and its Proper Role in Promoting Economic Dynamism*, at TRUTH ON THE MARKET (April 11, 2016) (criticizing the Attorney General for delivering a speech on federal antitrust enforcement that was "in severe tension" with the "consensus regarding the efficiency-centered goal of antitrust").

[19] Alden Abbott, *Competition Policy for a New Administration*, TRUTH ON THE MARKET (November 23, 2016). Abbott has also called for the Trump administration to "closely scrutinize" (i) "the inappropriate imposition of extraterritorial remedies on American companies by foreign competition agencies"; (ii) "the harmful impact of anticompetitive foreign regulations on American businesses"; and (iii) "inappropriate attacks on the legitimate exercise of intellectual property by American firms"; and to make "due process problems [associated with non-US competition agencies investigation and enforcement activities] in antitrust a major enforcement priority").

[20] See Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy* (August 19, 2003); Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy* (December 10, 2002).

[21] Although there is speculation and an expectation that President-Elect Trump will immediately upon inauguration designate a Republican member of each independent agency to be acting chair of each agency, recent history suggests there may be some delay. President George W. Bush did not name an acting chair of the FTC upon inauguration; Democratic Commissioner Robert Pitofsky continued as chair until May 31, 2001, when he resigned from the FTC to make room for Timothy J. Muris to assume his seat and position as FTC chair (on June 4, 2001). Republican Commissioner William Kovacic continued as FTC chair until March 1, 2009, when President Obama designated sitting Democratic Commissioner Jon Leibowitz as FTC chair. President Clinton did not replace President George H.W. Bush's FTC Chair Janet Steiger with a Democratic appointee until April 12, 1995, more than two years into his presidential term.

changes, enforcement actions or regulations.[22] She has also strongly rejected arguments of various commentators—including Paul Krugman, the *Economist* magazine and Senator Elizabeth Warren[23]—that the US economy suffers from a structural lack of competition and that additional regulation is necessary to maintain and increase competition.[24] She believes that "a market economy, free of private restraints and unnecessarily burdensome regulations, produces superior outcomes over time"[25] and, in her dealings with foreign competition authorities, strongly advocates that they adopt a competition law and enforcement "paradigm grounded in contemporary economic principles" "focused on . . . consumer welfare" because such a framework "promot[es] growth, spur[s] innovation and facilitates the efficient allocation of resources."[26] Recognizing the importance to the US business community of the proper development of Chinese competition law and policy, she has made engagement with China a top priority and has defended US interests, strongly advocating that China's competition agencies adopt and abide by "commonly accepted best practices" and "afford parties fundamental due process [rights], including . . . notification of the legal and factual basis of an investigation, and meaningful engagement with . . . decision makers."[27]

By late spring 2017, President-Elect Trump should be in a position to nominate two additional persons to fill the two currently open Commission seats. It is possible that Trump will designate one of those individuals, and not Commissioner Ohlhausen, as FTC chair. It is very likely that at least one of Trump's Commission appointees will be an economist (or lawyer/economist) with substantial experience in antitrust and consumer protection policy. President Ronald Reagan, who also came to office focused on repealing unnecessary government regulation, appointed James Miller, an economist, to head the FTC.[28]

Nominees for the two vacant commissioner seats are expected to be vetted carefully by the Trump administration to ensure that they are committed to the president-elect's regulatory reform agenda, because a one-vote majority can easily become a minority of two. During the George W. Bush administration, one Republican commissioner voted sufficiently often with the then-minority party commissioners—Democratic Commissioner Jon Leibowitz and Independent Commissioner Pamela Jones Harbour—so as to significantly

[22]This paper collects many such instances, but examples include (i) her dissenting statement and critique of the Commission's FTC Act Section 5 Policy Statement ("too abbreviated in substance" and "seriously lacking" in "content," and an "official embrace of . . . an unbounded interpretation" of an understanding of unfair methods of competition); (ii) her criticism (and vote against) the Commission's withdrawal of its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases ("[the FTC is] moving from clear guidance on disgorgement to virtually no guidance on this important policy issue"); (iii) her rejection of the Commission's Final Revised Interpretations of the Magnuson-Moss Warranty Act Rule (revised interpretation inappropriately "retains [the] . . . prohibition on pre-dispute mandatory binding arbitration," but where "[t]he courts have sent a clear signal that the Commission's position . . . is no longer supportable . . . the Commission should not reaffirm the rule"); and (iv) her criticism of the Commission's Amendment to the Telemarketing Sales Rule (supporting a number of changes that make it harder for telemarketers to engage in fraud, but dissenting from the decision to prohibit "four 'novel' payment methods," in part because it "is clearly preferable public policy not to create a fragmented 'law of payments' in which multiple federal agencies take differing and/or conflicting views on the legitimacy of specific payment instruments"). Additional examples are identified throughout the text.

[23]See, *e.g.*, Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES (April 18, 2016), at A21; *Too Much of a Good Thing*, ECONOMIST (March 26, 2016); *The Problems with Profits*, ECONOMIST (March 26, 2016); Chris Sagers, *Everyone Wants to Get Tough on Antitrust Policy, But Not Really*, DEALBOOK (April 29, 2016); and the aforementioned speeches (among others) of Senator Warren, *supra* note 6.

[24]See, *e.g.*, Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition*, 1 THE CRITERION JOURNAL ON INNOVATION 47 (2016); Maureen K. Ohlhausen, *What Are We Talking About When We Talk About Antitrust*? (September 22, 2016).

[25]*Id.* at 4.

[26]Maureen K. Ohlhausen, *International Convergence, Competition Policy, and the Public Interest* (March 8, 2014).

[27]Testimony of Maureen K. Ohlhausen, *The Foreign Investment Climate in China: U.S. Administration Perspectives on the Foreign Investment Climate in China* (January 28, 2015), before the U.S.-China Economic and Security Review Commission; see also Maureen K. Ohlhausen, *Antitrust Enforcement in China – What Next?* (September 16, 2014) (describing an increasing concern with a "Chinese" version of antitrust enforcement that appears to be moving away from international norms, especially with respect to the forced sharing of intellectual property rights and a history of challenging mergers involving only non-Chinese firms).

[28]See *Reagan Nominates Miller, Adkinson as FTC Commissioners,* [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1021, at A-l, 2 (July 2, 1981). For a review of the significant impact Chair Miller had on the long-term direction of the FTC, see James C. Cooper, ed., THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION.

undercut the enforcement and policy preferences of Republican Chair Debbie Majoras and, later, Republican Chair William Kovacic.[29]

The current management team of the operating bureaus—the Bureau of Competition, the Bureau of Consumer Protection and the Bureau of Economics—is expected to depart shortly after President-Elect Trump's inauguration. The FTC chair, when designated, will fill those positions. The FTC chair will also have the opportunity to replace the current acting heads of the Office of General Counsel and Office of Policy Planning, who are career civil servants promoted after the departure of the most recent political appointees. The FTC chair's ability to appoint the management of the operating bureaus[30] gives the chair the ability to significantly and quickly influence the FTC's law enforcement and regulatory agenda. The acting chair (if so designated) has the authority to fill those positions with his or her designees, if desired.

The FTC's New Democratic Minority: What Might It Look Like?

Neither of the current Democratic appointees to the FTC is expected to remain at the agency much longer. Current FTC Chair Edith Ramirez's term expired in September 2015. Although commissioners are allowed to remain on the FTC until the Senate confirms a successor, she is expected to resign from the FTC in early 2017.[31] Her resignation would allow the Senate Democrats to pair her replacement with at least one Republican nominee during the confirmation process.

Commissioner Terrell McSweeny's term expires in September 2017. Although highly respected—had Hillary Clinton been elected president, McSweeny would have been a strong candidate for FTC chair—she is now unlikely to seek re-appointment to the FTC. Recognizing that a replacement Democratic appointee to the FTC may not get a quick confirmation vote from the Senate majority unless paired with one of the president's nominees, Commissioner McSweeny may signal her willingness to step down as a commissioner prior to the expiration of her term in order to allow for such pairing.

The president's Democratic nominees to the FTC are likely to reflect the preferences of incoming Senate Minority Leader Chuck Schumer and Senator Elizabeth Warren. Senator Warren is likely to strongly oppose President-Elect Trump's deregulatory agenda; she has promised a "populist storm against Donald Trump's White House."[32] Earlier in 2016, she put forward an agenda supporting more vigorous antitrust enforcement. She also supports heavy regulation of the consumer finance industry.[33] She is likely to press Senator Schumer for a strong say in the selection of the Democratic nominees to the FTC.

Senator Schumer has not publicly identified his choices or preferences for the Democratic commissioner slots, although it is likely that his preferred nominees would be drawn from the ranks of current or former Democratic staff members of the Senate Judiciary Committee (or its subcommittee on Antitrust, Competition Policy and Consumer Rights) or the House Energy and Commerce Committee (or its subcommittee on Commerce, Manufacturing and Trade). His preferred nominees are likely to have a connection to the Democratic tech-and-finance community in California and New York, which would be consistent with the FTC's growing interest in the technology space. Senator Warren will likely push for more disruptive choices prepared to leave some "blood and teeth on the floor"[34] rather than accept what she

[29] See J. Thomas Rosch, *The Redemption of A Republican* (June 1, 2009) (discussing and defending his votes viewed as inconsistent with the enforcement agenda of the Republican chair of the FTC).

[30] 16 CFR §0.8.

[31] If Commissioner Ramirez resigns, the FTC will have only two Commissioners; in such instances, the FTC rules allow for two commissioners to fulfill the FTC's quorum requirements.

[32] See Victoria McGrane, *Elizabeth Warren is Ready to Defend Consumer Agency*, BOSTON GLOBE (November 20, 2016).

[33] See Senator Elizabeth Warren, *Reigniting Competition in the American Economy* (June 29, 2016). See also Senator Elizabeth Warren, *The Unfinished Business of Financial Reform* (calling for additional regulation of financial institutions (April 15, 2015).

[34] See Shahien Nasiripour, *Fight for the CFPA is 'A Dispute Between Families and Banks' Says Elizabeth Warren* (May 3, 2010) (quoting Senator Warren's preference for a strong consumer financial protection agency, with her second choice being "no agency at all and plenty of blood and teeth left on the floor" and "[her] 99th choice . . . some mouthful of mush that doesn't get the job done.")

would view as weak antitrust and consumer protection enforcement and regulations, especially now that the leadership and status of the Consumer Financial Protection Bureau is threatened.[35] Expect Senator Warren to push for at least one Democratic FTC nominee to have an agenda similar to hers and that of Richard Cordray, the current director of the Consumer Financial Protection Bureau.

> Senator Warren will want Democratic Commissioners prepared to leave some "blood and teeth on the floor."

Because of the likely Democratic resistance to a regulatory rollback, President-Elect Trump may designate as chair a person able to build consensus among the commissioners. Although the majority commissioners can push through policy and regulatory changes without the votes of the minority commissioners, such changes may be more likely to be reversed when, eventually, the Commission majority changes. President-Elect Trump may look to designate as chair someone who can obtain on a regular basis the vote of at least one Democratic commissioner; fewer party line decisions may help add legitimacy to and acceptance of the FTC's actions. The current FTC has adopted some policies without the support of the Republican commissioners, and those policies may now be reversed because they were not the product of consensus.

Some Expectations Regarding the FTC's Enforcement and Regulatory Policy Agenda

An FTC with a majority of commissioners appointed by President-Elect Trump is likely to pursue different policies than the current FTC, and to pursue policies consistent with the incoming Trump administration's focus on increasing economic growth, cutting unnecessary regulation, and repealing and replacing the Affordable Care Act (ACA). Some likely changes and initiatives are described below.

A More Restrained Interpretation of a Proper Competition Case Consistent with Section 5 of the FTC Act

During the eight years of the Obama presidency, the Commission moved aggressively to expand the agency's use of Section 5 of the FTC Act (which prohibits "unfair methods of competition" but leaves to the FTC to define what is "unfair") to challenge and regulate conduct that was not prohibited by the Sherman Act (a "standalone" application of Section 5).

In August 2015, the Commission issued a Statement of Enforcement Principles Regarding Unfair Methods of Competition Under Section 5 of the FTC Act[36] over the strong dissent of Commissioner Ohlhausen. Both Commissioner Ohlhausen and then-Commissioner Wright had called for the FTC to accept limits on its ability to characterize conduct as an unfair method of competition.[37] At the insistence of Commissioner Wright, the FTC Statement incorporated a limiting principle on the use of Section 5: that "the act or practice [would] be evaluated under a framework similar to the rule of reason." However, Commissioner Ohlhausen advocated for a more rigorous standard to be applied before resort to a standalone Section 5 case.

Commissioner Ohlhausen advocated for a Section 5 enforcement standard that included:

- A substantial harm requirement;
- A disproportionate harm test;
- A stricter standard for pursuing conduct already addressed by the antitrust laws;

[35] *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1 (DDC 2016) (the CFPB was unconstitutionally structured, in violation of Article II of the Constitution).

[36] *Statement of Enforcement Principles Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*.

[37] Maureen K. Ohlhausen, *Section 5: Principles of Navigation* (July 25, 2013); Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of its Unfair Methods of Competition Authority* (February 26, 2015).

- A commitment to minimize conflict between the FTC and the US Department of Justice (DOJ) (because DOJ does not enforce Section 5 but does enforce the Sherman Act);
- A reliance on robust economic evidence when evaluating the practice at issue and the exploration of available non-enforcement tools prior to taking any enforcement action; and,
- A commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice.[38]

Commissioner Ohlhausen continues to advocate for a policy statement that allows a firm to "be reasonably able to determine that its conduct would be deemed [an] unfair [method of competition—a standalone violation of Section 5] at the time it undertakes the conduct and not have to rely on an after-the-fact analysis of the impact of the conduct that was not foreseeable."[39]

President-Elect Trump's appointees are unlikely to advance a standalone application of Section 5, and, with a majority, may adopt, in practice or in a revised Commission statement, the principles articulated in Commissioner Ohlhausen's dissent. Her required principles appear to provide a stronger restraint on the FTC's broad use of Section 5 and the agency's regulatory authority. The six principles may also provide a higher standard for the federal courts' review of the FTC's standalone Section 5 cases, without chilling procompetitive or competitively neutral conduct.

A More Tempered Pursuit of Monetary Relief in Competition Cases

In July 2003, under the leadership of then FTC Chair Muris, the FTC issued a Policy Statement on Monetary Equitable Remedies in Competition Cases[40], which was a statement of principles in regard to the use of disgorgement or other forms of restitution against respondents in competition cases brought by the FTC. Although the FTC had long taken the position that it could seek equitable monetary remedies in competition cases, the agency had rarely used that authority and had provided almost no guidance on when it would seek such a remedy. The 2003 Policy Statement, agreed to by all five commissioners, set out three principles to guide the FTC:

- The conduct at issue must be a clear violation of the antitrust laws (as measured ex-ante, not ex-post with the benefit of hindsight).
- There must be a reasonable basis for calculating the amount of disgorgement or restitution to be ordered.
- Other remedies must be unlikely to accomplish fully the purposes of the antitrust laws, or such relief may provide additional benefits.

In July 2012, the Commission voted to withdraw the 2003 Policy Statement[41] (with Republican then-Commissioner Tom Rosch voting with the Democratic majority) over the strong dissent of Commissioner Ohlhausen. She argued that the decision was based on vague assertions and without any evidence of the statement inappropriately constraining the FTC, and that it ran counter to the FTC's goal of providing transparency in its enforcement processes. She argued that the majority was "moving from clear guidance on disgorgement to virtually no guidance," and was acting with a "seeming lack of deliberation."[42]

Commissioner Wright, who was not on the FTC at the time the 2003 Policy Statement was withdrawn, agreed with Commissioner Ohlhausen's position. Both remained critical of the FTC's use of disgorgement without the agency having articulated and made public a clear basis for when the FTC would seek such relief. [43] Both supported the use of

[38] Dissenting Statement of Commissioner Maureen K. Ohlhausen, *FTC Act Section 5 Policy Statement* (August 13, 2015).

[39] Maureen K. Ohlhausen, *A SMARTER Section 5* (September 25, 2015).

[40] *Policy Statement on Monetary Equitable Remedies in Competition Cases.*

[41] Statement of the FTC, *Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases* (July 31, 2012).

[42] Statement of Commissioner Maureen K. Ohlhausen, *Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases* (July 31, 2012).

[43] See, *e.g.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen, *Cardinal Health, Inc.* (April 2015); Dissenting Statement of Commissioner Joshua D. Wright, *Cardinal Health, Inc.* (April 2015).

disgorgement in cases that met the requirements of the 2003 Policy Statement, but argued that "the incentive to pursue monetary remedies more frequently, particularly in . . . cases without a clear violation, may cause the Commission to neglect its special mission to develop the antitrust laws through [FTC administrative] litigation and other unique tools." [44] Similarly, Heritage's Abbott has argued that the Commission's withdrawal of the 2003 Policy Statement will "increas[e] business uncertainty" and "chill efficient business practices that are not well understood by enforcers."[45]

Expect the Commission to reissue the 2003 Policy Statement and return to the principles articulated therein, perhaps after seeking comment on them, on the FTC's experience with disgorgement subsequent to 2003 (as Commissioner Ohlhausen challenged the FTC to do) and on the accuracy of the alleged justification for the withdrawal of the Policy Statement in 2012 (*i.e.*, that it improperly discouraged the use of disgorgement as a remedy).

A Requirement for a Stronger Evidentiary Showing of Harm to Competition Before Challenging a Transaction or Practice as Inconsistent with the Antitrust Laws

Both Ohlhausen and Wright found the FTC too willing to challenge conduct on the basis of what each believed to be insufficient evidence of actual competitive harm. For example, Ohlhausen dissented from the Commission's decision to accept injunctive relief from *AmeriGas* and *Blue Rhino*, finding that the "majority's pursuit and . . . settlement of [a] novel, unwarranted enforcement action" was "done in large part through a mischaracterization of the allegations actually levied in the complaint" and "runs contrary to the now decades-long evolution in antitrust doctrine away from per se treatment of benign or even procompetitive business conduct, as well as the more sophisticated economic analysis that animates modern antitrust law."[46] In another example, both Ohlhausen and Wright dissented from the majority's decision to obtain equitable and injunctive relief against Cardinal Health for refusing to grant distribution rights for [certain] products to new competitors.[47] Wright argued that the majority gave too little weight to the efficiencies associated with Cardinal Health's business practices that were likely to enhance consumer welfare.[48] Heritage's Abbott has similarly advocated that the FTC should be "more attentive to the potential efficiencies of exclusive dealing" and should proceed "far more cautiously before proposing an enforcement action in the exclusive dealing area."[49]

Expect a majority-Republican Commission to require stronger evidence of harm to *competition*—not merely harm to actual or potential competitors—before pursuing an enforcement action, and to take greater notice of the efficiencies associated with contractual (and structural) vertical relationships [50] before concluding that conduct harms consumers and the competitive process.

[44] Separate Statement of Commissioners Maureen K. Ohlhausen & Joshua D. Wright, *Federal Trade Commission v. Cephalon, Inc.* (May 28 2015), at 3; see also Maureen K. Ohlhausen, *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission* (April 20, 2016); Joshua D. Wright, *The Federal Trade Commission and Monetary Remedies* (July 19, 2013).

[45] Alden F. Abbott, *FTC Monetary Remedies Policy and the Limits of Antitrust*, ANTITRUST SOURCE (December 2012).

[46] Dissenting Statement of Commissioner Maureen K. Ohlhausen, *AmeriGas & Blue Rhino* (October 2014).

[47] FTC Press Release, *Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics* (April 20, 2015).

[48] Dissenting Statement of Commissioner Joshua D. Wright, *Cardinal Health, Inc.* (April 2015). See also *Dissenting Statement of Commissioner Maureen K. Ohlhausen, Cardinal Health, Inc.* (April 2015).

[49] Alden Abbott, *The FTC's Cardinal Health Settlement is Bad Antitrust Medicine and Highlights the Need for Additional Antitrust Guidance*, TRUTH ON THE MARKET (May 22, 2015). See also Dissenting Statement of Maureen K. Ohlhausen, In the Matter of Fortiline, LLC (August 9, 2016) (dissenting from the Commission's decision to sanction respondent where evidence was ambiguous, because "imposing liability in … equivocal factual circumstances may chill procompetitive vertical conduct").

[50] See Alden Abbott and Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, Keith N. Hylton, ed., ANTITRUST LAW AND ECONOMICS, 183 (2010) (the potential efficiencies associated with both tying and exclusive dealing, and the fact that both are prevalent in markets without significant antitrust market power, lead most commentators to believe that they are generally pro-competitive).

Acceptance of a Stronger Legal Standard for Obtaining Preliminary Injunctions in Merger Challenges, Consistent with the Standard Faced by the Antitrust Division

The FTC and the DOJ's Antitrust Division are subject to different standards when they seek to preliminarily enjoin a merger. Section 13(b) of the FTC Act provides that "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted. . . ."[51] The Antitrust Division must meet the traditional preliminary injunction standard, which generally requires the court to find that the Division has "a reasonable likelihood of success on the merits" and that "the balance of equities favor[s the DOJ]." The statutory standard is more favorable to the FTC than the standard applied to the DOJ.

The two agencies follow different practices as well. When attempting to block a merger, the FTC seeks only a preliminary injunction at the federal district court. Then, regardless of whether it is successful in obtaining a preliminary injunction, the agency may seek permanent relief through its administrative "Part III" proceedings. In such matters, an administrative law judge issues the initial decision, which is appealable to the Commission. The Commission's decision is appealable to the federal appellate courts. Thus, the litigation of the merger may continue for many years, regardless of whether the FTC obtained a preliminary injunction. The Antitrust Division usually combines its request for a preliminary injunction with a request for a permanent injunction, resolving the matter in one trial (subject to appeal to the federal appellate courts).

During the Obama administration (and at the tail end of the Bush administration), the FTC aggressively moved to limit and ultimately delay the federal judiciary's ability to inquire into the ultimate merits of the FTC's decision to seek to enjoin a merger. The FTC has repeatedly argued that it can meet its standard for a preliminary injunction merely by raising serious questions about the likely effects of a merger[52], and not by showing that it has "a reasonable likelihood of success on the merits." The FTC has also moved aggressively to use its Part III process to conduct full trials on the merits of particular mergers, delaying substantially the federal court's ultimate review of the merits of the FTC's case.

According to the Antitrust Modernization Commission (AMC), the FTC was established by Congress to make recommendations on changes to the antitrust laws:

> Some believe that these differences in DOJ and FTC practices and standards result in mergers' being treated differently depending on which agency is involved. The FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ. . . . [T]hese factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ. Any such differences—real or perceived—can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger.

Former FTC Chair Muris has argued that "because the FTC and DOJ divide merger review between them pursuant to an ad hoc agreement, the legality of some mergers today depends not on their underlying merits, but instead on which agency reviews them," and, in effect, "the FTC's relative ease in obtaining a preliminary injunction means that it can permanently foreclose more mergers than its counterpart."[53]

[51] 15 USC § 53(b).

[52] See, *e.g.*, Complaint for Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, *FTC v. Ardagh Group*, Civ. No. 1:13-cv-01021-RMC (DC, July 2, 2013) at ¶54; Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, *FTC v. Graco*, Civ. No. 1:11-CV-02239-RLW (DC, December 15, 2011) at ¶50.

[53] Testimony of Timothy J. Muris, *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers*, before the US Senate, Committee on Commerce, Science and Transportation, Subcommittee on Consumer Protection, Product Safety and Insurance, Washington, DC (March 17, 2010).

Heritage's Abbott argues that "private parties should expect to have their proposed mergers subject to the same methods of assessment and an identical standard of judicial review, regardless of which agency reviews a particular transaction."[54] The AMC recommended that Congress amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in mergers notified to the FTC under the Hart-Scott-Rodino Antitrust Improvements Act, and to require the FTC meet the same standard for the grant of a preliminary injunction as the DOJ. The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, known as the SMARTER Act, is intended to do that.

Commissioner Ohlhausen supports "legislation that ensure[s] that courts apply the same [preliminary injunction] standards to actions brought by the FTC and DOJ."[55] Commissioner Wright supported the SMARTER Act for, among other reasons, "remov[ing] from the FTC's structural design the due process concerns raised by its ability to get two bites at the apple and the incomplete separation of the agency's prosecutorial role from its adjudicative role."[56] However, the current Democratic majority does not support the SMARTER Act and rejects concerns about disparate preliminary injunction standards.[57]

Expect the new Republican majority Commission to support the principle of an equal preliminary injunction standard for the FTC and the Antitrust Division, and to refrain from using the administrative Part III process to adjudicate the merits of a merger if the FTC loses its preliminary injunction request in the federal courts. In short, the FTC, like the DOJ, will combine the preliminary injunction and permanent injunction phase into a single federal court hearing (appealable to a federal appellate court).

Merger (and Non-Merger) Investigation Process Reform That Reflects Improvements Sought by All Interested Parties, Not Just Those Identified by Agency Staff

The merger investigation and review process takes too long and has lengthened substantially in the closing years of the current administration. "Significant merger investigations" are now taking, on average, 9.7 months (approximately 290 days) to be resolved; this is up substantially from the 7.1-month average for 2011, 2012 and 2013 (a 25 percent increase in average time of an investigation). It is not a handful of investigations that affect the average. One-half of all such merger investigations completed in 2015 took 9.9 months or longer; this is substantially in excess of the 7.0-month median in 2011 and 2013.[58]

In 2006, then-Chair Majoras announced reforms to the FTC merger review process. In August 2015, the Bureau of Competition concluded that "parties rarely invoked the Merger Process Reforms" of 2006, and identified certain "best practices for merger investigations."[59] The statistics noted above suggest that these best practices are having no to only marginal impact. One likely relevant factor in the failure of the reforms and best practices to curtail the length of merger review periods may be that the FTC failed to solicit the input of persons outside the agency to design the reforms and best practices. What is "best" from the FTC staff's perspective may not be consistent with what the parties responding to a second request or civil investigative demand would find helpful in limiting the burden of their response.

Commissioner Ohlhausen has argued that the Commission unwisely and inappropriately makes major policy changes without soliciting comments or input from those outside the

[54] Alden Abbott, *Time for Congress to Consider Establishing a "SMARTER" Antitrust Merger Review Framework*, TRUTH ON THE MARKET (October 23, 2015).

[55] Maureen K. Ohlhausen, *A SMARTER Section 5* (September 25, 2015).

[56] Joshua D. Wright, *Judging Antitrust* (February 25, 2015).

[57] See Prepared Statement of the Federal Trade Commission Before the United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, on S. 2102, *The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015"* (October 7, 2015). Commissioner Ohlhausen voted against issuing the testimony to Congress because she disagreed with the Commission majority's position.

[58] Dechert LLP, *DAMITT Q3 Update: No Let Up in Antitrust Merger Investigation Activity*. Median figures were obtained from Dechert.

[59] Bureau of Competition, *Best Practices for Merger Investigations* (August 2015).

agency.[60] FTC Chair Muris and his Bureau of Competition Director sought such input during their tenure at the FTC, holding a series of public workshops regarding modifications and improvements to the FTC's merger investigations process. They sought input from a broad range of interested parties, including corporate personnel, outside and in-house lawyers, economists and consumer groups. The Bureau announced policy and process changes that addressed concerns identified by these interested parties and that were viewed as significant process improvements by the antitrust bar.[61] The issues were different in some but not all respects to those that bedevil parties today; however, the process followed by the Bureau then was more likely to identify and respond to the concerns of interested parties than those identified and addressed through a purely internal FTC effort.

Expect a Republican-majority Commission, acting through the Bureau of Competition, to seek input on merger (and non-merger) investigation process reforms from a wide group of interested parties, including, but not limited to, FTC and DOJ staff.

Expect a Comprehensive Review of Health Care Markets

Since the mid-1970s, the FTC has devoted a substantial portion of its enforcement and policy agenda to maintaining competition in health care markets. There is a strong bipartisan commitment to understanding the operation of health care markets, policing for anticompetitive conduct, recommending legislative changes to prohibit or constrain conduct that has anticompetitive effects, and advocating for the elimination of barriers to new forms of competition in health care markets.[62] The FTC's role, according to Commissioner Ohlhausen, goes "beyond enforcement" to "promoting health care competition and innovation."[63]

> The FTC will undoubtedly play an important role in helping both Congress and the president formulate health care policy.

It is hard to overstate the current interest in making sure that health care markets operate competitively and provide efficient, effective medical care to all persons in the United States. The FTC will undoubtedly play an important role in helping both Congress and the president formulate health care policy, especially if the announced intention to "repeal and replace" the ACA moves forward. To play an effective role, the FTC will want to inform itself more deeply and broadly on the current operations of health care markets. There have been significant changes in health care markets since the FTC's most recent comprehensive review of health care markets (2003–2004).[64] Some changes were encouraged by the ACA; others are a reaction to the opportunities identified by persons inside and outside the health care industry. Other changes are related to changing demographics and new forms of competition; for example, rural hospitals and the companies that provide health care services in rural areas are in substantial financial difficulty.

[60] See, *e.g.*, Statement of Commissioner Maureen K. Ohlhausen, Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012).

[61] Transcripts of the public workshops are available at https://www.ftc.gov/news-events/events-calendar/2002/06/ftc-merger-best-practices. The Bureau of Competition's 2002 Statement on Guidelines for Merger Investigations is available at https://www.ftc.gov/system/files/documents/public_events/114015/ftc_statement_on_guidelines_for_merger_investigations_12-22-02_2.pdf.

[62] See, *e.g.*, Julie Brill, *Competition in Health Care Markets* (June 9, 2014); Maureen K. Ohlhausen, *Health Care, Technology, and Health Care Technology: Promoting Competition and Protecting Innovation* (February 26, 2014); Edith Ramirez, *Antitrust, Accountable Care Organizations, and the Promise of Health Care Reform* (April 29, 2011); Timothy J. Muris, *Everything Old is New Again: Health Care and Competition in the 21st Century* (November 7, 2002).

[63] Maureen Ohlhausen, *Beyond Law Enforcement: The FTC's Role in Promoting Health Care Competition and Innovation*, HEALTH AFFAIRS BLOG (January 26, 2015).

[64] See Federal Trade Commission and Department of Justice, *Improving Health Care: A Dose of Competition* (July 2004). The FTC has periodically held additional workshops on health care competition; workshops were most recently held in February 2015 and March 2014.

New forms of health care delivery, efforts to increase price transparency and aggressive efforts by insurers to keep costs down (and increase choice) have developed or significantly expanded in the last five to 10 years.

Expect the FTC to devote significant attention and resources to updating its understanding of health care markets, so that it can provide guidance to the administration, Congress and the states on questions of health care policy, in support of policies that advance competition in health care markets and innovation in the delivery of health care. This could be the FTC's highest policy priority, given the likely changes to the ACA.

A Shift in Balancing the Benefits of Intellectual Property Rights with Concerns of Competitive Harm from Exclusionary Conduct

Recent Democratic Commission appointees have been more willing to use antitrust to address disputes related to intellectual property rights than recent Republican appointees. This is a small but significant difference between the commissioners. As one example, the Democratic appointees to the FTC have advanced an expansive interpretation of Section 5 that has supported the agency's challenge, under certain conditions, of efforts by holders of intellectual property to seek to enjoin others' use of that intellectual property. Over the dissent of Commissioner Ohlhausen, the FTC imposed antitrust liability on an owner of a standard essential patent merely for petitioning the courts for injunctive relief and for petitioning the International Trade Commission for an order preventing the importation of products alleged to violate the petitioner's intellectual property rights.[65]

On this same issue, Commissioner Wright argued that "the antitrust laws are not well suited to govern contract disputes between private parties" and that "neither economic theory nor available empirical evidence supports the proposition that filling contract gaps by suggesting specific terms or with the threat of antitrust enforcement actions is likely to [benefit competition and innovation] goals."[66] Heritage's Abbott has also argued that, rather than apply antitrust law to combat "hold-up" attempts or injunctive actions, "disputes regarding compensation to [standard essential patent] holders are better handled in patent infringement and breach of contract lawsuits," because "adding antitrust to the mix [of remedies] imposes unnecessary costs and may undermine involvement in standard setting and harm innovation."[67]

More broadly, Commissioner Ohlhausen has argued for a strong patent system, arguing that "[intellectual property] rights confer compelling benefits that patent skeptics overlook or discount," noting that "abundant evidence links strong patents with R&D investment and economic growth." She finds "claims of patent failure . . . wanting" and believes that "discarding or weakening inventors' rights would be reckless."[68] Commissioner Wright argued that the "FTC ought to be cognizant and cautious of the departure [from the symmetrical application of antitrust principles to real property and intellectual property] that appears to be underway [during the Obama administration] and evaluate vigilantly whether it is the best policy going forward for the sake of competition, innovation, and consumer welfare." Any such departure, he stated, should be "justified by the economic evidence" because of the risk of "regressing toward an antitrust enforcement regime that is overly hostile to the exercise and

[65] See, *e.g.*, Statement of Commissioner Maureen K. Ohlhausen in *Motorola Mobility* (January 2013); Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Robert Bosch GmbH* (April 24, 2013) ("it is simply not in the public interest to effectively oust other jurisdictions, including the federal courts and the International Trade Commission . . . from the important and complex area of [Standard Essential Patents], through the use of [the FTC's] Section 5 authority"); see also Reply Submission on the Public Interest of Federal Trade Commissioners Maureen K. Ohlhausen and Joshua D. Wright, *In the Matter of Certain 3G Mobile Handsets*, International Trade Commission Inv. No. 337-TA-613 (July 20, 2015) (supporting "evidence-based approach" and "requir[ing] proof that a SEP holder used injunctive relief to gain undue leverage and demand supra-FRAND royalties prior to precluding an exclusion order on public interest grounds").

[66] Joshua D. Wright, *SSOs, FRAND, and Antitrust* at pp. 27, 31 (September 12, 2013).

[67] Alden Abbott, *The Case Against Antitrust Challenges to Standard Essential Patent "Abuses" Intensifies – Will DOJ and the FTC Finally Get the Message*, TRUTH ON THE MARKET (October 6, 2015).

[68] Maureen K. Ohlhausen, *The Case for a Strong Patent System* at 1, 2 (June 8, 2016).

exchange of [intellectual property rights]."[69] Abbott "believe[s] that the weight of recent empirical [literature] by and large lend[s] solid support for strong patent protection," and cautions that "[c]laims that the increased antitrust scrutiny of patent transactions does not necessarily undermine a strong patent system are unconvincing. . . . New antitrust enforcement initiatives that seek to limit returns within the legitimate scope of the patent are unwise."[70]

Expect the Trump FTC to proceed more cautiously than the Obama FTC in using its enforcement authority and policy agenda to weaken the right of holders of intellectual property to exclude others from the use of that intellectual property, and to be more sensitive to concerns that loosening restrictions on intellectual property rights will have negative effects on consumer welfare and economic efficiency.

More Focus on a Requirement to Show Harm, Rather than Fraud or Misrepresentation, in Data Security and Privacy Enforcement Matters

The US privacy and data security legal regime consists of a number of laws and regulations whose purpose is to protect consumers from harms associated with the collection and misuse of certain types of personal information. These laws include the Children's Online Privacy Protection Act (information collected online from children), the Fair and Accurate Credit Transactions Act and the Fair Credit Reporting Act (information used to make credit, insurance and employment decisions), the Gramm-Leach-Bliley Act (financial information), and the Health Insurance Portability and Accountability Act (health information). These laws are enforced by federal agencies including but not limited to the FTC.

The FTC also has general authority to regulate the collection and disposition of consumers' personal information through the "unfair or deceptive acts or practices" prong of Section 5 of the FTC Act.[71] The FTC has brought more than 60 cases alleging data security and privacy violations; through these cases, the FTC establishes general data security standards that firms must meet to be compliant with the FTC's laws and regulations. These cases are of two general types: (i) explicit or implicit representations, followed by failure to comply with those representations ("deception" cases), and (ii) failure to take reasonable precautions to prevent the unauthorized disclosure (a data breach) of personal, sensitive information ("unfairness" cases). Firms that run afoul of the FTC's unfairness authority may have made no representation about their privacy and data security policies.

The FTC's recent case against LabMD is illustrative of an FTC unfairness case. The Commission found that:

> [LabMD's data security practices] were unreasonable, lacking even basic precautions to protect the sensitive consumer information maintained on its computer system because [a]mong other things, it failed to use an intrusion detection system or file integrity monitoring; neglected to monitor traffic coming across its firewalls; provided essentially no data security training to its employees; and never deleted any of the consumer data it had collected.[72]

According to the Commission:

> These failures resulted in the installation of file-sharing software that exposed the medical and other sensitive personal information of 9,300 consumers on a peer-to-peer network accessible by millions of users. LabMD then left it there, freely available, for 11 months, leading to the unauthorized disclosure of the information.[73]

[69] Joshua D. Wright, *Does the FTC Have a New IP Agenda?* at 24, 25 (March 11, 2014).

[70] Alden Abbott, *Abuse of Dominance by Patentees: A Pro-Innovation Perspective* (November 13, 2014).

[71] An act or practice is unfair if "it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition." 15 USC § 45(n). An act or practice is deemed deceptive "if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." Fed. Trade Comm'n, Policy Statement on Deception, *reprinted at* 103 FTC 174-5 (1984).

[72] Opinion of the Commission, *In the Matter of LabMD*, Docket No. 9357 at 1.

[73] *Id.*

The Commission concluded that "LabMD's data security practices constitute[d] an unfair act or practice within the meaning of Section 5 of the FTC Act." To address this failure, the Commission required that "LabMD notify affected consumers, establish a comprehensive information security program reasonably designed to protect the security and confidentiality of the personal consumer information in its possession, and obtain independent assessments regarding its implementation of the program."[74]

The FTC will remain active in policing privacy and data security claims and practices. However, expect a Republican majority Commission to take more notice of whether a practice is fully consistent with the FTC's unfairness requirements. Commissioner Wright described the proper analytical framework for an unfairness case: the FTC "consider[s] the security deficiencies at issue, the resultant harm to consumers, if any, and whether there were low-cost steps that would significantly reduce the risk."[75] The FTC's unfairness authority reaches only that conduct where the alleged injury is "substantial," and "includes the critical requirements that such injury 'must not be outweighed by any countervailing benefits to consumers or competition that the practice produces' and 'it must be an injury that consumers themselves could not reasonably have avoided.'"[76] In *Apple,* Wright argued that the FTC majority did not properly balance the harm (small and potentially diminishing) of Apple's failure to identify a feature of its billing app software with the benefits associated with the feature.

A Republican-majority Commission is likely to adhere to a more economically informed approach to the analysis of whether a practice has caused consumer harm. This is true for privacy and data security enforcement actions based on misrepresentation too. Overly aggressive enforcement actions may chill innovation and waste the FTC's scarce investigation and enforcement resources, according to Commissioner Ohlhausen. Ohlhausen dissented from the FTC's decision to charge *Nomi Technologies* with misrepresentation of its product's attributes, stating that the FTC "should have exercised its prosecutorial discretion" and not "use[d] its limited resources to pursue cases that involve [no] consumer harm." She also advocated that the FTC "not apply a *de facto* strict liability approach to a young company that attempted to go above and beyond its legal obligation to protect consumers but, in so doing, erred without benefiting itself, . . . fear[ing] that the majority's decision in [*Nomi*] encourages companies to do only the bare minimum on privacy, ultimately leaving consumers worse off."[77] Commissioner Wright also dissented, noting that the FTC's complaint and proposed settlement "risk significant harm to consumers by deterring industry participants from adopting business practices that benefit consumers."[78] According to Wright "penaliz[ing] a company for . . . minor shortcoming[s]—particularly when there is no evidence the misrepresentation harmed consumers—sends a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers."[79]

Heritage's Abbott criticizes the FTC's "security by design" approach, which "informs firms after the fact what they should have done without exploring what they might have done to pass agency muster." This approach is "inherently vague" and puts the FTC in the role of a "data security systems designer." He advocates that "the FTC . . . carefully consider whether its current policies [in the data security] area are cost-beneficial and whether specific reforms would advance the public interest in enhancing data protection in a less burdensome, more welfare-enhancing fashion."[80]

Recognizing that "the FTC's data security enforcement framework is not perfect," Commissioner Ohlhausen "would like to develop more concrete guidance to industry" in this

[74] *Id.*

[75] Joshua D. Wright, *Privacy and Data Security at the Federal Trade Commission: Recent Developments* (April 8, 2014).

[76] Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Apple, Inc.* (January 15, 2014) (arguing that the Commission majority did not properly balance the harm (small and potentially diminishing) of Apple's failure to identify a feature of its billing app software with the benefits associated with such feature).

[77] Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Nomi Technologies, Inc.* (August 20, 2015).

[78] Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nomi Technologies, Inc.* (August 20, 2015).

[79] *Id.*

[80] Alden Abbott, *The Federal Trade Commission's Role in Online Security: Data Protector or Dictator*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM (September 10, 2014).

area. The greater focus on harm by Ohlhausen and Wright (as compared to their Democratic counterparts on the Commission) and as recommended by Abbott, is consistent with President-Elect Trump's focus on elimination of unnecessary regulation and the creation of conditions that support innovation and economic growth. Expect their approach to be the approach that President-Elect Trump's nominees will follow.

A Significantly More Cautionary Approach to Restricting the Promulgation of Health Claims for Products Generally Recognized as Safe

Under President Obama, the FTC attempted a significant change in the agency's historical treatment of health claims for products generally recognized as safe. According to principles enunciated in *Pfizer*, the FTC determines the level of evidence an advertiser must have to substantiate its product efficacy claims by examining six factors: (i) the type of product advertised, (ii) the type of claim, (iii) the benefits of a truthful claim, (iv) the cost of developing substantiation for the claim, (v) the consequences of a false claim and (vi) the amount of substantiation that experts in the field would require.[81] The Obama FTC was skeptical of the benefits of health claims where the research supporting the claim "[is] inconsistent with the weight of scientific evidence in the relevant field," and believed that "[o]ne outlier study should not be the sole basis of support for a claim that a product will confer a benefit—particularly a health benefit."[82]

The FTC began applying this standard early in the Obama administration. In *Iovate* (for weight loss claims), *Dannon* (for relief of temporary irregularity claims) and *Nestle* (for duration of diarrhea claims), the FTC achieved settlements requiring respondents to have "at least two adequate and well-controlled human clinical studies . . . conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and scientific evidence, are sufficient to substantiate that the representation is true."[83] Neither Ohlhausen nor Wright was a commissioner (nor at the FTC) at the time of these settlements; no commissioner objected to these provisions.

In its opinion and order in *POM Wonderful*, the Commission required the respondent to have two randomized, double-blinded, controlled human clinical studies (RCTs) "before making any representation regarding a product's effectiveness in the diagnosis, treatment, or prevention of any disease."[84] Commissioner Ohlhausen opposed this regulatory standard, in part because "requiring two RCTs . . . limit[s] consumer access to potentially useful information," and, especially in the case of an "admittedly safe product" (pomegranate juice), setting an "unnecessarily high bar for such a product [is in tension] with the balanced approach to substantiation" set forth in *Pfizer* and is an "unduly burdensome restriction that might chill information useful to consumers in making purchasing decisions."[85]

Similarly, Commissioner Ohlhausen dissented, in part, from the FTC's Order in *GeneLink, Inc. and foru International* because the Order "impose[d] an unduly high standard of at least two randomized controlled trials . . . to substantiate *any* disease-related claims." She criticized the Commission for "[a]dopting a one-size-fits-all approach to substantiation by imposing such rigorous and possibly costly requirements for such a broad category of health and disease-related claims [because such standard] may, in many instances, prevent useful information from reaching consumers in the marketplace and ultimately make consumers worse off."[86] Rather, she said, "consumers would on balance be better off if

[81] *Pfizer, Inc.*, 81 FTC 23, 64 (1970).

[82] Remarks by David C. Vladeck, Director, FTC Bureau of Consumer Protection, *Priorities for Dietary Supplement Advertising Enforcement* (October 22, 2009).

[83] *FTC v. Iovate Health Services USA, Inc.,* No. 10-CV-587, slip op. at 7 (WDNY July 2010) (Stipulated Final Judgment); *In re Nestlé HealthCare Nutrition, Inc.,* No. 092-3087, Agreement Containing Consent Order at 4 (July 14, 2010); *In re Dannon Company, Inc.,* No. 082-3158, Agreement Containing Consent Order at 4 (Dec. 15, 2010).

[84] Opinion of the Commission, *In the Matter of POM Wonderful, LLC* (January 10, 2013) at 52.

[85] *Id.*

[86] Statement of Commissioner Maureen K. Ohlhausen, Dissenting in Part and Concurring in Part, in the Matter of In the Matter of GeneLink, Inc. and foru International Corporation (January 7, 2014).

[the Commission] clarified that [its] requirements permit a variety of health- or disease-related claims about safe products, such as foods or vitamins, to be substantiated by competent and reliable scientific evidence that might not comprise two RCTs."[87]

Commissioner Ohlhausen's view was adopted by the court of appeals in *POM Wonderful v. FTC*.[88] There, the court upheld the Commission's finding of liability, but agreed with Ohlhausen that "requiring [more than one] RCTs without adequate justification exacts considerable costs," including that "consumers may be denied useful, truthful information about products with a demonstrated capacity to treat or prevent disease."[89]

Commissioners Ohlhausen and Wright recognized as well that the FTC's treatment of health-related claims occasionally raised significant First Amendment issues. Both dissented from the FTC's proposed remedial order against *Genesis* as "inappropriately penaliz[ing] the defendants for some speech that is fully protected under the First Amendment" and as "threaten[ing] to deter the free flow of truthful [health-related] information into the marketplace to the detriment of consumers."[90] Abbott, writing in a Heritage Foundation Legal Memorandum, recognized the scope of the Obama administration's change in past policy and called for revisions to the FTC Policy Statement Regarding Advertising Substantiation that would commit the FTC to, among other things, (i) limit any restrictions on commercial speech to the smallest extent possible consistent with fraud prevention, (ii) apply strict cost-benefit analysis to framing remedies and investigating advertising claims, (iii) apply a reasonableness test consistent with the guidance in *Pfizer*, and (iv) not require clinical studies in order to substantiate advertising claims.[91] Expect President-Elect Trump's nominees to the FTC to adopt and follow the framework proposed and advocated for by Ohlhausen and Abbott.

Competition Advocacy to Increase

Competition advocacy at the FTC "involves the use of [its] expertise in competition, consumer protection, and economics to persuade other government actors to pursue policies that promote competition and consumer welfare."[92] This is an area, like health care, where there is agreement among all the commissioners on the importance of the FTC's role in advocating for competitive markets and the elimination of regulations that limit competition and restrict entrepreneurial opportunities. Commissioner Ohlhausen has been especially strong in highlighting the negative effects (to individuals) of state occupational licensing regulations, which have the effect of preventing lower-income individuals and families from starting their own, usually low-capital but highly in demand, businesses.[93] Her strong focus on removing regulatory barriers to entrepreneurship may be especially attractive to President-Elect Trump, who no doubt (rightly) considers himself an entrepreneur operating in the highly regulated real estate industry.

Expect the new FTC chair to put increased resources into this area and to look for new opportunities to advocate against "proposed laws or regulations that would limit choices and make consumers worse off." With President-Elect Trump promising to formulate a rule that, for every one new regulation, two old regulations must be eliminated, expect the Republican nominees to the FTC to favor an expansion of the FTC's use of competition advocacy to highlight the negative welfare effects of proposed or existing federal regulations.

[87] *Id.* See also Separate Statement of Commissioner Maureen K. Ohlhause, Dissenting in Part In the Matter of i-Health, Inc. and Martek Biosciences Corporation (June 5, 2014) (the Commission's action "imposes an unduly high standard of substantiation on a safe product" that "risks denying consumers useful information" and may "ultimately … make consumers worse off").

[88] *POM Wonderful v. FTC*, 777 F.3d 478 (DC 2015).

[89] *POM Wonderful v. FTC*, 777 F.3d 478, 502 (DC 2015).

[90] Dissenting Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright, *Federal Trade Commission v. Genesis Today, Inc., Pure Health LLC, and Lindsey Duncan* (January 26, 2015).

[91] Alden F. Abbott, *Time to Reform FTC Advertising Regulation*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM (October 29, 2014).

[92] FTC Commissioner Maureen K. Ohlhausen, *An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification* (November 5, 2013).

[93] See, *e.g.*, Maureen Ohlhausen, *From Hammurabi to Hair Braiding: The Ongoing Struggle for Economic Liberty* (April 28, 2016).

Conclusion

This article has identified a number of areas where a Republican-majority Commission is likely to adopt a different approach than that of the current Democratic-majority Commission (and a few areas of relative continuity). These differences are consistent with the president-elect's interest in removing unnecessary regulation that may hinder economic growth and efficient or beneficial business practices. However, because the FTC operates as an independent agency and the Commission will include only a bare majority of Republicans (when fully staffed), to effectuate such policy changes will require the president-elect to carefully choose his two appointees and chair-designate, if he wants high certainty that his appointees will be able to redirect the FTC to his preference of less unnecessary or costly regulation. Once his nominees are appointed to the FTC, President-Elect Trump has no ability to remove them from office for performance inconsistent with his policy preferences. President-Elect Trump may be in uncharted waters—able to say "you're hired" but effectively prohibited from saying "you're fired."

McDermott Will & Emery

Office Locations

BOSTON
28 State Street
Boston, MA 02109
USA
Tel: +1 617 535 4000
Fax: +1 617 535 3800

BRUSSELS
Avenue des Nerviens 9-31
1040 Brussels
Belgium
Tel: +32 2 230 50 59
Fax: +32 2 230 57 13

CHICAGO
227 West Monroe Street
Chicago, IL 60606
USA
Tel: +1 312 372 2000
Fax: +1 312 984 7700

DALLAS
2501 North Harwood Street, Suite 1900
Dallas, TX 75201
USA
Tel: +1 214 295 8000
Fax: +1 972 232 3098

DÜSSELDORF
Stadttor 1
40219 Düsseldorf
Germany
Tel: +49 211 30211 0
Fax: +49 211 30211 555

FRANKFURT
Feldbergstraße 35
60323 Frankfurt a. M.
Germany
Tel: +49 69 951145 0
Fax: + 49 69 271599 633

HOUSTON
1000 Louisiana Street, Suite 3900
Houston, TX 77002
USA
Tel: +1 713 653 1700
Fax: +1 713 739 7592

LONDON
Heron Tower
110 Bishopsgate
London EC2N 4AY
United Kingdom
Tel: +44 20 7577 6900
Fax: +44 20 7577 6950

LOS ANGELES
2049 Century Park East, 38th Floor
Los Angeles, CA 90067
USA
Tel: +1 310 277 4110
Fax: +1 310 277 4730

MIAMI
333 SE 2nd Avenue, Suite 4500
Miami, FL 33131
USA
Tel: +1 305 358 3500
Fax: +1 305 347 6500

MILAN
Via dei Bossi, 4/6
20121 Milan
Italy
Tel: +39 02 78627300
Fax: +39 02 78627333

MUNICH
Nymphenburger Str. 3
80335 Munich
Germany
Tel: +49 89 12712 0
Fax: +49 89 12712 111

NEW YORK
340 Madison Avenue
New York, NY 10173
USA
Tel: +1 212 547 5400
Fax: +1 212 547 5444

ORANGE COUNTY
4 Park Plaza, Suite 1700
Irvine, CA 92614
USA
Tel: +1 949 851 0633
Fax: +1 949 851 9348

PARIS
23 rue de l'Université
75007 Paris
France
Tel: +33 1 81 69 15 00
Fax: +33 1 81 69 15 15

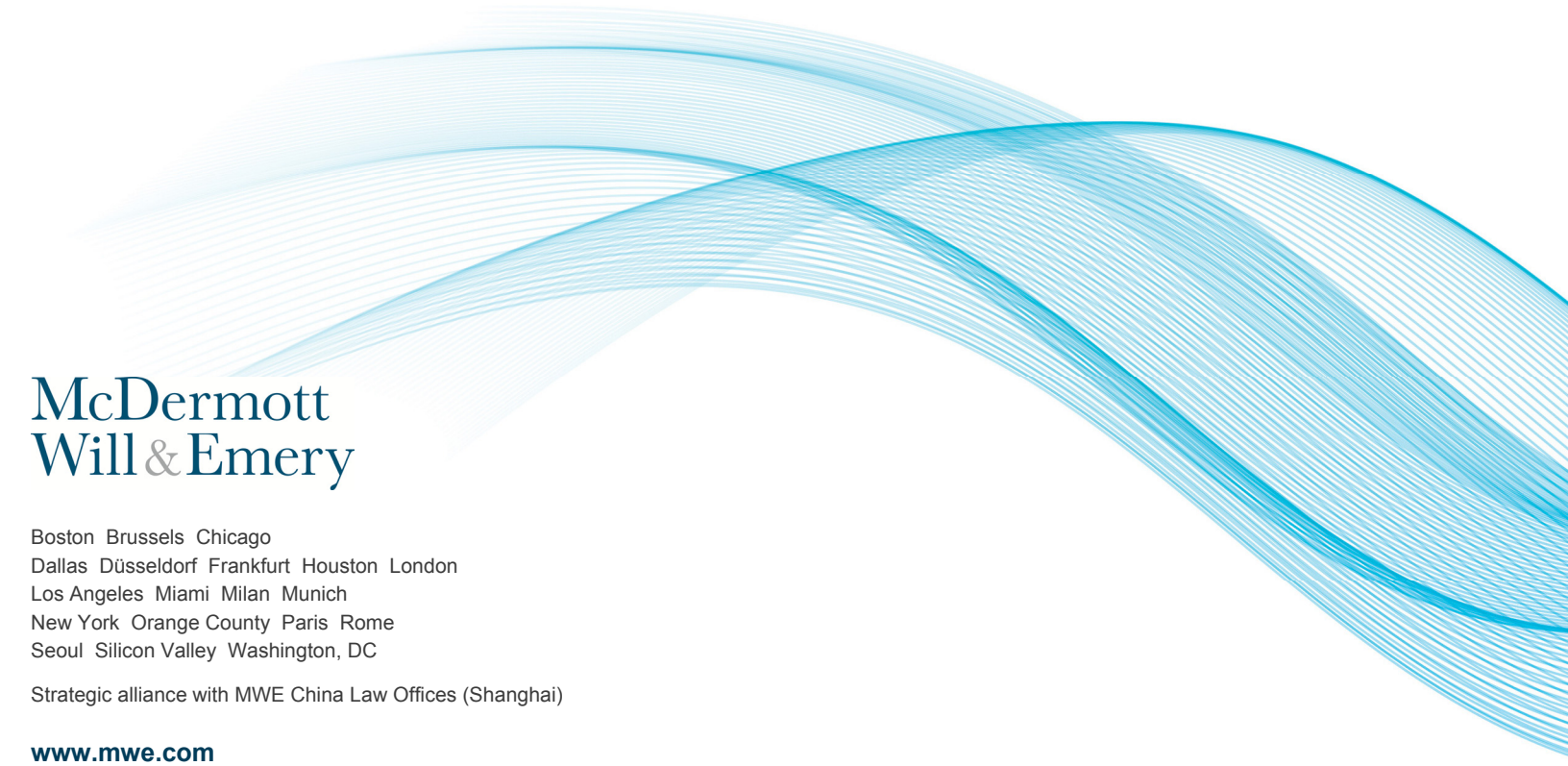
ROME
Via A. Ristori, 38
00197 Rome
Italy
Tel: +39 06 462024 1
Fax: +39 06 489062 85

SEOUL
18F West Tower
Mirae Asset Center1
26, Eulji-ro 5-gil, Jung-gu
Seoul 04539
Korea
Tel: +82 2 6030 3600
Fax: +82 2 6322 9886

SHANGHAI
MWE China Law Offices
Strategic alliance with
McDermott Will & Emery
28th Floor Jin Mao Building
88 Century Boulevard
Shanghai Pudong New Area
P.R.China 200121
Tel: +86 21 6105 0500
Fax: +86 21 6105 0501

SILICON VALLEY
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
USA
Tel: +1 650 815 7400
Fax: +1 650 815 7401

WASHINGTON, DC
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001
USA
Tel: +1 202 756 8000
Fax: +1 202 756 8087



McDermott
Will & Emery

Boston Brussels Chicago
Dallas Düsseldorf Frankfurt Houston London
Los Angeles Miami Milan Munich
New York Orange County Paris Rome
Seoul Silicon Valley Washington, DC

Strategic alliance with MWE China Law Offices (Shanghai)

www.mwe.com