

What Happens to the FTC Under a Biden-Harris Administration?

John E. Villafranco, Aaron J. Burstein

November 9, 2020

Now that [Joe Biden](#) has been declared the winner of this year's presidential election, many practitioners are beginning to turn their focus to how a Biden Administration will reshape federal agencies. This post takes a look at changes that may be in store for the [FTC](#).

For much of the past few years, the FTC has been at the center of vigorous debates about the exercise of its competition and consumer protection authority, with issues such as consumer privacy and potential antitrust enforcement against internet platforms dominating much of the agency's agenda. Although it is too early to assess how the FTC's substantive priorities might change under new leadership, a look at the Commission's structure provides some clues about the levers that a Biden-appointed Chair will be able to use to set the FTC's direction. This post examines some of the key elements of that structure.

Vacancies and Party Balance

The first question is whether and when President Biden will be able to put the FTC under Democratic control. The FTC Act provides that no more than three Commissioners can be of the same political party. Currently, three Republicans and two Democrats lead the FTC, with Joe Simons, a Republican, serving as Chairman. President Trump appointed all five members of the current Commission; they were confirmed by the Senate and sworn in in 2018, resulting in the most rapid turnover in the FTC's membership since its establishment in 1914.

The Biden Administration is likely to have fewer vacancies to fill initially. The Commissioners serve staggered seven-year terms, meaning that the terms don't all expire at once. (See the table below for details.) Only Commissioner Rohit Chopra's term has expired; he could be re-nominated or may continue to serve until a successor is confirmed. If Chairman Simons resigns, as is common upon a change in party control of the White House, the Biden Administration would be able to appoint a third Democrat. If other Commissioners resign before completing their terms, their successors would serve for the remainder of their predecessor's original term.

Commissioner	Political Party	Term Dates
Joseph J. Simons (Chairman)	Republican	05/01/2018- 09/25/2024
Rebecca Kelly Slaughter	Democrat	05/02/2018- 09/25/2022
Noah Joshua Phillips	Republican	05/02/2018- 09/25/2023

Christine S. Wilson	Republican	09/25/2018- 09/25/2025
Rohit Chopra	Democrat	05/02/2018- 09/25/2019

Even if Chairman Simons does not resign, the new President may replace him as Chairman. A new Chairman would have significant leeway to set the FTC's priorities, starting with the ability to appoint new directors for the FTC's three Bureaus: Consumer Protection, Competition, and Economics. The Bureau Directors, in turn, would be able to effectuate the new Chair's priorities in their respective Bureaus through case selection and the development of regulatory and policy proposals. The Chair also has the ability to appoint a handful of other positions, such as the General Counsel, though these officials play a less influential role in setting enforcement and regulatory priorities.

The FTC Chair's Levers and Limitations

At this point, it would be pure speculation to identify likely candidates for FTC Chair or the Directors of the Bureaus of Consumer Protection and Competition. One thing to note – given the way the Commission is viewing conflicts of interest in recent years, it is much less likely that these positions will be filled by attorneys in private practice. The Commission will impute a Firm's entire client list to the candidate, creating a potential lengthy list of conflicts that could force a Commissioner or Directors to have to recuse themselves on important enforcement and policy issues. We saw this when Andrew Smith was proposed as Bureau Director, leading to a contentious debate at the Commission, with both Democrats voting against Mr. Smith.

Regardless, a Democratic Chair would face limitations in his or her ability to realize new enforcement or policy objectives. A majority of the Commissioners must vote in favor of any significant agency action, such as proposing or issuing rules, filing complaints, and accepting settlements. Furthermore, if Chairman Simons departs from the Commission, the Senate could be slow to confirm a fifth Commissioner. In the meantime, the Commission would be evenly split between Democrats and Republicans, creating the potential for a stalemate which could delay any significant agency action.

The FTC is likely to undergo significant changes in a Democratic administration. Still, like most things in a new administration, its effects will take time to unfold. We will continue to closely monitor developments during the transition and beyond.

