

KIRKLAND ALERT

January 2013

Senate Confirms Bill Baer to Lead the Antitrust Division and Josh Wright as a Federal Trade Commissioner

The U.S. Senate confirmed two new antitrust enforcers in recent days. On Sunday, December 30, 2012, the Senate confirmed William J. Baer to serve as Assistant Attorney General in charge of the Department of Justice's Antitrust Division ("Division"). On Tuesday, January 1, 2013, the Senate confirmed Joshua D. Wright to serve as a Commissioner of the Federal Trade Commission ("FTC").

Mr. Baer is the longtime, well-respected head of Arnold & Porter LLP's antitrust group; he served as the Director of the FTC's Bureau of Competition from 1995 to 1999. His confirmation is not likely to prompt significant changes in the Division's antitrust enforcement priorities; Mr. Baer has stated that antitrust enforcement should be non-partisan and grounded in economic analysis. He is expected to investigate potentially anticompetitive mergers aggressively, to enforce vigorously criminal laws against firms that engage in price-fixing with their competitors, and to return the Antitrust Division to challenging business practices that may constitute illegal monopolization. For a more detailed review of Mr. Baer's positions on current antitrust issues, see our July 2012 [Kirkland Alert](#), *Senate Judiciary Committee Holds Hearing on William Baer's Nomination to Head the U.S. Department of Justice's Antitrust Division*.¹

Professor Wright is presently a Professor of Law at the George Mason University School of Law, and received his J.D. and a Ph.D. in economics from UCLA. He previously served at the FTC, most recently as a Scholar in Residence. He is a well-respected and prolific scholar; he has written extensively on the law and economics of antitrust, consumer protection, intellectual property, and contracts.² In his writings, Professor Wright has indicated a strong belief in the use of empirical economic analysis to identify business practices that cause consumer harm.³

Professor Wright joins fellow Republican Commissioner Maureen Ohlhausen on the Commission. We anticipate that he will join and support her efforts to restrain the current Commission's effort to expand the scope of practices deemed to constitute "unfair methods of competition" and to seek to check the Commission's recent repudiation of certain longstanding FTC consumer protection principles.⁴ While Commissioners Ohlhausen and Wright will not constitute a majority of the Commission, we expect they will exercise a temporizing influence on the Commission's actions in areas where the law is unsettled or where the anticompetitive effects of a transaction or practice are not clearly apparent.

President Obama likely will have another opportunity soon to influence the direction of antitrust and consumer protection policy; Jon Leibowitz, the current Chairman of the FTC, is widely expected to leave the Commission shortly.⁵

¹ http://www.kirkland.com/siteFiles/Publications/Alert_072712.pdf.

² A collection of Professor Wright's academic papers is available on the Social Sciences Research Network, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=466576. A collection of Professor Wright's shorter writings can be

found on the weblog *Truth on the Market*, <http://truthonthemarket.com>, of which he was a founding member.

- ³ See, e.g., Statement of Joshua D. Wright, Nomination as Commissioner, Federal Trade Commission, *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=5ff35210-dc11-4837-80c8-d04ac4c86f59.
- ⁴ See, e.g., Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Robert Bosch GMBH*, *available at* <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf> (criticizing the Commission's characterization of a party's seeking of an injunctive relief on a patent subject to a fair, reasonable and non-discriminatory license, without more, as an unfair method of competition or an unfair act or practice).
- ⁵ See, e.g., Juliana Gruenwald, "With Chairman's Likely Exit, Guessing Game Has Begun at the Federal Trade Commission," *National Journal*, Nov. 2, 2012, *available at* <http://www.nationaljournal.com/tech/with-chairman-s-likely-exit-guessing-game-has-begun-at-the-federal-trade-commission-20121102>.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Timothy Muris
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/tmuris
+1 (202) 879-5105

Bilal Sayyed
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/bsayyed
+1 (202) 879-5192

Christine Wilson
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/cwilson
+1 (202) 879-5011

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