

New FTC Chair To Shift Data Security Focus To Actual Harm

By [Allison Grande](#)

Law360, New York (January 26, 2017, 9:28 PM EST) -- With her appointment as acting chairwoman Wednesday, Maureen Ohlhausen is likely to steer the [Federal Trade Commission](#) away from privacy and consumer protection issues where consumer harm isn't crystal clear, and could finally answer businesses' long-standing calls for clarity on what exactly constitutes "reasonable" data security efforts. In a highly expected move, President Donald Trump **tapped Ohlhausen**, who has been serving as an FTC commissioner since 2012 and is the lone Republican remaining on what will soon be a two-member commission, to replace Edith Ramirez, a Democrat who **announced her resignation** as FTC chair earlier this month. Ramirez's departure from the agency on Feb. 10 will leave only Ohlhausen and Democratic Commissioner Terrell McSweeney at the helm of the commission, with the other three commissioner spots vacant. While attorneys expect that the FTC under Ohlhausen won't back down from work that has made it widely considered the nation's leading privacy and data security regulator, they predict the types of matters that she chooses to focus on are likely to differ significantly from her predecessor. "She will hit the ground running and begin right away to change the agency's priorities so that they align more closely with her own priorities," former FTC Commissioner Julie Brill, who left the commission last April, told Law360 on Thursday. "In the cybersecurity and privacy realm, I believe acting Chair Ohlhausen will be more exacting in her standards for enforcement actions, ensuring that any case that moves forward is founded on demonstrable and tangible harms." Other former commission attorneys who now work in private practice agreed with Brill's assessment that actual harm would be paramount to the new acting chairwoman. "I expect that under Chairwoman Ohlhausen, the FTC will continue to pay great attention to privacy and data security, but that we will see greater emphasis on whether data practices cause substantial consumer injury and are deserving of FTC enforcement on that basis," said Janis Kestenbaum, a partner at [Perkins Coie LLP](#) and former senior legal adviser to Ramirez. In the privacy and data security realm, the commission brings the vast amount of its enforcement actions under Section 5 of the FTC Act, which gives the agency the authority to police unfair and deceptive trade practices. As for the "deception" prong, the FTC has over the past several administrations consistently gone after companies that have allegedly made untrue or misleading statements about their privacy and data security practices, and attorneys expect that trend to continue without much change. "From the end of the Clinton administration through the Bush administration and through the Obama administration, the commission has been reasonably stable in its deception cases," said Reed Freeman, [WilmerHale's](#) cybersecurity, privacy and communications practice co-chair and a former FTC staff attorney. "The understanding of the elements of deception have spanned the political spectrum, so I believe the use of deception as a theory in privacy and data security cases to police misrepresentations and material omissions will continue." Where Ohlhausen's commission is likely to depart from previous ones is in the area of unfairness, which requires a showing that there has been a "substantial consumer injury" that is neither reasonably avoidable by

consumers nor outweighed by countervailing benefits to consumers or competition. The commission has in the past several years routinely used this authority to police companies that it believes have harmed consumers by maintaining "unreasonable" data security practices. During her tenure as commissioner, Ohlhausen has repeatedly clashed with her colleagues about the limits of this authority and has shown a willingness to push back in both the privacy and competition realms when she felt that the harm being alleged wasn't tangible enough. The most recent example of this tendency came [earlier this month](#), when Ohlhausen dissented to the agency's filing of a complaint in California federal court accusing computer network manufacturer [D-Link Corp.](#) of violating the unfairness prong of the FTC Act by putting consumers' privacy at risk through its failure to properly secure its wireless routers and internet protocol cameras. "Acting Chairwoman Ohlhausen is on the record as saying that she believes that there should be a showing of tangible harm and that part of regulatory humility is to foster both business innovation and privacy innovation," Freeman said. "So I think you will see fewer cases in privacy and data security under the unfairness prong and that this administration is not going to be bringing cases under the unfairness prong unless there's tangible harm." As acting chairwoman, Ohlhausen will inherit several matters from the Ramirez era, including the D-Link case. Following in the footsteps of [Wyndham Worldwide Corp.](#) and LabMD, D-Link has taken the rare step of choosing to fight rather than settle the commission's claims, which also include an allegation that the company flouted the deception prong by misleadingly touting its products as "easy to secure" or containing "advanced network security." While D-Link has yet to formally respond to the commission's complaint in federal court, both Wyndham and LabMD in pressing their challenges argued that the commission didn't have the power to categorize a failure to institute reasonable data security practices as "unfair" and had failed to give businesses reasonable notice of how it planned to wield its authority. "The business community has practically gotten on its knees and begged the FTC to say what is reasonable security," Freeman noted. However, despite these pleas, the FTC has been reluctant to give any definitive guidance on the issue, instead pointing companies to its prior data security enforcement actions and tips that it has offered in initiatives such as its "Start with Security" programs. The Wyndham and LabMD disputes have failed to shine much light on the matter either. The Third Circuit in the Wyndham case upheld the commission's authority to regulate corporate data security practices in 2015, while Ohlhausen and her two fellow active commissioners shot down LabMD's challenge in a July decision that is currently on appeal to the Eleventh Circuit. However, attorneys are optimistic that under Ohlhausen, businesses may finally get the guidance for which they have long been clamoring. "She will focus on policy work, but shift the agency's agenda in important ways," said former Commissioner Brill, who now serves as co-director of [Hogan Lovells'](#) global privacy and cybersecurity practice. She predicted that one of the acting chairwoman's early policy initiatives "may be to bring more clarity to the agency's 'reasonableness' standard in the context of data and device security cases." Kestenbaum agreed that she expected acting Chairwoman Ohlhausen to "redouble the FTC's efforts to provide clear guideposts to businesses about what are and are not acceptable data practices." While an actual checklist is unlikely given the

rapid changes in technology that cause data security best practices and standards to change frequently, Freeman noted that the industry has reason to be hopeful that they will get more concrete guidance and "more certainty about what is in bounds and what is out of bounds" when it comes to reasonable data security. The predictions for how the FTC will shift under Ohlhausen are bolstered by the acting chairwoman's substantial archive of dissents and speeches that she has given during her nearly five-year stint as commissioner. Ohlhausen most recently affirmed her beliefs at a speech delivered Tuesday, on the eve of her elevation to acting chair. While her speech at the Heritage Foundation focused on antitrust policy for the new administration, attorneys say that the points she focused on could easily apply to the privacy and consumer protection portions of the agency's work. "It's interesting that right before the announcement came, she gave a speech where she put forward a decent outline of where she'd like the commission to go and what she called some 'course corrections,'" said Phyllis Marcus, a [Hunton & Williams LLP](#) counsel and former chief of staff for the FTC's Advertising Practices Division. "That's a good place to start." In her speech, Ohlhausen homed in on her practice of looking for an "evidence-based solution to all issues" and urged the commission to approach its decisions to pursue a matter with "a philosophy of regulatory humility." She also advocated for less invasive investigations of companies under the Trump administration and said she was hoping to convene a meeting with the heads of the commission's consumer protection and competition bureaus to address "overbroad discovery" by the FTC during the probes. "The acting chairwoman is deeply committed to the agency, and I know from personal experience that she likes to partner with staff, so the idea of convening meetings with the bureaus to think through the overbreadth issue will certainly result in a dialogue," Marcus said. --Editing by Mark Lebetkin and Philip Shea.