Interview with William Blumenthal, General Counsel, Federal Trade Commission

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ANTITRUST SOURCE: Thank you for participating in this interview. We're very eager to chat with you about your role as General Counsel and some of the recent developments at the Federal Trade

the Reorganization Act of 1949, and that is at least as important day to day. My guess is until I mentioned it here, you probably weren't familiar with it, either.

the law department in a service business. In a sense what this agency does is provide investigation and enforcement services in the competition and consumer protection fields. OGC is like a law department that advises the service providers on issues of law that they get into. To some degree, those issues relate to the particulars of the mission—the various statutes, the competition and consumer protection acts that get enforced. But more fundamentally, OGC is spending a lot of its time dealing with all of the other legal issues that the agency encounters. As you know, there's an extensive body of law beyond competition and consumer protection law that deals with what one might term "the law of government." It's as if we run into another new acronym each day. It's like in any other business or governmental organization—a full range of legal questions: labor and employment, unions, ethics, procurement, torts, basically everything you learned in law school.

ANTITRUST SOURCE: Have you expanded your knowledge of other areas of the law in this job?

BILL BLUMENTHAL: Stunningly. The percentage of time that I spent on the things that I used to do for a living before I came into this job may be in the single digits; it's certainly in no more than the low double digits. I spend more of my time on labor and employment matters than I do on merger matters.

ANTITRUST SOURCE: Well, we don't have any questions about labor and employment law—you're probably relieved about that. Sticking with the OGC, could you give us a bit of an overview of how the OGC works with the other parts of the Commission: the Commissioners themselves, the Bureaus of Competition and Economics, Bureau of Consumer Protection, etc.?

BILL BLUMENTHAL: OGC has three or four main units. We have a litigation shop, a legal counsel shop, a policy shop, and then there is separately some energy responsibility. Within one of the shops that I described, we also handle things like the Freedom of Information Act (FOIA) and e-discovery.

On the litigation side, we tend to handle appellate matters. We coordinate on a dotted-line basis with the bureaus when they are considering whether to initiate litigation; and if things start getting rocky, we will sometimes provide an assist. But fundamentally, the bureaus are the ones that handle litigation at the trial court level or during administrative proceedings. OGC then steps in at the appellate stage.

The litigation shop will also be involved with the agency's litigation that is not in furtherance of the competition or consumer protection mission, as such, but that the agency gets involved in as an organization. For example, if there's labor litigation or tort litigation, we won't necessarily handle that directly. Often those will be handled by the Justice Department because we're an agency of the United States, and the Justice Department usually handles litigation where another government agency does not specifically have litigation authority. But the OGC litigation shop will work with our counsel at the Justice Department. It may be in a U.S. attorney's office as opposed to main Justice, but we'll work with the Justice Department on those matters.

On the legal counsel side, we routinely will get questions on all sorts of issues: ethics questions; questions relating to procurement law if we want to hire an expert; questions relating to tort issues; real estate questions; tax questions. There are lots of Administrative Procedure Act questions, questions about jurisdiction, questions about the Sunshine Act. I don't know if you're familiar with the Paperwork Reduction Act, but we have a lot of questions on that. All of those are typ-

ically handled by the legal counsel side of the shop.

ANTITRUST SOURCE: You mentioned that you have a policy department. There is an Office of Policy Planning at the Commission as well. Is that a separate office?

BILL BLUMENTHAL: It is. The Commission has three shops that might be regarded as discrete policy shops. One of them is within the Bureau of Competition. One of them is a free-standing Office of Policy Planning that reports directly to the Chairman. And then within the Office of General Counsel is the unit known as the Office of Policy Studies. The three policy shops have slightly dif-

foreign acquisition regulation, as opposed to the competition regulations themselves. At this point the new competition law that was enacted in late August has not yet become effective, but there is competition review occurring under the foreign acquisition regulations.

In terms of how it's going, my office has been quite pleased with the transparency of the process that the Chinese government followed. I think that the new competition law is quite mainstream in its text. It has a lot of the types of provisions that people would regard as quite familiar. A few things that came in late in the process are more industrial-policy-like in nature. We're not entirely sure how that is going to work out once implementation really begins.

ANTITRUST SOURCE: Can you elaborate on those industrial-policy aspects of the new competition law?

BILL BLUMENTHAL: There are particular provisions that deal with state-owned enterprises and protected sectors; there are some provisions that deal with macroeconomic objectives; and there are some provisions that deal with coordinating activity undertaken by industry associations. Those are not standard types of provisions in a competition law. You don't see them in most other jurisdictions. How those are really going to work out, how they are going to be reconciled with the more traditional competition objectives is something we're watching with great interest.

ANTITRUST SOURCE: The ABA Antitrust and International Sections recently commented on India's proposed merger notification regime. One concern was that it could potentially apply to a broad range of transactions with a very limited nexus to India. Have you had any dealings with the Indian government about the new merger control law there? And if so, what's going on with it?

BILL BLUMENTHAL: The Chairman in her Fall Forum speech indicated that I had gone over to India, and I think that's also reported in an article in — — that recently appeared about the Indian law.[4]

India's competition law was enacted in late 2002, but it was caught up in a number of legal challenges within India. There was an effort undertaken earlier this year by the Indian Congress to enact some amendments that would deal with the constitutional problems under the original version of the law. While those revisions were being made, some other changes were put in place. One in particular dealt with merger notification. The earlier version of the law had contemplated that the merger notification regime would be voluntary. The details of the provisions in the merger notification system were designed for a voluntary scheme and would be perfectly appropriate for voluntary scheme. Very late in the process, people recognized that many other jurisdictions, including the U.S. and the EC, had a mandatory regime, not a voluntary regime.

So a shift was made in the text simply to provide that what theretofore had been a voluntary system would now be mandatory, with a couple of other accommodating changes made. But the system was not completely redesigned in a way that you typically might if you are shifting from a voluntary to a mandatory merger control regime. That has led to a number of anomalies based on the text itself. I think this was just an unintended glitch, and we're hoping the anomalies are going to get addressed as the process of drafting regulations proceeds. My sense is that the Indian gov-

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ernment is alert to the concern. I think they were alert to the concern before the ABA or the IBA sent their comments. Pretty much everybody is speaking with consistent concerns and is offering a similar menu of what needs to be addressed.

ANTITRUST SOURCE: Apart from the merger notification regime issues, are there other areas within the Indian antitrust law that you've been involved in?

BILL BLUMENTHAL: Only on the periphery. Because implementation of the law was suspended for a number of years pending resolution of the constitutional challenges, people haven't been proceeding actively with any of the sorts of implementation work that one otherwise would have seen. With the amendments to the law having lifted the constitutional cloud, I think we're expecting that

I'm a fan of guidance. I think it's important for agencies to be reasonably transparent in letting the public know where they stand. But having the moniker of "guidelines" on a document tends to elevate the significance of the document, and using that name can sometimes lead to complications if the document is not of the right type.

ANTITRUST SOURCE: What would be an example of a document not of the right type?

BILL BLUMENTHAL: Well, I'm not going to name a particular document, and I would refer people back to that 2000 article. The proposition is that if guidelines are going to be effective, they need to be reasonably specific. They need to be reasonably well articulated, enough to let people know whether the conduct is or is not proper under the guidelines, and that often means that discretion is going to be somewhat limited. They need to be reasonably well specified. Oftentimes in policy statements that isn't done.

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ANTITRUST SOURCE: The European Commission has just come out with a new set of non-horizontal merger guidelines. The last set of guidelines in the U.S. on the subject of non-horizontal mergers date from 1984, and there has been some vertical merger enforcement activity at the agencies through the late 1990s. Do you think the U.S. should be introducing new non-horizontal merger guidelines?

BILL BLUMENTHAL: I don't see any need to. There haven't been that many non-horizontal cases, and the ones that the agencies have brought have been addressed in analyses to aid public comment or competitive impact statements. The cases have been addressed in speeches. And I think the public has a reasonably good sense as to what theories are currently regarded as valid. One of the risks of new guidelines in the field is that we would tend perhaps to overdignify the level of concern. If you're dealing with a handful of cases, issuing guidelines might suggest that the concern is greater than it is.

ANTITRUST SOURCE: While we're talking about mergers, let's talk a little about the involvement of the OGC in merger review. One specific role that I think the OGC has is in the second request appeals process. How is that working? Have many parties availed of themselves of it over the last couple of years?

BILL BLUMENTHAL: I've read of that process. Candidly, I have not seen a single appeal. I think that there have been four of them in the lifetime of the mechanism. There have been none in my time.

ANTITRUST SOURCE: Another issue that comes up in the context of merger review is clearance between the FTC and the Antitrust Division. The Antitrust Modernization Commission report earlier this year made a recommendation that a formal clearance process be instituted and suggested some incentives to get things moving in terms of timing. Have you witnessed any major clearance battles during your time at the OGC? And do you think a formal clearance system is required?

BILL BLUMENTHAL: The answer, I guess, would be yes and no. Have I seen any major clearance battles? Sure. But they are extremely rare. In my time here there have been maybe ten. But also in my time here there have been probably 6,000 filings, so we're dealing with a problem that arises about 0.2 percent of the time.

Before coming on board here, my practice was very heavily on the merger side of things. And

ing, truth-in-lending questions, fair credit reporting questions, and debt collection issues. There have been an awful lot of cases involving health-related claims that border on fraud. We have a number of do-not-call cases. We have the usual mix of business opportunity and franchise cases.

ANTITRUST SOURCE: The FTC has filed amicus briefs in many of the key Supreme Court cases of the last couple of years— [illegible] . How do you decide which ones you want to get involved in?

BILL BLUMENTHAL: All of those were while I've been here, although the Solicitor General makes the filing and we simply were participating in the process and signing on to what the SG did in most those cases.

To the extent there is a Supreme Court amicus situation involving antitrust or consumer protection, we will almost always have involvement where the Court asks for the government's views. Again, that request is directed to the SG, and we would be one of a number of agencies providing input into the SG's office. In the absence of a Court request for the government's views, the usual pattern is not to submit an amicus brief, and it would be quite exceptional for the SG to initiate an amicus brief in the absence of an invitation from the court. We're speaking here of the cert stage.

Below the Supreme Court, when we're dealing with amicus briefs in the court of appeals, those can be filed by the Commission under its own authority. We do so on occasion, but we are quite guarded. We typically would not appear before a court of appeals unless there was a quite compelling reason to do so. We find that especially in competition cases, parties tend to be well-represented, and the arguments tend to be adequately dev 0my, when 755e1995ue w (those cases.And,) TJ
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