Interview with FTC Commissioner Julie Brill

Editor's Note: *In this interview with* The Antitrust Source*, Commissioner Julie Brill discusses her experience at the Federal Trade Commission thus far, which includes the Commission's recent successes and setbacks in the courts in merger enforcement, coordination with states on antitrust matters, and her goals for the Commission's antitrust and consumer protection agendas. Commissioner Brill also discusses the potential for collaboration with the new Consumer Financial Protection Bureau and the Commission's own efforts in consumer financial protection matters, her thoughts on emerging data security and privacy issues, and her insights into the workings of the Commission.*

Commissioner Brill, a Democrat, was sworn in as a Commissioner of the Federal Trade Commission on April 6, 2010, to a term

ing consumers and competition. The FTC has estimated that pay-for-delay costs consumers $3.5 billion per year, or $35 billion over ten years. That's a lot of consumer harm.

The issue has also received bipartisan support in Congress. Pay-for-delay subverts the congressional mandate underlying Hatch-Waxman, and many in Congress agree with us that the practice is something that they need to look at through the legislative process. We are grateful for their support, and are eager to assist.

ANTITRUST SOURCE: You mention continuing to pursue legislation and litigation, but since those approaches have had some trouble gaining traction, is there another approach that the FTC could or should pursue? Or do you think the FTC should stay the course on these two approaches?

BRILL:

we approach state policymakers to express any concerns we may have. Having seen the state legislative process up close and personal over many years, I'm sensitive to how few antitrust resources the vast majority of state houses possess.

Your second question is an interesting one. I don't know that I see the FTC so much as looking for cases as having cases brought to it, particularly in the merger arena. Through the HSR process, the FTC and the DOJ filter many mergers, the majority of which are benign and receive early termination of the review process. With some mergers, however, we take a closer look. *hoe e utne* was one such merger, and it happened to involve a state action doctrine issue. When we took a hard look at it, however, it became clear to us that state action was being used by the hospitals to shield an otherwise anticompetitive merger from antitrust scrutiny. I would hope that we as an agency will identify these issues when they are presented to us by merging parties, and that we would react appropriately, as I think we did in *hoe e utne* .

The FTC advocates for competition principles to be considered in the legislative or rule-making process.

ANTITRUST SOURCE: In light of your comment regarding the antitrust resources available to state legislatures, could you say a word or two about the kind of assistance and advice that the Commission, primarily through its Office of Policy Planning, provides to state legislatures on antitrust matters?

In recent times, much of the FTC competition advocacy work at the state level has been in the healthcare arena.

BRILL: The assistance and advice you refer to is our competition advocacy work. Within the Beltway, it is a less well-known aspect of the FTC's mission, but it is something I am quite familiar with through my work as a state enforcer. FTC competition advocacy work often involves an advisory letter from FTC staff to a state legislature or professional board that is contemplating a change to existing laws or regulations, or adopting new laws or regulations, that impact competition. The FTC advocates for competition principles to be considered in the legislative or rule-making process. In recent times, much of the FTC competition advocacy work at the state level has been in the healthcare arena. We are a very transparent agency. All of our advocacy letters are available on our website.[8]

ANTITRUST SOURCE: In the *a Corp e t li* litigation, the FTC terminated both the federal court and administrative proceedings after the district court declined to issue a preliminary injunction and the Ninth Circuit refused to grant an emergency stay.[9] You voted against terminating the appeal and issued a dissenting statement explaining your reasoning.[10] What are your thoughts on when the agency should continue to challenge an unconsummated merger when the agency fails to obtain a preliminary injunction?

BRILL: Decisions about cases—whether to bring them, whether to appeal, how far the appeals should go—turn on the facts as well as the law. So it is difficult, and arguably not particularly useful, to try to discuss in the abstract when it might be appropriate to continue a merger challenge absent a preliminary injunction. From my perspective, the answer will almost always be, "It

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[8] *See generally* Fed. Trade Comm'n, Office of Policy Planning, Advocacy Filings by Date, http://www.ftc.gov/opp/advocacy_date.shtm.

[9] Motion for Voluntary Dismissal of Appeal, FTC v. Lab. Corp. of Am., No. 11-55293 (9th Cir. Mar. 23, 2011), *available at* http://www.ftc.gov/os/caselist/1010152/110324lapcorpmotion.pdf; Order Returning Matter to Adjudication and Dismissing Complaint, Lab. Corp. of Am., FTC Dkt. No. 9345 (Apr. 21, 2011), *available at* http://www.ftc.gov/os/adjpro/d9345/110421labcorporder.pdf.

[10] Comm'r Julie Brill, Fed. Trade Comm'n, Dissenting Statement on the Commission's Decision to Withdraw Its Appeal in FTC v. LabCorp (Mar. 23, 2011), http://www.ftc.gov/os/caselist/1010152/110324lapcorpstatement.pdf.

depends." That said, I am happy to explain my reasoning in *a Corp*, and why I thought we should have continued our challenge in that case.

In *a Corp*, the district court paid only lip service to the principle that pre-integration relief is often far more likely to remedy competitive problems than post-integration divestiture. In other words, the district court failed to recognize that it's very hard to unscramble the eggs. I believed, and still believe, that the *a Corp* opinion ignored two important parameters that the district court judge should have operated within: congressional intent and Ninth Circuit precedent. Congress recognized the difficulty of unscrambling the eggs when it granted us authority to seek a preliminary injunction under Section 13(b) of the FTC Act. The Ninth Circuit precedent also recognized the principle, and I thought that the court of appeals should have been given an opportunity to weigh in on the issue.

My vote in *a Corp* was also context-specific. In that case not only did the district court judge ignore important legal principles, but he did so in the context of a healthcare market. I felt that an appeal was worth the expenditure of resources given the importance of the industry involved. As I noted in my dissent, healthcare costs continue to rise dramatically in this country, and there is considerable debate over how best to contain them. In my opinion, vigorous antitrust enforcement plays an important role in bending the healthcare cost curve, and we should be especially vigorous in cases where price increases or output reductions are foreseeable, as was the case in *a Corp*.

ANTITRUST SOURCE: You have spoken on the changes in the 2010 Horizontal Merger Guidelines and have stated that you don't think the move away from a lockstep analysis—first analyzing market definition and then proceeding through the other steps—is a significant change. Many in the industry, however, would argue that the Guidelines represented a significant break with precedent. What is your response and do you think the concern over the Guidelines will quiet down over time as people see them in action?

BRILL: I find this question interesting, looking at it as I do from the perspective of an FTC Commissioner, as opposed to someone from industry. That is to say, from my perspective the 2010 Merger Guidelines do not mark a significant break from precedent but are instead part of a continuum. If you look at the 2006 Merger Guidelines Commentary, the agencies clearly stated then that they did not apply the 1992 Guidelines in a linear fashion. I believe the word we used in 2006 to describe the approach taken was "integrated." The 2010 Guidelines also take an integrated approach to merger analysis.

What the 2010 Guidelines did was to take a step away from the use of market definition, market structure, and market shares as gating issues. The 2010 Guidelines consider competitive effects first, and I think we got this right. The new Guidelines also provide important guidance about the kinds of evidence we and the DOJ will look at in analyzing competitive effects.

I believe the courts—as well as industry—will see the sense in our flexible approach and, over time, adopt it. Remember, the courts did not adopt the 1992 Guidelines overnight, but rather did so gradually, as merger cases were brought before them by the agencies. I think the courts will continue down this path with the 2010 Guidelines, as one court did recently in the *ro edi a* preliminary injunction decision.[11]

[11] FTC v. ProMedica Health Sys., Inc., No. 3:11-cv-47, 2dtcv-47,NX]IZZ

ANTITRUST SOURCE: You've also commented on the Commission's goal in making Part 3 administrative adjudications more expeditious. How would you assess the Commission's performance over the past year?

BRILL: The major Part 3 rule revisions were in place in 2009 before I got to the Commission, but I can speak to the more recent 2011 revisions,[12] and how I see the new rules operating in practice.

The rule revisions came about in response to a concern that the Part 3 adjudicative process had become too protracted, particularly in merger cases. The feeling was that the adjudicative process had created reluctance on the part of some federal district court judges to grant preliminary injunctions in cases brought under Section 13(b) by the FTC. The FTC listened closely to these concerns, but at the same time we recognized that we have been given a job to do by Congress as an administrative agency. That job is to enforce our statute and our mandate as an administrative agency with expertise in antitrust and consumer protection. So we decided to fence ourselves in—to self-regulate, if you will—and to speed up the Part 3 process, while at the same time preserving our mandate as an administrative agency.

My assessment of the Part 3 rule changes is: "So far, so good." Although I cannot comment on the substance of the *North Carolina Dental* decision, I know that it was produced in accordance with the new rules, and the appropriate deadlines were met. In fact, my understanding is that the Commission issued a decision in record time—slightly over four months from the date of the respondent's notice of appeal. I see no reason why this trend will not continue, both in merger and non-merger cases, and look forward to playing my part in it.

ANTITRUST SOURCE: There has been a great deal of discussion concerning the scope of Section 5 in competitive matters, including the FTC's 2008 workshop on the topic.[13] In your opinion, how broadly can the FTC act under Section 5, particularly in relation to the other antitrust statutes, and how broadly should the FTC act under Section 5 when it comes to curbing anticompetitive behavior?

BRILL: In commenting on how broadly the FTC *can* act under Section 5, it is helpful to remind ourselves of the congressional intent behind Section 5. As with the pay-for-delay issue, I think the congressional intent matters a great deal here. When you look at the congressional record, it's pretty clear that Congress intended Section 5 to be about three principles: one, to be broader than Sherman Act Sections 1 and 2; two, to cover conduct likely to have some demonstrable adverse effect on competition; and three, to be a common law statute, the interpretation of which would be developed through case-by-case analysis. So to answer your first question: the Commission was given a pretty broad mandate from Congress to curb anticompetitive behavior. I should also note here that the Supreme Court has held that Section 5 of the FTC Act is broader than the Sherman Act.[14]

Your second question goes to what the Commission *should* do with this broad congressional mandate. As I see it, two key parameters around this question are the courts and the limited reme-

[12] 16 C.F.R. Parts 3 Parts .4—RulbI[bfIfcXdIfTZIZI[]I[]dXfW]bZRoSW]bZRmST]v0ZXZbI[IZXd[IZX]]I8YtB]Xd[IZX]]ZbI[IZ]RkSWeRjSWds[I8YtB]Y]dZ[Y_[eR=S

dies available to the FTC under Section 5. The FTC has in the past received mixed reactions from some courts to standalone, unfair methods cases under Section 5. This is an important factor to take into consideration in deciding how the FTC should bring cases under Section 5, but there are others. As the Commission has emphasized in recent enforcement actions— *ntel* comes to mind[15]—the risks of Section 5 enforcement are limited since it does not give rise to treble damages actions in the way that Sherman Act enforcement might. These two factors, and perhaps others, need to be weighed along with the available evidence in an individual case when deciding whether or not to bring an action against unfair methods of competition under Section 5.

ANTITRUST SOURCE: Given that Section 5 has been developed, as you say, on a case-by-case basis and that there have been only a handful of recent cases outside the invitation to collude context, how should antitrust practitioners counsel their clients to avoid violating Section 5?

BRILL: In addition to invitation to collude cases, Section 5 was also recently applied in the standard-setting context in the *N-Data* case.[16] I'd advise counsel to look at the Commission's statement at the time, in which the Commission made clear that N-Data's conduct constituted an unfair method of competition within the meaning of Section 5.[17] Outside the standard-setting context, Chairman Leibowitz and Commissioner Rosch have spoken extensively to practitioners and others about their views on the scope of Section 5, particularly at the time of the Commission's Section 5 Workshop in 2008. In his remarks at the time, then Commissioner Leibowitz not only spoke about Section 5 in the standard-setting context, but also in cases involving inequitable conduct before the PTO, for example. I think these statements are useful sources of information for counsel to guide their clients.

ANTITRUST SOURCE: Turning to consumer protection topics, you were confirmed just before the Dodd-Frank Act was passed, which created the Consumer Financial Protection Bureau (CFPB), and there has been a great deal of conversation about how the CFPB and the FTC will work together. As a Commissioner, how will the presence of the CFPB inform your perspective and recommendations on consumer protection issues involving financial products?

BRILL: I'm looking forward to working with the new CFPB "cop on the beat." Coming from state enforcement, as I do, I am very comfortable with shared jurisdiction. While the provisions of Dodd-Frank required us to give up some rulemaking authority to the CFPB, in reality we did not have that much rulemaking authority with respect to financial services to begin with. Congress gave the CFPB broad authority for rulemaking, and the Commission gains the ability to enforce the CFPB's rules concerning entities within our jurisdiction. So I see it as a large net plus for our overall authority.

Safeguards Rule, the Children's Online Privacy Protection Act, and the CAN-SPAM Act, to name just a few. Both in the financial realm and otherwise, there is plenty of work for all of us to do.

In terms of our substantive work, having the CFPB up and running will give us—as well as industry and consumers—an additional expert to consult and work with regarding issues surrounding financial products. I look forward to that high level of consultation. I'm not sure the Bureau's presence, per se, will change the way I view consumer protection issues involving financial products, but I hope the Bureau's views will become part of the conversation to be considered by all regulators, as well as industry and consumers.

ANTITRUST SOURCE: At the ABA Fall Forum in November 2011, where you spoke on a panel with Peggy Twohig and Howard Beales,[18] you seemed to suggest that the CFPB needed to be careful about "agency capture"[19] and drew a contrast with the low risk of agency capture at the FTC. Could you explain your concerns and your thoughts on how the new agency could reduce the chances of agency capture?

BRILL: The discussion at the ABA Fall Forum was a theoretical discussion. I was speaking about the theoretical dangers of agency capture that come from being too close to the regulated community and not close enough to the public—those whom you are charged to protect. The CFPB has broad authority to directly engage with those they regulate, in a way that the Commission does not. The CFPB has the authority to conduct supervision over many companies—to actually go in and examine the books and the company's operations. The CFPB is also focused on a narrower sector of the economy in a way that the FTC, with its more diffuse jurisdiction, is not. The abstract concern I was expressing is that this more narrow focus, coupled with close ongoing relationships

BRILL: The consumer complaints in the Consumer Sentinel database[20] are incredibly important for both the Commission's work and that of our law enforcement partners. Over the past five years, through Sentinel, the FTC has collected and shared more than 16 million complaints with over 1900 law enforcement organizations in the U.S., Canada, and Australia. The Sentinel database enables law enforcers to spot consumer fraud and deception trends quickly, to target the most serious illegal practices reported by consumers, and to coordinate law enforcement efforts. States, federal, and international agencies, as well as non-governmental agencies, such as the Better Business Bureau, contribute consumer complaints to Sentinel, continually increasing the number and types of complaints available to law enforcement. And we are especially pleased that in February 2012 consumer complaints from the CFPB will be added to the Sentinel database.

stantiate, failing to disclose that debts were too old to be legally enforceable or that partial payment would extend the time the debt could be enforced, and failing to notify consumers when Asset provided negative information to credit reporting agencies. To settle our charges, Asset agreed to pay a $2.5 million civil penalty. More importantly, the company agreed to significant injunctive relief, including that Asset would notify consumers that it will not sue on debt that it

with a simple mechanism to find out who they are, what kind of information they collect and provide to others, and in appropriate circumstances, to provide them with the ability to access the information the companies hold and to correct the information if it is inaccurate.

ANTITRUST SOURCE: The FTC has recently announced settlements with both Google and Facebook regarding privacy violations. Still, there are calls on the Hill for legislation to address privacy. Do you see a need for legislation in this area or can the FTC and the states address the issue with their current tools?

BRILL: The FTC's authority to address privacy issues stems from a number of statutes and rules. We bring many of our data security and privacy cases under our Section 5 authority prohibiting unfair and deceptive practices. We enforce other statutes and rules in the privacy realm, including the GLB Act, COPPA, FCRA, the Red Flags rule, the Health Breach notification rule, CAN SPAM, and Do Not Call. In addition, states have "mini" FTC Acts that mirror Section 5, as well as breach notification and, in some cases, data security laws. These laws are effective in addressing a wide range of activities concerning collection, use, retention, and disposal of consumer data.

The Commission as a whole has called for federal legislation in the areas of data security and breach notification. Enactment of a federal data security and breach notification law would bring us into line with the states that already have such legislation in place. But more fundamentally, I am concerned that currently there is no federal law establishing baseline principles governing the collection, use, retention and sale of consumer data by the vast bulk of companies that collect and use this information. As just one example, outside some sector specific laws (HIPPA and GLB) there is no requirement that these companies establish a privacy policy or inform consumers about their data collection and use practices. The dearth of information available to consumers about data collection and use in the mobile space has been well documented by our agency[27] and the Future of Privacy Forum.[28] I think a federal law that establishes baseline privacy protections would be helpful to consumers and industry.

ANTITRUST SOURCE: What are some key elements that you would like to see in a federal data security and breach notification law?

BRILL: A federal data security and breach notification law should create data security requirements that are flexible and technology neutral, so any law does not lock in or promote particular technologies or approaches. And in creating a federal standard for data breach notification, the law will have to address the variety of issues that have been addressed by over forty-five states, such as when the requirement to provide notice is triggered, how long the entity that suffered the breach can delay in the event of a law enforcement investigation, and the like.

ANTITRUST SOURCE: In a September 2011 speech before the IAPP,[29] you spoke about the privacy

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[27] *See* Fed. Trade Comm'n, Mobile Apps for Kids: Current Privacy Disclosures Are Disappointing (2012), *available at* http://www.ftc.gov/os/2012/02/120216mobile_apps_kids.pdf.

[28] *FPF Finds Nearly Three-Quarters of Most Downloaded Mobile Apps Lack a Privacy Policy*, Future of Privacy Forum (May 12, 2011), http://www.futureofprivacy.org/2011/05/12/fpf-finds-nearly-three-quarters-of-most-downloaded-mobile-apps-lack-a-privacy-policy/.

[29] Julie Brill, Comm'r, Fed. Trade Comm'n, Privacy: From the Woods to the Weeds, Address Before the Int'l Ass'n of Privacy Professionals, Privacy Academy (Sept. 15, 2011), http://www.ftc.gov/speeches/brill/110915privacywoods.pdf.

issues that arise with the collection of browsing information and the aggregation of that information and highlighted the need to have a common understanding of terms, such as "track" and "commonly accepted practices" in the context of Do Not Track mechanisms. What is your definition of "track"?

BRILL: This is an important issue because it is unclear whether these terms are being used consistently—we need to develop some consensus as to what these terms mean. So thanks for asking the question. I define both terms from the vantage point of the consumer.

I believe that "tracking" should be understood broadly, in part because I believe that is how consumers understand that word, and in part because I think that is the fairest approach. So I believe that when consumers are given a choice about "tracking" they should have the choice not only about how their information is used, but also about whether and how their information is collected in the first place.

ANTITRUST SOURCE: On a broader agency note, most federal agencies are facing significant budgetary constraints, and the Antitrust Division recently announced it was closing several field offices to save money. How has the current budgetary climate affected the FTC and are you concerned about the agency's ability to maintain its enforcement mission?

BRILL: I may be a little biased, but I think that the FTC is doing a great job maintaining its enforcement mission given the current budgetary constraints. I would say that the key tools here include smart case selection and a continued emphasis on focus and efficiency once we are in litigation. I should also emphasize that, although we pick our battles carefully through our case selection process, once we have decided to enter the fray, we make sure that our staff has the resources and budget they need to get the job done.

Our current litigation docket is probably the best data point with which to illustrate my points. Right now, the FTC is litigating a merger challenge in Rockford, Illinois.[30] Many members of the Rockford team also litigated the *ro edi a* merger challenge in Ohio and before the ALJ here at the Commission last year. The experience of the *ro edi a* litigation will no doubt make our *o ord* effort both focused and efficient. Similarly, in the ongoing *Cephalon* litigation, the judge ordered the FTC to coordinate our discovery efforts with the other plaintiffs in the case, which we did. For example, we split some expert fees with the other plaintiffs, allowing some of our resources that would have been spent in that case to be deployed elsewhere.

Our productivity is a direct result of the dedication and effectiveness of our wonderful staff. As our Chairman likes to say both publicly and internally, "We are a small but mighty agency."

ANTITRUST SOURCE: Another challenge the agency is facing is a desire by some in Congress to give the agency's headquarters building to the National Gallery of Art. What is your reaction to this proposal?

BRILL: We Commissioners feel strongly about this issue. When he laid the cornerstone for the FTC building over seventy years ago, President Roosevelt told those gathered that our building was

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[30] *See* Complaint, FTC v. OSF Healthcare Sys., No. 3:11-cv-50344 (N.D. Ill. filed Nov. 18, 2011), *available at* http://www.ftc.gov/os/caselist/1110102/111118rockfordcmpt.pdf.

intended to be the permanent home of the FTC.[31] I believe history and symbols matter. We also understand that forcing us to move from our building would impose additional costs on taxpayers. We made our views known publicly in a letter to Congressman Mica last year, and we hope to continue our dialogue with him.

ANTITRUST SOURCE: In a speech given in September 2011 at New York University School of Law,[32] you encouraged law students to find a small world in which to practice law and within that world, to find issues of great significance. What would you describe as your own issues of great significance?

BRILL: One of the points I try to make to law students and young lawyers is that they may find great and meaty issues in unlikely places, and so they should keep their eyes open to spotting these issues from the very beginning of their careers. Early in my career, I was fortunate to work on two issues that directly impacted not just Vermont consumers, but also consumers nationwide: credit reporting and tobacco. Not long after I joined the Vermont Attorney General's office, I worked with residents of small towns from all walks of life who were being rejected for mortgages and refinancing, many of them inexplicably. We discovered through our investigation that the large,