

Federal Trade Commission member Maureen Ohlhausen thinks that regulators are at their best when they approach issues with humility. As the panel's lone Republican (a seat on the commission is vacant), she is increasingly viewed as the leading candidate to be the agency's next chairman if a Republican is elected president.

When asked about that possibility in a nearly hour-long interview, the affable commissioner declined to join the speculation, saying she would be "getting ahead of myself" at a time when Iowa caucuses haven't taken place. It's no wonder that Ohlhausen is so well-regarded, as she has devoted much of her career to the FTC.

Ohlhausen served on the staff for 11 years before leaving for private practice and then returning in 2012 as a commissioner.

Edited excerpts of the interview follow.

) 7 & : \$ 7 & ~~How~~ *How has the FTC changed as an institution since you started?*

2 K O K D X ~~The~~ *The biggest substantive change took place in the late 1970s and early 1980s, before I arrived here, with the increased use of economic analysis in competition matters. More recently, I have seen that lens used to view consumer protection issues. That is a positive change, and it has gradually gotten more and more important as our tools have gotten better.*

Fortunately, some of the best things about the FTC remain constant. When I came here I had been a staff attorney and law clerk at the DC Circuit, and when I interviewed at the FTC, I was immediately attracted to the strong sense of community. That continues to be the case today.

) 7 & : \$ 7 & ~~Is~~ *Is it a problem having just four commissioners?*

2 K O K D X ~~I don't~~ *I don't see it as a big problem, though I would love to get another Republican colleague. But I haven't seen it be a particular problem yet. I suppose it's possible we could come to a situation where there is a 2-2 deadlock. We had some of those votes when we recently had two Democrats and two Republicans. One of the good things about the agency is that we do have a history of consensus building. That's very important to me.*

) 7 & : \$ 7 & ~~Describe~~ *Describe the culture among the four of you.*

2 K O K D X ~~We're~~ *We're a collegial group. We talk to each other within the limits of the Sunshine Act. We talk to each other one on one, and our advisers talk to each other. Having worked at the DC Circuit, that's a model for me. You have a group of people who are serious about the law and think about it very deeply and come to a decision on a matter. And then you move on to another case. There are times when we will be in strong agreement, and times when we will be in strong disagreement. That's the reason we are a commission. If unanimity was expected in every case we would have a single head. The idea of having a commission is to push towards consensus. And even when consensus isn't possible, the important legal and policy issues get aired. That has real benefits.*

) 7 & : \$ 7 & ~~One contentious area involves Section 5. You wrote a very strong dissent to the policy statement. Former Commissioner Joshua Wright said the statement puts constraints on the agency in the~~

future, a rare thing for a government agency to accept. Why don't you see it that way?

2 K O K D X I V H H Q articulated my objections to the statement pretty well in my dissent. Let me just say that the few principles included in the policy statement only amplify the existing concerns that are out there about the expansive use of Section 5. I also think we should have put out the statement for public comment. We could have gotten some useful input from key stakeholders.

) 7 & : \$ 7 & € *Chairwoman Edith Ramirez said everyone's position was pretty well known.*

2 K O K D X I V H H Q The Commission had held a workshop on Section 5, but it took place before any of the current commissioners were serving, so it would have been useful to update our understanding and to hear from outsiders. I have long supported public input on these types of policy changes. Indeed, my very first dissent as a commissioner was on the withdrawal of the 2003 disgorgement policy statement. I argued that we shouldn't have withdrawn that statement without public comment.

) 7 & : \$ 7 & € *Speaking of which, is disgorgement ever appropriate?*

2 K O K D X I V H H Q I supported it in *Cephalon*, a clear case of fraud against the patent office. But I'm concerned about the commission's pursuit of disgorgement more broadly. We only get disgorgement if we go to federal court, but if we forego our Part 3 authority to go to court just to get money, I am afraid that will tilt us away from using what I think is one of our unique tools to advance antitrust law, our administrative litigation.

) 7 & : \$ 7 & € *You've been pretty outspoken about your concerns that the Federal Communications Commission is encroaching on the FTC and you've said the FCC's bar for taking action may be lower than the FTC. Why are you worried?*

2 K O K D X I V H H Q We've been a very active enforcer of privacy and data security. I'm concerned about us being out of that space in part because of changes in definition of what is a common carrier and because we are exempted from regulating common carriers. This may harm consumers. We are primarily a law enforcement agency and the FCC is primarily a regulatory agency. They act through rules on things like dividing up spectrum. We are well-constituted to bring enforcement actions, so I am concerned about us not being there to bring such actions on behalf of consumers.

The other problem comes down to competition issues. One of the Internet's biggest changes is that previously separate players in the telecom, communications and entertainment space are now competing against each other in a way they haven't in the past. If they are going to be subject to very different rulebooks, depending on whether the FTC or FCC is overseeing them, that could cause some competitive distortions in the marketplace, particularly involving data. If we are going to have two different regulators in this space, based on the FCC's decision to reclassify broadband, then we ought to be applying similar standards under similar approaches. The FTC's approach has worked pretty well: focus on actual harms,

very difficult to accurately predict far into the future and know what all the harms and benefits may be. That's why regulatory humility appeals to me. The case-by-case approach has allowed us to be incremental, rather than imposing ex ante industrywide regulation.

) 7 & : \$ 7 & *What would you like to see Congress do in the area of antitrust or consumer protection?*

2 K O K D X I V H Q I would like to see Congress clarify FTC privacy/data security authority over the Internet. This could be done through a repeal of the common carrier exemption, which the commission has long supported on a bipartisan basis. Such clarity is even more important following the FCC's reclassification of broadband as a common carrier service.

I also would like Congress to start to take a look at areas where I think the commission has gotten off track, such as some of our decisions in the advertising enforcement areas. I recently issued a partial dissent in the ECM Biofilms case because I think the application of "substantial minority" in claim construction has gotten a little out of whack. On ad substantiation, in the POM [Wonderful] case I also dissented in part, and the DC Circuit saw it my way. We could get some further congressional guidance on that.

) 7 & : \$ 7 & *Could you elaborate on what guidance you would seek?*

2 K O K D X I V H Q On advertising substantiation and the remedies that follow, what evidence do we have to provide to show that consumers took a specific claim away from an ad? And then how much evidence does an advertiser have to provide to show that their claim was truthful?

) 7 & : \$ 7 & *You've been in the majority on some of these cases and in the minority on others, such as the one on apps detecting cancerous moles. How do you draw the distinction?*

2 K O K D X I V H Q The app cases were particularly interesting. I looked at the claims very carefully and the apps never claimed to be a replacement doctor. In fact, the whole purpose of the app was to try to put you together with a dermatologist. So I was concerned that this over-reading of the claims would require the apps prove they were as effective as a doctor. This would actually make consumers worse off by discouraging apps in the health area. One of the things I try to do is to take a hard look at what those claims actually say. Interpreting claims broadly may actually make consumers worse off. Sometimes a claim might be disputed in the scientific community, but there is no such thing as settled science. If we say "there's a dispute so no one should talk about it," I don't think that makes consumers better off. And that's the yardstick I try to use: Are we giving consumers the information they need to make their own decisions?

) 7 & : \$ 7 & *Your former colleague Joshua Wright says the Bureau of Economics is outgunned, outmanned and not listened to sufficiently. Do you agree?*

2 K O K D X I V H Q I've found that the Bureau of Economics has played a very important role in our cases. One of the strengths of the FTC is that we do have a separate Bureau of Economics and that they make their own separate recommendations. Our economists are not supervised by lawyers and they are not paid based on whether they please lawyers or not, unlike at other institutions. I always seek the bureau's advice, and it has always been very forthcoming. There are times when its concerns, which often track mine, may not always carry the day, but they are always raised and always part of the discussion.

) 7 & : \$ 7 & *Does the FTC too often get distracted by hypothetical harms?*

to look at CON laws, which are often premised on providing indigent care which is definitely a laudable goal, but these CON laws seem like a very blunt tool that is not particularly well-designed to increase indigent care. In general, I am always concerned about situations where you need your competitor's permission to enter the marketplace. I call it the "Brother, may I?" problem. And certificate of need laws are a prime example of that

) 7 & : \$ 7 & ~~What~~ *What has surprised you most about being commissioner versus having seen how the commission works as a staffer?*

2 K O K D X ~~What~~ *What* ~~is~~ *is* ~~the~~ *the* ~~thing~~ *thing* ~~that~~ *that* ~~has~~ *has* ~~surprised~~ *surprised* ~~me~~ *me* ~~the~~ *the* ~~most~~ *most* — and I guess I should have known this — is how all-consuming this job really is. So I have four attorney-advisers and they each have their own work stream and it all flows up to me. I was a partner in a law firm and I think I frequently put in more hours as a commissioner. At the same time, this has been one of the greatest, if not the greatest, job that I have had in my career. That was not a surprise to me.

) 7 & : \$ 7 & ~~On~~ *On* ~~Safe~~ *Safe* ~~Harbor,~~ *Harbor,* ~~are~~ *are* ~~you~~ *you* ~~worried~~ *worried* ~~that~~ *that* ~~the~~ *the* ~~FTC~~ *FTC* ~~could~~ *could* ~~get~~ *get* ~~cut~~ *cut* ~~out~~ *out* ~~when~~ *when* ~~this~~ *this* ~~is~~ *is* ~~resolved?~~ *resolved?*

2 K O K D X ~~What~~ *What* ~~is~~ *is* ~~not~~ *not* ~~really~~ *really* ~~worried~~ *worried* ~~about~~ *about* ~~us~~ *us* ~~being~~ *being* ~~cut~~ *cut* ~~out.~~ *out.* We have been an important part of the approach. The administration obviously is negotiating it, but the FTC has been seen as an important part of that team. Obviously we were the enforcers of Safe Harbor and so much of the concern animating Europe in their questioning the Safe Harbor is whether we have sufficient privacy enforcement in the US. We're the premier privacy enforcer, so we have a good story to tell there. I am not worried about the FTC being cut out

) 7 & : \$ 7 & ~~So~~ *So* ~~the~~ *the* ~~FTC~~ *FTC* ~~has~~ *has* ~~been~~ *been* ~~sufficiently~~ *sufficiently* ~~aggressive~~ *aggressive* ~~in~~ *in* ~~this~~ *this* ~~area?~~ *area?*

2 K O K D X ~~What~~ *What* ~~is~~ *is* ~~so~~ *so* — particularly compared to Europe. We don't have the same overarching privacy law but we have a lot of sector-specific privacy laws and then everything else falls to the FTC. We have 100 or more cases — between privacy, data security, spam and spyware. That's a pretty good record.

) 7 & : \$ 7 & ~~You~~ *You* ~~don't~~ *don't* ~~need~~ *need* ~~a~~ *a* ~~change~~ *change* ~~in~~ *in* ~~privacy~~ *privacy* ~~laws?~~ *laws?*

2 K O K D X ~~What~~ *What* ~~do~~ *do* ~~you~~ *you* ~~think~~ *think* ~~we~~ *we* ~~do.~~ *do.* I know my colleagues may think differently.

) 7 & : \$ 7 & ~~What~~ *What* ~~are~~ *are* ~~you~~ *you* ~~proudest~~ *proudest* ~~of?~~ *of?*

2 K O K D X ~~What~~ *What* ~~is~~ *is* ~~a~~ *a* ~~tough~~ *tough* ~~one.~~ *one.* I would say — it sounds hokey — but just having the chance to serve. There were days when I have thought what a lot of responsibility it is — for example, for me to say these two companies can't merge because I don't think it's good for consumers, or I am going to give the vote to authorize a suit against a big, well-regarded company because I think it violated the consumer protection laws.

) 7 & : \$ 7 & ~~Has~~ *Has* ~~your~~ *your* ~~regulatory~~ *regulatory* ~~view~~ *view* ~~changed~~ *changed* ~~over~~ *over* ~~the~~ *the* ~~years~~ *years* ~~or~~ *or* ~~have~~ *have* ~~you~~ *you* ~~always~~ *always* ~~had~~ *had* ~~a~~ *a* ~~similar~~ *similar* ~~view~~ *view* ~~on~~ *on* ~~regulatory~~ *regulatory* ~~issues?~~ *issues?*

2 K O K D X ~~What~~ *What* ~~is~~ *is* ~~it~~ *it* ~~like~~ *like* ~~to~~ *to* ~~have~~ *have* ~~the~~ *the* ~~view~~ *view* ~~that~~ *that* ~~we~~ *we* ~~need~~ *need* ~~to~~ *to* ~~be~~ *be* ~~humble.~~ *humble.* In a position of responsibility, some people give off this persona that they know everything — but no one does, of course. When I was working at the DC Circuit for five years, that made me think very hard about regulation and law. Then I came to the

FTC and have thought hard about how we decide when regulation is appropriate. From what I have seen in the world and being a mother of four and being married for 30 years, you never know what life is going to throw you. So I approach things with humility about predicting the future.

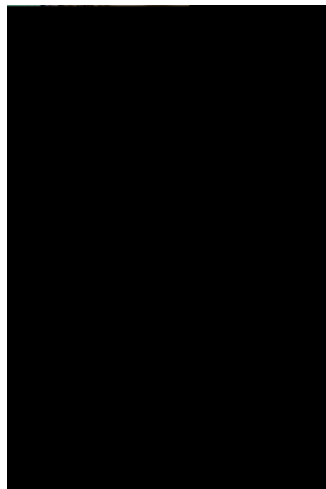
— Claude R. Marx and Kirk Victor

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Private monopoly is indefensible and intolerable, and our program is founded on that conviction', Wilson said.



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