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INTERVIEW WITH FTC COMMISSIONER EDITH RAMIREZ

by John Scribner and Jeff White[1]

You were a litigator in private practice at Quinn Emanuel before joining the Commission in April 2010. How has your experience as a Commissioner compared to being a litigator in private practice?

Let me first say that it has been a privilege to serve as a Commissioner. The FTC is a wonderful institution that plays a critical role in protecting the interests of American consumers, and there is no place I would rather be.

My entire career before joining the Commission was as a litigator in private practice, and there is no question that the role I have now as a Commissioner is very different. In private practice, I was an advocate. My job was to develop a winning strategy and articulate the best position for my client. Now my job is to do what is right for consumers given my best understanding of the facts and the law. That can at times be very challenging because, as one would expect, many of the contested matters that come before the Commission are the closest and most difficult cases.

But while my role here is different, I have found that my litigation experience has served me well. In private practice, I was "in the trenches" on IP matters and other complex business disputes. While it is not possible for me to be as immersed as I used to be on matters, reviewing and assessing evidence, developing the right questions and directing them to the right people, applying the law to the facts, and evaluating litigation risks are all things I have been doing throughout my legal career. And, fortunately, I have the benefits of a talented, expert staff to provide me with the information I need to make an informed decision based on the best available evidence.

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What were your thoughts on merger enforcement when you came in as a Commissioner in April 2010?

I came to the Commission with a significant amount of antitrust experience in conduct matters, but less experience with mergers so I started at the agency with a special interest in the Commission's merger work. The importance of this work cannot be overstated. The agency's expertise and focus on mergers in key sectors, such as healthcare and technology, has a very real impact on the everyday lives of consumers.

Taking healthcare as an example, the data shows that annual healthcare costs for consumers are approximately 18% of total GDP. Merger activity has been increasing among healthcare providers, and evidence shows that growing consolidation can lead to higher prices without corresponding improvements in the quality of care. Against this backdrop, it is vitally important that the Commission continue to investigate and, where appropriate, challenge hospital deals and other transactions in healthcare markets to protect competition.

High-technology markets are also playing an increasingly important role in consumers' lives and raise some of the more novel and challenging questions for antitrust enforcement policy. *Google/Admob* was my first matter at the Commission, and it was a good introduction to the challenge of antitrust enforcement in dynamic markets. Apple's 11th hour announcement that it was entering the relevant market proved to be a game changer. I was involved in litigation in technology markets in private practice, so I came to the agency with an understanding of the complex issues regarding innovation, standards, and IP rights that dominate the competitive landscape in this area. I expect we will continue to face new and difficult enforcement and policy questions in this sector.

Can you give us some insight into how the FTC and DOJ divide the high tech space both for mergers and non-merger investigations? The FTC challenged Rambus and has investigated other activities in this deal, whereas the DOJ recently investigated some high-profile patent acquisitions by Google, Apple, and others.

As in other areas, the agencies need to coordinate who will review matters that fall into the high-tech arena. Both the Commission and the Antitrust Division have expertise in the area, and we have a clearance process in place to determine which agency is best situated to investigate a particular matter. Although the clearance process is an area where the agencies could sometimes do better, we collaborate closely with our colleagues at the Antitrust Division, and, from my perspective, the process generally works well.

To what extent have the revised Horizontal Merger Guidelines that were adopted in August 2010 influenced FTC enforcement actions? Does the complaint challenging Graco's proposed acquisition of ITW suggest that the FTC is embracing a framework that is more in line with the revised Merger Guidelines?

The revised Guidelines reflect the way the Commission has analyzed mergers for some time, rather than a change in enforcement policy. But they do show how merger review has evolved in the last two decades as a result of the agencies' enforcement experience and advances in economic thinking. For example, we have learned that in some cases, particularly those involving highly differentiated products or consummated mergers, an upfront focus on market definition may not be the best way to shed light on the competitive effects of a merger. And the goal in merger review, of course, is to assess likely competitive effects. This understanding is now reflected in the Guidelines.

I think the *Graco/ITW* case is a good example of the more subtle effect I expect the revised Guidelines will have. In the *Graco/ITW* complaint, we alleged a combination between the two dominant suppliers of industrial liquid finishing equipment. The evidence indicated that the parties were head-to-head competitors in markets that included a very large number of highly differentiated products. Under those circumstances, the level of pre-acquisition competition between the merging parties is often more probative of post-acquisition effects than market shares, and those facts would have played a key role in the agency's investigation long before we adopted the new Guidelines. But I think it's fair to say that the revised Guidelines influenced the way we framed the case for the

court. While we alleged several relevant markets, our factual allegations emphasize loss of competition rather than shares as the critical factor in showing likely competitive harm.

The legal framework for analyzing a Section 7 claim is, and should be, a flexible tool that enables the factfinder to organize the evidence in a way that is most probative of the likely competitive effects. Market structure may not always be the best way to do that. With the revised Guidelines in hand, I hope we will continue to find appropriate opportunities to make this important point to the courts.

When the staff is recommending a merger challenge, what types of evidence do you expect to see or find most persuasive?

The form of the evidence is less important to me than how strong it is and whether the weight of the evidence is pointing in a consistent direction. For example, I voted to challenge the Graco/ITW merger based on what we believe is strong evidence of direct, head-to-head competition in the market for liquid finishing equipment between the merging firms. Meanwhile, I voted to challenge Omnicare's hostile tender offer for PharMerica based more on the likely impact the transaction would have given the unique market structure in which both parties operated—the CMS-regulated Medicare Part D market.

That said, as all practitioners know, the merging parties' business documents are an important source of evidence. A party obviously knows its business well, and its views of competitive conditions in the relevant market tend to be very probative of the likely effects of a merger. Information provided by customers is also highly relevant. I take competitors' views into account too. In any given case, I want to understand the market dynamics and bases for the views being offered. Third parties sometimes have different motives or incentives when they engage with the agency over a particular merger investigation. Understanding the motives of the various industry participants helps paint a

clearer picture of competitive effects. I also take a close look at the full scope of available economic data.

Every case is different, so it is important to have a full understanding of the evidence and all of the various viewpoints in order to fully assess the merits. Moreover, when recommending a merger challenge, I also expect staff to present the best available counter evidence as well as their expectations about how the parties will likely use that evidence. Understanding the strength of the parties' arguments is essential to my assessment of the likely competitive effects and the litigation risks of proceeding with a merger challenge.

It is no secret that staff from BC and BE sometimes disagree about the likely competitive effects of a proposed deal. How do you determine which side is right?

I think it is absolutely critical to get all of the data and hear the different perspectives of staff, especially in those instances where the opinions of BC and BE may differ. I also want to hear directly from the merging parties and interested third parties. I try to keep an open mind, and I invite the parties to engage on all of the contested issues.

Assume a hypothetical where the staff is recommending that the Commission issue a complaint challenging a particular merger. The parties have complied with the Second Request and the clock is ticking. The parties have scheduled a meeting with you to try to persuade you not to support the staff's recommendation. What advice would you give them to maximize their chances of having a productive meeting?

The advocacy that I've seen here at the Commission has generally been very good. I really appreciate the time parties take to meet with me. As I've already mentioned, party meetings are a very important part of my decision-making process. As for offering advice, my suggestions are simple but worth stating. First, try not to wait until the day before the meeting to submit a lengthy white paper. I want to have time to digest the parties' arguments and factual support before sitting down to talk face-to-face. That will make for a much more productive meeting. The most unproductive meetings I have are ones where the

arguments of the parties and FTC staff go past each other. So my second piece of advice is that parties should do their best to address the concerns that have been raised by staff about a transaction, rather than just telling me they are wrong without meaningfully explaining why. And where disagreement centers on a factual issue, it is often more useful to hear directly from the business people rather than the lawyers. Finally, I place a high value on candor and credibility. Parties sometimes make a mistake when they overstate the strength of their position on a particular point. There is value in acknowledging a weakness and then explaining why it should not be dispositive of the Commission's position.

You wrote the Commission's opinion upholding an ALJ ruling that Polypore's consummated acquisition of Microporous substantially lessened competition in markets involving battery separators. Was there something interesting to you about that case that made you want to write the opinion?

The Commissioners take turns writing opinions. I was next in line in the rotation when the *Polypore* case came up for review. One interesting aspect of that decision is that it was the Commission's first merger opinion following the issuance of the 2010 Guidelines. I think some people were surprised to see an opinion emphasizing market structure, particularly in a consummated merger. The approach we took was largely dictated by the record that was before us. At the time of trial, the transaction had only been recently consummated, and, as a result, the case had been litigated primarily as a structural case. The factual record covered market structure and pre-acquisition intent, and also included some evidence of post-acquisition conduct. While we could have drafted an opinion that looked more narrowly to post-acquisition effects, I believed that taking the full record into account could only improve our analysis and strengthen our decision. Because all of the evidence pointed in the same direction, I felt very comfortable affirming the ALJ's opinion.

You voted to withdraw the FTC's appeal in *Labcorp*, whereas Commissioner Brill dissented and stated that she would have pursued the appeal to clarify "important principles of merger law." Can you shed some light on why you voted to withdraw the appeal?

Although I continue to believe the district court got it wrong in that case, I ultimately concluded that continuing the litigation would not serve the public interest. Following the district court's denial of the Commission's motion for a preliminary injunction, the Ninth Circuit Court of Appeals denied our request for a stay pending the outcome of the appeal. At that point, LabCorp was free to fully integrate the Westcliff assets. The Commission's ability to obtain effective relief after the integration -- given the combination of labs, contracts with customers and suppliers, and personnel -- would have been very limited. And that was foremost in my mind, particularly given the agency's limited resources.

In *LabCorp* and *Graco*, the FTC filed 13(b) actions in federal district court in DC only to have the parties successfully move to transfer the cases to their "home" court -- *LabCorp* to California and *Graco* to Minnesota. What's your reaction to those case transfers? Going forward will the FTC's pre-complaint discovery focus more significantly than in the past on developing evidence of the parties "contacts" with DC?

Our general preference, when the facts support it, is to file 13(b) actions in federal district court here in Washington. Our approach will continue to be the same. It is much more efficient for us to litigate here where we are located. In light of that, it has been the general practice for some time for staff to gather the evidence necessary to establish venue during investigations. Of course, every case is different and the appropriate forum depends on the facts.

What is your view on the effectiveness of relief the Commission has obtained in merger cases over the last decade? How valuable would retrospective analyses on this be to you?

I believe retrospective studies can be very valuable. In the late 1990s, the Commission issued a study that examined the effectiveness of the agency's merger remedies, and it led to important improvements in how the agency approaches divestitures, particularly in the pharmaceutical arena. That's just one example of the potential value of retrospective analyses. But it is also important to recognize that retrospective studies are very resource intensive and can often

prove challenging to conduct. I would certainly like to see more in the way of retrospectives, if they can be done effectively within our resource constraints.

What have you enjoyed most about your time as a FTC Commissioner?

Many before me have said that being a Commissioner at the FTC has been the best job they ever had. I certainly feel that way. It's an honor to be here doing my best to protect the interests of consumers. The fact that I am doing this with terrific colleagues at an agency that has such a rich history and is tackling some of the most important and cutting edge issues of today is more than I could have ever hoped for.