

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 that expires on September 25, 2016. Prior to her appointment, Commissioner Brill was the Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice, a position she held from February 2009 to April 2010. Prior to her work in North Carolina, Commissioner Brill was an Assistant Attorney General for Consumer Protection and Antitrust for the State of Vermont from 1988 to 2009. This interview was conducted in writing by Editor Kristin McPartland for The Antitrust Source.

ANTITRUST SOURCE: You arrived at the FTC after a significant career working at the state level. How has your work at the state level informed your approach as a Commissioner?



Commissioner Julie Brill

JULIE BRILL: I worked at the state level for over twenty years before my appointment to the FTC as Commissioner. My state level experience informs my approach as a Commissioner pretty much every day. If I had to narrow it down though, I would say that my state experience instilled in me a hands-on, no-nonsense, consumer-focused approach to my work as a Commissioner. As a state enforcer I worked up close with consumers, businesses, and state agencies in a hands-on way, whether it was working to get refunds to consumers who had been victimized by various scams or deceptive practices, or providing practical antitrust advice to state and local entities. Similarly, I approach my work here at the Commission with a consistent consumer focus. That's my North Star. Also as a state AG, I was a no-nonsense prosecutor. I represented my state in court and in multi-state negotiations with corporations. Here at the Commission, I bring that approach to the table.

ANTITRUST SOURCE: What do you mean by "no-nonsense" approach?

BRILL: My no-nonsense approach flows from having been a senior state enforcer with a large docket to manage with limited resources. To be effective in my role, I had to manage that docket with those resources as efficiently as possible, and the smart way to do that was with a straightforward, practical, and direct approach to the work. I bring that very practical viewpoint to all of our enforcement and policy work here at the Commission.

ANTITRUST SOURCE: You've been at the FTC for just over a year and a half now. What, if anything, has surprised you about the experience?

BRILL: Over my twenty years as a state antitrust and consumer protection enforcer, I became very familiar with the FTC—its enforcement philosophy, its policies, and the key personnel. Although I

The FTC staff, in particular my personal staff, will tell you that

had not worked at the FTC before becoming a Commissioner, it felt like I knew quite a bit about the work the FTC does from day one. So I have not been particularly surprised by anything we do, or how we do it, in the enforcement arena. As a Commissioner, however, I am involved in a wide array of decisions outside the enforcement arena, such as our policy work, and also the day-to-day administration of the agency. In the policy arena, we Commissioners deliberate over and vote on the issuance of reports, such as the Privacy Report¹ and the Authorized Generics Report.² Although I hadn't previously experienced how closely the public watches the agency's policy work, I thoroughly enjoy this aspect of the job. On the administrative front, we consider and vote on FTC budget proposals and various other issues. Having managed a large state consumer protection and competition division before coming to the FTC, I was pretty familiar with this aspect of the job.

I am interested in everything

ANTITRUST SOURCE: Since you've been at the FTC, has your work focused more on antitrust or consumer protection?

When dealing with the Commission's external stakeholders, I have

BRILL: The FTC staff, in particular my personal staff, will tell you that I am interested in everything, whether it be a recommendation to close an antitrust investigation or a recommendation to enter a multi-million dollar settlement in a consumer protection matter. I am someone who likes to dig deep into the issues and to ask questions before making a decision. So, internally, my work is focused on all aspects of the Commission's mission. When dealing with the Commission's external stakeholders, I have focused principally on consumer protection issues, in particular privacy and financial practices. Yet I'm also very interested in competition issues, and have had a lot of interaction with our external stakeholders on the competition side as well.

focused principally on consumer protection

ANTITRUST SOURCE: A high priority for the agency has been putting a stop to so-called pay-for-delay pharmaceutical settlements. The agency has had a number of setbacks in the courts, and Congress has yet to pass a legislative solution. What are your thoughts on the pay-for-delay issue and what do you think the FTC's strategy should be in light of these setbacks?

issues, in particular privacy and financial practices.

BRILL: Pay-for-delay remains a key priority for this Commission. The FTC is taking a two-pronged approach to restricting pay-for-delay agreements. First, we continue our law enforcement work in the area, and second, we're talking to Congress about legislation. There have been setbacks in the courts, but the cases continue apace. Our *Cephalon* case is ongoing in the Eastern District of Pennsylvania (in which the district judge recently held that Cephalon's patent was invalid and unenforceable),³ and we await the Third Circuit's decision in *K-Dur*,⁴ as well as the Eleventh Circuit decision in *AndroGel*.⁵

I believe that some pay-for-delay deals result in a large amount of consumer harm, and we should not let the setbacks you refer to deter us from continuing to do the right thing by protect-

¹ FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS (2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>.

² FED. TRADE COMM'N, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT (2011), available at <http://www.ftc.gov/os/2011/08/2011genericdrugreport.pdf>.

³ See *Apotex, Inc. v. Cephalon, Inc.*, No. 2:06-cv-02768-MSG, 2011 U.S. Dist. LEXIS 125859 (E.D. Pa. amended Nov. 7, 2011), ECF No. 516, available at <https://ecf.paed.uscourts.gov/doc1/153110663884>.

⁴ *K-Dur Antitrust Litig.*, Nos. 10-2077, -2078, -2079 & -4571 (3d Cir. argued Dec. 12, 2011).

⁵ *FTC v. Watson Pharms., Inc.*, No. 10-12729-DD (11th Cir. argued May 13, 2011).

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: Well, I'm an optimist by nature, so the short answer to your second question is "yes." Right now, our resources in the pay-for-delay area are focused primarily on investigations and law enforcement actions, and I support that approach. Also, as an optimist, I see the "glass-half-full" and think that we are actually gaining some traction in the courts. In the *Cephalon* case, the judge denied the defense's motions to dismiss and has since ruled that the patent at issue is invalid and unenforceable. In *K-Dur*, both the FTC and DOJ participated as amici, including at oral argument before the Third Circuit. I see these developments in a positive light, and sincerely hope that the judges involved will see the evidence and arguments as we do.

ANTITRUST SOURCE: The FTC has brought two recent cases—*North Carolina Dental*⁶ and *Phoebe Putney*⁷—that prominently featured the state action issue, another agency priority over the last decade. Given your background at the state level, do you approach this issue differently from the other Commissioners? Do you expect the agency to continue to look for cases to narrow the state action doctrine?

BRILL: I should say at the outset that I was recused from *North Carolina Dental*, the most recent Commission decision involving the state action doctrine, but I am happy to talk about the doctrine as it relates to *Phoebe Putney*, and more generally.

In the ongoing *Phoebe Putney* hospital merger case, state action was a gating issue. The defendant hospitals and the county hospital authority argued that the transaction was exempt from federal antitrust liability under the doctrine. We believed the transaction was motivated and planned exclusively by Phoebe, with the hospital authority serving only as a "straw man" to shield an anticompetitive merger to monopoly. All the Commissioners felt strongly that we needed to call the defendants on their state action arguments, despite some tough precedent in the Eleventh Circuit. Did I approach the issue differently from the other Commissioners because of my background in state enforcement? I would say that the answer to that is "no." I think that had I been confronted with the same evidence during my time as a state enforcer, I would have made the same call. So, I was pleased but not surprised that the Georgia Attorney General joined forces with us in the *Phoebe Putney* case. This really spoke to the strength of the Commission's evidence.

With respect to other matters that raise state action issues—particularly bills under consideration in various state houses—my past experience may lead me to think a bit differently about how

⁶ N.C. Bd. of Dental Examiners, 151 F.T.C. 607, 2011 FTC LEXIS 188 (2011) (Kovacic, Comm'r), available at <http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf>.

⁷ FTC v. Phoebe Putney Health Sys., Inc., 793 F. Supp. 2d 1356 (M.D. Ga.), *aff'd*, 663 F.3d 1369 (11th Cir. 2011).

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. *Phoebe Putney* 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 *Phoebe Putney*.

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.

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?

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 *LabCorp/Westcliff* 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

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 *LabCorp*, and why I thought we should have continued our challenge in that case.

In *LabCorp*, 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 *LabCorp* 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 *LabCorp* 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 *LabCorp*.

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 *ProMedica* preliminary injunction decision.¹¹

¹¹ *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-47, 2011 U.S. Dist. LEXIS 33434 (N.D. Ohio Mar. 29, 2011).

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 and 4—Rules of Practice, 76 Fed. Reg. 52,249 (Aug. 22, 2011) (to be codified at 16 C.F.R. pts. 3 & 4), available at <http://www.ftc.gov/os/fedreg/2011/08/110812part3frn.pdf>.

¹³ See Public Workshop Concerning the Prohibition of Unfair Methods of Competition In Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50,818 (Aug. 28, 2008), available at <http://www.ftc.gov/os/2008/08/P083900section5.pdf>.

¹⁴ See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).

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—*Intel* comes to mind¹⁵—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?

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.

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.

And we have other statutes and rules within our jurisdiction that we will continue to enforce: Section 5 of the FTC Act, the Telemarketing Sales Act, the Telemarketing Sales Rule, the GLB

¹⁵ See Statement of Chairman Jon Leibowitz & Comm'r J. Thomas Rosch, Fed. Trade Comm'n, *Intel Corp.*, FTC Dkt. No. 9341 (Dec. 16, 2009), <http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf>.

¹⁶ Negotiated Data Solutions LLC, FTC File No. 0510094, <http://www.ftc.gov/os/caselist/0510094/index.shtm>.

¹⁷ Statement of the Federal Trade Commission, Negotiated Data Solutions LLC, FTC File No. 0510094 (Jan. 23, 2008), <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

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 with the businesses the agency is regulating, can theoretically lead to regulatory capture.

To balance that direct connection with the regulated community, the agency must also have a direct connection with consumers. So, while I flagged capture as a theoretical issue, I have no doubt that the CFPB has begun to vigorously and directly engage with consumers. For example, the Bureau has a division devoted to consumer outreach and education, led by Gail Hillebrand, and it has created entire offices devoted to outreach towards vulnerable consumer populations, including senior citizens and the military. And the Bureau is already taking credit card and mortgage service complaints directly from consumers. It will expand the number of issues about which it will accept complaints as time goes on. The Bureau has committed to sharing those complaints with other law enforcement agencies nationwide, including the FTC, through our Consumer Sentinel database.

So I believe the CFPB has done a good job of setting up systems to engage directly with consumers, and will undoubtedly work hard to avoid any theoretical concerns about agency capture.

ANTITRUST SOURCE: You talked about consumer outreach by the CFPB. The FTC itself has engaged in a fair amount of consumer outreach through Sentinel, consumer alerts, and consumer-directed information on the FTC website. Would you comment on how and to what extent consumer complaints influence the Commission's direction?

¹⁸ See ABA Section of Antitrust Law, Fall Forum (Nov. 17, 2011), http://www2.americanbar.org/calendar/at11111-2011-antitrust-fall-forum/Documents/fall_forum_2011_brochure.pdf.

¹⁹ This term refers to a situation in which a regulatory agency is “uniquely susceptible to domination by the industry [it is] charged with regulating.” Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

BRILL: The consumer complaints in the Consumer Sentinel database²⁰ 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.

There are many members of the law enforcement community, including the FTC, that use the information in Sentinel as a guidepost in case selection and development. Of course, Sentinel is just one tool that we use in developing our enforcement agenda, but it is a very useful tool.

ANTITRUST SOURCE: You have been active in the area of consumer protection issues arising in debt collection, giving a speech to the ACA in July 2010²¹ and issuing a concurring statement to the Commission's FDCPA Enforcement Policy Statement on collecting decedent debt in July 2011.²² Would you call debt collection one of your signature issues?

BRILL: I'm not sure that debt collection is one of my signature issues, but it is certainly one about which I care deeply. In the down economy, debt collection has been an incredibly important issue for me. And it is one where the Commission has been active.

With regard to the decedent debt policy statement, I thought it important to recognize the legitimate need of the industry to find the person with whom they are authorized to speak, but it was also important to recognize the potential for abuse, and to be clear that if such abuse occurs we will take appropriate action.

The Commission has been very active in debt collection enforcement. A good example is our case against West Asset Management, one of the country's largest debt collectors.²³ The Commission alleged that West Asset Management engaged in abusive collection practices, such as repeated calls, threats of arrest, disclosure of debts to third parties, and unauthorized withdrawal of funds from bank accounts. To settle our charges, West Asset Management agreed to injunctive relief and to pay a record civil penalty of \$2.8 million.

And we just announced another important decision involving Asset Acceptance, the largest debt buyer in the country.²⁴ The Commission believed that Asset had engaged in a host of collection activities that violated the FTC Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act, including asserting that consumers owed debt that Asset could not sub-

²⁰ See *Consumer Sentinel Network*, FED. TRADE COMM'N, <http://www.ftc.gov/sentinel/>.

²¹ Julie Brill, Comm'r, Fed. Trade Comm'n, Remarks Before the ACA International Annual Convention and Exposition (July 12, 2010), <http://www.ftc.gov/speeches/brill/100712aca.pdf>.

²² Comm'r Julie Brill, Fed. Trade Comm'n, Concurring Statement on the FDCPA Enforcement Policy Statement, No. P104806 (July 20, 2011), <http://www.ftc.gov/speeches/brill/110720deaddebt.pdf>.

²³ *United States v. West Asset Mgmt., Inc.*, No. 1:11-cv-0746 (N.D. Ga. filed Mar. 16, 2011), <http://www.ftc.gov/os/caselist/0723006/index.shtm>.

²⁴ Press Release, Fed. Trade Comm'n, Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception (Jan. 30, 2012), <http://www.ftc.gov/opa/2012/01/asset.shtm>.

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 knows or has reason to know is time-barred and, once that disclosure is given, that it would be barred from filing suit even if partial payment revives the debt.

Going forward, we will continue to consider the issues raised by the collection of time-barred debt—that is, efforts to collect debt where a collection action would be barred by the statute of limitations. Some debt buyers convince consumers to make a partial payment on debt that is time barred without informing them that such payments may revive the stale debt.

In addition to enforcement, I think the FTC should play an active role in encouraging the data industry to be more transparent about the data it collects and sells for sensitive uses, like employment, housing, and credit.

ANTITRUST SOURCE: There has been a great deal written about the use of consumer and credit reports in the media since the recession began, and several states have passed laws addressing the use of consumer or credit reports in hiring. *The New York Times* reported in December 2011 on new consumer reports that are drawing from untraditional sources, such as payday lenders or homeowner's associations, for consumer information.²⁵ What do you see as the FTC's role in overseeing these issues and how can the FTC work with the states to address potential concerns?

BRILL: The Fair Credit Reporting Act, which we enforce, addresses the use of credit reports. To be a credit report under FCRA, the report must be a communication bearing on a consumer's credit worthiness, character, general reputation, and the like; and it must be used for decisions about credit, insurance, employment, housing and the like. So, for instance, if a report contains information about your character and is used for employment purposes, its use may very well come under the FCRA. The most important implication of applying the FCRA to these reports is that the law provides consumers with certain notification rights about the use of credit reports, as well as the right to access and correct information contained in the reports.

Now, with the much greater ability to gather information across websites, including social media, I believe we need to ensure the same safeguards are in place for a broader array of reports on consumers. The rights of the consumer to view and correct reports should be on a sliding scale with the sensitivity of the information being gathered and the consequences for the consumer of the way the information is being used. Employment is a good example of where the consequences are very high, and so access and correction rights should be in place.

Indeed, the FTC staff recently sent warning letters to three mobile app companies that market background screening apps that provide users with information often used to screen potential employees. Staff informed these companies that the use of their apps for employment purposes would trigger the FCRA, and all the consumer rights that go along with the FCRA.²⁶ In addition to enforcement, I think the FTC should play an active role in encouraging the data industry to be more transparent about the data it collects and sells for sensitive uses, like employment, housing, and credit. Many consumers do not know who these data brokers are or where to find them. I believe the data broker industry should become much more transparent and provide consumers

²⁵ Tara Siegel Bernard, *A Credit Score that Tracks You More Closely*, N.Y. TIMES, Dec. 3, 2011, at B1, available at http://www.nytimes.com/2011/12/03/your-money/credit-scores/corelogics-new-credit-score-exposes-even-more-of-your-financial-life.html?_r=1&ref=paydayloans.

²⁶ Press Release, Fed. Trade Comm'n, *FTC Warns Marketers that Mobile Apps May Violate Fair Credit Reporting Act* (Feb. 7, 2012), <http://www.ftc.gov/opa/2012/02/mobileapps.shtm>.

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 agency²⁷ 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

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.

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.

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 *ProMedica* merger challenge in Ohio and before the ALJ here at the Commission last year. The experience of the *ProMedica* litigation will no doubt make our *Rockford* 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

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, national credit reporting agencies had misread Vermont's town records, registering everyone who received a property tax bill as failing to pay. In other words, residents of entire towns were registered as deadbeats. I worked hard to correct the problems that arose, and my work led me to testify before the U.S. Senate and House of Representatives about what ultimately became changes to the Fair Credit Reporting Act. After considering the problems in Vermont and elsewhere under the law, Congress enacted the 2003 revisions to the Fair Credit Reporting Act. And my work also led to my leadership role among the states on privacy issues, a role that I continue to play at the Commission.

Similarly, my work leading Vermont's efforts on tobacco issues brought me into contact with other state AGs, industry, and members of Congress. Our work focused on the tobacco industry's deceptive practices, including advertising to children and misleading the public about the harm smoking causes. We entered into protracted litigation with the tobacco industry, culminating in a historic settlement with the industry. My work on tobacco issues led directly to my interest and concerns about advertising substantiation and marketing practices related to health, issues that I continue to focus on at the Commission.

Many of the issues in which I played a leadership role at the state level continue to be of great importance to me as a Commissioner. Today, the issues of great significance to me now are privacy and data security; financial services like credit reporting, financial scams, and debt collection; advertising substantiation particularly with respect to health; and competition in health care and high tech. ●

³¹ For a downloadable recording of President Roosevelt's dedication speech, see <http://www.ftc.gov/ftc/turns100/audio/1937-fdr-speech.mp3>.

³² Julie Brill, Comm'r, Fed. Trade Comm'n, Finding Heroes in a Small World, Robert Abrams Public Service Lecture, New York Univ. School of Law (Sept. 12, 2011), <http://www.ftc.gov/speeches/brill/110912nyubobabramsspeech.pdf>.