

FEDERAL CIVIL ENFORCEMENT COMMITTEE

NEWSLETTER

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Interview with FTC Commissioner Maureen Ohlhausen

Federal Civil Enforcement Committee:

Congratulations on your appointment as an FTC Commissioner. Can you start by telling us how you think your background will affect your approach to issues at the Commission?



Returning to the Commission has been a great homecoming for me. At the Commission, I served in the General Counsel's Office, as an Attorney Advisor to a Commissioner, and as Deputy Director and finally Director of the Office of Policy Planning, as well as head of the agency's Internet Access Task Force. My varied roles have given me a broad understanding of the FTC's many activities, as well as providing me a wide perspective on the intersection of consumer protection and antitrust. I have always been impressed by the effectiveness and dedication of FTC employees in protecting competition and consumers. Increased interaction among the bureaus and offices could provide even greater benefits to consumers. As a Commissioner, I hope to facilitate such interaction to ensure that the Commission is operating at the highest possible level.

I also served as a law clerk for Judge David Sentelle at the U.S. Court of Appeals for the D.C. Circuit for several years before I joined the FTC. That experience was invaluable on

many levels, but especially prepared me for an environment where you may agree with your colleagues on one case, disagree on the next, but work together again on the one after that. Most recently, I served as a partner at Wilkinson, Barker and Knauer, working primarily on FTC issues, and I hope to provide a private practitioner's perspective on FTC functions in my role as Commissioner.

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FCEC: *What do you see as your top priorities and goals as a Commissioner?*

Supporting the FTC's mission to prevent business practices that are anticompetitive, deceptive, or unfair to consumers is a top priority. Additionally, I plan to work to enhance informed consumer choice and public understanding of the competitive process without unduly burdening legitimate business conduct. I will encourage the agency to use all of its tools to achieve these goals and to evaluate carefully what tool is appropriate to address any given problem. I will encourage the Commission to consider all possible approaches to any given problem, such as enforcement, research, consumer and business education, and sometimes allowing market forces to work on their own. Further, our focus should be on outcomes, not output – that is, examining whether agency activity is actually improving consumer welfare and whether it can be done more effectively. I also believe strongly that the FTC should,

whenever possible, provide detailed explanations of what it is doing – or not doing, as the case may be – and why.

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The FTC's mission cannot be carried out without external support. As a Commissioner, I have a vital role to play in building and maintaining support for

that mission from Congress, other parts of the federal government, the states, consumer groups, industry, and the public at large. I will do this through outreach to various institutions and groups and by encouraging transparency in FTC decision making.

FCEC: *While you oversaw the Office of Policy Planning, it held hearings, published reports, and issued advocacies on such topics as the Noerr-Pennington doctrine, barriers to e-commerce in various industries, and broadband competition policy. If you had to identify one or two accomplishments of which you are most proud, to what would you point?*

First, let me say that I very much enjoyed my time overseeing OPP. That office serves an important mission at the FTC, with its focus on competition advocacy and policy research and development.

One of the major accomplishments from my time in OPP is the [Broadband Connectivity Competition Policy report](#) issued by the FTC's Internet Access Task Force [IATF] in 2007. Chairman Majoras formed the IATF in 2006 to address competition policy in the area of Internet access generally, as well as the specific issue of so-called network neutrality. I had the privilege of heading the IATF, which brought together staff from virtually the entire agency, including each of the three bureaus, the General Counsel's office, and the policy offices. The IATF held a public workshop that

brought together relevant stakeholders, including consumer advocates, the technology sector, and experts from business, government, and academia to grapple with the various legal, business, and technical issues raised by proposals for network neutrality.

Based on this workshop and the staff's independent research, the IATF issued a report to inform policy discussions regarding network neutrality taking place at the time. Those discussions did not always fully reflect the competition, consumer protection, and economic issues that we felt were vital to the discussion. The report also identified guiding principles for policy makers in evaluating proposals to enact new laws or regulations in the Internet access area. The report was well received and provided useful insights on these issues, which continue to play out in the courts and other agencies.

Another accomplishment from my OPP days is the work that we did in real estate brokerage. At the time, new online business models were starting to gain traction in the industry, and traditional real estate brokers and agents responded by urging state legislators to require agents to offer a minimum set of brokerage services, which would prohibit some lower-cost brokerage services that were popular with consumers.

To address what in our view was activity – by both private parties and the states – that was likely harmful to competition and consumers, the agency took a global approach, utilizing all of the tools in the its arsenal, including law enforcement, competition advocacy in a number of states, policy R&D, and even consumer education. Many of these efforts, including a workshop and a report on competition in the real estate

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brokerage industry, were done in partnership with the Justice Department's Antitrust Division.

OPP of course continues to do good and important work, and I look forward to working with that office in my new role as a Commissioner.

FCEC: *You have taught as an adjunct professor at George Mason, following in the footsteps of Tim Muris and Bill Kovacic. What influence have those former FTC Chairmen had on your thinking about antitrust and consumer protection issues?*

First, both Chairmen Muris and Kovacic have spent significant amounts of time and energy thinking and writing about the various institutional capabilities of the FTC and how the agency can use these capabilities to serve competition and consumers. In brief, both of these Chairmen have analyzed the agency's effectiveness through the prism of institutional structure, capabilities, strategic planning, development, and awareness. I am privileged to have assisted them in these efforts.

Chairman Kovacic's [FTC at 100 report](#), which I highly recommend to your readers, explores each of these ingredients to agency effectiveness in great detail. I highlight just a couple points here. A well-developed internal decision-making process, while not itself sufficient, is crucial to an agency's ability to obtain effective results in particular matters. The FTC is fortunate to have so many tools at its disposal, but the agency must decide whether to bring a case, engage in advocacy, create rules, issue guidelines, or conduct policy R&D to address the various competition and consumer protection issues that it regularly confronts. Having a formal process in place for evaluating the proper tool or combination of tools will help the agency make the right decision in the particular matter before it and over the longer term as well.

Another matter of institutional importance is the method by which the FTC measures its success. As both former Chairmen have argued, institutional success should be

measured not by simply counting the number of cases brought or the amount of press coverage the agency can garner. An agency's success ought to be measured instead by the outcomes of its enforcement and non-enforcement efforts, the use of its many tools for reaching such outcomes, its guidance to outside constituencies, and the degree to which its core mission is understood and embraced both within and outside the agency.

The dual mission of the FTC as both a competition and consumer protection agency is another point that has resonated with

me. Both competition policy and consumer protection policy serve to improve consumer welfare. The two policies ought to be developed in tandem, with an understanding of the impact of our actions in both spheres. For example, when fashioning consumer protection policy, an agency – or any other policy maker – should also consider the competitive effects of such policy. Similarly, in developing competition policy, an agency should recognize the importance of truthful information to the proper functioning of markets. The FTC's dual mission is an important and distinctive feature of the agency, and the FTC ought to continue to consider the extent of the integration of the competition and consumer protection programs within the agency.

Food advertising restrictions are an issue I expect will arise during my time as a Commissioner, and for the reasons I mention above I would oppose such restrictions without better evidence that they would be effective.

FCEC: *You have published extensively, on both consumer protection and antitrust topics. Turning first to consumer protection issues, your article on "Obesity and Advertising Policy" in the George Mason Law Review opposed restrictions on marketing to children but supported changes in food labeling rules. Is*

that an issue you expect to push as a Commissioner?

The increase in obesity, and childhood obesity in particular, is an important health challenge in the U.S. It is therefore vital that we use our analytical tools to focus on steps that might actually have an impact, rather than settle for easy but ineffective targets. As discussed in my ["Obesity and Advertising Policy" article](#), I believe that the available evidence does not indicate that food marketing to children is a primary causal factor in children's increased obesity rates. In fact, research data indicates that children were watching less TV than in the past and were exposed to less food advertising on TV over the period when obesity rates were rising. From a policy standpoint, it thus seems

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unlikely that imposing food advertising restrictions would be effective in reducing obesity rates. Further, imposing such restrictions could actually have negative consequences if it inhibits marketers from advertising lower calorie foods and thus

deters food producers from competing to produce healthier products. Food advertising restrictions are an issue I expect will arise during my time as a Commissioner, and for the reasons I mention above I would oppose such restrictions without better evidence that they would be effective.

For advertising enforcement in general, the FTC must strike a delicate balance: under-regulation may allow deceptive advertisers to take advantage of consumers, while over-regulation runs the risk of prohibiting the dissemination of truthful information to consumers. Our role is to help ensure consumers can make their own informed choices, not to prevent them from making choices we don't like. Advertising also plays an important role in the marketplace. As the Supreme Court stated in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*

Council, Inc., "[s]o long as we preserve a predominantly free enterprise economy . . . the free flow of commercial information is indispensable." 424 U.S. 748, 765 (1976).

Creating and enforcing an effective regulatory framework also means keeping regulations in step with technological progress. For example, the means by which advertisers reach consumers are evolving every day. A particular challenge to advertising regulations today is posed by the increasing rate at which the Internet is accessed on mobile devices. As one example, the FTC Act requires disclosures of certain types of information in advertisements. These necessary disclosures become a challenge for advertisers creating ads designed for the smaller screens of mobile devices. Many commentators believe that these challenges should be left to industry self-regulation because of the degree of highly technical knowledge involved. The Commission has been a strong advocate of self-regulation. However, any self-regulation works best when backed by a law enforcement presence. Again, designing solutions to these issues requires balancing the protection of consumers with the understandable need for and benefits of innovation in the industry. These are issues in which the FTC is already deeply involved and ones that I intend to pursue as a Commissioner.

FCEC: *Privacy is a very "hot" consumer protection issue these days. Do you think the Commission has struck the right balance by promoting best practices while also challenging deceptive practices?*

Privacy is a vitally important issue for consumers, as advances in information technology have facilitated the compilation, synthesis, and sharing of detailed personal information. These advances have produced many benefits for society and consumers, such as free content and personalized services, but also create risks for the misuse of consumer information. Thus, protecting consumers' privacy has become a central element of the FTC's mission. I believe the best way to safeguard consumer privacy is to

give consumers the tools to protect their personal information through transparency and choices. The FTC has a key role in this effort – through both enforcement and the encouraging of industry best practices. For example, in May 2012, the agency hosted a [workshop on mobile disclosures](#), including privacy disclosures. The report and workshop examine the adequacy of information that app stores and developers provide to parents about what information is being collected, how it will be shared, and who will have access to it. We also have reached out to and worked with industry on improving disclosures.

In addition, the FTC produces consumer education aimed at keeping children safe online, such as the award-winning brochure for parents, [Net Cetera: Chatting with Kids About Being Online](#), as well as the [Net Cetera Community Outreach Toolkit](#) to help disseminate this information as widely as possible. This type of research, inquiry, and outreach – or to your question, advocating for best practices – is an area of particular strength for the Commission.

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With respect to law enforcement, the FTC has a strong record in the area of privacy. It has brought more than a hundred spam and spyware cases and more than thirty data security cases, including against [ChoicePoint](#), [CVS](#), and [Twitter](#). The agency also

has charged companies with failing to live up to their privacy promises in cases against companies, such as [Google](#) and [Facebook](#), which together protect the privacy of more than one billion users worldwide. The FTC's enforcement in this area serves several important functions. Foremost is the protection of consumers from particular bad practices. Also, by challenging deceptive practices the FTC provides industry guidance by defining what is, or is not, acceptable commercial behavior as it relates to privacy and seeks to deter such practices.

To return to one of the themes mentioned earlier, it is important to view privacy through the lens of not just consumer protection but also competition. For example, new privacy restrictions could adversely affect competition by favoring entrenched entities that already have access to consumer information, ultimately making consumers worse off in terms of competitive alternatives. As both a consumer protection and competition agency, the FTC must be sensitive to these concerns.

FCEC: *Sticking with privacy issues, a majority of Commissioners have supported a "Do Not Track" option for consumers, while Commissioner Rosch*

and former Commissioner Kovacic have raised concerns about mandating this option through legislation. Do you support such legislation?

... I am not convinced that we need legislation to achieve a workable Do Not Track option for consumers.

I hope to explore this issue in greater detail during my time as a Commissioner. The recent [FTC privacy report](#), which was issued before I joined the FTC, identified the "Do Not Track" option as an important one for consumers, whether enacted through legislation or by industry self-regulation. In May, I [testified](#) before the Senate Commerce Committee on the need for privacy protections. I appreciate the commitment in Congress to consumer privacy, but I am not convinced that we need legislation to achieve a workable Do Not Track option for consumers.

An effective alternative to such legislation can be industry self-regulation, where there have been many developments in the last year. For example, the World Wide Web Consortium, or W3C, has convened a broad range of stakeholders to create an international, industry-wide standard for Do Not Track. This effort to establish standards at the industry level is not yet complete, but is promising. The Digital Advertising Alliance also has established industry-wide self-regulation for advertisers. The FTC has been supportive of industry self-regulatory efforts, and I think it

is important that the FTC continue to encourage such efforts.

FCEC: *Let's turn now to antitrust enforcement. You have been an advocate for eliminating state imposed restraints on competition, among other things publishing an article in the Antitrust Law Journal on alcohol regulation. How do you expect to advance that agenda as a Commissioner?*

Advocating against government-imposed restraints on competition has been a significant component of the FTC's advocacy program over the past several decades. State laws or regulations that restrict business activities or prohibit certain business models altogether are a significant – and, unfortunately for consumers, durable – source of harm to competition. It is also less risky for competitors to seek anticompetitive restrictions from government than to pursue their desired outcomes through unlawful private actions.

As OPP Director, I oversaw advocacy efforts to address proposed state statutes and regulations that we believed would reduce consumer welfare in areas such as real estate brokerage, gasoline pricing, alcohol

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distribution, and the provision of various health care services. I was also involved in the State Action Task Force, which the FTC convened to reexamine the scope of the state action doctrine and to make recommendations to ensure that this exemption from the antitrust laws remains closely tied to protecting the deliberate policy choices of sovereign states and is applied in a manner consistent with federal competition policy. The Task Force issued a [report](#) in 2003, recommending several clarifications of the doctrine to bring it more closely in line with its original objectives.

As a Commissioner, I will continue to support efforts to oppose unnecessary restraints on competition in state laws and regulations and overly broad interpretations of the state action doctrine. The FTC has used and should continue to use both its competition advocacy and law enforcement tools in these efforts.

FCEC: *Do you have other goals to influence Commission antitrust enforcement in particular directions?*

There are several areas in which I will seek to influence antitrust enforcement at the FTC. First, I have long been concerned about abuses of government processes by private parties to restrain competition. Market participants may misuse federal or state government processes to gain competitive advantage over their rivals – both actual and potential – to the detriment of the competitive process and ultimately consumers. The FTC should continue to use both its law enforcement and competition advocacy tools to address such abuses of government processes.

Another important goal is transparency about how and why we enforce the antitrust laws. Transparency in our enforcement efforts, of course, offers guidance to market participants on how to comply with the antitrust laws. Transparency also may allow the agency to gain broader support among its various stakeholders for its core mission. Finally, the discipline of explaining our decision making is likely to improve the quality and the end results of that decision making.

To date, the agency has responded to calls for increased transparency in our antitrust enforcement in many ways, from issuing statements in connection with the closing of significant investigations, to releasing – jointly with the Department of Justice Antitrust Division – merger review data. I applaud those efforts and hope the Commission will maintain, if not increase, its level of transparency through guidelines and policy statements on important issues.

Harkening back to a theme I mentioned previously, another antitrust goal that I intend to pursue is the use of all tools to ensure the best outcomes for consumers. One core tool is the competition policy research and development that the agency regularly conducts. Policy R&D – including activities, such as workshops, hearings, studies, reports, and ex post assessments of agency actions – helps to inform the agency’s pursuit of its competition mission. One of the ways in which we can maintain a successful and appropriate course of antitrust enforcement is to be mindful of the difficulties of predicting the future in rapidly changing industries. That is not to say that antitrust has no role to play in technology or other changing industries;

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when properly applied, current antitrust legal and economic principles are capable of maintaining competition and protecting consumers in rapidly changing industries. It does mean, however, that we as an agency need to remain current on prevailing business practices, technologies, and consumer preferences.

A final goal that ought to drive our antitrust enforcement is to focus our efforts on transactions and conduct that actually present, or have the potential for, significant consumer harm. This may seem like a fairly elementary point. However, it can be overlooked at times – particularly in investigations that involve competitors complaining about a proposed acquisition or a certain type of business conduct. Harm to competitors simply cannot be equated to harm to consumers. When we go down that road, there is a substantial risk that the agency will misuse its scarce resources on a case that does not present significant consumer harm, while neglecting other cases that do present such harm.

Let me add one caveat to the goal of focusing on significant consumer harm. It may very well be that the Commission is presented with a case that involves a relatively small amount of consumer harm in the matter at issue, but that offers the opportunity to clarify the law in a particular area of antitrust and thus will allow us to address more significant consumer harm in later cases. In that situation, it may be prudent for the Commission to pursue a nominally low-value case in an effort to clarify the law.

FCEC: *Should the Commission be taking any action to deal with high gasoline prices? How should the Commission deal with pressures that come from high energy prices?*

The Commission takes high gasoline prices very seriously as part of its significant efforts in the energy sector. For several decades now, the agency has devoted substantial resources to protecting consumers and maintaining competition in oil and gas markets. As in other important areas of the economy, the FTC deploys multiple tools in its arsenal to carry out its responsibilities in the energy sector.

A significant tool that the agency uses is law enforcement. For example, the FTC reviews proposed mergers and acquisitions under the Hart-Scott-Rodino Act and monitors the industry for non-reportable transactions that might raise competitive concerns. Our law enforcement efforts also include assessments of potentially anticompetitive conduct in the petroleum and gas industries. To that end, the FTC continues to run a decade-old project that has provided valuable information in connection with the agency’s efforts to police conduct in the petroleum industry. The [Gasoline and Diesel Price Monitoring Project](#) involves monitoring by the Bureau of Economics of the wholesale and retail prices of gasoline and diesel fuel in order to help detect possible anticompetitive activities and determine whether a law enforcement investigation is warranted. This project continues to track retail gasoline and diesel prices in 360 cities across the nation and

wholesale [terminal rack] prices in 20 major urban areas.

The FTC also monitors compliance with the [Petroleum Market Manipulation Rule](#), which prohibits manipulation in wholesale markets for crude oil, gasoline, or petroleum distillates. Last year, the FTC and the Commodity Futures Trading Commission signed a [memorandum of understanding](#), which allows the agencies to share non-public information, helping each agency carry out its authority to detect and prevent wholesale market manipulation.

Beyond law enforcement, the FTC devotes substantial resources to conducting competition policy research and development in the energy sector. Over the last decade, we have held several [workshops](#), issued

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numerous [reports](#), at both the staff and Commission levels, and engaged in [competition advocacy efforts](#) in this important area. The agency also issues [consumer education materials](#) designed to help consumers maximize their energy dollars.

Notwithstanding these significant efforts in the energy sector, the FTC does feel pressure from outside constituencies when gasoline prices rise. Being open and responsive to these constituencies' concerns is crucial to maintaining external support for the agency's mission over time. Maintaining our constituents' support requires that the FTC be responsive to their concerns. However, it is also incumbent on the agency to help consumers, policy makers, and other constituencies better understand the dynamics of, and benefits from, competition in complex markets, including petroleum and gas markets.

FCEC: *At present, at least pending the Presidential election, you will be serving as one of two Republican Commissioners, with Commissioner Rosch. While the Commission often comes to a unanimous decision in enforcement matters, there are times that the Commissioners disagree. Would you expect that the election of a Republican President would affect policy or enforcement decisions at the Commission?*

It is very difficult to make such predictions because FTC enforcement should focus on anticompetitive conduct and transactions that result in consumer harm. Prevailing conditions and business conduct in the marketplace often have more impact in setting the enforcement agenda than even the political leadership at the FTC. Moreover, reviews of agency enforcement across administrations suggest that policy and enforcement decisions do not fall easily into political boxes. For example, former Commissioner Tom Leary has noted that over the last twenty years FTC merger policy has remained remarkably consistent, even in a period of "vigorous policy debate." Similarly, when former Republican FTC Chairman Tim Muris replaced Democrat Bob Pitofsky in 2001, Muris stated that there would be continuity in the FTC's agenda and enforcement policies despite the political switch in FTC leadership, citing only two instances in which he would have voted differently than Chairman Pitofsky, had Muris been on the Commission at the same time. As both Muris and Leary have pointed out, the FTC's focus has always been on the protection of consumers, and that remains a bipartisan statement of the FTC's mission today.

FCEC: *You have now been at the Commission for a few months. So far, what has surprised you the most about the job?*

I was only away from the agency for a little over three years, so I have not been particularly surprised by anything. Also, because I headed up the FTC practice at my previous firm, I was current on most developments within the agency. However, if

I reflect back on changes since I first joined the Commission in 1997, I am struck by the degree to which the work of the agency now is truly done on a global scale. This is perhaps not surprising, given the global economy in which we live, but I don't think we realized then just how inter-related competition and consumer protection policy would become on a global basis.

I will also mention how pleased I am about the degree to which the staff has been able to stay ahead of the curve on so many issues that change at lightning speed. For example, I mentioned the workshop we recently held on advertising and privacy disclosures in a digital world. This is cutting edge work and I am glad we are on top of it. So, while I am not surprised by this, government is not generally thought to be operating at the forefront of technology innovations. It's great that the FTC is an exception in this regard.

FCEC: *Thanks for speaking with us. One last question, on a personal note, when you are*

not consumed by antitrust and consumer protection law, how do you enjoy spending your time?

I am very fortunate to have had a fulfilling career and a lively family life. My husband and I always enjoy activities with our four children, and sometimes the kids even like it too, particularly if the activities involve beaches or ski slopes.