

Leadership Changes at FTC's BC: Dave Wales installed as Acting Director of Bureau of Competition; Marian Bruno and Norman Armstrong become Deputies

On August 7, 2008, the FTC [announced](#) that Jeff Schmidt would leave his post as Director of the Bureau of Competition (BC), to be replaced by his longtime deputy Dave Wales as Acting Director. The transition occurred on September 2; that same day, the FTC [announced](#) the appointments of Marian Bruno as Deputy Director and Norman Armstrong Jr. as Acting Deputy Director.

Wales was previously Deputy Director in BC. Bruno and Armstrong were previously Associate Director of Management and Operations and Deputy Assistant Director of the Bureau's Mergers IV Division, respectively. Short biographies of each are included in the FTC's announcements.

Interview with Dave Wales



The Federal Civil Enforcement Committee caught up with Dave Wales shortly after he was appointed, effective September 2, as Acting Director of the FTC's Bureau of Competition in Washington, DC.

Federal Civil Enforcement Committee:

Dave, first of all, congratulations in your new position. Can you tell us your goals as Acting Director?

Wales: Thank you very much. I am incredibly excited to be taking on this new role and having the opportunity to continue my government service at the FTC. This is a very special place.

I have several goals that come to mind. My primary goal is to ensure that the Bureau is fully prepared to continue the Commission's

very active enforcement agenda. Since I arrived at the Commission in the Spring of 2006, we have been incredibly busy with both merger and conduct cases. In the span of a year, we sought to block four mergers in federal court, with two preliminary injunction hearings on the very same day. In fact, in FY2007 we had a record number of merger challenges — 22 — including consents and litigation. The conduct enforcement agenda has been equally active. We had 12 nonmerger enforcement actions in FY2007, and have been very active in the areas of exclusion payment settlements in the pharmaceutical sector and other conduct in the health care, real estate, energy and technology sectors. There is no reason to doubt that we will be just as busy going forward, and in fact, there are signs that we should expect an even higher level of activity.

My second goal is to ensure that while pursuing this active enforcement agenda, the Bureau maintains the highest levels of quality. This includes not only quality work products, but also quality decision making at every level. In light of our limited resources, the Bureau has to do a very good job at deciding which investigations to pursue, when to close them, if a settlement might be acceptable and whether a matter is ready and worthy of challenging in court, to name a few. I am committed to making these difficult decisions promptly, with as much careful consideration and input from those involved as possible, and in a manner that attempts to maximize transparency.

Third, I want to make sure that when we decide to litigate a case, either in federal court or under our administrative process, that we do everything we can to win. Because the typical challenge involves a tough case — otherwise the parties would settle or decide not to fight — the odds are that we will not win every case we bring. What we must do, however, is focus on those factors we can control and work to maximize our chances of prevailing. Decisions on staffing, the theory of the case, key evidence, the venue, and whether this is the right case are just some of

the things we will be focusing on to advance this goal.

Finally, I want to make sure that whatever improvements are made in the Bureau, they put the institution in a better position, not only in the short term, but also well into the future. Nothing would make me happier if in five or ten years from now someone at the FTC could reap the benefits from improvements made during my tenure in the Bureau.

FCEC: *You worked as a senior counsel in the front office of the DOJ's Antitrust Division before returning to private practice and eventually joining the FTC as Deputy Director. How has this varied experience prepared you for your current job?*

Wales: I find that each of my experiences helps me in this job. First, having spent most of my career in private practice representing clients and defending them before the FTC and DOJ, I have a very good understanding of what motivates private parties and what goes behind the arguments and positions they and their lawyers advance before the antitrust authorities. I find this perspective invaluable as an antitrust enforcer because it allows me to more rapidly focus on the issues that matter and formulate strategies that will put the government in the best position to achieve a successful outcome. It has also convinced me that the best enforcement decisions are made after all of the parties put their cards on the table, with a full exchange of arguments and evidence.

My time in the front office at the Antitrust Division has also provided invaluable experience. It is there that I realized the importance and value of public service, and really for the first time understood the role of staff within the antitrust agencies. Although there are some differences between the Antitrust Division and Bureau, most notably differences in process, what is identical is how hard the staff works, how important their recommendations are, and how much they try to do the right thing for consumers. At the

Antitrust Division, I learned how to forge a strong and positive relationship between the front office and staff, and how to maintain that relationship so that there was room for both the support and backing of the staff, as well as input from agency leadership and possible differences of opinion.

Finally, my time as Deputy Director in the Bureau has prepared me well for serving as Acting Director. Upon joining the Bureau, I quickly observed the differences between the FTC and DOJ. The major difference is, of course, the Commission structure at the FTC. Instead of one ultimate decision maker, as at DOJ, there are five at the Commission, which acts by majority vote. This creates a slightly different dynamic between the front office and staff, as well as that between the front office and the agency leadership. Serving as Deputy Director allowed me to figure out how this different process works and to form strong relationships at each of the different levels within the FTC, including staff, the other bureaus, my front office colleagues and each of the Commissioners and their advisors.

FCEC: *Of course, we need to ask the obligatory question about clearance. What is the state of the clearance process between the FTC's Bureau of Competition and the DOJ's Antitrust Division? You have now seen the process from within both organizations — any insights to share from that perspective?*

Wales: You probably will not be surprised to hear that my experience at both agencies has convinced me that the clearance process could use some improvement. Indeed, I was at the Antitrust Division when Charles James and Tim Muris tried unsuccessfully to adopt a new clearance agreement. For the vast majority of investigations, the clearance process works fine. For a number of merger matters each year, however, there are disputes between the two agencies. The problem with these disputes, even if relatively small in number, is that they delay and prolong investigations, raise public questions as to whether the agencies are acting responsibly, needlessly

expend agency resources, and potentially create inter-agency bad blood, all while contributing nothing to the agencies' missions. Handling clearance disputes as Deputy Director definitely was one of my least favorite responsibilities.

What I can say about the current situation is that we continue to think of ways to improve the clearance process, and I am hopeful that real improvements will be made in the not-to-distant future.

FCEC: *Congratulations are also in order for the FTC's July 2008 victory in its D.C. Circuit appeal in Whole Foods. The case had been stayed at the administrative level pending the appeal. To the extent you can comment, where does the case go from here — can you give us any idea of timing and next steps?*

Wales: Thank you. We were quite pleased with the Court of Appeals' decision in *Whole Foods* and are looking forward to a full trial on the merits before the Commission and any future proceedings before the district court.

With respect to the trial on the merits, the stay on the [Part 3 administrative trial](#) was lifted by the Commission about a month ago and the schedule for the trial has now been set. According to this schedule, the administrative trial will commence on February 16 and will last at most 30 trial days. After the initial decision by the presiding official, the losing party can appeal to the Commission. The Commission would then issue a final opinion after briefings and oral argument.

With respect to the federal proceedings, Whole Foods filed a petition *en banc* for the entire D.C. Circuit to reconsider the three-judge panel's decision. We just filed our response to that petition. Depending on the outcome in the court of appeals, the case will be remanded back to district court, as instructed, to weigh the public equities arising from the transaction. The threshold question of whether the FTC demonstrated a "likelihood of success" should not be at issue in the remand

proceedings because the court of appeals held that we prevailed on that question. If the district court finds that the public equities favoring the defendants do not outweigh the likely harm from the transaction, the district court will decide what relief is appropriate. This relief could include a hold separate or stay on integration of the Wild Oats business or, according to the D.C. Circuit, a partial or entire rescission of the Wild Oats acquisition.

FCEC: *In the period between the District Court and D.C. Circuit opinions, Whole Foods consummated its acquisition of Wild Oats Markets and took a number of steps to change the status quo, such as shutting some of the Wild Oats stores. This obviously affects the remedy posture of the case. What remedy is the FTC now seeking?*

Wales: What we are seeking in both the full trial on the merits and in federal district court is to completely restore the competition that was lost as a result of this anticompetitive transaction. To start, this includes stopping Whole Foods from further consolidating any Wild Oats stores into their system and preventing Whole Foods from disposing of former Wild Oats assets. The relief may also include a divestiture of the existing and former Wild Oats stores in the overlap markets and in additional markets, if necessary, to provide the new entity with the economies of scale and efficiencies to operate a viable, successful premium natural and organic supermarket business. In addition, to the extent Whole Foods legacy stores are necessary to reconstitute Wild Oats because Whole Foods has closed or relocated a number of Wild Oats stores, we may seek a divestiture of those stores as well. All of these possible remedies are outlined in the Notice of Contemplated Relief in our [Amended Complaint](#) in the Part 3 proceedings.

FCEC: *The FTC's chief career Administrative Law Judge, Stephen F. McGuire, [retired](#) in August 2008. What is the FTC doing to ensure that it maintains the high level expertise in its ALJ corps that Judge McGuire helped to*

establish? Was the FTC's decision to appoint Tom Rosch as ALJ in [Inova](#) informed, in part, by the anticipation of this retirement?

Wales: I understand that according to the organizational rules of the FTC, the Office of Personnel Management both appoints and approves each Administrative Law Judge. The Chairman of the FTC has authority to designate the Chief ALJ from among those currently serving at the FTC. Because the FTC does not control the hiring or appointment process, there is no guarantee about the experience of the next ALJ. As to the appointment of Commissioner Rosch as the ALJ in the *Inova* matter, that decision was made long before Judge McGuire announced his retirement, so it does not appear that it was done in anticipation of Judge McGuire's retirement. As the Commission explained in [designating Commissioner Rosch](#) as the ALJ, it did so "based on his 40 years of experience as a trial lawyer, predominantly in the context of complex competition law cases, making him the best available candidate to sit as a trier of fact in this case."

FCEC: *Another enforcement matter that recently made headlines was the FTC's January 2008 consent decree with [Negotiated Data Solutions LLC \(N-Data\)](#). The Commission there proceeded in part under its "unfair acts and practices" authority pursuant to Section 5 of the FTC act, and did not tether its analysis to the antitrust framework of Sherman Act section 2. Going forward, how does the Bureau of Competition expect to make use of such "unfair acts and practices" theories, independent of Section 2 analysis?*

Wales: As you know, several of our Commissioners are interested in exploring standalone Section 5 claims. In fact, the Commission will be hosting a [public workshop](#) on October 17, 2008, to explore the scope of the prohibition of "unfair methods of competition" in Section 5. The workshop will examine three general subject areas: (1) the history of Section 5, including Congress' enactment, the FTC's enforcement, and the

courts' response; (2) the range of possible interpretations of Section 5; and (3) examples of business conduct that may be unfair methods of competition addressable by Section 5. As for the Bureau's stance, we will continue to assess each matter on its own specific facts and determine whether a standalone Section 5 claim may be appropriate.

FCEC: *Finally, we know you are a fierce Penn State partisan from your undergraduate days. You're a competition expert — let's test your ability to model their "market." Any predictions for the 2008 college football season?*

Wales: Penn State will be undisputed Big Ten and BCS national champions; Joe Paterno retires as the winningest Division I college football coach of all time. Thanks for at least one softball question!
