

FEDERAL CIVIL ENFORCEMENT COMMITTEE NEWSLETTER

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EDITOR'S NOTE

Dear Committee Member:

In this issue, we are very pleased to bring you an interview with FTC Commissioner Julie Brill, which expands on Commissioner Brill's ABA Brownbag presentation in September.

Registration for the [2011 Spring Meeting](#) is open and the agenda is now available online. Also, please remember that we always are looking for ideas for brownbags, other events, and articles for this Newsletter. Please contact any member of the Committee's leadership (below) for suggestions about how you can become more involved with the Antitrust Section.

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Interview of FTC Commissioner Julie Brill



Julie Brill was sworn in as a Commissioner at the FTC on April 5, 2010, to a term that expires on September 25, 2015. She holds her law degree from NYU and her undergraduate degree from Princeton University, and she joins the FTC after a long career in state law enforcement. She was the

Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice from February 2009 until her FTC appointment, and she was an Assistant Attorney General for Consumer Protection and Antitrust for the State of Vermont for over 20 years, from 1988 to 2009. As a state enforcer, she received several national awards for her work protecting consumers. See her [FTC page](#) for links to her recent speeches, articles and statements.

The Federal Civil Enforcement Committee held a brownbag with Commissioner Brill on September 14, moderated by Committee Chair Howard Morse and Vice Chair Hill Wellford. The following interview is adapted from a transcript of that event, updated to cover some developments in October and November.

Background and Goals at the FTC

Howard Morse: Commissioner Brill, thank you very much for joining us today. You come to the Commission with a career in state antitrust and consumer protection. Now, you have six years to accomplish your goals at the FTC. What do you see as your highest priorities and goals at the Commission?

Commissioner Brill: First of all, thank you, Howard, and thank you, Hill, for inviting me here. Thanks also to the ABA Federal Civil Enforcement Committee for inviting me. For over 20 years, I have been active in antitrust and consumer protection issues,

working with states, and engaged in front-line consumer protection cases as well as front-line antitrust cases. In the past, I have been very active on ABA matters, and for about nine years I've served on various committees with the ABA. The ABA Antitrust Section's work both in antitrust and consumer protection is incredibly useful to regulators and industry practitioners.

In terms of my priorities and goals as a Commissioner, I came into this job noting that the past two years have been the worst two years economically that consumers have faced in my entire career. There has been a devastating economic crisis. A critical role of regulators at the Federal Trade Commission and elsewhere, I believe, is to assist consumers in recovering from this crisis.

One of my top priorities is going to be focusing on scams and other activities that harm the very worst-off consumers: for instance, mortgage relief and foreclosure rescue scams, debt settlement scams, and debt collection issues. These are bread and butter issues, and they are incredibly important to so many consumers who really have been suffering. At the same time, I think it's important to ensure that consumers are protected as technology advances and develops, and that consumers' interests are incorporated into business models that use new technologies. This is going to require thinking about innovation and technological developments. These are the kinds of issues that cut across broad swaths of what the FTC does and will touch on everything from privacy, to behavioral advertising, to data security, but also areas involving antitrust concerns. And we've seen a couple of very recent cases that involve the high tech area, which I'm sure we'll get into as the hour progresses.

Another priority for me is healthcare: everything from antitrust issues involving hospitals, to pharmaceuticals and pay-for-delay issues, to advertising issues surrounding food, particularly functional foods and dietary supplements.

Howard Morse: You've joined the FTC as someone who knows her way around government agencies but someone who has been outside the Washington beltway. What are your early impressions of differences between your former positions and working at the FTC?

Commissioner Brill: It's true I've never worked in Washington. The only time I've worked in Washington prior to this position is back when I was a summer college intern at the Urban Institute, which was a really long time ago. But, as you note, I've spent a long time around government, and I actually have worked a lot in and around Washington even though I didn't have a position based here. I've worked a great deal with the FTC, with DOJ, and with various congressional committees over the years, so I felt like coming here I knew my way around Washington. But I don't think I really knew what it was going to be like to be in Washington until I arrived at the agency. There are some stark differences between the states and the federal government. I am very accustomed to the substantive issues that I'm dealing with here at the FTC. The issues I worked on in Vermont and in North Carolina as well as with all the states in various multi-state groups are very similar to the issues that we address at the FTC. So substantively, I feel very much at home. But now at the FTC, I have the opportunity to work with the nation's top experts in so many of these areas. State AGs have fabulous attorneys, really wonderful unsung heroes on many issues. But here at the FTC we are lucky to have many national experts, and that's an incredible privilege.

Another stark difference: I did a lot of multi-state work where I was working on matters that affected the entire nation, but many of the matters that I worked on were also small and had localized effects and implications. At the FTC, nearly every issue that I face is one of national reach, so the geographic scope of the issues is much broader. Finally, the FTC is much larger than any of the other agencies

where I've previously worked, so the sheer number of matters I'm working on has grown exponentially.

Howard Morse: With your appointment and that of Commissioner [Edith Ramirez](#), the FTC now has three Democrats for the first time since Chairman Pitofsky served with Commissioners Anthony and Thompson in the late 1990s. I know that the Commission usually acts unanimously, but I also know there are occasionally differences of opinion. What impact on the Commission's enforcement agenda do you expect from the fact that there's now what I would call a solid Democrat majority?

Commissioner Brill: It's an interesting question. I don't think an impact is going to be felt because the three of us -- Chairman Liebowitz, Commissioner Ramirez, and I -- are Democrats. I wouldn't chalk any changes up to the political party that we may or may not belong to. Rather, I think an impact may be felt because of the issues that we are interested in.

I'm not sure whether there have been Commissioners who've been so focused on some of the consumer protection issues that I've mentioned, for instance. Commissioner Ramirez has a very distinguished career focused on intellectual property and matters along those lines, so my expectation is that she will be very interested in some innovation issues, some intellectual property issues that in the past may not have been brought to the Commission in the same way that she will be focused on them. Moreover, it's been my experience over the many, many years that I've been in this business that a great deal of the consumer protection and antitrust work that we do is really non-partisan. It's about protecting consumers, it's about strong law enforcement, and it's about ensuring that businesses understand their obligations under the law because we clearly communicate our expectations ahead of time, so we're as transparent as can be. Members of both

parties are usually quite supportive of those issues.

Howard Morse: One last overall question on the Commission before we jump into the substance. In terms of how things are organized and specific responsibilities, given your background with the states, and knowing how much comes before the Commission that ends up on every Commissioner's plate, are there official or unofficial divisions of responsibilities in which you would be taking the lead?

Commissioner Brill: Yes, there are a few areas of official division of responsibilities. I am going to be known as the compulsory process Commissioner. I'll be following in Commissioner Harbour's footsteps in this role. I will act, in the first instance, on petitions to the Commission to limit or quash subpoenas or CIDs. Then the full Commission may act on these petitions if the party decides to appeal. Commissioner Rosch also has a special role: he is the Motions Commissioner for Part 3 motions. I don't know that Commissioner Ramirez or Commissioner Kovacic have a particular role assigned to them at this point in time.

What I think is much more interesting and substantive are our unofficial roles. Of course, we all act on all the issues that come before the Commission. I've only been Commissioner for five months, so I don't know exactly how all of us will work on various issues over time, but I sense that each of us will focus on the issues that are of particular interest to us. I will probably be paying very close attention to issues that relate to financial practices, privacy, healthcare, and innovation, all of the areas that I mentioned a few moments ago. It is likely the case that I will be playing a key role in relations with the states. I should point out that all the Commissioners as well as the FTC as a whole have historically had excellent relations with the states. My presence might add a little extra in that area, but I don't think the FTC needed a lot of assistance in this area,

because its relations with the states have been quite good.

Howard Morse: Can you elaborate on your role with the states?

Commissioner Brill: I have reached out to State AGs with respect to particular cases where we are working with them or contemplating working with them, and some state Attorneys General have reached out to me to discuss areas of mutual concern.

Financial Fraud

Howard Morse: Let me turn it over to Hill as we move to substance. I think he's going to jump in on the first issue that you already identified, the financial area.

Hill Wellford: Yes, and let's start with a broad question. You've talked about the great financial distress we've had in the last two years and you've mentioned that the FTC has some ability to solve those problems. But if it has always had that ability, then the question arises, did the FTC do enough? And regardless of how you answer that, are there particular lessons learned from the financial meltdown? Are there things that the FTC has expanded, learned to do differently, and is going to be doing in the future to try to make sure this doesn't happen again?

Commissioner Brill: Those are great questions. Needless to say I've been asked those questions a lot. Just looking for a moment at the FTC in isolation, our jurisdiction is circumscribed by the FTC Act. We certainly haven't shied away from testing the limits of our jurisdiction, but some activities and players are clearly beyond our reach. For instance, depository institutions: we just don't have jurisdiction over banks, credit unions and the like. The causes of the economic downturn were multiple and complex. But clearly skyrocketing mortgage defaults and foreclosures over the past few years have been some of the primary causes

of the recession. Subprime mortgage loans, how they were marketed and sold to consumers, how they were then sold on the secondary market, lack of sufficient underwriting, lack of disclosures about fees and increases in interest rates, and lack of disclosures about other aspects of loans – these are all issues that contributed to the financial meltdown.

Unfortunately, the FTC was not able to pursue banks with respect to their activity in the subprime market and how those loans were being packaged for the secondary market. The FTC could and did pursue non-bank lenders and mortgage brokers. The states also have jurisdiction over the non-bank lenders and mortgage brokers and pursued them for the same activity. But it's hard to deal with a problem as large and complex as the one that we recently faced when you're really only dealing with a portion of the market.

Similarly, with respect to the secondary market, huge questions arose as to what was happening with the mortgage-backed securities and collateralized debt obligations: how they were being sold, and whether the entities that were buying, selling and trading them even understood the risk that they were taking on. This was a huge part of the problem. Again, unfortunately, the FTC has no jurisdiction whatsoever over those issues.

Could the FTC have done more? Absolutely, no question. Could the states have done more? Absolutely, no question. Could other regulators -- the OCC, the FDIC, and others -- have done more? Absolutely. Every regulator could have done more in this area. Going forward, the Bureau of Consumer Financial Protection will have the authority to take a broad look at these issues. It will not suffer from the same balkanization of authority that previously existed at the federal level.

I think one of our very important roles at the FTC will be to assist the new Bureau as it gets

up and running. We need to share what we at the FTC have learned over the years with respect to many important issues in the financial practices arena. We will also need to coordinate with the new Bureau as we go forward because, as you probably know, enforcement authority will be shared by the new Bureau, the FTC, and the states. So I think it's going to be very important that everybody coordinate and think carefully about the kinds of issues we pursue going forward, both on our own and through coordinated activity.

At the same time, it's very important for the FTC to continue to aggressively engage in enforcement in this area. We must continue to focus on debt relief scams, bogus foreclosure rescue operations, inappropriate mortgage advertising and servicing. All of these issues will be incredibly important going forward, particularly in this interregnum period before the Bureau really gets up and running.

Hill Wellford: One entity that you didn't mention is the DOJ. They do have a [Civil Division](#) and a [Financial Fraud Enforcement Task Force](#). How does that play into the mix of agencies you just talked about?

Commissioner Brill: Through the Financial Fraud Enforcement Task Force, DOJ has been serving as a coordinator for various agencies to come together and focus on financial fraud, including mortgage fraud. I've participated in this Task Force from the state side. As a Commissioner, I participated in the Task Force's full meeting in June. The Task Force facilitates discussion among all of the agencies who are dealing with mortgage issues, from HUD, to DOJ, to the FTC, to the FDIC. Everybody is there and participating. DOJ plays a coordinating role around some of these issues, and it is doing a great job. I get the sense that the states agree that DOJ is doing a great job. I hope this initiative continues into the future.

Consumer Debt Collection Report

Hill Wellford: Let me move to a major report just released by the FTC, the [Consumer Debt Collection Report](#). Could you tell us about the report? Also, can you tell us why you issued a [concurring statement](#)?

Commissioner Brill: The debt collection report entitled "Repairing a Broken System" took a great deal of effort and time to prepare. Staff studied the industry for years, conducted workshops, and tried to get an understanding of the current state of debt collection in the country. It's an outstanding report. It is not a happy read, but it is a very good read. It paints a pretty bleak picture about the state of debt collection in our country and it identifies some serious consumer protection problems, especially in the area of debt collection litigation and mandatory arbitration area. The report makes a number of excellent recommendations with respect to how states can reform their laws to make the litigation process more effective and fair. Consumers need to understand the nature of the debt they are being sued over: whether they actually owe it; whether the entity that's suing is a debt collector, a debt buyer, or the original creditor; and whether there's confusion about who the consumer is. There are also a number of really excellent recommendations the report makes in the area of mandatory pre-dispute arbitration. Some of the serious flaws in that area have existed for many years.

Some of you may be aware that the State Attorney General of Minnesota recently sued the National Arbitration Forum. A few days after she sued, NAF stopped conducting consumer debt arbitration and, as a result, a nationwide moratorium on mandatory pre-dispute arbitration is now in effect. The Minnesota AG identified some serious improprieties among the arbitrators and the debt collectors. In addition, there is the issue of whether consumers ever had a meaningful choice to engage in arbitration. As I

mentioned, since the Minnesota case, the arbitration industry has imposed upon itself a moratorium with respect to consumer debt collection arbitration. The industry has said, "we are not going to engage in mandatory pre-dispute arbitration," and in fact mandatory pre-dispute arbitration clauses have been taken out of many, if not most, credit agreements at this point.

The Commission's debt collection report points out that the Commission ought to continue to study the arbitration issue, but the Commission didn't go so far as to call for an end to mandatory pre-dispute arbitration. In my concurrence I stated, first, I appreciated industry's sensitivity around mandatory pre-dispute arbitration, and I appreciated the fact that there was a self-imposed moratorium. But I said that Congress should enact a temporary ban on mandatory dispute arbitration until these problems could be sorted out. As we know, a voluntary moratorium can be lifted at any time by industry, and I want the moratorium stay in place until the underlying problems are addressed.

The day that we issued the report I also gave a speech to the American Collection Association. I said in my speech that the report contained many recommendations to change state law. However, in my speech, I highlighted the fact that the FTC can continue to aggressively use its Section 5 unfairness and deception authority with respect to abuses surrounding debt collection litigation and arbitration. This is not simply a problem that should be dropped in the laps of the states or industry or Congress. The FTC also has a very important role to play here, and it should continue to do so.

Hill Wellford: That raises another question. How much of this problem was, "you guys just aren't following the law," versus how much was "maybe you guys don't know where the lines are drawn." Is there a role for the FTC to say, look, some of this is good faith confusion, and we are going to help you collaboratively? Are there new reports, new rules, new

guidance that can be issued in this area that can help people who have messed up but are operating in good faith?

Commissioner Brill: The short answer to that is yes. The debt collection industry is diverse and enormous — from very large corporations who meet with the Commissioners and staff and who appear to try to follow the law, to very small mom-and-pop operations who also may be trying to follow the law but just may not have all the means at their disposal to do so, or to even know how to investigate the legal requirements imposed on them. Yes, absolutely, there is a tremendous role here for educating industry, consumers, and state courts about appropriate practices.

Deceptive Advertising and Privacy

Hill Wellford: We could spend all day on financial fraud but we also should talk about truth and deception in advertising. I specifically want to talk about the [Kellogg cereal matter](#) in June. In that matter, you and the Chairman issued a separate [statement](#). Can you tell us about that matter and again, why the separate statement?

Commissioner Brill: Chairman Leibowitz and I filed a concurring statement. The underlying case involved Kellogg's highly questionable claim that its Rice Krispies cereals boosted children's immunity. What caught my eye in that case was the timing of Kellogg's immunity claim. At the time Kellogg was developing and preparing to market its highly questionable claim about Rice Krispies, it was simultaneously negotiating with the FTC to resolve concerns about another claim it was making for another cereal product — specifically, Kellogg's claim that its Frosted Mini Wheats cereal improved children's attentiveness.

I firmly believe that companies like Kellogg have the ability — not to mention the responsibility — to ensure that their advertising

is truthful and not misleading. Kellogg likely has products in every family's cupboard in this nation. In my view, Kellogg can clearly do better than it did with respect to these two claims about its cereals. I wrote the concurring statement, and Chairman Leibowitz joined me, to remind the large players in the industry that we expect better, and that the Commission will act swiftly against all marketers who fail to comply with the law — especially when they make health claims in their advertising for food products, and especially when those claims relate to children.

We're all concerned about our health these days. We all want to avoid health problems and we want to eat foods that will help us avoid health problems. This new burgeoning area of so-called "functional foods" is a very important one. I think it is critical for the FTC to vigilantly enforce the advertising laws and require substantiation for health claims to ensure that they are true and supported by valid scientific evidence.

We will continue to monitor advertising by the food and nutritional supplement industries. In fact, the FTC recently brought two other cases in this area — one involving Nestle Healthcare Nutrition and the other involving Iovate. These cases challenged similar claims relating to immunity, colds and flu, and other health claims. These cases further demonstrate the Commission's priority in this area: to make sure that, when advertisers are communicating health information to consumers, the information is truthful and substantiated.

Howard Morse: I have one more advertising question. The [Green Guides](#) have been on the Commission agenda for some time. *Advertising Age* recently wrote an [article](#) that said the new Guides would "radically reshape how far marketers can go in painting their products and packages as green" and possibly render seals of approval as in violation of the FTC standards. Where are the Guides headed, and why do we need new Guides?

Commissioner Brill: Yes, the FTC has been reviewing its Guides for the Use of Environmental Marketing Claims – that’s the formal title, but we call them the Green Guides. We have prepared proposed revisions to the Guides that we published for public comment on October 15, 2010.

I would disagree with the characterization that the proposed revisions will “radically” change green marketing. What they do is update the Green Guides, which haven’t been updated since 1998. A lot has happened since then in the area of environmental marketing, and a lot has developed technologically in terms of ways to improve the “green” attributes of various products. Responding to these changes, the proposed revisions to the Green Guides are designed to strengthen and clarify our existing guidance, and also provide new guidance to address some issues that, frankly, weren’t on anyone’s radar screen twelve years ago.

In preparing the proposed revisions, we held several public workshops on green marketing, covering issues like carbon offsets, renewable energy, packaging and textiles, and buildings. To take the example of carbon offsets, I don’t even know if anyone knew what that term meant back in 1998, and I don’t think it was something that regulators were thinking about. We also solicited and received extensive public comment on how the Green Guides should be updated. The FTC also conducted a consumer perception study to gain an understanding of how consumers perceive various green marketing claims. All of this information was carefully considered as we crafted the proposed revisions.

I’ll highlight just a few key areas of revision contained in the proposed revised Guides. First, general environmental benefit claims: our consumer perception study looked at how consumers understand unqualified general environmental benefit claims – such as “environmentally friendly” or “eco-friendly.” We found that these claims convey numerous specific environmental benefits to consumers – for example, that an “eco-friendly” product is

made from recycled materials, is recyclable itself, is biodegradable, *and* is non-toxic. But since very few products – if any – have *all* of the attributes that consumers perceive, the claims are virtually impossible to substantiate, and we have therefore proposed strengthening the current guidance to advise marketers not to make unqualified general environmental benefit claims at all.

Second, certifications and “seals of approval”: use of these devices is pervasive in environmental advertising and they can convey many different meanings to consumers, such as that the product is certified by a third-party or that the product meets certain criteria developed by the marketer itself. We have proposed adding a new section to the Guides to remind marketers that certifications and seals are considered endorsements and should meet the criteria for endorsements set forth in the FTC’s [Endorsement Guides](#). For example, it is deceptive to represent that a product or service has been endorsed or certified by an independent third-party organization if that is not the case.

Third, newer claims in the marketplace: our consumer perception evidence indicated confusion and a potential for deception with respect to newer claims such as “made with renewable materials” and “made with renewable energy.” We have therefore proposed revising the Guides to recommend that advertisers *qualify* these claims by providing clear information about the precise contours of the environmental benefits being touted.

Those are just a few highlights of our proposed revisions. We are now seeking comment, through December 10, on all of the issues raised in the revised Guides.

The FTC’s Privacy Report

Howard Morse: One last consumer protection question. You already mentioned that privacy is an area of importance to you, and I know

you bring tremendous background to that issue. The Commission has held a series of [privacy roundtables](#) over the last year to explore the privacy challenges posed by new technologies and business practices. Can you tell us what you think has been learned from those roundtables and where things are headed on the policy front?

Commissioner Brill: As you alluded to, the Commission held three public roundtables in December 2009, January 2010, and March 2010 to explore these privacy challenges. We also solicited public comments. The Commission staff has been hard at work reviewing all the ideas that were generated. It's a big task. The challenge is that there have been traditional ways of thinking about privacy – at the FTC and frankly by the states, and by other regulators – which in my view do not adequately take into account some of the dynamics and realities of today's online and mobile environment. What the roundtables attempted to do was bring together some of the leading thinkers in academia and among consumer and privacy advocates, government officials, and industry representatives to discuss how the Commission should look at privacy regulation and enforcement going forward.

Commission staff has prepared a [Report](#), which we issued on December 1, 2010. Many of the points discussed in the report were areas of substantial consensus at the workshops. One of those points is that we need to rethink the concept of harm and how consumers can be harmed in the privacy context. Traditionally, we have looked primarily at monetary harm, but consumers experience a broader range of harm in privacy-related matters. They can suffer reputational harm, or harm merely from the fact that some of their information is being used in unexpected and surprising ways that consumers did not agree to, or even contemplate, when they entered into a relationship with a particular entity. So the

question is, do we need to be re-thinking how we look at harm?

Another issue is the idea of notice: how we inform consumers about how their information is being used. Of course, the traditional model here in the U.S. is a one-time “notice and choice” model, which is reflected in the Gramm-Leach-Bliley Act, and now appears in other contexts. Under this model, businesses give consumers a complex notice, written by lawyers, with the goal of insulating companies from potential future liability. Most people seem to agree that consumers don't read these notices, and if they do read them, they don't understand them. They simply do nothing upon receiving these notices, and that's the end of it. The relationship goes forward but there is no ongoing communication between the company and the consumer about privacy and information use. This is the typical model today.

Now, some companies are starting to move away from this model, and there has been some discussion about trying to develop more dynamic ways of notifying consumers, in a more informative way, at the time that consumers are providing their information online or on their smart phones. And that raises another issue – how to better notify consumers of information practices in the context of technologies that were not contemplated when the notice and choice model was developed. Cloud computing is just one example. How do you incorporate concepts of privacy and responsibility in a world where there is cloud computing? These are some of the issues addressed in the staff's report. It's a very complicated area, needless to say.

Howard Morse: Let me press a little bit on your last comment. At the same time as the Commission has been re-thinking its policy, it continues to bring enforcement actions, including a recent [case against Twitter](#) for failure to adequately protect personal

information. Are these new policy initiatives likely to lead to new legislation, guidelines and regulations, or are we going to see its impact in case enforcement?

Commissioner Brill: We certainly will continue to do enforcement work. In addition to the Twitter case, we recently brought a [case against Rite Aid](#) involving document disposal. We will continue to be very aggressive in enforcing the law with respect to privacy and data protection.

The staff report is designed to provide guidance to policymakers, including Congress, and industry as they determine the most appropriate framework for addressing privacy concerns in this new era. Chairman Leibowitz has said he is not expecting an immediate proposed rule from our agency to come out of this review of how we approach privacy at the FTC. But we expect the report will be used by policymakers.

Antitrust Enforcement

Hill Wellford: Let's turn now to antitrust issues, and I'd like to start off at the broadest level. Can you discuss the FTC's current competition enforcement priorities, and what competition enforcement issues most interest you or concern you personally?

Commissioner Brill: Some of the most important issues that I would like to focus on going forward are strong enforcement of the antitrust laws with respect to healthcare and pharmaceutical matters. There has been a substantial increase in branded drug prices over the past several years, at rates that exceed inflation. I think it's more important now than ever for the agency to continue its effort to stop anti-competitive practices in the "pay-for-delay" pharmaceutical area, where entry of low cost generic alternatives in drug markets are delayed. So I fully support the agency's efforts to stop pay-for-delay deals. We have had some disappointing outcomes from the courts recently, which we will try to address. Protecting consumers in this area

continues to be extremely important, and I expect that we will move forward with our enforcement efforts in this area. In addition, there has been some proposed legislation as well. I fully support that.

Another area that I'd like to address in the health care realm involves the new healthcare reform law. I want to work with our sister agencies to ensure that the newly launched healthcare reforms are implemented in a way that promotes competition and lowers costs for consumers. We have been working with that goal in mind. There has been a lot of inter-agency cooperation around that issue.

I also think it is important for the Commission to keep an eye out for anticompetitive practices in high tech industries, where innovation plays a key role. At the press conference when we announced the Intel settlement last month, I said that I think competition in these markets is vitally important, because these markets are responsible for many of the benefits that we enjoy in our modern society. The innovation we see in these markets helps drive our economy. It is arguably more challenging to address competition issues in these markets, as there is some uncertainty to them because you don't have a lot of history to look back on. In high-tech, it's harder to analyze and rely upon historical trends in a market five years ago, ten years ago, because we simply don't have that same history in many cases. Despite these challenges, I believe it's still very important to engage in robust antitrust enforcement in these areas because of the broad-reaching effect it can have.

Those are two of my top priorities in the antitrust realm.

Hill Wellford: Let me move to the release of the [new Horizontal Merger Guidelines](#). When the agencies announced this initiative, there were different predictions about what changes would be made. Originally people thought that not much was going to change. Then a view developed that a whole lot was going to

change. For example, that market definition might totally be thrown out the window. In the end, I think both the maximalists and the minimalists were a little disappointed at the relatively modest document that came out. Can you talk about the changes that did occur, and how big are they, really?

Commissioner Brill: I think that both the maximalists and minimalists, as you call them, should be relieved that neither of their concerns came to fruition. But there are some changes in the revised Guidelines that I think are significant. In particular, I think there are three significant changes.

First, I think the Guidelines make clear that merger analysis does not rely on one single methodology. Instead merger analysis is, as it should be in my view, a fact driven process that uses a variety of tools to analyze the evidence.

Second, and related, I think the Guidelines make clear that market definition is not an end in and of itself, nor is it always the starting point for merger analysis. Market definition is instead a tool that should be used to illuminate potential competitive effects of a proposed merger.

Third, the Guidelines now contain a more realistic portrayal of the Hirschman-Herfindahl Index (HHI). I don't believe this section actually reflects a change in terms of agency practice. The HHI numbers as written in the Guidelines have been increased, to better reflect the way we have been looking at HHIs, when we do look at HHIs as a tool in merger analysis. Thus, the thresholds for unconcentrated, moderately concentrated, and highly concentrated industries have increased, and the deltas, or the change in HHI, have also increased.

In my view, those are the three biggest changes in the Guidelines.

Hill Wellford: One short follow up question. You mentioned that the Guidelines merely

reflect agency practices. But of course, for the agencies to continue doing what they do, they've got to test it in a judicial forum: at the FTC, before an ALJ and then eventually a circuit court; at the DOJ, straight to a court. How does that affect, if at all, how the FTC is going to employ these Guidelines? Are you actively looking for the right test case to get it out there and start educating the courts?

Commissioner Brill: A lot of our cases are driven by industry. Certainly, with respect to our merger work, that work is determined in the first instance by the merging parties. We then have to look at the facts and determine whether or not we think there is a competition concern. I think what you may be asking is whether there are some cases where maybe we'd be more interested in going to court to test a particular theory. The answer is that we call each case as we see it, and don't bring "test cases." I am certainly not aware of that happening.

Howard Morse: I'd like to ask another quick follow-up question on the Guidelines. You emphasized two different aspects of the Guidelines. First, the theme that market definition is only one tool to get to an outcome, and second, that the HHI thresholds were increased. It seems to me that there is a bit of tension between those two, since the HHI thresholds are dependent upon market definition. You need to define a market in order to have an HHI, so what does it mean to raise the HHI threshold at the same time that agencies are downplaying the importance of market definition in the analysis? Does coming to a conclusion about a market definition and saying the HHI is below these new raised thresholds under the Guidelines put one in a safe harbor? Or does one nonetheless need to look at the various other tools that are set forth in the Guidelines? Or alternatively, perhaps, is the government just saying if you've got different evidence, maybe your market definition is wrong as one goes through this process?

Commissioner Brill: Well, that's a very astute question and I think you have pointed out the tension around these issues. I don't think market definition is a tool to be used to get to an outcome. I think it's a tool to be used to analyze the facts. Ultimately whatever the facts are, that is what determines what the agencies should do. We don't predetermine cases that we look at.

The Guidelines do say, when the agencies go to court, they will *normally* articulate what the market is, and we recognize that that's what courts will likely expect going forward. But the ultimate goal of merger analysis is to look at likely competitive effects, wherever the source of that evidence. I think market definition and the HHIs, and the tension between them as you described it, means that this aspect of our investigations will be an iterative process. How the market is defined will of course determine what the HHIs look like, and then other factors that we see in the market may then cause us to rethink some of the contours of the market definition or reshape it, and then that will cause us to take another look at the HHIs. So it is not a snap shot, it is an iterative process, dependent on the facts and other evidence.

Howard Morse: Let's turn now to some specific antitrust cases. On the antitrust front, what do you see as the most significant of the cases that the Commission has brought since you joined in April? I count about 10 or 12 in total. Over that period of time, which do you identify as really important?

Commissioner Brill: Of course every case we do is important. For me, the two most important thus far have been our investigation of [Google's proposed acquisition of AdMob](#) and our [Intel settlement](#). They are related in the sense that they both deal with high-tech, innovative markets.

For those of you who may not be familiar with our Google/AdMob investigation, it involved the emerging market for mobile advertising networks. Google and AdMob were the leading competitors in this market. Mobile ad

networks drive the availability of free or low-cost applications and content for smartphones and other mobile devices. Mobile ad networks "monetize" mobile publishers' content by selling publishers' advertising space. Advertising revenues, in turn, fuel the development of mobile applications and internet content.

The proposed merger necessitated close scrutiny because initial evidence from our investigation showed that Google and AdMob had competed head-to-head in the mobile ad network space for the past few years, with a notable increase in intensity during the past year. But after thoroughly reviewing the deal, we concluded that the merger was not likely to harm competition. We came to this conclusion in large part because of the move by Apple – the maker of the iPhone – to launch its own competing mobile ad network. This happened in the midst of our investigation – the market was changing while we were investigating. So the competitive concerns we were initially concerned about were overshadowed by this development. This real time development that affected our analysis was very interesting to me because it relates to the iterative process I was just discussing: we had to think about how to define the market, who to include in it, and then rethink it as we considered the case, because of the development taking place. The Commission closed this investigation, and we were very transparent in issuing a closing statement that explained that there is no free pass for mergers in emerging and hi-tech markets. The Commission said that it will subject these mergers to the same level of scrutiny and will take action to preserve competition if needed.

As for Intel, it is truly one of the biggest monopolization cases that has been undertaken by the FTC in many years and it was extremely important to consumers. In December, 2009, the Commission filed a complaint against Intel alleging that, since 1999, it unlawfully maintained a monopoly in the market for central processing unit [CPU] microchips (often referred to as the "brains" of

a computer), and sought to acquire a second monopoly in the graphics processing units [GPU] market, using a variety of practices that violated both the competition and consumer protection prongs of Section 5 of the FTC Act.

The Commission alleged that Intel shut out rivals' competing CPU microchips by cutting off their access to the marketplace, thereby depriving consumers of choice and innovation. The Commission alleged that Intel did this through threats and rewards aimed at the world's largest computer manufacturers, including Dell, Hewlett-Packard, and IBM, to coerce them not to buy rival computer CPU chips. In addition, the Commission alleged that Intel secretly redesigned key software, known as a compiler, in a way that deliberately stunted the performance of competitors' CPU chips. In the GPU market, the Commission's complaint alleged that, as GPUs began to take over some functionality of CPUs, Intel misled and deceived potential competitors in the GPU market in order to protect its CPU chip monopoly.

The Commission accepted for public comment a settlement with Intel that opens the door to renewed competition in the CPU and GPU markets, and prevents Intel from suppressing competition in the future in these very important hi-tech markets, where innovation is so important to consumers. I should also note that our settlement goes further than terms applied to Intel in other actions against

the company, including the EU and AMD's private action.

Hill Wellford: We've covered a lot of ground, but I thought I'd ask one last question. I know you're a sports fan. I believe there's a pro football team in New England where you used to live, and there may be one or two basketball teams in North Carolina where you were most recently. So this is a question to really test how much of a Washington insider you've become in a short time. Who are you rooting for this Winter?

Commissioner Brill: Well, you can take the girl out of New Jersey, but you cannot take New Jersey out of the girl. I grew up in New Jersey and I'm a life-long Yankees fan. When I watch baseball games at home, I have to watch in a different room than the rest of my Red Sox Nation family. So that's baseball. As for football, I usually tune in when the playoffs come along. I'm a big soccer fan, and a big basketball fan. Speaking of which, for the ACC league (which is very important to some), once you cross the border into North Carolina you immediately have to declare your loyalty: Is it UNC or is it Duke? I love college basketball. I love lots of different teams. I like both Duke and UNC, both of whom were recent champions, so the way I answer this question is, I said I love UNC but I love Coach K. And that is true. My answer usually ends further inquiries.

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Competition Roundup: Other Significant FTC and DOJ Actions Since October 31

December:

- DOJ announces front-office staff appointments (as reported in detail [last issue](#)): Patty Brink as Director of Civil Enforcement; Bob Kramer as General Counsel; John Terzaken as Director of Criminal Enforcement; and Marc Siegel as Chief Counsel for Criminal Litigation
- FTC [rules](#) unanimously that Polypore International, Inc.'s 2008 acquisition of a rival manufacturer was anticompetitive, and orders Polypore to divest the rival company
- DOJ [obtains](#) 18-month prison sentence for former CEO of The Morgan Crucible Company plc for his role in a conspiracy to obstruct a federal grand jury investigation into price fixing
- DOJ [announces](#) indictments of three former financial service executives for fraudulent conduct affecting contracts related to municipal bonds
- AG Holder [speaks](#) at the final Agriculture Workshop about pricing margins in the industry
- AAG Varney [delivers](#) closing remarks at the final Agriculture Workshop
- DOJ [announces](#) that Bank of America agrees to pay \$137.3 million in restitution to federal and state agencies as a condition of the Leniency Program
- DOJ [obtains](#) guilty plea from president of an Iowa ready-mix concrete company for participating in a conspiracy to fix prices for sales of ready-mix concrete
- DOJ [announces](#) indictments of Florida West International Airways Inc. and three

of its executives for participating in a conspiracy to fix and coordinate certain components of air cargo shipments from Colombia to Miami

- DOJ [obtains](#) guilty plea from former New York City Hospital employee for participating in bid rigging and fraud conspiracies related to contracts for maintenance and insulation work performed at Mount Sinai
- FTC [challenges](#) Laboratory Corporation of America's \$57.5 million acquisition of rival clinical laboratory testing company Westcliff Medical Laboratories, Inc., alleging that the transaction would harm competition in Southern California
- DOJ [testifies](#) and FTC [testifies](#) before Congress on antitrust enforcement in the health care industry

November:

- FTC [seeks](#) public comment on an application by Agrium Inc. to reopen and set aside two FTC orders related to its now-abandoned acquisition of CF Industries
- DOJ [obtains](#) guilty plea from Singapore Airlines Cargo Pte Ltd. for price fixing in air cargo shipments.
- DOJ [reaches](#) settlement with GrafTech International Ltd. to modify its supply agreement with ConcoPhillips in order to proceed with its acquisition of Seadrift LP
- DOJ [announces](#) indictment of former executives of two Japanese airlines for conspiracy to fix rates for air cargo shipments to and from the United States

- FTC [requires](#) Universal Health Services to sell 15 psychiatric facilities as a condition of its \$3.1 billion acquisition of Psychiatric Solutions, Inc.
- DOJ [obtains](#) settlement with Hewlett-Packard for alleged violations of FCC competitive bidding rules
- DOJ [announces](#) settlement with CFP Group and its president based on alleged false statements to obtain a contract from the Department of Veterans Affairs
- FTC [requires](#) Simon Property Group, Inc. to divest property and modify tenant leases as part of a settlement designed to preserve outlet mall competition
- DOJ [announces](#) indictment against three former executives from two color display tube manufacturing companies for their participation in a global conspiracy to fix prices.
- FTC [approves](#) modified settlement order resolving charges that Intel Corp. illegally stifled competition in the market for computer chips
- DOJ [obtains](#) guilty plea from All Nippon Airways Co. Ltd., which will pay \$73 million in criminal fines for its role in two separate conspiracies to fix prices in the air transportation industry

Consumer Protection Roundup: Other Significant FTC Actions Since October 31

December:

- FTC [settles](#) with The Dannon Company, Inc., on charges of deceptive advertising relating to the alleged exaggerated health benefits of its Activia yogurt and DanActive dairy drink
- FTC Chairman Leibowitz [speaks](#) on Congress passing the "Restore Online Shoppers' Confidence Act"
- FTC obtains [judgment](#) halting an operation that duped consumers into paying a fee to collect bogus prize money
- FTC [receives](#) hundreds of comments on its proposed revised Guides for the Use of Environmental Marketing Claims
- FTC Chairman Leibowitz [speaks](#) on Congress passing legislation clarifying the Red Flags Rule
- FTC [seeks comment](#) on whether and how to strengthen the Caller ID provisions of the Telemarketing Sales Rule
- FTC [approves](#) settlement shutting down two groups of Florida-based telemarketers that allegedly flooded consumers with misleading pre-recorded robocalls that falsely promised to reduce credit card interest rates
- FTC [obtains](#) settlement banning a deceptive advertising operation from the debt relief business
- FTC [charges](#) three debt relief operations with making unsubstantiated claims to lure consumers into paying thousands of dollars in up-front fees, and failing to reduce credit card debts as promised

- FTC [testifies](#) before Congress that it supports a “Do Not Track” option for consumers
- FTC [issues](#) preliminary staff report that proposes a framework to balance the privacy interests of consumers, businesses, and policymakers

November:

- FTC [settles](#) with EchoMetric, Inc., on charges that the company failed to tell parents using its web monitoring software that information collected about their children would be disclosed to third-party marketers
- FTC [obtains](#) settlement shutting down a website operation that allegedly deceptively touted free government grants for personal expenses or paying off debt, and then debited consumers’ bank accounts without their approval
- FTC [provides](#) tips and information for consumers who use gift cards for holiday gift-giving
- FTC [warns](#) consumers about online dating scams
- FTC [issues](#) a new rule to protect struggling homeowners from mortgage relief scams
- FTC [announces](#) a series of law enforcement actions as part of its continuing crackdown on scams that target homeowners
- FTC [issues](#) checks to 957,928 people who were victims of allegedly false claims made by LifeLock, Inc.
- FTC [sends](#) warning letters to marketers of caffeinated alcohol drinks regarding unfair or deceptive practice
- FTC [issues](#) 34,130 refund checks to consumers who were deceived by advertising for “Ab Force” electronic stimulation devices
- FTC [obtains](#) \$3.6 million federal judgment against companies that debited money from consumers’ bank accounts without permission
- FTC [gets](#) federal judge to ban marketers of Kinoki “Detox” Foot Pads from selling a wide variety of products
- FTC [obtains](#) \$400,000 settlement from three online retailers, and notifies two others that it will seek \$640,000 in fines, for failing to post EnergyGuide information to inform consumers about the energy use of major home appliances they sell