

United States

An Interview with Maureen Ohlhausen

In an interview with **Pallavi Guniganti**, Federal Trade Commission member Maureen Ohlhausen talks about the FTC's advocacy tools; public choice theory and self-interested state regulators; and the problem of "gauzy cloaks" that avoid political accountability.

When Maureen Ohlhausen was sworn in as a commissioner of the US Federal Trade Commission in April 2012, it was a kind of homecoming. She had already served at the commission for 11 years, starting at the general counsel's office in 1997. The next year she became an attorney adviser for former commissioner Orson Swindle, and in 2001 she went to the Office of Policy Planning.

As director of the Office of Policy Planning from 2004 to 2008, Ohlhausen led the commission's task force on internet access but also championed studying traditional areas of concern, such as the health-care industry.

With your experience of heading the Office of Policy Planning, what effect has that had on your ideas about how the FTC can influence other government entities, whether at the federal, state or local level, on competition concerns? I think that the FTC's ability to use its knowledge and expertise, which it has developed in its policy work, its R&D work, its economic analysis, that we've developed through cases, through reviewing mergers, even through looking at consumer protection issues, gives us a great body of knowledge that we can share with other policymakers, whether at the federal or state level, to explain to them the likely impact on consumers and competition of policies they are considering. There are proposed regulations that we favour, and we tell policymakers: "We think this would be a good idea, this will help consumers, we see a problem here, it's a good idea that you pursue this." But there are also regulations we really think will not benefit consumers or even be harmful to them. We can in a way speak on behalf of consumers in some of these other regulatory settings at the state level and before other federal agencies, to provide them, as an agency that is really concerned about consumers, some insight and guidance about what we think would really be the best outcome for those consumers.

Are there any particular areas you anticipate doing that in the near future? I know there has been a lot of attention here in Washington to Uber's conflict with the DC taxi regulatory commission, and there have been some states considering legislation to immunise health-care coordination in the future.

The *Uber* example is really in line with the types of competition issues we have a long history of weighing in on. We've done



advocacies in the taxi area before, for example in the 1980s. It's interesting and fun, and people gravitate toward that area because they understand it on very much a consumer level. But one of the advocacy areas I'm particularly interested in is health care, because that's an area where we can really bring some of the greatest benefits to consumers by both breaking down entry barriers and increasing access, particularly for rural and other underserved populations.

Do you think that, in terms of your ability to interact with state regulatory boards, they're receptive to hearing from the FTC in the soft persuasion of letters, or do you foresee needing to take more actions like *North Carolina Dental Board*?

For us to file a comment with a state, someone in the state government had to have asked for our opinion, whether it's a state legislator, or sometimes it's the governor or the attorney general who asks us. That really helps us be more effective because we have someone there who's interested in our views. So I think that's an important part of our programme.

If it's put out for public comment, then anybody can comment and we will comment. I think our advocacy efforts have been useful. We've occasionally had direct attribution to our letters by someone saying that "this is why we didn't move forward on this, because the FTC suggested it would be a bad idea." One of the things we instituted when I was head of Policy Planning is actually a follow-up for all of our advocacies. We follow up with a letter, a couple months later, asking a series of questions about our advocacy: Was it effective? What factors were important? What attributes of the letter did you find useful? So that we get a better sense of whether we are targeting things correctly, explaining things well, sending it at the right time and getting it to the right people. So I think that's really important. We don't just send it out and say, "Gee, I hope it works," because we do need to use that feedback to improve our advocacy programme as we go along.

On one side there's the regulated industry. Do you find people in states are good at organising on the other side, creating consumer groups to advocate for their benefit as consumers?

I'm a big believer in the insights that public choice theory offers, which is that the group that is going to benefit a lot is typically better organised than the group that may be harmed a little. It's important for us to try to include the voice of consumers in the mix. There are organised consumer groups and sometimes they provide a good pushback, or sometimes it's the new entrant who does a good job of pushing back. For example, I think Uber has done a good job of getting attention for their side of the policy argument.

You also, on the previous question, asked me about whether we need to do enforcement against state boards. I do think that's an important part of what we've been doing in the area of the state action doctrine. The advocacy element is an important part, but so is challenging some of the state boards – the self-interested state boards – that have put these protections against new competitors, new forms of competition, into place without the appropriate authorisation or oversight by the state. It's important to have both of those pieces in our approach.

Has the commission done any advocacy for a kind of structural change to these regulatory boards, reducing the influence that people who are in the industry have over its regulation?

I don't believe we've ever taken a position on anything structural, or how a state board should be composed. But one of the things we did do is have a state action task force that looked at these issues very holistically. We issued a state action report that looked at the state action doctrine, why it was created, what purposes it should serve and then what its limits should be. We actively sought out cases to move the law along in these areas. It all sort of culminated in the *Phoebe Putney* case, where I think we got a very good outcome in a unanimous Supreme Court decision that helped make more clear at least the clear articulation requirement for getting state action protection. It's a good step, and maybe we can find a case that will clarify the active supervision part of the doctrine.

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Are you concerned about the legislation that's being proposed in some states about giving a semi-blanket immunisation to certain kinds of health-care coordination, that does not seem to clearly indicate that they're planning to do active supervision?

I'm always concerned about exemptions from the antitrust laws, of any kind. I think the antitrust laws play a very important role in our economy, so I would be generally concerned about that. One of the important points about the state action doctrine is that the protection it affords certain activity is meant to assign political responsibility and not obscure it. So the idea is that it has to be the action of the state itself, and I think that's very important, because if it's causing consumer harm, people who are being harmed should be able to know that the state has made this as a political decision; not that it's cast some sort of – I think one of the cases calls it – "gauzy cloak" of state protection over what is essentially private anti-competitive action. So I'm always concerned about taking the antitrust laws out of the picture.

How do you think the bureaus of competition and consumer protection have interacted during your tenure here so far, and has there been anything you've been able to do to avoid the "siloeing" problem?

This is one of the important roles that our policy function plays, and the Office of Policy Planning can be a sort of nexus of this, where competition and consumer protection overlap. I think that's one of the key points we always need to keep in mind: Is what we're doing going to make consumers better off, from both the competition and consumer-protection standpoints? So, if for example there were a consumer-protection proposal being put forward, I think it's also important to think about the competitive impact of the proposal. Are we drawing the line in a place that's going to hurt competition in a way? I've talked about this in regard to privacy, that where we draw the lines for privacy can have competitive implications, and we need to think about that. If we say that sharing within a single entity is fine, but sharing outside that entity or sharing between smaller entities is a problem, that could have a competitive impact. It could lead to consolidation into larger entities. We also need to think carefully about the impact of taking information out of the marketplace. Information is a very useful tool for consumers on the consumer protection side, but it also drives competition. That's how you find out about competing offers, about a better

product, a better service, a different product. We need to think carefully about what the competitive impact may be, and I think that using our policy tools is a good way to do that. Our Bureau of Economics is also a fantastic resource that we can bring to bear on some of these issues, and I've encouraged them to think about that intersection of competition and consumer protection in the privacy area in particular.

In terms of network effects for a lot of these products, do you think there's a possibility for the commission to regulate the extent to which entities might be required to be interoperable with each other, so that consumers on the high-privacy, low-sharing network would still be able to interact with people on more information sharing, less-privacy one?

On the antitrust side, it would have to rise to the level of some kind of anti-competitive act, whether it's foreclosure or some other anti-competitive conduct, and the standards for that are pretty high. We don't have an essential facilities doctrine; I don't think we should. I would be very hesitant to intervene. Basically, it would have to fit some sort of antitrust violation for us to take that kind of action.

Do you anticipate the commission making any formal statements on network neutrality, or is that going to be left more in the FCC's jurisdiction?

I don't know what the commission will do. I know that personally I think the FTC can play an important role in examining those kinds of issues. If there is actual competitive harm going on, we can use our enforcement tools to address it.

Is this an issue that the FCC and FTC have discussed?

I can only speak for myself and say that I have just been talking about it myself. [Laughs.] It's something I've been trying to draw some attention to because we issued a report in 2007 – Broadband Connectivity Competition Policy – and I think our recommendations and our approach in that report have stood the test of time pretty well. Bandwidth has been growing, new types of competition have come online, wireless broadband has really exploded, there are a lot more content delivery networks, there are a lot more interconnection points, capacity has really grown and demand is growing as well. But I think the “things seem to be trending in a good direction, let's wait and see if there are any problems” approach, and then do case-by-case enforcement, is still a very appropriate model to apply here.

Rather than coming up with one principle that should govern the entire industry.

That's right.

There's been an explosion in the use of smartphones by underserved communities, especially by people who are young and people of colour.

That's been a huge trend for minority populations. They are accessing the internet through their smartphones much more

than the majority population, who certainly use their smartphones but also continue to use traditional desktop wired broadband. That's been a great trend. One of the aspects of the internet of things that I think is exciting and important is that so many more devices will be connected to the internet, and the need for prioritisation of traffic is key here, because some of those communications will be much more important than my e-mail to my kids, for example. Somebody's heart monitor, or minute-to-minute navigation of your car, or making decisions about where electricity needs to go, and other things like that. I think it really brings to the fore some of the issues that were maybe a little hard to foresee six years ago when we talked about net neutrality, about why prioritisation could on balance be a good thing.

Do you think there's a good way to figure out how the prioritisation of web traffic should happen?

I think mainly that's something markets sort out. Higher-value use will often pay a higher price, and lower-value uses pay a lower price and get lower priority.

Do you think there's any way in which multi-sided markets could potentially affect that?

That's certainly a possibility. I think that one of the great things about the internet model has been the fabulous amounts of experimentation that have happened, with different delivery models and ways to monetise things. It's an exciting space to work in. I can't say what will happen, but I'm excited to sit back and watch it and see what happens, and then if there are consumer protection or competition problems that arise, use our tools to address them, but not assume that bad things will happen. Thinking back, I remember e-mail before it was a free service; the amount of data we get for free now that we used to have to pay to get is really amazing. We used to pay a lot of money for Lexis Nexis and services like that – not that they've been totally replaced by the internet, far from it, but the types of data through search engines or specialised search that we now have at our fingertips, people used to pay a lot of money to get. And that's just one example of the kinds of services that we almost take for granted. Increased accessibility and decreased costs, down to free in a lot of cases, for services and data and information that people had to pay a lot for, which restricted access to people who could afford to pay for it.

Do you think the companies that are potentially on the losing end of that are just trying to prevent competitors from coming up, or are they themselves coming up with new innovations and services to keep themselves worthwhile?

I think it's a little bit of both. It depends on the company. To tie this back to some of our advocacies in certain areas, such as contact lenses and interstate direct shipment of wine, that has been the conflict: where you have the new internet business that has this new model, which can provide either greater selection or lower price or increases convenience, the entrenched competitors are trying to find a way to forestall that competition.