

Federal Civil
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Interview with Christine S. Wilson, Commissioner, Federal Trade Commission

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The Federal Civil Enforcement Committee is pleased to present this interview with Christine S. Wilson, Commissioner of the Federal Trade Commission:

Federal Civil Enforcement Committee (FCEC): Most recently, you came to the Commission in 2018 for a term that will expire in 2025. What has surprised you the most about your time as a Commissioner thus far and are there any aspects you will approach differently in the time you have left?

Commissioner Wilson: The biggest surprise for me involves the potential unraveling of the longstanding bipartisan consensus on consumer welfare as the appropriate touchstone for antitrust enforcement. Premised on sound (while continually evolving) economic analysis, the consumer welfare standard is feasible to administer, generates predictable outcomes, and imbues antitrust decisions with credibility.

The consensus regarding consumer welfare as the appropriate goal of sound antitrust enforcement extends beyond our borders. I was privileged to support the work of former Assistant Attorney General James F. Rill on the International Competition Policy Advisory Committee, which planted the seeds for the creation of the International Competition Network (ICN). Through the ICN, the OECD, and other fora, the U.S. antitrust agencies and the U.S. antitrust community more broadly have played a leading role in developing an international consensus on best practices for antitrust enforcement, including apolitical enforcement focused on consumer welfare rather than other goals like promoting national champions. If the U.S. shifts gears and abandons the consumer welfare standard, so too will other jurisdictions – with detrimental effects on multi-jurisdictional mergers and international trade, and ultimately on U.S. consumers.

In my remaining time on the Commission, I will continue to promote sound antitrust enforcement and the benefits of free markets. The Neo-Brandeisians have spread a misleading story of failed antitrust enforcement to gain support for economy-wide changes that will undermine competition and dampen innovation. For example, they envision applying the failed regulatory regimes that once governed railroads and airlines to new sectors like tech. I will continue to oppose misguided attempts to regulate competition that would cause us to repeat the mistakes we have previously made in the U.S. – mistakes that were acknowledged and rectified in a bipartisan way by repealing those destructive regulatory regimes in the 1970s.

FCEC: You have served as part of both the majority and minority at the Commission and worked with a number of different Chairs as well. Can you describe how the role of a Commissioner can vary based on being in the majority vs. minority or from Chair to Chair?

Commissioner Wilson: First, let me say that I am blessed and honored to serve American consumers as an FTC Commissioner. This is my third time at the FTC: I first worked here as a law clerk while in law school, and returned to the agency as chief of staff to Chairman Tim Muris. During these periods of service, and through the lens of private practice, I have studied the agency’s rhythms and functioning.

Over the years, the FTC has been run by many different types of chairs. We’ve seen strong chairs and weak ones, chairs with positive agendas and chairs who take a reactive stance, chairs who focus on external stakeholders and chairs who focus internally, extroverted chairs and scholarly ones. While the personalities and agendas of FTC agency heads can vary widely, they have shared one thing in common – a commitment to nurturing the bipartisanship and collegiality that has long characterized the Commission. And overall, dissent has been relatively rare; even those commissioners who have a reputation for being frequent dissenters actually dissented on approximately 5 percent or fewer of their votes. This approach produces better informed and more durable outcomes than those that flow from a polarized process.

Against that backdrop, let me answer your question. For me, the real shift in roles occurred not when I moved from the majority to the minority, but when leadership changed from Acting Chair Rebecca Slaughter to Chair Lina Khan. The procedures, traditions and norms that long have promoted the smooth functioning of the agency were jettisoned when Chair Khan arrived. Staff have been muzzled, both internally and externally. Sweeping policy changes have been voted out on a partisan basis with little to no input from the public or our experienced staff, and with minimal notice to minority Commissioners. Dialogue at the

Commission level has suffered, particularly given the denial of routine agency information to minority Commissioners. Under any FTC Chair, being in the minority brings an increased likelihood of disagreement with the majority. But Acting Chair Slaughter understood that even absent unanimity, process matters, dialogue among Commissioners leads to stronger outcomes, and agency staff have incredible expertise.

FCEC: The Commission seems to be moving in many directions at once lately. What do you see as the greatest priority for the Commission in competition and consumer protection given the Commission’s limited resources?

Commissioner

Wilson: That is a good question, and an appropriate one. Unfortunately, I’m not sure I can provide a helpful answer. Thus far, the enforcement actions we have seen under President Biden do not match the rhetoric, both because the number of

enforcement actions has dropped precipitously year over year and because those cases that have been brought look quite similar to those brought under President Trump. As I noted in a recent speech, cases brought by new leadership declined drastically compared to the last year of leadership under Chairman Simons. In 2020, the FTC had an unprecedented 31 merger enforcement actions. But in 2021, the FTC had just 12 merger enforcement actions. On the consumer protection side, there were 79 actions in 2020 but only 31 in 2021. I can assure you that this decline in enforcement cannot be attributed to our stellar FTC staff, who are just as dedicated and productive as ever.

Instead of enforcement actions, we have seen activity on other fronts. Policy statements premised on sound economics and established legal precedent have been rescinded but not replaced, creating significant uncertainty for stakeholders. In this category, we saw the withdrawal of Vertical Merger Guidelines and the rescission of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act.

And the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases, premised on appropriate stewardship of agency resources, was also

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withdrawn. These actions rightly have drawn significant attention, whether due to lack of notice and deliberation, the use of “zombie” votes to push the actions through, or other procedural and substantive concerns.

Looking ahead, on the consumer protection front, I would predict a focus on individual liability; a continued focus on consumer privacy and data security; cases involving harm to communities of color, gig workers, the elderly, and students; scrutiny of lending practices; expanded partnerships with state AGs and a reliance on rules to obtain monetary remedies in the wake of *AMG*; and a heavy emphasis on rulemaking. On the competition front, I would predict a sustained effort to throw sand in the gears of the market for corporate control, using procedural tactics both to avoid accountability for decisions and to increase the risk and uncertainty of doing deals. In merger reviews, I would predict a rejection of the consumer welfare standard and efficiencies arguments, a focus on labor considerations, and investigations involving non-competition issues. With respect to conduct investigations, I would expect a heavy emphasis on non-competes, exclusive dealing, predatory pricing (minus the recoupment prong), and investigations in the tech sector. And despite the questionable wisdom and legality of the initiative, the majority may try to enact competition rules. I also expect to see a resuscitation of cases under the Robinson-Patman Act and enthusiasm for price controls and price-gouging cases.

FCEC: The Commission’s Annual Regulatory Plan for 2022 (to which you dissented) states that the FTC “will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices.” This comes just months after the Commission amended its Rules of Practice under Section 18 of the FTC Act and engaged a new rulemaking group within the Office of General Counsel. You have been openly critical of attempts to regulate competition through rulemaking. What do you see as the biggest harm from potential overreach in this area?

Commissioner Wilson: Chair Khan has said that overreach is not on the list of the top 10 threats to the agency. I disagree. There are already members of Congress in both chambers who want to remove all antitrust authority from the FTC, in part because of procedural and substantive differences between the two federal agencies. Competition rulemaking at the FTC will provide further fodder to these critics. And it’s worth remembering that when the Commission last went on a rulemaking binge, it invoked the wrath of Congress, which twice passed legislation adding extra hurdles to the FTC’s rulemaking procedures.

Particularly if Republicans retake both the House and the Senate during the coming midterm elections, as expected, it is highly unlikely that Congress will sit idly by as current leadership simultaneously removes procedural safeguards in the rulemaking process and engages in a Rule-a-Palooza. And overreach in this area — combined with extra-jurisdictional pursuits on other fronts — will lessen the likelihood of a Section 13(b) fix.

It is also unclear whether courts will find competition rulemaking to be legal. Due to the changes made by Congress that I just mentioned, *National Petroleum Refiners* does not neatly apply to competition rulemaking. These rulemakings will inevitably be challenged in court, consuming the FTC’s finite and valuable resources. Unfortunately, these cases will also invite courts to revisit the non-delegation doctrine, yet another way current leadership is flirting with institutional destruction.

And, of course, I should mention that in addition to all the legal concerns with rulemaking, history shows us that competition rulemaking is a bad idea. Attempts at regulating our way to more competition failed miserably in the past. If we pursue this path, I would expect to see a preference for rivals over consumers, dampened incentives to innovate, and higher prices — the last thing we need during a period of record inflation.

FCEC: Chair Khan has suggested there is a need to return to the “statutory text” of competition laws. The recent guidelines inquiry, for example, asks several questions highlighting the words “may” and “tend” in Section 7’s prohibition against transactions whose effect “may be substantially to lessen competition or tend to create a monopoly.” How do you interpret these developments?

Commissioner Wilson: This call to action is based on a false premise. The Neo-Brandeisian framing suggests that developments in antitrust law were driven by a desire to avoid robust antitrust enforcement. In fact, references to consumer-centric enforcement can be found not just in scholarly commentary and judicial decisions over the decades, but also in the legislative history of the antitrust laws. The Chicago School pilloried by the Neo-Brandeisians is only one data point among many that led, over time, to the analytical framework we have today. Antitrust law and policy developed incrementally, based on refinements in economic analysis and the need for an administrable and predictable standard. Contrast today’s approach with early Section 7 enforcement — as Justice Potter Stewart said, the only consistency then was that the government always wins. If enforcers seek to implement the old structural approach to antitrust law, under which the government always wins, I suspect the courts will not be receptive.

FCEC: You have referred to new policy approaches at the Commission as merely “Twitter-tested.” What did you mean when you suggested the Commission has “Twitter-tested” arguments? Can you elaborate?

Commissioner Wilson: Declaring a course of conduct unlawful on Twitter and proving its illegality in the courtroom are two very different exercises. To win a lawsuit, you need witnesses, documents, and economic evidence. To declare something unlawful on the internet, you need only your imagination and a keyboard. Collecting “likes” and retweets on Twitter is no substitute for sound analysis of the law and the facts.

To avoid substituting Twitter-tested arguments for sound enforcement, leadership should heed the recommendations of the FTC’s experienced staff. A robust dialogue with staff and fellow commissioners promotes outcomes that can withstand the test of time. In contrast, marginalizing staff, excluding other commissioners, injecting politics into enforcement decisions, and living in an echo chamber inevitably will lead to flawed outcomes that cannot withstand scrutiny even in the short term, let alone withstand the test of time.

FCEC: On January 18, 2022, the FTC and the Antitrust Division announced a review of their prior merger guidelines and a comment period is underway. This of course comes after the Democratic majority at the FTC voted to withdraw from the 2020 Vertical Merger Guidelines last year. You have opposed the repeal of the Vertical Merger Guidelines and stated that guidelines should only be modified if changes in the law or economic analysis warrant. Are there improvements in either the Vertical or Horizontal Merger Guidelines you would like to see?

Commissioner Wilson: One of the many things I love about the FTC is its perpetual propensity to conduct research, monitor developments in economic analysis, and stay abreast of market dynamics. We hold workshops and roundtables, we conduct studies and retrospectives. By staying up to date on emerging trends, we can ensure we are making informed enforcement decisions. For the same reasons, it is appropriate to reevaluate guidelines to ensure that they reflect refinements in economic analysis, the latest judicial precedents, and so on. I am open to changes in merger guidelines that are supported by developments in law and economic analysis. Antitrust is not meant to be static; the Supreme Court made this clear in *Kimble v. Marvel*. I look forward to reviewing the comments submitted in response to the agencies’ RFI and hope to have the opportunity for a constructive dialogue with my colleagues on these issues.

FCEC: Notwithstanding the recent announcement, the Horizontal Merger Guidelines have been relatively stable, the current version in effect since 2010, whereas

the Vertical Merger Guidelines have been much more in flux over the last several administrations. Why do you think lasting consensus has been so hard to reach in the area of vertical analysis? Do you think we are headed for more administration-by-administration discord with the Horizontal Merger Guidelines?

Commissioner Wilson: I respectfully disagree that consensus has been difficult to reach in vertical analysis. Yes, before the Vertical Merger Guidelines were implemented in 2020, the prior version had been issued in 1984 and only formally adopted by the DOJ. But challenges to vertical mergers have occurred at a relatively consistent pace during the last two decades. And during each of my three stints at the FTC, vertical mergers have been a focus. My first case at the FTC as a law clerk was *Lilly/PCS*, which involved the vertical integration of a pharmaceutical manufacturer with a PBM. During that same timeframe, the Commission challenged *Merck/Medco*, which involved a similar fact pattern. During my tenure as chief of staff to Chairman Tim Muris, we closely scrutinized *Cytec/Digene* (which we challenged) and *Synopsis/Avant* (which we did not). Under Chairman Joe Simons, we required remedies in several vertical mergers, including *Staples/Essendant*, *United/DaVita*, *Northrop/Orbital*, *Corpus Christi Polymers (DAK/Indorama/FENC)*, and *Broadcom/Brocade*. And most recently, we brought three vertical merger challenges involving unanimous votes – *Illumina/GRAIL*, *NVIDIA/Arm*, and *Lockheed/Aerojet*.

As with any facet of antitrust law, developments in economic analysis and empirical research have led to developments in the enforcement approach. Professor Steve Salop’s work on raising rivals’ costs, for example, played a pivotal role in the analysis of vertical mergers. Since the 1984 Guidelines, the antitrust agencies have come to understand more fully both the potential harms and the potential benefits of vertical integration. I believe there is a bipartisan consensus on the appropriate analysis of vertical mergers, with diverging opinions at the margins based on preferences for Type 1 or Type 2 errors. In crafting the 2020 Vertical Merger Guidelines, we considered a broad spectrum of perspectives regarding how best to analyze these deals in accordance with sound economics. No one was fully satisfied with the final version of the guidelines, so one could infer that the approach reflected a consensus middle ground.

The Neo-Brandeisians base their dissatisfaction with the consensus approach *not* on economic grounds, but instead on the fact that vertical integration itself is somehow responsible for societal ills. Sanjukta Paul recently described concerns regarding “curbing vertical control as a mechanism of economic and market organization and replacing it with more horizontal forms of cooperation,” which likely includes encouraging strong labor unions and horizontal cartels among small businesses. In other words, this approach would abandon the consumer welfare

standard. And in another departure from sound economic principles, the Neo-Brandeisians seek to resuscitate failed regulatory regimes that prohibited certain vertical practices and favored competitors over consumers. For example, Chair Khan has spoken favorably of railroad regulations enacted in the 1900s and suggested we apply those provisions to large tech companies. Again, this approach requires departure from the consumer welfare standard. For these reasons, I view the Neo-Brandeisians' approach not as undermining the consensus, but instead not even engaging with it.

FCEC: The issue of enforcement against consummated transactions has surfaced in the Commission's case against Facebook, a Sherman Act Section 2 case, and with respect to the Commission's use of "close at your own risk" warning letters in the HSR Act/Clayton Act Section 7 context. What do you think should guide the Commission's consummated merger enforcement policy under Section 7 and Section 2?

Commissioner Wilson: Enforcers should be guided by the spirit of the HSR process; they should avoid undermining the integrity of this beneficial compromise enacted by Congress. Before the HSR process was in place, enforcers were regularly put in the difficult position of challenging consummated mergers. If those mergers were found to be anticompetitive, enforcers and courts were given the often impossible task of unwinding those transactions to restore competition. The HSR process gave enforcers the time and ability to challenge mergers pre-consummation. In exchange, the business community has incurred the burden of pre-consummation review but has benefited from the repose that comes from following the process. I believe this compromise should generally be respected. The use of pre-consummation warning letters unnecessarily injects risk and uncertainty into this beneficial compromise – but perhaps that is the point. And ironically, a trend of post-consummation challenges following the issuance of pre-consummation warning letters would sacrifice the benefits of the HSR process for enforcers.

To be clear, enforcers have the right to challenge consummated mergers. *Chicago Bridge & Iron* and *Bazaarvoice* provide two notable examples. If a merger is non-reportable, it is understandable that enforcers might seek to challenge a merger post-consummation. But I believe enforcers should face a high bar when seeking to challenge deals that dutifully complied with the HSR process, particularly when non-trivial resources were expended to investigate the possibility of anticompetitive effects and drove the conclusion that no harm was posed to competition. This high bar could be satisfied, for example, if the merging parties were later found to have withheld Item 4 documents or key materials responsive to a Second Request.

FCEC: The Commission suspended grants of early termination of the HSR waiting period in February 2021, citing an uptick in merger filings and the pandemic. Its suspension was supposed to be "temporary" and "brief." Why do you think early termination has not been reinstated?

Commissioner Wilson: Early terminations allow transactions that pose no apparent competitive risk to close before the statutory waiting period runs. The ET process removes an unnecessary regulatory delay for transactions that clearly do not violate Section 7 and therefore will not undergo an in-depth investigation by one of the federal antitrust agencies. When early termination was first suspended, we were told the FTC needed to review the "processes and procedures" used to grant early termination to make sure the agency was capturing all of the cases that merited further investigation. As you note, we were also assured that the suspension would be temporary and brief.

It would be legitimate for a new chair to assess the process involved in reviewing merger filings to ensure that she has faith in that process – especially if she is highly skeptical of merger benefits to begin with. But surely this assessment would not take more than a year. So why has the suspension continued?

I believe leadership is delaying lawful mergers for at least two reasons. First, I believe the suspension of ET is part of a broader policy to use procedural tactics to increase transaction costs for M&A activity, based on a belief that mergers are an evil that needs to be constrained. And second, I believe the suspension of ET allows leadership to avoid any inference that they have somehow "blessed" specific deals. But if they were to grant ET, that inference could be drawn.

FCEC: Recently members of Congress have introduced a number of legislative bills that would significantly change the federal antitrust laws. Are there any proposals of particular interest to you?

Commissioner Wilson: I am concerned about many of the legislative proposals that are specific to the tech sector, but I do believe there is constructive legislation that Congress can enact. For example, ensuring symmetry between the FTC and DOJ with respect to both substance and process in merger challenges would provide greater legitimacy to FTC actions. And repealing laws that provide immunity from antitrust enforcement would benefit consumers. Recent discussions have focused on removing antitrust protections from ocean carriers, and it was only last year that some McCarran-Ferguson protections were removed from health insurers. The FTC could also use more funds for investigating mergers – but tying these funds to use of the consumer welfare standard would be a good idea.

Those are a few places where antitrust legislation would be constructive. Another area where Congress could help consumers concerns the FTC's so-called Section 13(b) authority. While this authority touches both the antitrust and consumer protection missions of the agency, it has been used most frequently to recoup money for victims of consumer fraud. But the Supreme Court's decision in *AMG* invalidated the use of 13(b) to obtain monetary relief in federal court. While Congress could and should put guardrails in place to address concerns about how 13(b) has been used, passing legislation that clearly grants the FTC authority to obtain monetary relief in federal court should be a priority. Also in the consumer protection arena, I have encouraged Congress to pass federal privacy legislation. Companies need certainty regarding the rules of the road, Americans need much greater transparency about which data are collected and how that data is used and shared, and the spillover implications for our civil liberties need to be addressed. And as an added bonus, I believe privacy legislation would result in greater competition in the tech sector.

FCEC: You have expressed support for the Commission's 6(b) study of the technology industry, you voted in favor of the pending 6(b) study into supply chain disruptions, and you have suggested the Commission look into doing similar studies in other industries such as healthcare. Are there any other industries where the Commission would benefit from a similar in-depth review?

Commissioner Wilson: The ability to study various industries is a unique power of the FTC that allows us to build a strong understanding of emerging trends, key policy issues, and important industries. I would encourage the Commission to continue prioritizing the healthcare industry when considering potential 6(b) studies, given both the FTC's significant portfolio of healthcare cases and the industry's importance to every American. The FTC completed an important 6(b) study on generic drug entry under Chairman Tim Muris, a data-driven PBM study under Chairman Deborah Platt Majoras, and an authorized generics study under Chairman Jon Leibowitz, to name just a few examples.

The Commission could start to study healthcare again by analyzing sub-HSR deals in various industries, a path I suggested when we voted out the study of non-reportable GAFAM [Alphabet (Google), Apple, Meta (Facebook), Amazon, and Microsoft] mergers. A few specific areas that I have mentioned as ripe for study include sub-HSR acquisitions in the hospital, pharmaceutical, and dialysis markets. Although the draft PBM study presented for a vote at the Commission's open meeting in February 2021 was not yet ready for issuance, I strongly support a broad PBM 6(b) study. I am engaging with staff in connection with the development of a data-driven and comprehensive PBM

study that will produce useful information to inform both our enforcement efforts and policy positions.

FCEC: What do you find most remarkable from the Commission's 6(b) study of non-HSR reported transactions in the technology industry? Do think there are actionable datapoints for the Commission or Congress?

The 6(b) study of non-HSR reported transactions in the technology industry examined generally "smaller" transactions by the five so-called "Big Tech" companies. This study was undertaken in response to concerns that large tech companies have acquired many small companies that, according to the narrative, could have evolved into major competitors. FTC staff presented a report on key findings during our open Commission meeting in September 2021. Given the inability to anonymize the complete universe of information we received, not all of the information that we gathered could be made public – but it was nonetheless informative.

One notable aspect of the study concerns acquisitions that were non-reportable not because they were "small" but because they met one of the statutory or regulatory HSR Act filing exemptions or exclusions. The agency should assess whether merging parties are using these exemptions and exclusions to bypass HSR filings for transactions that would benefit from agency review. Concerns extend beyond the tech sector – as noted earlier, we have seen many sub-HSR acquisitions in other sectors, like dialysis, hospitals, and pharmaceuticals, that retrospectives have deemed concerning. Studies in these other sectors would be useful. And where appropriate, the FTC should change its rules and encourage Congress to revise the HSR Act.

FCEC: Similarly what do you think the key takeaways and/or actionable findings are, if any, from the 6(b) study of internet service provider privacy practices?

Commissioner Wilson: The FTC launched the ISP study to ensure that as we regained jurisdiction from the Federal Communications Commission, we were familiar with the latest industry trends and prepared to act swiftly, if necessary. The fact that we undertook an industry-specific assessment of privacy practices should not be construed as support for a sector-specific privacy approach. Instead, a review of existing sectoral privacy laws demonstrates growing gaps and inconsistent privacy protections. I have urged Congress to pass comprehensive federal privacy legislation, and will continue to do so.

FCEC: Looking back at the time since you've joined, the FTC has had a number of active antitrust conduct cases. What do you see as the most significant ones during your tenure?

Commissioner Wilson: There are three conduct cases that make me particularly proud. The first involves Surescripts, a company that offers e-prescribing and other health information services. The FTC alleged that Surescripts monopolized two separate technology markets by preventing multihoming. This case demonstrates that existing antitrust law can deal with dynamic and evolving technology markets. The second involves Vyera Pharmaceuticals and Martin Shkreli, the so-called “Pharma Bro.” The FTC alleged that the defendants engaged in a multifaceted strategy to monopolize, and significantly increase the price of, life-saving drugs. This matter is emblematic of the FTC’s countless cases in the health care sector, an area that affects consumers’ wallets on a near-daily basis. Our team did an outstanding job when litigating the case against Mr. Shkreli and earned a well-deserved victory. The third case, *Board of Dental Examiners of Alabama*, underscores the benefits of the FTC’s competition advocacy work in deconstructing barriers to entry erected by incumbents. I believe the agency’s competition advocacy work is one of the most important roles we play for consumers and competition.

FCEC: Lastly, on a personal note, what have you enjoyed most about your time as a Commissioner?

Commissioner Wilson: The FTC improves the lives of Americans in countless ways, despite its relatively small size. As I’ve said on many occasions, I am incredibly proud of this “little engine that could.” I am continually amazed by the huge volumes of good and thoughtful work we do in so many different sectors, enforcing dozens of laws, with so few employees. But it is only because of the talent, experience, and dedication of FTC staff that we can accomplish as much as we do. And it is engaging with our knowledgeable staff that I enjoy most as a Commissioner. While I do not agree with their perspectives in every instance, I always walk away from my interactions with new insights.

When I was confirmed as a Commissioner, I told staff I felt like I was coming home. That sense of “home” is attributable to the dedicated FTC community with whom I am privileged to work every day.