The Capitol Forum: Interview with FTC Commissioner Maureen Ohlhausen

Please note this interview was conducted on 9/30/14. The transcript has been modified slightly for clarity.

JOE TIPOGRAPH: This is Joe Tipograph at the Capitol Forum. I'm here today interviewing FTC Commissioner Maureen Ohlhausen. Commissioner Ohlhausen, thank you very much for sitting down to talk with me today.

COMMISSIONER OHLHAUSEN: Great. Thanks, Joe. I'm delighted to speak with you. I should say at the outset that the views I express here are my own.

JOE TIPOGRAPH: Understood. The FTC is turning 100 this year, and you lead the preparation of the FTC at 100 Report during your tenure as the Agency's Policy Director. Which few FTC enforcement our policy actions over the past 100 years stand out to you as the agency's most important contributions to American commerce?

COMMISSIONER OHLHAUSEN: In my answer, I'm going to focus on the last thirty years or so, rather than giving the complete history of the FTC. In both the competition area and the consumer protection area, there were significant shifts in policy in the late 1970s and early 1980s that have directed our work subsequently.

So, with that in mind, starting with competition first, one area that I think is important to focus on is health care enforcement. That's a very important area for consumers. It's a large part of our economy. It really affects consumers' day-to-day lives.

One example in particular is the enforcement that we've done regarding hospital mergers. So, I don't know if you recall, we had had a series of losses in challenges to hospital mergers.

So the Chairman at the time, Tim Muris, decided to do a merger retrospective, to ask: did the effects that we were forecasting actually take place in the marketplace? And we used that learning to shape our hospital merger enforcement efforts going forward. And I think that's been very effective.

For example, we recently were upheld by the Sixth Circuit in the ProMedica hospital merger case. We've also expanded our efforts into hospital acquisitions of large physician groups, for example in the St. Luke's/Saltzer case. I think that health care enforcement has been one of those areas where we've really made a difference to American consumers.

One of the other areas that we focused on, as antitrust enforcement against private action has gotten fairly effective, is that companies have an incentive to try to shift their activities or their behavior to seeking some sort of shelter from antitrust enforcement by saying, well, we're really part of the government. We're going to have the government enforce our anticompetitive agreement. We're going to shelter it under the government's umbrella.

JOE TIPOGRAPH: State action immunity.

COMMISSIONER OHLHAUSEN: State action immunity in particular. So that's one of the areas where the FTC has invested a lot of resources. And I've personally been involved in those efforts – particularly during my tenure as Director of the Office of Policy Planning in the mid-2000s. In state action immunity, we won in the Supreme

Court unanimously on the clearly articulated prong with *Phoebe Putney*, and now we have the active supervision prong before the Supreme Court in the *North Carolina Dental case.*

I think that a very important area that we focused on is narrowing the scope of exemptions and immunities to make sure that private anticompetitive conduct isn't getting this, I like the Supreme Court's phrase, "gauzy cloak" of state authority put on it.

Another area I would highlight is our efforts in improving the enforcement of antitrust laws and clarifying antitrust doctrine. So, for example, in the rule of reason area, we helped develop quick look analysis in the PolyGram case with the inherently suspect framework, which has now been endorsed by the D.C. Circuit and the Fifth Circuit. That really was the culmination of a long-term effort, going back to the *Indiana Federation of Dentists* case, and the Massachusetts Board case before that.

Given my time in OPP, I can't leave out competition advocacy from a list of FTC achievements. That I think ties in well with the state action doctrine and the work that we've done in the area of antitrust exemptions. I used to head up the competition advocacy program at the FTC. We engage with other parts of the federal government and the states to encourage them to consider the impact on consumers, on competition as they consider other regulations. We've also done this internationally. That's been a big growth area for us, our international engagement in trying to ensure that regimes around the world, nations around the world, also take the approach to competition that we advocate for in the U.S.

We've talked about what we've done. I'd also like to just touch briefly on what we haven't done. One of the areas I've been concerned about is using an expansive definition of Section 5 of the FTC Act, beyond the scope of the Sherman Act - that is, using our standalone Section 5 authority.

I think we've used that fairly carefully in invitations to collude. We've done a good job of developing that area of law. Our most recent case was the *Barcode Resellers* case. But I have argued for keeping that the scope of Section 5 narrow. I wouldn't support a more expansive use of Section 5 without having a clear policy statement and some very, very clear guiding principles.

I also want to touch on consumer protection. Obviously, that's half of our mission. We have a very broad statute on unfair or deceptive acts or practices. We've used guidance that the agency has issued to bind itself to give an explanation of how we interpret this broad statute, and to use as a guideline for how we bring enforcement actions.

We have an unfairness statement, and we have a deception statement. Those were adopted in the early '80s. We've also developed a very robust fraud program. I think that's one of the most important things that the FTC can do and we do it effectively. It doesn't always get the attention because it's not a bright shiny object quite so much, but it's very important. Billing issues, including unauthorized billing, are another major area I would highlight. We've brought several mobile cramming cases recently.

Of course, there is all the work we've done in data privacy and security. As so much of consumers' everyday lives have shifted, first to the Internet and now to transacting every kind of business, communicating with other people, interacting with the world is through your handset.

JOE TIPOGRAPH: You've described the FTC's administrative litigation function as a foundational aspect of the agency. What role has administrative litigation recently played in advancing the FTC's antitrust and consumer protection objectives?

COMMISSIONER OHLHAUSEN: Our part three authority, that is, our administrative litigation capability, is really a unique feature of the FTC and an important part of how we carry out our mission, both on the competition side and on the consumer protection side.

On the competition side, I think the administrative litigation is very, very significant, and much more important than anything we've done involving our stand-alone Section 5 authority. We've used it as a way to engage in substantive development of the antitrust law.

For example, I already mentioned *PolyGram* and the development of the inherently suspect framework. In the Unocal case, we used it to develop the case law on the misrepresentation exception to Noerr.

COMMISSIONER OHLAUSEN: We already touched on state action. That was a project, started under Chairman Muris, where we first did a report where we looked at the state action doctrine, the underlying principles, why it exists, what it protects, why it might be overly broadly interpreted, and sensible ways to pare it back. Then we looked for cases that might serve as a vehicle to move the law in the appropriate direction.

Right now we have the North Carolina Dental case on appeal to the Supreme Court. That's being argued in about two weeks. I think the administrative litigation function has allowed us to invest long-term in developing and clarifying the antitrust law.

JOE TIPOGRAPH: Just really quickly on the state action. These are fact patterns, like the North Carolina Dental, where you have a licensing or a regulating board of people who actually practice in the field that they are regulating. And the concern is to not allow them to use that power to exclude competition in an anticompetitive way. Is that the way you'd describe it?

COMMISSIONER OHLHAUSEN: Right. So the question there is, when you have a board made up of private actors who have their own financial interests to pursue as well as whatever they're doing in their public role, is the state actively supervising the actions that they take? Is the state saying we are paying attention to what this board is doing, such that we take responsibility for it. That we are saying, yes, this is the appropriate outcome that we want for the citizens of our state.

The state action doctrine is really to protect the states as sovereigns. They're allowed to take these actions. They're allowed to adopt a law that you or I might think is anticompetitive. But the state first has to clearly articulate that. Then if it's allowed private actors to adopt regulations or to enforce regulations, the state has to take responsibility for that and has to oversee it.

I wrote an article a few years ago on how an important part of the state action doctrine is not to obscure political responsibility for actions that may reduce competition. It's actually to assign responsibility for it. Having the state actively supervise these private actors is a way of assigning political responsibility for these kinds of otherwise anticompetitive actions.

JOE TIPOGRAPH: So the North Carolina dental context is about teeth whitening.

COMMISSIONER OHLHAUSEN: Yes.

JOE TIPOGRAPH: And it would be okay for the state to actively take the position that only dentists can do teeth whitening, but it's not okay for dentists, independent of state supervision, active state supervision, to make that determination.

COMMISSIONER OHLHAUSEN: That's right. That's right, exactly. Just to conclude my view on our administrative litigation function. We use it to try to move the antitrust laws in a desirable direction, but that's always subject to review by the courts. People who don't like the decision we make are certainly free to appeal it to any Court of Appeals they wish to appeal it to.

JOE TIPOGRAPH: So on the topic of the courts, the FTC has won every merger case it's litigated in the last few years. But according to practitioner feedback, shared in the FTC at 100 Report, if the FTC wins every case it brings, then maybe it's not bringing enough cases. Some commented that by seeking the courts input in difficult cases, the FTC could bring more transparency to shaping antitrust doctrine. How would you respond to the perception that the FTC is overly risk-averse with respect to merger enforcement?

COMMISSIONER OHLHAUSEN: I think it's important to take a step back and widen the scope a little bit on that question. For example, going back into, well, not quite ancient history since I was here at the Commission at the time, between the FTC and the Department of Justice, we lost seven straight merger hospital cases.

I think it maybe isn't quite right to say, we've won every case, so therefore we're being too risk-averse. In February 2011, we lost a PI motion in our challenge to LabCorp's acquisition of Westcliff Medical Labs. And we lost a challenge to Ovation's acquisition of a drug used to treat congenital heart defects in infants in 2010. No doubt we have had some victories recently in District Court and in the Courts of Appeals. The St. Luke's case I mentioned previously is currently on appeal to the Ninth Circuit, so we'll see how we do there.

I just want to be realistic. Things average out over time, so we need to take a bigger snapshot. I also don't think we're overly risk-averse regarding merger challenges. Challenging a transaction is a significant investment of agency resources, making sure that we have the right evidence, that we have the right theories. It takes a lot of time and effort to develop those well.

The other thing is that we don't have control over the mergers that are brought to us. They walk in the door. We're generally challenging HSR-reportable mergers. Sometimes we do pursue consummated deals, including ones that are under the HSR threshold. But for the most part, mergers are what come through the door for us. So our ability to choose cases is also influenced by this exogenous factor.

Another important thing to recognize about the FTC is we're a bipartisan agency. I'm a Republican Commissioner. Right now we have three Democrats and two Republicans. And much of our merger work, including our challenges, has been bipartisan over the years. I think that also helps lead to a middle-of-the-road approach to merger enforcement. I wouldn't necessarily say it's risk-averse. I would say it's balanced.

Since I've been here, I think we've weighed risks appropriately. And I bet you would also find some people who would say we've been overly aggressive in our merger enforcement efforts. So I think you can't please everybody. But there is a value to taking on difficult cases, the resolution of which can develop the case law.

You can imagine the risk of losing, between us and DOJ, seven merger cases in a row and then you go for the eighth one. But I think we did a very good job of refining our approach, of bolstering support for our views before we went for that eighth case. But that was a risk and it was an appropriate risk.

And now in retrospect you can say, well, we have won all these hospital merger cases. That outcome was not a foregone conclusion, given our history. But the trick is finding the right case to advance the law on a given issue, particularly in the merger area, where, as I said, your ability to select from among mergers is based on what comes before the Commission.

JOE TIPOGRAPH: Do believe robust merger enforcement by the FTC can serve to protect industries from the burdens of prescriptive regulation or legislation that arise in response to excessive market concentration?

COMMISSIONER OHLHAUSEN: I do. One of the things that I like to think about is how competition is really the first line of defense for consumers. A competitive market gives them a variety of choices, better prices and higher quality. Having firms compete on those metrics is for the benefit of consumers. That's why we engage in competition enforcement: to protect consumer welfare, not to protect competitors. Some competitors may be winners. Some competitors may be losers. What we care about is the ultimate impact on consumers.

Competition is also a tool to make other types of regulation less necessary, whether you're talking about regulation to address excessive market concentration or even consumer protection issues. In a competitive market, a company that is providing a substandard product or not giving consumers the benefit of the bargain, loses market share -- consumers vote with their feet. Or a competitor may advertise against it. We see that all the time. Your product, your network, whatever you are selling, is not as good as ours. Here are your flaws. We're going to use that to drive consumers to our product because we have a better offering. I think that dynamic is very important to keep in mind.

I do think that measured, but effective, antitrust enforcement can help ward off legislative or regulatory attempts to intervene in highly concentrated markets. And so I would much prefer smart, targeted enforcement to industrywide regulation.

This is a point I've been stressing frequently in my speeches and articles on net neutrality issues. A competitive market is better protection for consumers than a prescriptive regulatory regime.

JOE TIPOGRAPH: So I guess on the topic of net neutrality, Commissioner Wheeler of the FTC, he said that part of the reason why he thinks there might be need to be aggressive net neutrality legislation and regulation is because there's a lack of competition in the space. How would you respond to that?

COMMISSIONER OHLHAUSEN: What I would say is, look at whether broadband is becoming more or less competitive over time. I headed up the FTC Internet Access Task Force during my time in OPP. And in 2007, we

issued a report on broadband connectivity competition policy. I have a copy of the report cover hanging on the wall in my office.

In that report, we looked at whether this was a market that was getting more or less competitive. And even since that 2007 report, I think you've seen the market for broadband get more competitive with the entry of wireless as a true channel for consumers to access broadband. Over time, I think this is actually a market where you've seen reduced costs, increased quality, and more competition.

JOE TIPOGRAPH: In late 2012, the FTC allowed Hertz and Dollar Thrifty to merge, conditioned on a divestiture. Despite one dissenting Commissioner who felt the FTC should have just challenged the merger. Within a year the divestiture buyer declared for bankruptcy and sold assets back to the merging parties. Is it possible that the FTC failed to exhibit regulatory humility here by negotiating a complex remedy to facilitate a controversial merger instead of challenging the merger out right?

COMMISSIONER OHLHAUSEN: Before I turn to Hertz / Dollar Thrifty, I think it is useful to put it into a broader context. For example, in fiscal year 2013, we brought twenty-three merger challenges. Some of those deals were abandoned, but sixteen deals resulted in consents. And virtually all of our consents worked well.

I think that the reason there's a lot of attention on the Hertz-Dollar Thrifty matter, is that it is very atypical. It's unusual that one of our consents doesn't work out the way we anticipated it working out. I do think it's unfortunate that the original buyer here wasn't able to keep the business going.

But I think that we are starting to see some positive developments in the marketplace. We now have a viable fourth competitor in Advantage Rent A Car, which emerged from bankruptcy with over forty domestic airport locations and now has an international presence in Europe, and it's got the backing of an experienced, large private equity firm.

And the market itself has changed. Now, for example, we have Sixt, which is based in Germany and is the fifth largest car rental company in the world. At the time we were looking at the consent, they had a small U.S. presence, but now they have over forty locations in the U.S.

I think the market is getting more dynamic. We can't be 100 percent successful in everything that we do. But I think the consent decree system overall is actually a good example of regulatory humility. And let me tell you why.

When we review a merger, we gather evidence from a variety of sources. We talk to the parties. We talk to other members of the industry. We talk to customers. And what we're trying to do is weigh the likely costs and benefits of a transaction. Mergers oftentimes have strong consumer benefits. They have strong efficiencies. Overall, they're going to be good for competition and ultimately good for consumers.

But a merger may also have a problematic element to it. And we have to focus on trying to mitigate that problematic element, often through divestiture to a third party, while allowing the pro-competitive benefits to go through.

I think the consent process really is a good example of regulatory humility because we are trying to educate ourselves about the industry. We look at what are the likely benefits to consumers. What are the likely risks? Then

we try to maximize those benefits and minimize those risks through a very targeted approach. Do I wish it worked 100 percent all the time? Yes, I do. But just going back to my original point, I think the Hertz-Dollar Thrifty matter is unusual. It's not the norm for us.

JOE TIPOGRAPH: In the past year, the FTC challenged glass bottle maker Ardagh's acquisition of its rival VNA from Saint-Goban. You joined the majority, but one Commissioner dissented, expressing concerns over how efficiencies were analyzed. What can you tell us about this matter that will help us understand how you think the government should factor efficiency into merger reviews?

COMMISSIONER OHLHAUSEN: Looking at the acquisition, the facts of the acquisition itself, it would have created a duopoly in the U.S. market for glass containers for certain uses. The two remaining competitors would have controlled 85 percent of the relevant glass container market for brewers and 77 percent of the market for distillers. These are high, high concentrations by anyone's measures. It was effectively a three-to-two merger.

Further, the industry exhibited certain characteristics that from decades of prior experience we know are likely to lead to parties coordinating their competitive behavior, which, of course, hurts consumers. The industry had low demand growth. It had tight capacity. It had high barriers to entry. These are the kinds of things that we've identified in our merger guidelines as likely leading to what we call coordinated effects.

Our investigation also revealed that Ardagh and Saint-Gobain frequently went head-to-head in competing for customers. So we had that track record as evidence of competition between the parties. After the merger, this head-to-head competition would have evaporated.

When we're presented with such a strong showing of potential harm, we ask the parties to present extraordinary efficiencies to justify the transaction. And, in this case, I think the parties offered some broad efficiencies claims. I was concerned that they were neither merger-specific -- for instance, they talked about staff reductions that could have been accomplished without the deal. Or there were general operation efficiencies with little evidence that could be substantiated and verified. –There were also changes in some of the processes the parties were going to employ. And we said, well, you can do that separately right now. Why do you need to combine to do that?

Merger review always involves some level of prediction, both on what the harms will be and on what the efficiencies will be. Section 7 is an incipiency statute. Each side has to present estimates about the future impact of the deal. While it was suggested that the FTC in practice may require a higher showing of efficiencies from the parties than the showing of harm by agency staff, I think that's incorrect.

Before we take action, we have to have reason to believe that the transaction violates Section 7. And that's based on the evidence gathered by staff and the information submitted by the parties. Then we have to go to court and prove to the court that our reason to believe was justified and that the deal should be blocked.

Both sides are predicting what the outcome will be. In this case in particular, I think really the proof is in the pudding. What was the outcome here? The parties were very well counseled in this transaction. We litigated it for several months. But then we see what the final settlement was, the final outcome.

They settled by agreeing to divest six of the nine plants that were owned by Ardagh at the time of the deal, as well as the corporate headquarters of the Anchor Glass Corporation, which had been acquired by Ardagh in 2012. Essentially, Ardagh agreed to divest the bulk of the Anchor business.

That is actually a pretty good barometer of what the parties thought they were going to be able to prove in litigating this matter. I think it was a very good outcome for consumers. I feel confident that we took the right approach in this case.

JOE TIPOGRAPH: Okay. And what about the dissent? What was the dissent's concern? Why did you not share that concern?

COMMISSIONER OHLHAUSEN: Well, I'll let Commissioner Wright characterize what his concerns were. But I think there was substantial evidence that this deal would be anticompetitive for consumers. We have a three-to-two merger, and the case law supports the need to show extraordinary efficiencies in such a situation. Based on our guidelines, this transaction was likely to result in anticompetitive impacts for consumers. I thought we were applying the appropriate standard to our evidence as well as to the efficiencies that the parties needed to show. And again, it's always forecasting. Reviewing mergers is a predictive exercise, and I thought we applied the same standards to both sides.

JOE TIPOGRAPH: All right. Thank you for clarifying. A couple of months after the FTC elected not to challenge Men's Wearhouse acquisition of Joseph A. Bank, Men's Wearhouse announced on an earnings call that it would phase out Joseph A. Bank's competitive promotional pricing strategies in an effort to stabilize margins and drive revenue strategies. As an FTC Commissioner, what is your reaction to hearing this?

COMMISSIONER OHLHAUSEN: As you mentioned, the Commission conducted an investigation and ultimately closed that investigation without taking any action. Given the nonpublic nature of the investigation, I can't really discuss in detail the analysis that went into that decision.

But I would note that our BC Director Debbie Feinstein recently provided some insights into staff's analysis of the matter. As she explained, staff looked at two markets of potential concern. First was the retail sale of men's suits, and second, tuxedo rentals.

With respect to men's suits, staff believed that there are numerous competitors that sell suits across the range of prices of the parties' offerings. The two companies also had different customer bases, with Men's Wearhouse selling branded and private label suits to younger, trendier customers, and Joseph Bank selling only private label suits to an older, more traditional customer base. So I don't know where you buy your suits, whether you think you're the younger, trendier or the older more traditional customer.

With regard to tuxedos, Joseph A. Bank has been a relatively small player since its entry in 2010.The other thing is that as we looked at this, it looked like there are a lot of competitors in both of those markets.

To put this in context, there have been several mergers in the past year or so that I think have provided some interesting views into the dynamics between online and brick-and-mortar sellers. The Office Depot-OfficeMax case was particularly interesting because online competition for office supplies became very relevant in that market,

even though previously when we successfully blocked the Staples merger, we didn't think that online sales would be an effective competitive constraint at the time. That certainly changed. And in the Jostens-AAC merger, we found online competition was insignificant in the class rings industry. So each market is really different and has to be taken on its facts.

Ultimately, while it's not entirely clear what that statement means, and what the ultimate impact of phasing out those pricing strategies would be in the marketplace, closing an investigation, in my mind, suggests that we think that there is adequate competition from other players in the market.

JOE TIPOGRAPH: We'll have to see how it all shakes out.

COMMISSIONER OHLHAUSEN: We always do. Again, these are predictive exercises. We use our best evidence. We use our best tools. We use our experience and our judgment to try to draw the lines in the right place.

JOE TIPOGRAPH: Right. So switching gears to consumer protection, the FTC has taken an interest in mobile billing practices that allow children to make purchases without parental consent. The FTC reached settlements with Apple and Google and sued Amazon over such concerns. What in your view is the government's role when parents hand over their tablets or smart phones to their kids, but don't want to hand over their wallets? Or more broadly speaking, when do consumers need protection from their children?

COMMISSIONER OHLHAUSEN: That's a very cleverly phrased question. I have four children of my own. They're older now, but I understand some of the challenges parents face. I think in this context, the question was how would parents know to take steps? Many of these companies, Apple, for example, have good parental controls, no doubt about that. But how would parents know to use those parental controls in the first place? That's what we really focused on.

I think this is an exciting technology. I see in-app purchases as being part of the larger universe of mobile billing, mobile payments. These technologies can offer consumers great convenience and benefits that can spur competition. I'm a big believer in that. I think also mobile payments can lead to increased security over traditional payment systems. It really has a lot of benefits for consumers.

But the traditional consumer protections need to continue to apply. One of the most basic ones is that consumers need to know what they are being billed for and what event triggers that bill. And I think that was the problem here. The companies rolled out these new innovations, in-app purchases. Consumers were unfamiliar with them. It was a new channel for purchasing.

In my separate statement in the Apple case, I really focused on this. My concern wasn't that they rolled out a new technology and there was an unforeseen issue that arose with that. It's once that problem became manifest, what did they do to correct it? Did they take appropriate steps?

If you recall, there was a lot of coverage in the press about people asking where did these charges come from? How is there a couple hundred dollars worth of Smurfberries showing up on my bill? How did that happen?

And these companies continued to roll out their products without making any changes, even though there were all these reports about consumers who were unhappy about this. So that's what I really focused on. I'm not there saying, I know how to design products better. I certainly don't. It's really a performance standard.

If you're charging consumers, have you given them at least a one-time notice that they could be billed for that? Here's what you're being billed for. Here's the amount and here is the act that's triggering that bill.

For me, that was really the focus in this case. The remedies in the Apple and the Google cases really focused on having a one-time disclosure to parents that notified them that these charges could occur this way and gave them the ability to consent to them.

And it's not all-or-nothing. We're not saying, well, we don't like the fifteen minute billing window. That window is probably great for most consumers. So it's not that consumers are being protected from their children. They need basic consumer protections, which in the billing area means they need to know that this can result in a charge and they need to know what that charge is.

JOE TIPOGRAPH: In January, you dissented to a couple of consent orders that settled FTC advertising substantiation complaints. In your dissent, you suggested that adopting a one size fits all approach to substantiation could make consumers worse off by preventing useful information from reaching them. How useful to the consumer are claims that various companies make about their various products when all of those claims are not held to the same standard of being proven accurate?

COMMISSIONER OHLHAUSEN: The Commission has traditionally applied what we call the Pfizer factors – from a 1972 case involving Pfizer – to determine the appropriate level of substantiation required for a specific advertising claim. Those factors include the nature of the claim and the type of product it covers, the consequences of a false claim and the benefits of a truthful claim, the cost of developing substantiation for that claim, and the amount of substantiation that experts in the field believe is reasonable.

This is a shifting multi-factor test for a good reason. It would ultimately be to consumers' detriment for the Commission to require the same level of substantiation for all products. And that simply hasn't been our history.

What we're trying to balance in this approach is the value of greater certainty of information about a product's claimed attributes with the risk of the product itself. And you can't lose sight of the fact that having too high of a standard can suppress useful information about a product.

For example, the FTC, in particular our Bureau of Economics, did a very good study a number of years ago about fiber in cereals. At the time, the FDA had a very high standard for any kind of health claims involving fiber. Kellogg's decided to push the envelope a little bit.

It introduced a high fiber cereal with advertising claims about the benefits of high fiber in consumers' diets. And the really interesting result of that was the kinds of market responses that it engendered in making these claims about the link between fiber and the benefits to consumers' diets.

Consumers started buying that cereal. It increased fiber intake in consumers' diets, particularly consumers who were least likely to pay attention to government health messages. They'd read the back of cereal boxes. They were sitting there reading their cereal boxes.

You had this consumer benefit. And then other companies got in on the act and they said, oh, that's a benefit. Improving our product this way is driving consumer demand. So more fiber products were introduced. So you've got this beneficial cycle, with more information to consumers about a dietary benefit and more products available to them in the market.

I think it's important to keep in mind that if you're suppressing useful information to consumers, you might be stopping them from making good decisions based on that information. Advertising is a wonderful vehicle to convey that kind of information to consumers. So you have useful information that can improve their diets and then ultimately improve the offerings available to consumers in the marketplace.

That is why I think the Commission ought to pay close attention to the Pfizer factors. When you're talking about a safe product, such as food and in this case , the fiber in cereal, it doesn't make a whole lot of sense to hold advertising claims to the same level of substantiation as you might for a drug that has serious adverse side effects.

Rather than saying, well, everything should be at the same level, in my view, it's actually better, to take the approach that we historically have taken. That is, to ask, what's the risk to consumers from using this product, from eating a little more fiber in their cereals? That's a very low risk. What are the benefits of a truthful claim? The benefits for consumers knowing now that fiber can be such a good heart healthy part of their diet, that's a big benefit to consumers.

That's why I think that it's appropriate to strike a balance, based on the claims, the risks and benefits of the product, and the costs and reasonableness of the substantiation. The fiber cereal study is a wonderful example of FTC research that showed the benefits of useful, truthful information for consumers, as well as the risk of suppressing truthful information to consumers.

JOE TIPOGRAPH: Now let's tie it into the recent matter where you dissented. What was the product in that matter? Was it skin care products?

COMMISSIONER OHLHAUSEN: I'm sorry, which one?

JOE TIPOGRAPH: That is the GeneLink.

COMMISSIONER OHLHAUSEN: In GeneLink and some other recent cases, my concern is that, for certain types of health claims, the majority of the FTC has adopted a substantiation standard of two randomized controlled trials, that is, clinical trials.

That's just too high a standard for safe products, relatively safe products, like vitamins and foods. The two RCT standard is the FDA standard for drugs. We're not talking about drugs here. We're not talking about products that are being advertised as a substitute for medical treatment or that can have serious side effects. We're talking about

foods and vitamins. I think it's appropriate to have a lower substantiation standard than what the majority has required for some of these health claims.

JOE TIPOGRAPH: How expensive can the randomized controlled test be for a company?

COMMISSIONER OHLHAUSEN: Well, sometimes it can be very expensive. It depends on the product. If something has a long-term effect, an RCT would be extremely expensive. A lot of the dietary guidance in the U.S. is not based on RCTs. It's based on long-term observational studies? The Framingham Heart Study, for example, which asked: how healthy are you? And what do you generally eat?

One RCT or two RCTs is not appropriate for all products. It is not even what the FDA requires for a lot of food claims. Our dietary advice is not based on RCTs.

JOE TIPOGRAPH: Privacy has been a major issue at the FTC over the past decade. And this year, the FTC released the data broker's report. In your opinion, when consumers provide information to a particular entity for a particular purpose, what role should the FTC play in managing and protecting their expectations about who else might gain access to that information and how it might be used?

COMMISSIONER OHLHAUSEN: Looking at the FTC's core authority in the consumer protection area, we have deception and we have unfairness. Let's take deception first. If a company's made a promise to a consumer about what information it's going to collect, how it will use that information, how it will share it, the company should be held to that promise. Our role is to make sure consumers get the benefit of the bargain. Companies have to follow their privacy promises.

We also have our unfairness authority. And unfairness is not based on representations to a consumer. Rather, it's based on a substantial harm to the consumer that the consumer cannot avoid and that is not outweighed by countervailing benefits to competition or to consumers.

Our unfairness statement defined what a substantial harm is. It looks at financial, medical data, health and safety information, information about children, quiet enjoyment of home, those kinds of things. But it also says that more subjective types of injury, like emotional injury wouldn't necessarily be unfair under the FTC Act.

Putting that into practice, we have brought cases against companies that didn't make a promise, but that did collect sensitive information, such as precise location data about consumers, and then shared it with third parties – without giving consumers appropriate notice or getting their consent.

A recent example is a case we brought against Golden Shores, which advertises a flashlight app. And it worked fine as a flashlight. But what the company didn't tell consumers was that it was collecting their precise location information and sharing that with third parties. In that area, I think we have an appropriate role to safeguard a baseline protection for consumers of their most sensitive information.

I already mentioned that in May, we issued our data broker's report. It's titled Data Brokers: A Call for Transparency and Accountability. One of the things that we recommended in the report is that Congress consider

requiring brokers to be more transparent about how they use consumer information and give consumers more insight into and control over that use.

The report also suggests that consumer facing entities, the ones that are collecting the information from consumers, give consumers notice if they're going to share that information with third parties, such as data brokers.

The report focused on three products, including marketing products, risk mitigation products, which involves information used to decide if the consumers engaging in transactions are really who they say they are, and people search products. We had different recommendations based on those different products.

The FTC plays an important role in protecting consumers and their privacy. And, of course, we do a lot in the data security area through our enforcement actions. But I don't see my role as necessarily taking choices away from consumers in this area. It's more providing baseline protections for their most sensitive information and then making sure that privacy promises are followed.

JOE TIPOGRAPH: Earlier we discussed some of the FTC's accomplishments in its first 100 years. I have to imagine with all of the work that you've done related to this occasion that you've given some thought to what might lie ahead for the next century. Now, I promise not to find you in 2114 and hold you to anything you say here, but I'd love to hear how you think the agency's role in American commerce might evolve in the long run.

COMMISSIONER OHLHAUSEN: The other day, I was outside our building and was looking up at the friezes above the doors (see below). They represent areas of commerce, such as industry, shipping, and agriculture, that were important in 1938, when our building was constructed. We were wondering, if these were being carved today, what might they include to best represent the work that this agency does?

One of the friezes today could be a consumer taking a lifesaving medication or getting a lifesaving treatment for all the work that we do in the health care area. It could be somebody looking at his or her smart phone and buying something online or keeping in touch with family members. Or a consumer pumping gas, perhaps, given what we do in the energy space, and in oil and gas in particular.

The FTC has a very broad and flexible mandate, and we've been able to keep up with the times. We've been able to keep up with the changes in industry, the changes in technology, and have continued to pursue consumer interests in those spaces. So those more modern friezes would be good physical representations of what we do.

To answer your question on the next 100 years, I actually want to talk first about the FTC at 100 Report that then-Chairman Kovacic issued in 2009. I think that report provided a very good framework for measuring our success over the next century. And I've tried to put the principles discussed in the report into action as a Commissioner. I've been very fortunate being able to draw upon that experience as the person who led the FTC at 100 efforts under Chairman Kovacic. Based on the principles set forth in that report, I've made some recommendations. I hesitate to say for the next 100 years, but at least for the next decade. My recommendations are included in an article that is part of a recently published tribute to Bill Kovacic and available on my speeches page on the FTC website.

So what are some of these recommendations? One is staying focused on our core competencies. On the antitrust side, that means focusing on developing the antitrust laws through our competition policy and administrative litigation tools, and particularly how those two can work together, leading to targeted enforcement and the improvement of the antitrust laws.

However, to the extent the Commission wants to rely on its standalone Section 5 authority, I think we need to provide guidance on that authority through a policy statement or some other comparable means. I talked about the unfairness statement and the deception statement. Those consumer protection powers were very controversial at the time, but the agency issued these bipartisan statements that have really guided our enforcement for the past thirty or so years in those areas. And they have become much less controversial. So I think that provides a good framework if we do want to use Section 5 more expansively on the competition side. Last year in a speech before the U.S. Chamber, I laid out some guidelines that I think are appropriate in using Section 5.

On the consumer protection side, I think we should focus on hardcore fraud to consumers. That is very damaging to consumers, and often it's targeted at some of the most vulnerable members of our society, people who are non-English speakers, new immigrants, or who are otherwise vulnerable. They've lost a job, they have poor credit. So I think that's a very important area to focus on. Billing is another important area. It's a core issue for consumers when they've lost money or don't know what they're being charged for. Looking ahead, privacy will be a continuing concern for consumers. New technology is great, but we've seen increased problems in the data security area.

I also think defining appropriate levels of ad substantiation will remain an important part of our efforts going forward because of the potentially great benefits to consumers of having more information about products, but also the need to balance that with the risks of that information being incorrect. Many of our cases involve the same fundamental issues, but they are raised in different contexts. Going back to one of those friezes that I mentioned,

the consumer looking at his or her smart phone, we have a common carrier exemption in our statute that removes from our jurisdiction common carriers acting as common carriers.

That made sense at a time when you had a monopoly provider that was pervasively regulated. The history of the communications sector has been big moves towards greater competition in that space, new cross-platform competition. We're in a very different world today than the Ma Bell monopoly of old.

So I don't think it makes sense for us to have this kind of limitation on our jurisdiction anymore. We've brought some mobile cramming cases recently. I think they've been very effective. We've brought many, many landline cramming cases. We've tried to be vigilant about consumers' interest as much as possible in this space, but I think it's important that we continue to be able to act, to protect consumers' interests. Because that's how they're transacting their business now. That's how they're communicating. They're running their lives through these telecommunications-enabled devices. So I don't think it makes sense for consumers, to be honest, to continue to have the common carrier exemption in our statute.

One last thing I want to mention for the next 100 years is the need to continue our international efforts. The economy has become more and more globalized, and that's just going to continue. We've engaged in a lot of international outreach for developing countries, as well as established countries, to move towards internationally recognized norms in competition and consumer protection. We will need even more of these international advocacy efforts in the future as the number of competition and consumer protection agencies continues to increase.

JOE TIPOGRAPH: Okay. Well, we covered a lot of ground today. Thank you very much for sitting with me here.

COMMISSIONER OHLHAUSEN: Oh, it's my pleasure. Thank you very much for your thoughtful questions.

JOE TIPOGRAPH: Thank you.

(END OF TRANSCRIPT)