

Taking the humble approach: An in-depth Q&A with Maureen Ohlhausen ftcwatch.com

Federal Trade Commission member Maureen Ohlhausen thinks that regulators are at their best when they approach issues with humility. As the panel's lone Republican (a seat on the commission is vacant), she is increasingly viewed as the leading candidate to be the agency's next chairman if a Republican is elected president.

When asked about that possibility in a nearly hour-long interview, the affable commissioner declined to join the speculation, saying she would be "getting ahead of myself" at a time when Iowa caucuses haven't taken place. It's no wonder that Ohlhausen is so well-regarded, as she has devoted much of her career to the FTC.

Ohlhausen served on the staff for 11 years before leaving for private practice and then returning in 2012 as a commissioner.

Edited excerpts of the interview follow:

FTC:WATCH: *How has the FTC changed as an institution since you started?*

Ohlhausen: The big substantive change took place in the late 1970s and early 1980s, before I arrived here, with the increased use of economic analysis in competition matters. More recently, I have seen that lens used to view consumer protection issues. That is a positive change, and it has gradually gotten more and more important as our tools have gotten better.

Fortunately, some of the best things about the FTC remain constant. When I came here I had been a staff attorney and law clerk at the DC Circuit, and when I interviewed at the FTC, I was immediately attracted to the strong sense of community. That continues to be the case today.

FTC:WATCH: *Is it a problem having just four commissioners?*

Ohlhausen: I don't see it as a big problem, though I would love to get another Republican colleague. But I haven't seen it be a particular problem yet. I suppose it's possible we could come to a situation where there is a 2-2 deadlock. We had some of those votes when we recently had two Democrats and two Republicans. One of the good things about the agency is that we do have a history of consensus building. That's very important to me.

FTC:WATCH: *Describe the culture among the four of you.*

Ohlhausen: We're a collegial group. We talk to each other within the limits of the Sunshine Act. We talk to each other one on one, and our advisers talk to each other. Having worked at the DC Circuit, that's a model for me. You have a group of people who are serious about the law and think about it very deeply and come to a decision on a matter. And then you move on to another case. There are times when we will be in strong agreement, and times when we will be in strong disagreement. That's the reason we are a commission. If unanimity was expected in every case we would have a single head. The idea of having a commission is to push towards consensus. And even when consensus isn't possible, the important legal and policy issues get aired. That has real benefits.

FTC:WATCH: *One contentious area involves Section 5. You wrote a very strong dissent to the policy statement. Former Commissioner Joshua Wright said the statement puts constraints on the agency in the*

future, a rare thing for a government agency to accept. Why don't you see it that way?

Ohlhausen: I think I articulated my objections to the statement pretty well in my dissent. Let me just say that the few principles included in the policy statement only amplify the existing concerns that are out there about the expansive use of Section 5. I also think we should have put out the statement for public comment. We could have gotten some useful input from key stakeholders.

FTC:WATCH: *Chairwoman Edith Ramirez said everyone's position was pretty well known.*

Ohlhausen: The commission had held a workshop on Section 5, but it took place before any of the current commissioners were serving, so it would have been useful to update our understanding and to hear from outsiders. I have long supported public input on these types of policy changes. Indeed, my very first dissent as a commissioner was on the withdrawal of the 2003 disgorgement policy statement. I argued that we shouldn't have withdrawn that statement without public comment.

FTC:WATCH: *Speaking of which, is disgorgement ever appropriate?*

Ohlhausen: I supported it in *Cephalon*, a clear case of fraud against the patent office. But I'm concerned about the commission's pursuit of disgorgement more broadly. We only get disgorgement if we go to federal court, but if we forego our Part 3 authority to go to court just to get money, I am afraid that will tilt us away from using what I think is one of our unique tools to advance antitrust law, our administrative litigation.

FTC:WATCH: *You've been pretty outspoken about your concerns that the Federal Communications Commission is encroaching on the FTC and you've said the FCC's bar for taking action may be lower than the FTC. Why are you worried?*

Ohlhausen: We have been a very active enforcer of privacy and data security. I'm concerned about us being out of that space in part because of changes in definition of what is a common carrier and because we are exempted from regulating common carriers. This may harm consumers. We are primarily a law enforcement agency and the FCC is primarily a regulatory agency. They act through rules on things like dividing up spectrum. We are well-constituted to bring enforcement actions, so I am concerned about us not being there to bring such actions on behalf of consumers.

The other problem comes down to competition issues. One of the Internet's biggest changes is that previously separate players in the telecom, communications and entertainment space are now competing against each other in a way they haven't in the past. If they are going to be subject to very different rulebooks, depending on whether the FTC or FCC is overseeing them, that could cause some competitive distortions in the marketplace, particularly involving data. If we are going to have two different regulators in this space, based on the FCC's decision to reclassify broadband, then we ought to be applying similar standards under similar approaches. The FTC's approach has worked pretty well: focus on actual harms, focus on deception and unfairness. It has allowed a lot of innovation to take place without us dictating business models.

FTC:WATCH: *Speaking of the FTC's approach, you've been a big proponent of regulatory humility. Has the FTC been sufficiently regulatorily humble?*

Ohlhausen: One of the values of having the case-by-case enforcement approach is that it is very focused on proving actual or likely harm — whether this is in the antitrust world or consumer protection world — which necessarily avoids some of the problems that I see when you don't have regulatory humility. It's

very difficult to accurately predict far into the future and know what all the harms and benefits may be. That's why regulatory humility appeals to me. The case-by-case approach has allowed us to be incremental, rather than imposing ex ante industrywide regulation.

FTC:WATCH: *What would you like to see Congress do in the area of antitrust or consumer protection?*

Ohlhausen: I would like to see Congress clarify FTC privacy/data security authority over the Internet. This could be done through a repeal of the common carrier exemption, which the commission has long supported on a bipartisan basis. Such clarity is even more important following the FCC's reclassification of broadband as a common carrier service.

I also would like Congress to start to take a look at areas where I think the commission has gotten off track, such as some of our decisions in the advertising enforcement areas. I recently issued a partial dissent in the ECM Biofilms case because I think the application of "substantial minority" in claim construction has gotten a little out of whack. On ad substantiation, in the POM [Wonderful] case I also dissented in part, and the DC Circuit saw it my way. We could get some further congressional guidance on that.

FTC:WATCH: *Could you elaborate on what guidance you would seek?*

Ohlhausen: On advertising substantiation and the remedies that follow, what evidence do we have to provide to show that consumers took a specific claim away from an ad? And then how much evidence does an advertiser have to provide to show that their claim was truthful?

FTC:WATCH: *You've been in the majority on some of these cases and in the minority on others, such as the one on apps detecting cancerous moles. How do you draw the distinction?*

Ohlhausen: The mole app cases were particularly interesting. I looked at the claims very carefully and the apps never claimed to be a replacement for a doctor. In fact, the whole purpose of the apps was to try to put you together with a dermatologist. So I was concerned that this over-reading of the claims would require the apps prove they were as effective as a doctor. This would actually make consumers worse off by discouraging apps in the health area. One of the things I try to do is to take a hard look at what those claims actually say. Interpreting claims broadly may actually make consumers worse off. Sometimes a claim might be disputed in the scientific community, but there is no such thing as settled science. If we say "there's a dispute so no one should talk about it," I don't think that makes consumers better off. And that's the yardstick I try to use: Are we giving consumers the information they need to make their own decisions?

FTC:WATCH: *Your former colleague Joshua Wright says the Bureau of Economics is outgunned, outmanned and not listened to sufficiently. Do you agree?*

Ohlhausen: I have found that the Bureau of Economics has played a very important role in our cases. One of the strengths of the FTC is that we do have a separate Bureau of Economics and that they make their own separate recommendations. Our economists are not supervised by lawyers and they are not paid based on whether they please lawyers or not, unlike at other institutions. I always seek the bureau's advice, and it has always been very forthcoming. There are times when its concerns, which often track mine, may not always carry the day, but they are always raised and always part of the discussion.

FTC:WATCH: *Does the FTC too often get distracted by hypothetical harms?*

Ohlhausen: It happens from time to time. It goes back to my regulatory humility point. We should be focusing on real and likely harms. It is much harder to predict whether the hypothetical harms, the

theoretical harms, will happen. Or if they do happen, whether there will be a new business model or new technological tool that will ameliorate them. It is better to focus on real harms — it's a better use of our limited resources.

FTC:WATCH: *The SMARTER Act (or in its longer form the Standard Merger and Acquisition Reviews Through Equal Rules Act) has gained some momentum — how big a deal is that to you, especially given the big disagreement between you and Chairwoman Ramirez on its merits?*

Ohlhausen: I do think that the FTC and the Department of Justice should be applying the same standard, and for the most part they do. That was one of the things that I really disliked about the Section 5 policy statement — widening that gap between the FTC and DOJ rather than narrowing it. I think we should be applying the same PI [preliminary injunction] standard as DOJ. Even though we generally do, to the extent that there is some perception that we don't or that the courts will give the FTC an easier path to a PI, I would support a bill making it clear that it is the same standard. With the Part 3 [administrative trial] issues, there was this question of whether, if we lost a PI, would we continue our Part 3 case. I really championed our internal rule change earlier last year to make it clear that this was not the default situation — in fact, when we have lost a PI hearing in court we haven't proceeded in Part 3 for 20-something years.

The presumption in the rule should follow the normal practice. Normal practice hasn't been to proceed and the idea behind the rule change was to reaffirm that that was going to continue to be the normal practice. I think our Part 3 authority has been very useful in conduct cases and in consummated mergers.

I wouldn't want to see us lose that. Much of the concern driving the SMARTER Act is that we have undue leverage because of timing considerations for unconsummated mergers — so to the extent that leverage is not an issue in conduct cases and consummated mergers I don't think there is any reason to change our authority there. If a bill were passed, I would certainly want to make sure that it maintains our independent litigating authority, and that we are able to settle cases on our own. I think that is very important for the FTC. I would also want to see as much clarity as possible on what the Part 3 carve-out would look like in any bill.

FTC:WATCH: *Some Democrats on the Hill contend that one reason behind the SMARTER Act is to defang the FTC's merger review authority. Some even thought that it might lose it altogether. Do you see it as an effort to weaken the agency?*

Ohlhausen: Not necessarily weaken the agency but make sure that there is more of a level playing field between us and DOJ. One of my concerns is how deals do get divided up between the two agencies. It's roughly divided up by subject matter expertise as an administrative convenience. It shouldn't be a liability trigger. It shouldn't be that if your deal goes to DOJ, it gets through; if your deal goes to FTC, it doesn't get through because we are applying a different standard. It should be that we apply the same standards, so that it is not outcome determinative whether you go to FTC or DOJ. So I don't think it is designed to defang the FTC, but again the impulses behind the SMARTER Act are to make it consistent with DOJ.

FTC:WATCH: *Are the antitrust agencies aggressive enough? Revered economist John Kwoka found that some mergers that ought to be challenged aren't. He also found that remedies often don't address problems such as subsequent price hikes.*

Ohlhausen: I think that we have been pretty effective and well-targeted in our merger enforcement. It is very hard to predict the future — so occasionally we may get one wrong in either direction, under or over. I would like to see when people raise those arguments, specifics of what we didn't do that we should have done or what we did that we shouldn't have done. I think he was really talking about not worrying too much

about over-enforcement; and in the merger area I don't think that we have had a huge tilt towards over-enforcement during my tenure.

FTC:WATCH: *You dissented in US Foods-Sysco. Given the FTC's victory in federal court, do you reflect on your vote or how do you react?*

Ohlhausen: The reason I voted no in *US Foods-Sysco* was because I thought, taking into account the proposed divestiture that we had before us, the efficiencies outweighed the anticompetitive effects of that transaction. The District Court obviously disagreed with that view. I did think that an unremedied transaction would have been worth challenging. It is always good to know what courts are thinking and how they approach things, how they weigh the evidence from different groups of customers.

FTC:WATCH: *What role should privacy considerations have in merger reviews?*

Ohlhausen: Non-competition factors should not figure into a competition analysis because otherwise where does it stop? One country may say, "we really care about local employment effects" and another country might say, "we really care about state enterprises." Now that isn't to say that privacy can never be considered in a merger analysis, but it has to be impacting competition. So if you have, for example, two competitors who are both competing on their really great privacy protective products and they were merging, maybe they could have market power. So we would consider it in that situation.

A couple of things: one, companies are always going to have to follow the privacy promises that they made to consumers, and two, if it is going to lead to a substantial harm even where there wasn't a promise, that is what the consumer protection laws are for. So why distort a competition analysis when you have consumer protection — deception or unfairness — that can address any harms that may occur down the road.

FTC:WATCH: *How do you see self-regulation vis-a-vis government regulation?*

Ohlhausen: A couple of things: self-regulation can be a particularly useful tool in some of the advertising areas where the First Amendment would limit our ability to bring an enforcement action. Additionally, self-regulation in fast-moving industries can be a very flexible tool compared to government regulation. But self-regulation has to be effective and it has to be backed up by enforcement. So if a company says I am going to follow these self-regulatory guidelines and it doesn't, we should bring an enforcement action if there are substantial consumer harms. Or, even if they are following self-regulatory guidelines and they are still causing a substantial harm that meets the unfairness test, the FTC should be able to and will bring an action in that scenario.

FTC:WATCH: *What about the agency's work in healthcare cases, especially in states with certificates of need. Any thoughts on recent trends in this area?*

Ohlhausen: Obviously healthcare competition has been a huge part of our enforcement agenda. That includes encouraging more competition — not just stopping anticompetitive practices, but encouraging competition. For example, we — the FTC and DOJ — just issued a letter to the governor of South Carolina. The state is considering repealing its certificate of need laws, and the governor asked for our views on that issue.

FTC:WATCH: *Are many states moving to do that?*

Ohlhausen: I think several states have been considering whether to get rid of their certificate of need laws. We have now filed competition advocacies in Virginia, North Carolina, and South Carolina. States are wise

to look at CON laws, which are often premised on providing indigent care which is definitely a laudable goal, but these CON laws seem like a very blunt tool that is not particularly well-designed to increase indigent care. In general, I am always concerned about situations where you need your competitor's permission to enter the marketplace. I call it the "Brother, may I?" problem. And certificate of need laws are a prime example of that.

FTC:WATCH: *What has surprised you most about being commissioner versus having seen how the commission works as a staffer?*

Ohlhausen: The thing that has surprised me the most — and I guess I should have known this — is how all-consuming this job really is. So I have four attorney-advisers and they each have their own work stream and it all flows up to me. I was a partner in a law firm and I think I frequently put in more hours as a commissioner. At the same time, this has been one of the greatest, if not the greatest, job that I have had in my career. That was not a surprise to me.

FTC:WATCH: *On Safe Harbor, are you worried that the FTC could get cut out when this is resolved?*

Ohlhausen: I am not really worried about us being cut out. We have been an important part of the approach. The administration obviously is negotiating it, but the FTC has been seen as an important part of that team. Obviously we were the enforcers of Safe Harbor and so much of the concern animating Europe in their questioning the Safe Harbor is whether we have sufficient privacy enforcement in the US. We're the premier privacy enforcer, so we have a good story to tell there. I am not worried about the FTC being cut out.

FTC:WATCH: *So the FTC has been sufficiently aggressive in this area?*

Ohlhausen: I think so — particularly compared to Europe. We don't have the same overarching privacy law but we have a lot of sector-specific privacy laws and then everything else falls to the FTC. We have 100 or more cases — between privacy, data security, spam and spyware. That's a pretty good record.

FTC:WATCH: *You don't need a change in privacy laws?*

Ohlhausen: I don't think we do. I know my colleagues may think differently.

FTC:WATCH: *What are you proudest of?*

Ohlhausen: That's a tough one. I would say — it sounds hokey — but just having the chance to serve. There were days when I have thought what a lot of responsibility it is — for example, for me to say these two companies can't merge because I don't think it's good for consumers, or I am going to give the vote to authorize a suit against a big, well-regarded company because I think it violated the consumer protection laws.

FTC:WATCH: *Has your regulatory view changed over the years or have you always had a similar view on regulatory issues?*

Ohlhausen: I have always had the view that we need to be humble. In a position of responsibility, some people give off this persona that they know everything — but no one does, of course. When I was working at the DC Circuit for five years, that made me think very hard about regulation and law. Then I came to the

FTC and have thought hard about how we decide when regulation is appropriate. From what I have seen in the world and being a mother of four and being married for 30 years, you never know what life is going to throw you. So I approach things with humility about predicting the future.

—Claude R. Marx and Kirk Victor

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Private monopoly is indefensible and intolerable, and our program is founded on that conviction', Wilson said.



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