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# FTC Commissioner Wilson on COVID-19, AbbVie/Allergan and More

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And **Kenneth Schwartz**

For this month's column, we virtually sat down with FTC Commissioner Christine Wilson for a conversation in which she offered her thoughts on a wide array of topics, ranging from the proposed merger moratorium and price-gouging legislation to the recent AbbVie/Allergan consent agreement and beyond. Below are excerpts from the interview.

**Ken Schwartz:** Commissioner, thanks so much for taking the time to join us this morning. We really appreciate it.

**Karen Hoffman Lent:** Good morning Commissioner Wilson, thank you from me as well for agreeing to participate. We are excited to talk to you and to take a new twist on our monthly column. Just to start us off, I'll ask a very broad question: How has COVID-19 impacted your role as a commissioner?

**Commissioner Wilson:** The Commission moved to telework beginning the week of March 16th. It happened almost overnight, and it was an amazingly seamless transition. The agency has done a remarkable job of keeping all of the balls in the air and continuing in an incredibly productive way despite the fact that parents are at home with their kids while they are working. Productivity has not declined. And that is a sign of the excellent, dedicated and committed folks that we have working to protect consumers at the agency.

The Commission has changed how various aspects of business are handled. We announced in mid-March the FTC was implementing an electronic filing system for Hart-Scott-Rodino pre-merger filings and that the agency would not be granting Early Terminations (ETs) of the 30-day HSR waiting period. We stayed Part 3 proceedings essentially across the board. But despite the change in procedures, work flow is essentially unchanged. By the end of March, the FTC had announced ETs would again be granted in appropriate circumstances, but noted that ETs would be available "on a more limited basis than had historically been the case"—meaning granted in fewer cases and more slowly.

We have had the regular flow of consent and merger challenges on the competition side of the agency. We issued a consent in Danaher's acquisition of GE's biopharmaceutical business and AbbVie's acquisition of Allergan. We launched a Part 3 challenge of Altria's acquisition of a 35% stake in JUUL and associated agreements. Commission investigations are proceeding, although there are some new twists and wrinkles with respect to conducting depositions and investigational hearings remotely.

And one last note on this topic. The Commission also takes into account the impact of the pandemic on its stakeholders. We are cognizant of the fact that businesses are having difficulty accessing some of their documents at headquarters. We also are cognizant of the fact that if we issue proposed rule-makings, it may take longer for stakeholders to submit comments, so we are planning to offer extensions of comment periods when necessary.

**Karen**: I'm wondering, substantively, has the crisis affected the types of issues that you're interested in as a commissioner? One of the things we thought about was price gouging and whether you thought the FTC should use its powers under Section 5 to address price gouging.

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**Commissioner Wilson:** Members of Congress have urged the FTC to use its authority to challenge price gouging, and I disagree. I think price increases usually reflect the forces of supply and demand. In my view, there is no role for the Commission to challenge price increases that reflect increased demand or decreased supply. I believe those signals are necessary to prompt beneficial market reactions like increased production. If there is a mask shortage, and mask prices are increasing precipitously, that tells mask manufacturers they need to add another shift to produce more masks. So I am not in favor of using the FTC's authority to address price gouging.

In terms of other issues on my radar, I think what's happening in terms of deregulation is incredibly beneficial. You see authorities thinking seriously about rolling back certificate of need constraints for building new hospitals or expanding existing hospitals. You see a lot of thought given to rolling back occupational licensing restrictions and more thought given to implementing reciprocity across state lines. You see many aspects of regulatory regimes that restrict the use of telehealth being lifted to allow people to "visit their doctors" virtually.

In terms of other issues that the coronavirus pandemic has brought to the forefront, I have renewed my call to Congress for comprehensive federal privacy legislation. And the FTC is incredibly active on the coronavirus fraud and scam front.

**Ken:** There has been a lot of public discussion and congressional debate over whether merger reviews should be lengthened, HSR waiting periods lengthened or even whether mergers should not be filing during the crisis. I know you've been very public on this issue: You've come out against requests to halt merger reviews. Can you weigh in on your views on what's driving this debate?

**Commissioner Wilson:** I think this is Exhibit A for the admonition to never let a good crisis go to waste. There are lots of voices out there who have called for bans on mergers of a certain size or in certain industries, and I think people are now using the pandemic as cover to advance ideas that didn't gain traction pre-pandemic. Taking this step is unnecessary because the conditions created by the pandemic haven't altered the Commission's ability to investigate and, if necessary, challenge mergers. Certainly people shouldn't be arguing that mergers need to be halted because the FTC and DOJ are incapable of doing their jobs right now. And, substantively, we haven't changed the standards that we're applying.

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At most, as I mentioned at the outset, the pandemic may require longer periods for investigations. It is difficult for companies to access some of their documents that are available only in offices, and the challenge of interviewing industry participants who are themselves working remotely is one that we have to overcome. To address some of the concerns, the Commission has modified timing agreements, and that action gives the FTC up to 120 days to review transactions after the parties substantially comply with a second request.

This push for a merger moratorium is ironic because the number of transactions notified through the pre-merger office has fallen significantly. For the three weeks before the Commission began working remotely, on average, we had 42 transactions filed each week. The most recent three weeks, we had an average of approximately 15 transactions filed each week. So there has been a precipitous decline in the number of filings, which further takes away any argument that we're not able to thoroughly investigate at this time.

I think frankly it's essential that M&A is available to businesses as one option to address financial difficulties that are created by the pandemic. As demand for many products has fallen, businesses may need to find buyers for their companies to prevent the layoff of many employees. Obviously, we're not in the business of preserving jobs. We are in the business of making sure there is no harm to competition. But many of the people who are pushing for a merger moratorium are the ones who are very interested in including job loss in the FTC's analysis of whether a merger should be permitted to proceed, so I think there's a little bit of irony there. And so I will continue to say that a merger moratorium or a merger ban is absolutely unnecessary.

**Ken:** I appreciate that. The takeaway I would have as a practitioner or a client is it's just business as usual at the FTC notwithstanding COVID.

**Commissioner Wilson:** That is absolutely right, it is business as usual.

**Ken:** Let's move to a couple of hot topics that aren't COVID related. In AbbVie/Allergan, as you referenced earlier, there appears to be a fundamentally different approach to merger analysis and evaluating divestiture buyers between the majority and the minority. What is your perspective? Can you comment on what you're seeing at the Commission?

**Commissioner Wilson:** Yes. First, I want to start by noting that the statements issued in the case are strongly worded, but there is no animosity among the commissioners. I continue to speak at least weekly with every one of my colleagues, and the same is true for them as well. The Commission remains a collegial body with open lines of communication among its members.

I will tell you that I approached the recommendation of this case with a slightly different perspective than my fellow commissioners. When I was in private practice, I represented pharmaceutical companies in transactions. I actually sat across the table from the same Mergers I and Compliance staff that investigated AbbVie's acquisition of Allergan and crafted the divestiture. I can personally attest to their diligence when they're investigating a case and negotiating a consent agreement. They are committed, diligent, thorough, meticulous and exacting. They leave no stone unturned.

From my private practice experience, I know all of the work that went into pulling Staff's recommendation together, and that perspective is very helpful to me in assessing the recommendations that Staff make. As we noted in our statement, I view as mistaken the dissent's claims that Staff's analysis in the investigation was incomplete and insufficiently rigorous. AbbVie/Allergan isn't the first time this Commission has had a split vote in a pharma merger. We saw this in Bristol Myers Squibb/Celgene. There, Staff listened to the questions and concerns that were raised by the dissenting commissioners. Staff did everything that was asked of them, investigated every theory of harm that was raised by the dissenting commissioners and still did not uncover evidence of additional harm.

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Based on this track record, I think it is unfortunate that my dissenting colleagues are calling into question the thoroughness and the commitment and diligence of Staff.

Going more to the substance, Commissioner Chopra expressed concerns about the divestitures that he believes reduce the likelihood of success. I think his concerns frankly are belied by the evidence. For example, he asked whether a product in development can be expected to be completed. But here, the product in development was being returned to the company that was the original developer of the drug, AstraZeneca, and the key personnel are still at AstraZeneca. Clinical trials and ramp-up for production are conducted by third parties, so there would be no ongoing entanglements with the merged firm. The merged firm will make payments to AstraZeneca that are contingent on AstraZeneca continuing to develop the product. And the structure of the divestiture agreement—these contingent payments for development—are modeled on similar past arrangements, which have succeeded in bringing drugs to market.

Commissioner Chopra also questioned whether Nestle was an appropriate buyer for Zenpep because Nestle is not a large pharmaceutical company. Ironically, in BMS/Celgene, Commissioner Chopra expressed dismay that divestiture assets usually go to large pharmaceutical companies. In this case, Staff listened to Commissioner Chopra's questions, investigated his concerns and provided answers to each of his questions. I listened to Commissioner Chopra's concerns over a number of weeks. I conducted my own inquiry regarding Nestle, and I became convinced that his concerns were inconsistent with the evidence.

Unfortunately, I think this is not a disagreement about the substance of any particular merger. This is a desire to see all pharma mergers banned in keeping with a general desire for a moratorium on mergers. It's in keeping with the Open Market Institute's calls for a ban on pharma mergers. And so I think you're going to see a pattern of dissents in pharma mergers, just as you've seen dissents in a lot of other areas.

**Karen:** You mentioned data privacy at the outset when talking about some of the issues that you've been more focused on during the crisis. Are there specific things that you'd like to see implemented with respect to data privacy?

**Commissioner Wilson:** Let me take a step back and explain why I think we need federal privacy legislation because, as you may know, I am a huge fan of free markets. I am not a fan of a regulatory approach, but here I believe

federal privacy legislation is necessary. There is an emerging patchwork of state laws here in the U.S., and a growing number of privacy laws in other jurisdictions. This patchwork creates significant uncertainty and potentially conflicting obligations for businesses. In addition, consumers need transparency about how their data is collected and used and shared. Finally, there are emerging gaps in sector-specific approaches that are created by evolving technologies.

Another question that people ask is whether the FTC should enforce any new privacy legislation or whether we should have a new data protection agency, like some other countries. My response is to note that the FTC has brought hundreds of privacy and data security cases. We have conducted dozens of hearings and workshops and drafted dozens of studies and reports. There is an immense amount of expertise on these issues at the FTC, and it just wouldn't make sense to use taxpayer dollars to stand up another agency when the FTC already has that expertise.

To your specific question about what I would want to see in legislation, I would like to see the FTC granted jurisdiction over non-profits and common carriers. With respect to non-profits, schools and hospitals have a great deal of very sensitive information, but right now, the FTC has no authority over non-profits. I think that limitation should be removed. Same with common carriers. Any new legislation should provide for civil monetary penalties so that we can impose civil penalties even for first-time violations. I think that legislation should grant targeted APA rule-making authority. I'm not in favor of extensive rule-making, but we have seen in the privacy arena—for example, children's privacy, COPPA—that targeted rule-making allows us to update legislation that takes into account evolving technologies.

Wearing my dual hat as both a consumer-protection enforcer and competition enforcer, the law needs to take competition into account. What we've seen with respect to GDPR is that it has had a significant impact of diminishing competition, increasing market shares of large incumbents and decreasing innovation and venture capital investment. I would be very concerned about something like that happening in the United States. So I want Congress to preserve consumer privacy, but at the same time, do so in a way that continues to promote competition and foster innovation.

Then there are two issues that appear to be nearly insurmountable hurdles thus far: whether there should be a private right of action and preemption. I do not think there should be a private right of action. I don't want to create yet another way for plaintiff's lawyers to line their pockets at the expense of consumers. And I do want to see preemption because the internet doesn't stop at state borders, let alone national borders. I think preemption is the way to go.

**Ken:** I was thinking about differences from your perspective, ten years ago when you were Chairman Muris' Chief of Staff to today. Every commissioner now has a Twitter account, what are the benefits or drawbacks of that?

**Commissioner Wilson:** I actually waited a year before joining Twitter. I opened a Twitter account and launched it on my first anniversary in office. I had not intended to do that, but frankly I became convinced that Twitter is a useful source of substantive dialogue among thought leaders. I think it adds a facet to the dialogue that takes place about the work that the Agency does. Sometimes it feels more destructive than constructive, but we have free speech in America. There was a guillotine gif that was directed at me a few weeks ago about a statement that I wrote in a case called *Progressive.* I will proudly count that as my first death threat in office.

**Karen:** If there is anything else that you want to add, we're happy to give you that opportunity. Clearly you spent some time getting this all together, and we greatly appreciate that.

**Commissioner Wilson:** My closing thoughts would echo where I began. The FTC is an amazing institution. One of the reasons that I have come back to it again and again during my career is that the people are so dedicated to the mission of protecting consumers. I have been awed and inspired by the excellence and commitment of Staff during these incredibly uncertain times. It is a community of people who care deeply about their work and about their mission, and they have doubled down during this time. It's a great reminder of everything that is good and wonderful about working with this excellent team of people.