Interview with Melissa Holyoak, Commissioner, U.S. Federal Trade Commission

Editor's Note: *The Source would like to thank one of the FTC's newest members, Commissioner Holyoak, for taking time to sit down and chat with us. In this wide-ranging interview, Commissioner Holyoak shares her thoughts on a number of topics, including the scope of the Commission's authority, her priorities with respect to competition, consumer protection and privacy, the importance of economic analysis to the Commission's work, areas where the Commissioners can work together in a bipartisan fashion, and unique perspectives the FTC brings to its shared role of merger enforcement.*

RANDAL SHAHEEN: I thought I would start first in terms of the background you bring to the Commission. You have had quite an interesting and varied legal career up to this point. I wonder if you could give the readers a summary of your career to date and in particular are there any prior positions that you think really helped you prepare for your relatively new role now as a Commissioner.

MELISSA HOLYOAK: Yes, absolutely. Thank you again for meeting with me today.

I started my career at O'Melveny & Myers in Washington, D.C. I always describe it as a fantastic apprenticeship because it was great exposure to a couple of different areas. I worked in litigation, so I did a lot of consumer financial regulatory and financial services defense litigation, but was also able to do some white-collar crime. I was able to work with the transactional group for a while, which I think is great exposure for understanding mergers and how those come together. I was there for five years.

Then I followed my husband out to Missouri for his residency, and there I became a local prosecutor and did some consulting work, and then eventually I met up again with my former O'Melveny colleague, Ted Frank, and we spent eight years doing public-interest law work. More specifically, we challenged unfair class action settlements. A class action would be presented to the court and, when appropriate, we would come in and argue that it was unfairly treating consumers in terms of the proportion of the settlement that they were actually receiving compared to the plaintiff's attorneys' fees or in some instances other third parties. I did that for eight years.

Then we returned to Utah again for my husband's career, and I was introduced to the attorney general and was the Utah solicitor general for three years. In that role I oversaw civil appeals, criminal appeals, constitutional defense, special litigation, and the antitrust and data privacy division. Diving into that work prepared me for this role in many respects. I was able to work on many merger enforcement reviews, as well as overseeing Utah's work in *Utah v. Google*, which was a large multistate effort in California against Google, and it ended up in a fifty-state settlement which the court is still reviewing right now.

After that I came to the Commission. A lot of that work helped prepare me both on the consumer protection front but also on the competition side.

RANDAL SHAHEEN: It sounds like you knew what you were getting into as far as D.C.'s wonderful hot and humid summers as well.

I want to ask you about your views. I think every Commissioner brings a unique set of perspectives in terms of what they view as the Commission's priorities, but let me ask you more broadly in terms of consumer protection, privacy, and antitrust, what you see as the important priorities.

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MELISSA HOLYOAK: Absolutely. Even before talking about specific substantive areas, I think one thing that is really driving my approach and tenure on the Commission is thinking about what we are authorized to do, what we are mandated to do, by Congress

Most importantly, as members of the Executive Branch, we enforce the law. We do not make law. And thinking about where that authority comes from, every statute that does give us authority, we need to go back to that statute and understand what Congress authorized us to do, and have that in mind with all of our actions both in enforcement and rulemaking capacity.

The Federal Trade Commission cannot regulate every inch of the economy, particularly those that are reserved for other agencies, like the environment, labor, or civil rights, so to be thinking about what our mandate is and starting from that approach I think is an important perspective for everything that we do.

Starting with consumer protection, I think the agency is at its best when it is protecting consumers from the most harmful and most deceptive practices—fraud—and also protecting some of the most vulnerable, like children and the elderly.

Talking about fraud, that is why I supported many of the Commission's complaints: for example, just recently a bill payment company, Doxo, was impersonating consumers' legitimate billers; there was another complaint against BlueSnap, which was allegedly knowingly processing payments for bad actors; and one final example is a sweepstakes scam in *Mail Tree*.

When we think about consumer protection, I am also thinking about the emerging trends in technology, so making sure we are being kept abreast of those trends and applying our statutes and our laws to those new areas. One example that I have given in the recent past is voice cloning. A lot of fraudsters have turned to voice-cloning applications to call up older individuals and impersonate their grandchildren, for example, ask them for money, and try to scam them out of money that way.

A great example of what the FTC is doing to stay on top of these trends is we had a voice-cloning challenge. We offered a reward to someone who could share some examples of how we could address this problem. There were terrific submissions explaining how they could create the voice so that we were able to recognize that it was fake or other types of technology. This is a great example of creative ways to address technology problems that are creating fraud and other issues that we are seeing. It is a creative way to be able to approach some of those issues.

You mentioned privacy as well. Protecting the privacy of personal information is top of mind for consumers. I am particularly concerned with protecting children online.

Just recently we had a settlement with a company, NGL, and two of its founders. In that instance that company had anonymous messaging to children, to teens, and it would send fake messages to these teens, such as, "I am stalking you on Instagram, I know what you did," to try to lure them into this app. This is an example of where we can use these types of authorities to protect children and teens who were harassed and cyberbullied.

Beyond children's privacy, though, I am very sensitive to over-broad regulations. I do not think we are prudential regulators, and I think we need to be very careful in how we use rulemaking to regulate broadly, including for privacy. I am, however, supportive of comprehensive federal

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legislation. I know there have been a number of drafts that are being considered by Congress and I would support a general comprehensive privacy legislation.

On the competition side in terms of priorities, recently there has been a discussion about whether antitrust has been effective. In fact, President Biden a couple of years ago mentioned that the last forty years was a "failed experiment." I disagree with that characterization. I think that characterization is belied by the facts.

I also want to recognize that nothing is perfect and we need to do our part to see if we can improve our competition enforcement efforts, and I will continually do that. But as a general matter I also think, in addition to saying that antitrust has been this huge failed experiment, there is this focus on wanting to use antitrust to solve everything. Antitrust is not a panacea, and it cannot solve all of the perceived problems in our country, and we need to make sure that we use antitrust to protect consumers from anticompetitive conduct. Our main focus should be on consumers.

There is significant precedent in the last couple of years from the Supreme Court that has really reminded us that the goal of antitrust is to promote the interests of consumers and to protect the competitive process, and that is what the FTC should be doing.

The recent emphasis on precedent, mostly by current leadership, that is pretty old, forty or fifty years old, a lot of which are ignored by courts today is unfortunate. The argument appears to be "Well, those cases have not been overturned, so let's focus on them."

I would respond, "Well, neither have the cases that came after these out-of-date cases, so I am not sure why we are going back so far." As a litigator—I have been litigating for twenty-plus years—when I am in court I am not looking to the cases that are fifty or sixty years old. Obviously, the legal principles in those cases are going to be applied in more recent cases, and those are the cases that I am pulling for the court and want to look at as they apply those same legal principles in a more modern setting. I think that is going to be more persuasive for courts when we are litigating cases.

RANDAL SHAHEEN: I know your two Republican predecessors on the Commission had a fair number of dissents that they published, and I know you and Commissioner Ferguson have had some of those so far, but do you feel like at least in these areas there is potentially the ability for the Commission to work in a bipartisan fashion?

MELISSA HOLYOAK: Absolutely. Both on the competition side we have had some 5-0 votes and many, many 5-0 votes on the consumer protection side. I think when we are focused on these broadly accepted theories of harm that it is not difficult to work together in a bipartisan manner, particularly when those cases have good economic evidence that we can rely on.

I would also say in terms of bipartisan work that even when you see a 3-2 vote the bipartisan nature of the Commission is working because what you don't see behind the scenes is that I am engaged with staff on these cases. I might not end up supporting a complaint or an enforcement action, but my engagement with them and understanding where my perspective comes from is internalized by the staff and may reflect what the Commission is doing.

RANDAL SHAHEEN: It is interesting to get the behind-the-scenes view on that. What the rest of us all see are just the different statements by the Commissioners.

Part of the job obviously is meeting with parties that have matters before the Commission. Do you have any advice for parties that are getting ready to meet with you? Are there things you find particularly helpful or not so helpful in terms of presentations?

MELISSA HOLYOAK: Oh, yes. What is really helpful is when they engage with me on the law and the facts, frankly, when they come prepared for me to push back on what they think are the legal theories and explain their position with good-reasoned analysis and understanding what the relevant case law is. That is similar with the facts; if they do not think our view of the facts is correct, show me and explain why.

Strong advocacy in these meetings is extremely helpful. I love when I can come to a meeting where the advocacy is so strong that we have really good engagement back and forth. A few weeks ago our party meeting extended well beyond the time period that we had planned for because we were so thoroughly engaged in discussion.

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I also want to emphasize that good economic evidence is helpful. It is helpful for both competition and consumer protection cases. On the consumer protection side the theories of harm can rise or fall with the economics. On the deception front economics can help determine whether the materiality element is satisfied. And then, of course, on the fraud side economics is not as helpful probably with the liability, but very helpful with respect to remedies.

RANDAL SHAHEEN: You mentioned earlier your concept of the Commission staying in its regulatory lane, the lane that Congress has assigned to it. There has been, particularly in light of the *AMG* decision several years back, an unprecedented wave of rulemaking going on at the Commission, and I think you suggested in a speech recently that the Commission may be "wasting our resources proposing rules that perhaps exceed its authority or are not well-founded and may just be struck down by the Court subsequently." Are there any areas in particular that you can see a place for rulemaking to go on?

MELISSA HOLYOAK: Certainly. Just stepping back for a moment, I think there are two categories of rulemakings. You have rulemakings that are needed to procure economic redress for consumers. After the Supreme Court's decision in *AMG* we are no longer able to get economic redress, but we can get economic redress when there is a rule violation, so some of our rulemaking is focused on ensuring consumers can get made whole.

The other kinds of rulemakings the Commission has been focused on are more discretionary. They are not necessary for our team to secure consumer redress. It is this second bucket I am much more concerned with—for example, the noncompete rule. The problem there, as you mentioned, is that we are spending a significant amount of resources on writing these types of broad rules. The noncompete in particular will likely be invalidated at the end of the day.

Just to step back for a minute on the noncompete, to be clear, I do not think that all noncompetes are procompetitive or beneficial, so as I explained in my statement we would have been better off spending our resources on investigating potentially anticompetitive noncompetes and bring enforcement actions where warranted, rather than spending all of our resources on this very broad rule that is going to be invalidated. That does not serve American consumers very well.

On the substance of the noncompete rule, the noncompete rule is really based on the idea that Sections 5 and 6 working together provide the authority for the Commission to write competition legislative rules. If you look at the text and structure of the Act, Section 5 is really about an adjudication framework and Section 6 is about our investigatory powers. The ancillary provision right in the middle of that says we can "classify corporations or make rules to carry out the purposes of the provisions of the Act" and is what the noncompete rule relies on for authority.

The problem, though, is that you have to determine what kinds of rules Congress authorized in Section 6. The Supreme Court has made clear that if Congress conferred legislative rulemaking

authority to an agency, then there has to be a clear indication that Congress intended the agency to have such authority. There is nothing in Section 6 to indicate Congress conferred competition legislative rulemaking authority—the relevant scholarship suggests sanctions were key to such authority and there is no mention of sanctions. Section 5 also has no mention of rulemaking, but more importantly its adjudication process makes no mention of how you would sanction a violation of a rule, beyond a cease and desist. So taking the text and structure of all of that together, you really have no authority for unfair methods of competition legislative rulemaking.

Going back to the rules that were in the first bucket, I have supported some since I have come to the Commission. I have supported the Amplifier Rule and the Eyeglass Rule.

The Eyeglass Rule is a great example of a well done Commission rulemaking. It had a strong factual record. The rule created significant consumer benefits because it requires that consumers receive a copy of the consumer prescription, which allows the consumer to shop around for the best price. This is an excellent example of where a rule can complement our competition agenda because it is promoting competition in that respect.

RANDAL SHAHEEN: I don't know whether it is because of *AMG* and other Supreme Court decisions, but it seems like there has been a lot of litigation generally around the structure of agencies. The FTC has had a case in the Supreme Court, and I think there are a number of cases pending in the courts regarding this. Is there anything from your perspective that you find potentially troubling about aspects of the Commission's structure or authority as they are currently set up?

MELISSA HOLYOAK: I am going to forgo talking about any potential problems with the structure or authority. A lot of those are in litigation right now, so I will not be talking about that. I can say more generally that I do imagine that many of these legal challenges are likely in response to the breadth of the FTC's efforts right now, unsupported efforts both legally and from a policy perspective.

But, again, I want to emphasize that I am very supportive of robust enforcement. However, I think some of the problems we see with the recent broad assertions of authority is that it undermines the institutional legitimacy of the Commission. When we are taking such broad actions, whether it be rulemaking like the noncompete or whether it be an enforcement action, and those actions are struck down or we lose the case in court, it undermines our legitimacy both in the market and also with Congress, which is particularly concerning when we want to, for example, restore our ability to seek consumer redress after *AMG* and also while Congress is considering giving us additional authorities, for example, in data privacy and security. Those are some of my concerns with taking actions that go beyond the authority Congress has given us.

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RANDAL SHAHEEN: You mentioned the *NGL* case a little earlier. I gather there you supported the specific complaint against NGL and the specific prohibition against them marketing anonymous messaging apps to teens and preteens. I gather you had some concern about the extent to which the majority was conveying a broader message potentially that it would be unfair for anybody to market anonymous messaging apps to teens and preteens. Is that in your mind an example of the Commission perhaps overreaching its authority?

MELISSA HOLYOAK: Yes. I wanted in my dissent to differentiate between that, to make clear that it was based on the specific facts of that case. But I think that highlights why enforcement actions are so important, because we can really focus on the particular facts of a case. When you get to rulemaking, it gets more difficult as you are trying to make these broad assumptions that can sweep in things that may not necessarily be a problem in an enforcement action, for example.

RANDAL SHAHEEN: We have two entities that regulate competition, the Antitrust Division at the Department of Justice and the FTC. From time to time, folks raise whether it makes sense to have two agencies doing this as opposed to consolidating it in one. From your standpoint, do you feel like there are unique perspectives and value to having two different government entities regulating in this space?

MELISSA HOLYOAK: I think there is some discussion of whether each agency has unique competency in certain areas. I think each agency's staff have developed industry-specific expertise which then drives the clearance process.

But I think where our jurisdiction overlaps, like civil enforcement of the relevant statutes, both agencies have highly skilled and dedicated staff who are able to do the hard work of antitrust enforcement.

I think what is interesting about the FTC staff is that they have to anticipate and respond to each Commissioner. I work with the staff and engage with them on every issue and they have five folks they are trying to get onboard with their particular theory and arguments on the case. I think that adds a lot of value in terms of developing a case because each Commissioner is going to have their views and priorities, and with each case their understanding how law and precedent may impact something, so that can be helpful in shaping and developing a case.

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Staff want to get every Commissioner on board, so they want a unanimous vote. Sometimes they will get it, for example, our merger challenges in *Tapestry* and *Tempur/Sealy* cases recently. From the beginning staff was open-minded and worked with us in understanding the cases, and I think the complaints were developed much better because of that interaction.

I should say that this is not meant to denigrate the DOJ at all. Everyone is going to come back and say, "She thinks the DOJ is not as great." No, not at all. I am just saying that that different dynamics can help our agency with its enforcement decisions.

RANDAL SHAHEEN: You mentioned the importance to you of economic analysis. You had a dissenting statement this week concerning the release of the interim pharmacy benefit managers (PBM) report where you expressed some concerns about the analysis. For the benefit of folks who maybe have not read it, would you be able to briefly summarize your key concerns?

MELISSA HOLYOAK: Absolutely. The FTC is known for its excellent objective economic-based work. The Commission put out a report in 2005 on PBMs, and it was thorough, objective, and empirical-based. Unfortunately, that is not what the interim report was. It was not robust, it was not objective, it was not evidence-based. I am hopeful that we will finish the study, go back and look at all the data, and I hope it is evidence-based like our previous studies.

A big problem with the interim study is that it does not evaluate harm to consumers. For example, they rely on a couple of case studies. The case studies do not even look at the impact to consumers. The case studies are not representative either. The report notes that there were over 6.5 billion drugs dispensed by PBMs, but the case studies looked at was just a very small fraction of that, so we have no idea whether that represents the market or how it represents it.

Even more importantly, as I mentioned with consumer prices, it was looking specifically at PBM-affiliated reimbursement rates and noting that it does look like a troubling trend in terms of increased reimbursement rates, but we have no idea how that translates to consumer prices. It also did not discuss why those reimbursement rates have gone up, and I think when you take such a narrow view of the market you are not going to be able to make that type of determination.

We need to have an objective study, a fulsome study, something like we did in 2005, something that explains why the market has changed. The interim report provides no explanation of why the world and the market today look different than the 2005 market. We don't know how it looks different and we don't know why. That kind of robust, empirical-based, and evidence-based type of report needs to happen here, so we need to finish the work, get it done, and produce the kind of report that the FTC is known for.

RANDAL SHAHEEN: That's interesting. More to come on that I suspect.

MELISSA HOLYOAK: Yes.

RANDAL SHAHEEN: One last question: Is there anything about the job so far that surprised you, hopefully in a good way and not a bad way? Is there something or some things that were unexpected surprises about the job?

MELISSA HOLYOAK: I have enjoyed it so much. What has been so great is working with BOTH the FTC staff and my staff and really digging into these cases, like on the competition side digging into these markets, into these industries, and the same with the consumer protection side.

I will sit there with my staff and we will talk about the law for hours and how we think it should apply in the case we are evaluating. That part has been so enjoyable.

The career staff have been fantastic and so engaging with us. I will go back to them time after time after time on the same case, wanting to work out a certain issue, and they will keep working with us and engaging with us. It is fantastic.

RANDAL SHAHEEN: It is great to hear somebody say they love their job. It is not as often as it should be that you hear somebody say that.

I want to thank you again for this. I really appreciate it.

MELISSA HOLYOAK: Thank you so much. I appreciate it. ●