Interview with David Vladeck, Director, FTC Bureau of Consumer Protection

Editor's Note: *In June 2009, David Vladeck became Director of the FTC Bureau of Consumer Protection. Prior to his appointment, Mr. Vladeck was a Professor of Law at Georgetown University Law Center. At Georgetown, he taught federal courts, government processes, civil procedure, and First Amendment litigation. In addition, Mr. Vladeck co-directed the Center's Institute for Public Representation, a clinical law program for civil rights, civil liberties, First Amendment, open government, and regulatory litigation. Under Mr. Vladeck's direction, the Institute has urged the FTC to strengthen regulations in order to ensure that consumers are protected from unlawful business practices. At the start of his legal career, Mr. Vladeck spent almost thirty years with Public Citizen Litigation Group, including ten years as Director. Public Citizen Litigation Group is the litigating arm of Public Citizen, which is a national, nonprofit consumer advocacy organization established by Ralph Nader to represent consumer interests in Congress, the executive branch, and the courts. The Litigation Group specializes in cases involving health and safety regulation, consumer rights, access to the courts, open government, and the First Amendment, including Internet free speech.*

This interview was conducted for The Antitrust Source *on March 19, 2010, by John Villafranco, a partner at Kelley Drye.*

—John Villafranco

David Vladeck, Director, FTC Bureau of Consumer Protection

ANTITRUST SOURCE: Do you consider yourself a consumer advocate?

DAVID VLADECK: Yes. If one looks at the trajectory of my career, I have spent most of my time handling or supervising litigation that is intended to benefit consumers, workers, other participants in the market. So I don't think my career path has been atypical compared to my predecessors in the position of Bureau Director.

ANTITRUST SOURCE: Well, it certainly hasn't been typical. You've had an impressive career as a litigator and as a professor, primarily in the area of representing consumer interests. Was there a particular event or a specific advertising campaign that pushed you in this direction? Was there a moment, for example, when you saw an ad and thought, "This can't be true and I need to do something about it?"

VLADECK: I don't think I could point to any event like that. I think like most people of my generation, who lived through the tumult of the Vietnam War era and the trauma of Watergate, I saw law as an instrument for social change. But if you had asked me thirty-five years ago, when I was law student, would my ideal job be to work at the Federal Trade Commission, I probably wouldn't have said, "Yes." Watergate soured many of us on government service.

ANTITRUST SOURCE: You spent nearly thirty years with Public Citizen Litigation Group. During your ten years as Director of Public Citizen, you brought a number of cases relating to health and safety regulation, consumer rights, access to the courts, open government, and the First Amendment, including Internet free speech. What do you consider your greatest achievement while at Public Citizen?

VLADECK: It is too hard to isolate one accomplishment, but in relation to our current work at the Federal Trade Commission, I would point to Public Citizen's litigation in the area of commercial speech. I arrived at Public Citizen just as we were wrapping up *Virginia Pharmacy Board*, which many would cite as the capstone case that gave rise to the commercial speech doctrine. I think the intellectual groundwork for it was laid in *Bigelow*, where we played quite an active role. So I came to Public Citizen just as we were concluding *Pharmacy Board* and I began to work on a series of other commercial speech cases. For instance, I did most of the briefing in *Zauderer*. I handled, while I was the Director, *Edenfield v. Fane*, a case I decided to take on based on a handwritten letter I got from Scott Fane who was then a CPA in Florida. Scott had then recently moved to Florida and wanted to establish a practice advising small businesses. But Florida law barred him from going to businesses to introduce himself and explain the services he could offer. After a six year odyssey, the Supreme Court ruled in Scott's favor and struck down Florida's ban on in-person solicitation by accountants. We did a lot of commercial speech litigation. I tried, for several weeks a case called *Schwartz v. Welch*, which was an attack on Mississippi Bar Association rules essentially banning lawyer advertising on the television. I represented the lawyers challenging the restrictions, and we won at trial. The Bar did not appeal.

Those cases . . . were focused on harnessing the power of government to protect those who were not capable of protecting themselves. And we have a similar objective in a lot of the fraud work that we're doing here.

So I did a lot of work on commercial speech. It was intellectually challenging and exciting litigation. But also I think it helped shape my views on the proper role of government in mediating between the advertiser's interest in selling products and the public's right to ensure that the flow of commercial speech flows cleanly as well as freely, which of course is the Court's great line in *Pharmacy Board*.

Those cases were a treat to work on. And they were very important to consumers, who benefit tremendously from a steady and reliable flow of information about the price and quality of the goods and services they are thinking of buying. But those cases also recognized the perils of an unregulated market rife with false and deceptive claims, and thus laid the intellectual groundwork for the work that we continue to do here at the Federal Trade Commission.

Another chain of cases I am particularly proud of are the ones challenging the failure of health and safety agencies to take reasonable steps to protect workers. For example, in 1981, we brought a case to force OSHA to issue a standard to protect health and hospital workers from ethylene oxide—a gas used to sterilize heat-sensitive medical equipment in hospitals. And we ultimately won. It took seven years, three trips to the court of appeals, but in the end we forced OSHA to issue a tough standard that protects over 100,000 workers from grave risk of harm.

I handled many similar cases. For awhile my docket sounded like a bad chemistry course, including challenges to the Department of Labor's failure effectively to regulate formaldehyde, benzene, cadmium, hexavalent chromium, and radon daughters, the radioactive byproduct of radon gas in mines. I also handled cases involving other safety risks, including the risks of explosion in grain storage facilities and the hazards of failing to lock-out electrical and hydraulic machinery during maintenance operations.

Those cases all had a common thread. They were focused on harnessing the power of government to protect those who were not capable of protecting themselves. And we have a similar objective in a lot of the fraud work that we're doing here.

We are spending the lion's share of our resources these days focusing on what we call, "Last dollar frauds"—frauds that are aimed to take the last dollars out of the pockets of people rendered economically vulnerable by the economic downturn. We have been conducting sweep after sweep of mortgage rescue scams, bogus debt consolidation services, and job and business opportunity scams, in an effort to safeguard the economically vulnerable. And so I see a lot of parallels in my earlier work and the work we're doing today.

ANTITRUST SOURCE: You just ran through some impressive achievements while at Public Citizen. What was your greatest frustration while there?

VLADECK: We did many great cases, but all the while we were doing triage. I have exactly the same frustration at the FTC. At Public Citizen, we were really the lawyers of last resort. When every other institution—including government—had failed them, people would send letters to us or Ralph. And Ralph would send anything involving a legal matter on to the Litigation Group.

Early in my career at Public Citizen, I took on what my colleagues thought was the short-end-of-the-stick assignment of looking through these letters to see whether they presented good cases that we could take on. And I responded to every letter. I spent a lot of time writing letters to people saying, "I'm sorry, there's nothing we can do for you." We had to decline many good cases—cases that should have been brought—because we didn't have the resources to handle them. And I found that very frustrating.

I don't think that I'm exposing any secret by acknowledging that the Bureau does not have the capacity to do every case that we ought to do. And so a lot of my job, and a lot of the work of my colleagues, is doing triage: deciding which are the best cases to bring in what I would say is a target rich environment.

ANTITRUST SOURCE: Early in your career, you worked on the initiative known as Kid-Vid, a rule-making with the objective of restricting the promotion of highly sugared foods to children in television advertising. Three years after the notice of the proposed rule, the FTC staff recommended that the Commission terminate the rulemaking proceeding. At that time, did you disagree with that recommendation? And has your opinion remained the same or has it changed over the years?

VLADECK: Well let me correct the record, just a little. The clinical program at Georgetown where I worked right out of law school—before I joined Public Citizen Litigation Group—was working on Kid-Vid while I was there. I didn't work directly on that issue; I worked exclusively on litigation matters. Nor can I say that I followed the controversy as closely then as I've now looked at it retrospectively. I think, in hindsight, I understand both the reasons why people were pushing regulation and the reason why the regulatory effort struck such a discordant note.

To be clear, I don't look on that episode as an opportunity lost. I do think that there are lessons to be learned from that episode, and for good or ill, the dispute still casts a shadow on the agency.

ANTITRUST SOURCE: How so?

VLADECK: In two ways. One is that Congress clipped the Agency's wings as a result, and we are now hobbled with a byzantine, Rube Goldberg-like rulemaking system that is close to useless. So one important regulatory tool that would allow us to better do our job has been taken from us. The other is that folks are understandably wary about taking action that might be portrayed as paternalistic. We want to protect consumers, but we don't want to be America's nanny.

ANTITRUST SOURCE: You have stated that you were chosen by FTC Chairman Jon Leibowitz to run the Bureau in part because of your experience as a litigator with a background in bringing test case litigation. How would you define the term "test case?" And what sort of test case should we expect you to bring during your tenure?

VLADECK: I think that the quote is likely accurate, but it would be interesting to hear Jon's version of the story.

Before I took this job, I looked at the litigation output of the Bureau of Consumer Protection over the last three years. And two things became apparent. One is, we didn't lose a case—not a single case. And my reaction then, and my belief now, is that part of our job is to be stewards of the statutes that we have to implement. And if we think the law says X, but there isn't a case that establishes X and people are not conforming their conduct to our belief about how the law ought to work, then we should look for a good case to establish X as a governing legal principle.

I would define the term "test case" as a case in which the facts directly and clearly support the legal theory that you are advocating, even if the legal theory has not been accepted by a court prior to that time. And you bring a test case to see whether you can persuade the court to adopt your reading of the law.

[T]here are areas where we will look for cases to establish legal principles that we believe are important to fulfill our consumer protection mandate.

If the court agrees, then the hope would be that people would conform their conduct to that norm. And if they don't, then you have grounds for further litigation. Of course, if the court disagrees, you add that to the list of things that you may ask Congress to rectify. Often in the course of test case litigation you bring a number of cases based on the same legal theory and see whether you can make some progress. When the *Pharmacy Board* case was filed my colleagues at the Litigation Group were looking at other cases as well. To be sure, given the facts, they thought that *Pharmacy Board* would make an especially good vehicle for establishing the principle that commercial speech is entitled to some level of constitutional protection. But other cases might have worked as well.

Perhaps a better example was our strategy to overturn the legislative veto—a strategy that culminated with a win in *INS v. Chadha*. *Chadha* was one of six or seven cases we filed challenging the use of the legislative veto to overturn important administrative action. *Chadha* just happened to be the one that made it up to the Supreme Court. But we were filing a number of cases, including, if I recall correctly, one against the FTC over the veto of the used car rule—each of which we thought perfectly illustrated our concerns about the veto.

Using test cases to move the law better to protect consumers is one tool that we have and will continue to use. As you know, the FTC has a very broad mandate from Congress that includes enforcing a number of consumer protection statutes. And there are areas where we will look for cases to establish legal principles that we believe are important to fulfill our consumer protection mandate.

ANTITRUST SOURCE: You have mentioned *Pharmacy Board* a few times now. As I understand your general thesis, the commercial speech doctrine was originally directed at the importance of truthful information to consumers, and the focus has moved toward protection of commercial speakers' rights. Given that the constitutional analysis requires an assessment of the truthfulness of the commercial message, how in your view has the balance shifted in favor of the commercial speakers' rights?

VLADECK: I think in two ways: first, if you look at the early cases, there is no hint that the constitutional protection was being accorded to facilitate the speaker's own interests. The locus of the Court's concern was in dismantling state restrictions that interfered with consumers receiving information that may be relevant to their purchasing decision. If one looks at the Court's early decisions, there's a real emphasis on sending a signal to states that prohibitions on the provision of truthful speech relating to the price and availability of goods and services to consumers would be

looked at skeptically by the Court. For the first twenty years or so of the commercial speech doctrine, the Court's sole focus is protecting consumers' interest in the free flow of commercial information that might be germane to consumer choice. It was not until *Lorillard* that the Court began to talk in terms of protecting the speaker's independent First Amendment right.

In my view, I think that a close reading of the Court's commercial speech decisions shows that, over the years, the nature of the right has been transformed, albeit not formally. Instead of a right of the listener to receive information that may be material to his or her purchasing decision, the right now appears to have expanded to embrace the speaker's, that is, the seller's right to convey information of its choosing to consumers.

Apart from the transformation of the nature of the constitutionally protected right, there has also been a transformation in the stringency of the review triggered under the commercial speech doctrine. Again, if one looks at the briefing in *Pharmacy Board*, and indeed the briefing in most of the cases until *Central Hudson*, there was no effort to equate commercial speech with pure speech, let alone to argue that the rigorous "strict scrutiny" test for restraints on pure speech should apply to restraints on commercial speech. The briefs and the decisions all presupposed that the antifraud frameworks that preexisted the commercial speech doctrine—state laws, and federal laws like the Federal Trade Commission Act, that give the government tools to go after false, deceptive or misleading speech—would be in place.

Ironically, I would trace this transformation to one of my cases, *Edenfield v. Fane*. There, Justice Kennedy's opinion for the Court certainly goes beyond the brief that I wrote in terms of placing a significant burden on government to justify speech restraints and to demonstrate a material connection between the restraint and the deception or fraud the government wants to prevent.

Again, over the years the "intermediate" standard of review the Court established in *Central Hudson* has changed, although again the Court has not said so. While there has been no formal alteration of the *Central Hudson* standard, the Court's review is much more searching now than it was twenty years ago. The standard now used makes it harder for the government to enforce restraints on truthful speech the government may want to suppress for important public health reasons (such as protecting kids from advertising of tobacco products) and on speech that may not be demonstrably false, but is deceptive and misleading.

ANTITRUST SOURCE: As a litigator, your background is different than that of your predecessors who have served as Bureau Director. In fact, I believe that you recently argued the FTC's position in a case in federal court in New Jersey, which is something that a Bureau Director would not typically do.

VLADECK: I appeared before a judge for an all-day settlement conference; it was not merits argument. I should add that the case (*United States v. Civic Development Group*) was settled on the terms we proposed.

ANTITRUST SOURCE: Do you expect to make any merits arguments as Bureau Director? Or are you going to leave that to other staff attorneys?

VLADECK: I've been thinking about that. There have been some cases that I really have been tempted to argue myself.

But thus far I've resisted the temptation. One of the wonderful things about my job, and I credit my predecessors for this, is that I inherited a Bureau that was in terrific shape. We have excel-

lent managers. The caliber of lawyering in the Bureau is top-notch. I'd certainly be interested in arguing a case or two. But I would not want to push aside an attorney who has spent his or her time getting the case ready. So we'll see. I may exercise my prerogative at some point. What I'd really like to do is persuade FTC General Counsel Will Tom to let me argue one of our cases in the Court of Appeals. That way his lawyers would forfeit the argument and not one of mine.

ANTITRUST SOURCE: Turning to social media, when the revised Endorsement and Testimonial Guides were issued, one of their effects was to cause, a great deal of anxiety among bloggers and others who enter into an endorsement arrangement with advertisers. The concern was that, by the language of the Guides, bloggers would be exposed to potential FTC enforcement actions.

In October, Mary Engle, who is the Director of the Bureau's Advertising Practices Division, assured these individuals that the FTC is not planning on investigating individual bloggers, and will be focusing any enforcement actions on advertisers, not individual endorsers. What is the rationale for a hands-off approach to individual bloggers? Especially given the more general focus on expanding the circle of responsibility for false advertising?

VLADECK: First of all, let me assure our readers that BCP has not created a Division of Blogging. And second, there's nothing new about our position that material connections between advertisers and endorsers should be disclosed. As always, our main concern is with the folks sponsoring these endorsements. But we haven't said that endorser-bloggers are free to ignore the law. What Mary Engle was underlining is our general approach to enforcement. We try to go after the entity most responsible for the misconduct. Typically, if an advertising agency is using viral or word of mouth marketing to sell a product, the agency is not just enlisting a single blogger to spread the word. There generally is a broader, orchestrated campaign. Our concern will rarely be an individual blogger; rather, it will be the advertisers who are hiring or compensating a number of bloggers, and others, to hawk their products.

And so the message that Mary was trying to convey, and I think she did it quite well, is, "If you're an advertiser and you're going to use bloggers and other viral marketing, don't think you can insulate yourself from liability simply by having the blogger do your work for you."

I would say, in hindsight—and this is no criticism of Mary, this is more a criticism of me—that we did not do a good job with the rollout of the Endorsement Guides. I think we should have explained more clearly at the outset why we needed to modernize the Guides. Indeed, the references to bloggers are actually just a clarification of longstanding FTC policy; after all, the Guides were originally issued in 1980 before there was an Internet, and before there were bloggers. The Guides didn't change Commission policy, they just clarified that endorsements by bloggers will be treated as any other endorsement. But in retrospect I wish we had done a better job explaining this at the time the Guides were updated. Your question just is symptomatic of the fact that the updated Guides engendered more concern, anxiety, and confusion than they needed to.

ANTITRUST SOURCE: How would you have done the roll-out differently?

VLADECK: That's a fair question. First, neither Mary nor I were available for comment the day the Guides were issued. As a result, the initial press accounts were sensational, and sensationally wrong. The major Associated Press story that was widely circulated wrongly said that the FTC would target bloggers and then, also wrongly, said that the FTC could impose fines up to $16,000 on bloggers who failed to disclose material connections. So a number of things went wrong. We

didn't affirmatively get our story out; we didn't have business education pieces ready to go; and we hadn't set in motion an outreach program to accompany the Guides' release.

ANTITRUST SOURCE: Turning now to alternative remedies for data breaches, last summer in an interview in the *New York Times*, you suggested that it may be time to move beyond an economic and tangible harm-based model for redress in data security cases, to one that also recovers for intangible harms, such as harm to a consumer's dignity. This may, for example, include situations involving disputed online behavioral advertising practices, or data breaches where personal information is potentially compromised but consumers are not financially harmed. What is the rationale for this initiative, and what kind of concrete guidance might be offered to marketplace participants to minimize such non-economic losses?

First of all, let me assure our readers that BCP has **not** *created a Division of Blogging.*

VLADECK: Let's distinguish between two separate but related questions embedded in your question. The question that I'd like to tackle first is a question that we wrestle with all the time which is, "What do you do when there's a data breach?"

So, so far we've brought between 25 and 30 cases involving data breaches which have resulted in the disclosure of personal information of consumers in one form or another. But that number is dwarfed by the number of investigations we have conducted into data breaches. The fact is that data breaches are common. One question we are wrestling with is, "How do we do a better job deterring these breaches? Would some form of civil penalty be appropriate?"

As you know, Congress is considering whether to give us civil penalty authority. And one area we've suggested we might want to exercise that authority is in the area of data security. We are concerned that the remedies available to us under current law are inadequate to force companies that store sensitive data to take reasonable precautions to safeguard the data.

But it's not only the deterrence issue that is troublesome. Another difficulty in these cases is that it is often hard to quantify the injury the consumers suffer as a result of data breaches. Sometimes the injury doesn't take a tangible form in the sense of, for instance, ID theft that results in financial loss. Sometimes the consumer injury resulting from the breach is anxiety and the time and burden of ensuring that one's finances are in order. Sometimes there has been an ID theft but the money drained from a bank account has been returned by the bank, but the consumer nonetheless spends hours and hours and hours putting his or her financial house back in order. These are all injuries, even if they can't be measured in dollars and cents. And we think that, in some cases, there is a good argument for consumer redress.

Data security is a big issue for us. And it is only becoming more complicated as increasing amounts of personal information is being stored in the cloud, where questions of responsibility become more diffuse. And data security has become more problematic with the proliferation of file-sharing and spyware programs that can often be difficult to detect. As you know, we just announced a major P2P Sweep, where we found an alarming amount of very sensitive information about individuals available on the Internet as a result of peer-to-peer file sharing data breaches. So the issue of data breaches—and how to prevent them—is one that occupies a fair amount of our time and energy.

Data security, however, is just one part of the broader question I think you were asking, which is, "Where are we heading on privacy generally, and on online behavioral advertising more specifically?" And if that's your second question, let me address that.

ANTITRUST SOURCE: Please.

VLADECK: As you know, we have just concluded a series of three workshops to take a fresh look at how we address privacy, especially with respect to evolving technology. And this is the point I was trying to make in *The Times* interview: the problem that we face is that the privacy frameworks that have served us well in the past don't promise to serve us well in the future. One of the many lessons we learned during the workshops is that there is widespread agreement that we need to develop a set of principles to guide us as we move forward, especially given the dynamic and evolving nature of the media, the transition to mobile computing, the broad dispersion of data storage, the integration of online and offline information, and the erosion of the distinction between anonymous and individually identifiable information.

Historically, the FTC has put a lot of emphasis on a regime that focuses on notice and then consent or choice by consumers. Today both facets of that framework are problematic.

Notice is typically given in privacy policies, which are rarely read. They're written by lawyers so they're incomprehensible to ordinary consumers. And they don't really convey clearly what the consumer needs to know. Instead, they are chock full of legal disclaimers designed to protect the company, not inform consumers.

And second, questions of choice and how consumers can exercise choice effectively have now become very difficult. For one thing, the concept of "choice" generally presupposes that the consumer has read the privacy policy, which we know rarely happens. And the means provided to consumers to exercise choice are often troublesome as well. We have gotten bogged down in what I consider to be a rather sterile debate between opt-in and opt-out, as if those were well-defined terms with accepted meanings. But they are not. Some opt-in methods can provide consumers a clear and effective way of making a choice, while some "opt-out" programs are so confusing that they are counter-productive. The real challenge is to make the process transparent and enable consumers to make an informed and meaningful choice. And whatever system is adopted, it is going to have to work not just on computers, but also on cell phones, PDAs and other devices that have screens that display as few as 140 characters.

The "harm" model used by the Commission at times also is problematic. For one thing, it has been applied mainly where consumers suffer economic harm. And the point I was trying to make in the *Times* interview is that our conception of privacy reaches harms that cannot be expressed in terms of dollars lost. For another, the "harm" approach provides little guidance. It is aimed at redressing consumer injury but not at providing companies and consumers with clear principles that guide conduct going forward. So it too is a model with serious limitations.

So we've held a series of roundtables to explore the question of where we ought to go. We are considering questions about how to make the data collection process more transparent and to provide consumers with meaningful controls over the use of their information. We have been thinking about ways to ensure that data is not kept beyond the time it is needed for its expected use. And, as I've mentioned, we are exploring ways to encourage companies to enhance data security measures.

There is also the related question of whether there are areas that merit special protection. For example, I think that there is a consensus that an individual's health records should be subject to heightened protection. But even where there may be general agreement, there are serious definitional questions. For instance, is information about a skin cream someone uses to combat dry skin health information? How about a cream for psoriasis? How about a cream used to treat skin cancer?

Congress has already required additional protection for information relating to children thirteen and under. HIPAA requires special protection for certain health records. And Gramm-Leach-Bliley requires certain protections for financial records.

But we need to start thinking about privacy issues more systematically. With respect to online behavioral advertising, we've been crystal clear that our current effort intends to build upon, not displace or supplant, the principles that we set out in February 2009. We think that those principles provide meaningful guidance to people engaged in online behavioral advertising and we appreciate the considerable self-regulatory efforts that are geared towards putting those principles into operation.

But those principles only go so far. We left a number of questions open in that report; one question concerns how to give clearer and more timely notice to consumers. As I said, the industry has been engaged in self regulatory efforts to address those concerns.

The report also stops short of addressing what we think is a major issue coming up in the future, which is, what do you do about secondary uses of consumer data? What do you do about data that is collected for online behavioral advertising but has value elsewhere? Do you let the advertising network sell that information even though that sale and the uses the buyer may make of that information may not be within the consumer's reasonable expectation? Do you restrict secondary uses, absent explicit consent from the consumer? What sort of rules should govern?

[W]e are spending a lot of our time now thinking about mobile applications because the reality is, within five years, mobile smart phones, iPads, and PDAs are going to dominate the marketplace, and laptops may be an anachronism.

We left those questions open last February. We need to try to start providing answers to them. And I think that the roundtable discussions that we've held provide us with a platform for starting to think about those issues going forward.

Let me be clear about this: Our goal is a modest one here. We've now spent four months intensively gathering information. It's going to take us a while to digest it all. But we'll be in constant discussions with stakeholders as we do so.

My hope is, and this may be optimistic, my hope is that by the end of the summer or early fall, we'll be able to publish something that looks like a report and maybe some recommendations, which we will distribute in tentative or draft form. We will then invite public comment—and I suspect we will get a lot of comments. And then we'll try to issue a final report and recommendations or principles, as we did with online behavioral advertising. But this is not an area in which we want to set strict or binding regulations or inflexible norms. Some folks have suggested that the FTC is looking to set out formal regulations on privacy. Let me be clear about this: That is not our aim. We are addressing technologies that are evolving so quickly that it would be, in my view, foolhardy to try to set rules in place knowing that two or three years later they would be rendered obsolete.

For example, we are spending a lot of our time now thinking about mobile applications because the reality is, within five years, mobile smart phones, iPads, and PDAs are going to dominate the marketplace, and laptops may be an anachronism.

ANTITRUST SOURCE: The Administration and both the House and Senate have made establishing a Consumer Financial Protection Agency a centerpiece of regulatory reform. Is this legislation necessary? Particularly as many are arguing that the FTC's regulatory role has been sufficient in this area and should continue, rather than be transferred to a new agency.

VLADECK: Well, let me start with an observation, I'm not sure I hear a lot of people arguing that our role has been sufficient, and that is a justification for not creating this new agency.

ANTITRUST SOURCE: Fair enough. Let me ask the question differently. Would it be more efficient to expand the FTC's role, rather than to create a new agency?

VLADECK: Well, I think that there's room for both actually. The FTC does not have, and we have not

asked for, the capacity to engage in any examination function. And one insight that the legislation has made clear is that for certain market players, some form of examination role is useful.

I don't know that we need examination authority to police the pay-day lenders, mortgage brokers, or credit reporting agencies over which we have regulatory authority. But as you move up the food chain in lending institutions and financial institutions, examination authority is essential. The Commission has come out in support of a new consumer protection agency in the financial products and services arena, and I agree with that assessment. We need more resources in this area, not just for the financial service providers under FTC jurisdiction, but for the full-range of financial institutions.

We do a very good job with the resources we have, but as I said earlier, part of my job is to do triage. Anything that places the spotlight on enhancing consumer protection in the financial products realm is a good idea. As you know, we had some problems with the bill as originally proposed by Treasury, but we were happy with the bill that emerged from the House.

Now that the debate has shifted to the Senate, I don't know where the process will end up. But I have two observations: first, the FTC could use more resources in this area. If you look at our docket over the last year or so, we have done everything we can to bring cases against phony mortgage rescue firms, bogus debt settlement companies, and job and business opportunity scams. I think we've been effective. I think we've made progress here, but there is always more to do, and additional resources would help.

Second, we could have used rulemaking authority at an earlier stage. Because the FTC lacks general APA rulemaking authority, we had to wait until Congress gave us rulemaking authority in the mortgage area. By the end of this year we'll probably have finalized a series of rules that regulate the advance fees mortgage rescue companies can charge and mortgage advertising and servicing for non-banks. Had we had general rulemaking authority, we likely would have been done with those rules by now, if not earlier. That, in my view, is a serious opportunity lost. Without rules in place, we had to proceed against companies one-by-one. With a rule, we could have effected reform on a wholesale basis, sparing many consumers the tragedy of losing thousands of dollars in scams while facing foreclosure.

ANTITRUST SOURCE: Another issue before Congress, or actually it seems to be before Congress annually, is the potential repeal of the Common Carrier Exemption. I know a number of commissioners have urged Congress to repeal the exemption over the years, particularly as phone and Internet services continue to expand. Have you given any thought to the types of cases that you might bring if the exemption were repealed?

VLADECK: I have not focused on your "what if" question relating to the possible repeal of the common carrier exemption. I have, however, focused on the problems that the Common Carrier Exemption causes us in areas where there is a jurisdictional gap with the FCC. For instance, we bring phone card and cramming cases, but the scope of those cases is limited because our authority to go after deceptive advertising does not extend to matters that the FCC regulates. Fortunately, we are now working closely with the FCC to better coordinate our enforcement efforts, and I think that we can resolve some of the difficulties we've encountered in the past.

As for the Internet, we exercise authority over Internet providers and users in several ways—privacy, data security, and anti-fraud—to name a few. I understand that the Broadband Plan that has been announced by the FCC would clarify the FCC's authority over the Internet. We are working closely with our FCC colleagues to ensure that the FTC's consumer protection mission remains

unimpaired while the FCC moves ahead to implement its Broadband Plan and ensure net neutrality.

ANTITRUST SOURCE: Is there any effort to increase the interaction with the Federal Communications Commission? Historically, there's been some criticism, not from the Federal Trade Commission of course, but there's been some criticism of the FCC's efforts to protect consumers who are purchasing phone and Internet services. And I know that there has been some success of interagency cooperation in the past, and I'm thinking about the Truth in Billing efforts that occurred not long ago. Is there currently any effort to increase that sort of interaction with the FCC?

VLADECK: Yes, I don't want to comment on past efforts, but I would say that certainly in the last nine months we have established very good working ties with the FCC. We are working on matters of common interest. We meet regularly with our counterparts there. And we look forward to deepening our collaboration.

ANTITRUST SOURCE: You've written extensively on the subject of administrative law, and in particular federal agency preemption. In Congressional testimony, you've generally argued against broad federal preemption of state laws. In particular you've stated that "recent assertions of preemption of State law by Federal regulatory agencies are in the main nothing less than an effort by the Executive Branch to arrogate power that properly belongs to Congress." Given that your position envisions the state as an active participant in protecting consumers, how do you see the Bureau of Consumer Protection increasing its collaboration with the various states during your tenure, in particular the offices of the attorneys general?

VLADECK: Let me make two quick points; one is, that quote in context refers to assertions of preemption by agencies, not in regulations or other formal statements of agency policy, but simply in Federal Register preambles and other informal statements, which I saw as an arrogation of authority. The FTC has not and would not do that. I think that the Supreme Court's ruling in *Wyeth v. Levine*, which sharply criticized the FDA for attempting to exercise preemptive power through a statement in a regulatory preamble, took the same view as I did. And I think that practice has come to a halt.

But the more pertinent answer is, yes, I believe that the FTC and State Attorneys General, as well as legal service providers, are natural partners. Getting back to the resource question—none of these entities has resources sufficient to do its job. And one thing I feel strongly about is working collaboratively with states and other important partners, like legal services providers, to optimize the use of our resources.

We recently settled a case against LifeLock, which billed itself as a company that could prevent ID theft. Thirty-five State Attorneys General participated in that settlement, along with the FTC. I don't know if that's a record for the Federal Trade Commission, but it was emblematic of what I want to accomplish in terms of FTC-state collaboration.

Collaborations serve important purposes. They conserve scarce resources. They facilitate settlements with companies facing the possibility of multiple enforcement actions. And they build working relationships that have value going forward.

I recently spent two days in Chicago meeting in our Midwest Regional Office with nearly 100 lawyers from the offices of State Attorneys General and legal service providers. The meeting, which we called a "Common Ground" conference, was the first one held by the FTC that brought

lawyers from states, legal service organizations, and the FTC together. It was energizing and inspiring to meet with others who are doing the same kind of high-volume anti-fraud work we're doing. We had a lot to discuss. The legal services providers often see scams before we do, but they too are under-resourced and cannot cope on their own with the flood of cases that they review. One goal of the conference was to think about allocation of responsibilities and to explore whether there are resources, including training, access to briefs and pleadings, and technical assistance that we can offer to better equip legal services providers and State Attorneys General to handle these cases. And I plan on doing these meetings at every regional office within the next year to eighteen months. So yes, I think we do want to cooperate more with our state partners.

ANTITRUST SOURCE: And it would occur to me that the recent confirmation of Julie Brill as FTC Commissioner will advance that objective, given Julie's great work over the years in the Office of the Vermont Attorney General and, more recently, as the Chief of the Consumer Protection Division in the Office of the North Carolina Attorney General.

If you look at some of the great consumer protection cases, they're antitrust cases dressed up in other garb.

VLADECK: I think that's right, and of course I agree with your assessment of Commissioner Brill. We're looking forward to Commissioner Brill helping us build on the foundation for a closer collaboration with states and legal services organizations that we've been laying for the past year.

This is in keeping with one of my top priorities. I am anxious to forge partnerships with the FTC's natural allies: not just state AGs and legal services providers, but also our federal partners, the FCC, as you mentioned, the Food and Drug Administration, the Department of Justice (especially the Civil Division's Office of Consumer Litigation), the EPA, and the Department of Energy.

ANTITRUST SOURCE: Given that most of the readership of *The Antitrust Source* is comprised of competition lawyers, many readers of this interview will be curious about your views regarding the interplay of competition and consumer protection law.

Some have commented that both are intended to remedy market distortions, in the case of consumer protection law by correcting a misimpression that a product or service has a greater value than it actually does, and by doing so preventing consumer injury. Do you agree with this characterization? Would you describe the interplay any differently?

VLADECK: No. I think that the observation is true. If you look at some of the great consumer protection cases, they're antitrust cases dressed up in other garb.

Consider again the early commercial speech cases. These cases were aimed at dismantling anticompetitive restraints that might have been actionable under the antitrust laws but for the fact that they were imposed by guilds operating under the protection of the state.

The Florida Board of Accountancy, which was the defendant in *Edenfield v. Fane*, was unreachable under the antitrust laws as a result of cases like *Ronwin*. But the Board was composed of practicing CPAs who wanted to retain the anti-solicitation rule to prevent CPAs from the North moving to Florida and "poaching" their clients.

The one time I got Chief Justice Rehnquist to crack up during an argument was in *Edenfield*. He asked me to describe the origins of the Florida anti-solicitation rule. When I began my answer with a description of the 1905 "Anti-Encroachment Rule," also known as the "Anti-Poaching" rule of the then Guild of Florida Accountants he interjected and said, "Did you say anti-poaching?" And I said, "Yes, your Honor, anti-poaching." He thought that was hilarious. It was the only time I got him to laugh, and I think it was the only time I got his vote.

I think it is also worth noting that BC and BCP are working together on a number of cases in which we have mutual interest.

ANTITRUST SOURCE: Your predecessors, as Bureau Directors—Lydia Parnes, Howard Beales, Jodie Bernstein, and others—have left very strong legacies. I'm curious as you look ahead and you someday arrive at the conclusion of your tenure, is there one thing for which you would like to be remembered?

VLADECK: I think I came in with a clear sense of what I wanted to accomplish here. I think we need—at least in the time of this economic downturn—to concentrate on anti-fraud work to protect those rendered vulnerable by the recession. That has been a focus of our enforcement and rulemaking efforts and I think we're making real progress in that regard.

The privacy initiative that we've launched is also essential. The current frameworks available to the Commission just aren't going to serve us well going forward. We need to construct a framework that works in a highly dynamic, constantly evolving market. And establishing a framework that provides consumers meaningful control over their personal information without stifling innovation or placing barriers on the information superhighway is a serious challenge.

I also am happy to capitalize on the successes of my predecessors. The group you mentioned is an illustrious one, and I am proud to be part of that heritage. Lydia Parnes, my immediate predecessor, should be applauded for her many accomplishments.

From my standpoint, Lydia's most important achievement was building an institution that is exceptionally high functioning and is staffed with top-flight lawyers who get the work done who have a deep commitment to the agency's mission, and who genuinely enjoy working with one another. There is a culture within BCP that is special and needs to be preserved. If I can do that, then I think that I'll have done a good job.

ANTITRUST SOURCE: Well, David, thank you very much for taking the time this morning.

VLADECK: John, it's always a pleasure to chat with you. ●