Interview with Andrew Smith, Director, FTC Bureau of Consumer Protection

Editor’s Note: In May 2018, Andrew Smith became the Director of the Federal Trade Commission Bureau of Consumer Protection. Prior to his appointment, Mr. Smith was a partner at Covington & Burling, where he co-chaired the financial services practice group. Early in his career, Mr. Smith served as an Assistant to the FTC Director of the Bureau of Consumer Protection, where he played an integral role on a variety of rulemakings regarding consumer protection in the financial sphere. In this interview, Mr. Smith discusses his priorities, the prospect of new federal privacy and data security legislation, and the experience of working with five new commissioners. This interview was conducted on February 7, 2019 for ANTITRUST by Janis Kestenbaum, a partner at Perkins Coie.*

ANTITRUST: You are especially well-known as an expert on consumer protection with respect to financial services. What drew you to consumer protection and your focus on the financial services area?

ANDREW SMITH: Following law school, I worked at the SEC on investor protection issues. In 1999, the Gramm-Leach-Bliley Act was passed, which promised a convergence of financial services, so banks would be offering securities products and insurance products, insurance companies would offer bank and securities products, and broker dealers would be offering all of the above. So, I decided to broaden my horizons. I left the SEC and I went to work at a law firm which focused on “consumer financial services”—a euphemism for retail credit and deposit products—cards, mortgages, auto loans, etc.

At this law firm, I worked with Anne Fortney, who was a long time FTC hand and a serial alumna of the FTC. She was an attorney advisor for Commissioner Mary Gardiner Jones during the 1970s, and she came back in the early 1980s to be the head of the Division of Credit Practices, which is now the Division of Financial Practices. And working with Anne I really got interested in consumer protection issues and financial services issues, and credit reporting and privacy specifically. With Anne’s help I came to the FTC in 2001 to work with Howard Beales, who was at that time the Director of the Bureau of Consumer Protection.

Anne was well-known to Howard and well-known to FTC Chairman Tim Muris. Howard needed someone in his office who understood financial services and I presented myself as that individual, and so I came to work for Howard as what was then called an Assistant to the Director.

At the FTC I was really quite focused on financial services and on credit reporting in particular. At that time, the Fair Credit Reporting Act was being overhauled and there were various provisions in it that were expiring. In order for those provisions to be renewed, the Act needed to be amended. That was 2003, and that took up a lot of the time of Howard and people in this office and the Division of Financial Practices, before there was the split with privacy and financial practices.

After the law was enacted, we had something like 20 different rules to make. Some of them had very short deadlines, like six months. We also had 10 or 11 different studies. I led those various rulemaking and study teams and, after completing most of the tasks, left the FTC in 2005 to go back into private practice. I worked at Morrison & Foerster and Covington & Burling and then came back here when Joe Simons gave me a call.

That’s how I come to consumer protection. It is a little bit accidental, but I have not regretted a minute of it. The mission is an important one at the FTC, but it is also intellectually challenging, particularly these fairly complicated statutory schemes like the Fair Credit Reporting Act or Children’s Online Privacy Protection Act where it’s like a puzzle trying to figure out what the right answer is and how best to protect consumers while not hampering innovation.

ANTITRUST: You went from being an Assistant to the Director to being the Director with about 13 intervening years in the private sector. How does your prior experience in the Bureau affect how you approach your job now? What did you notice had changed or stayed the same at the Bureau?

ANDREW SMITH: So, remarkably, I showed up here on May 21, 2018 and I walked into the [Bureau Director’s] office in which we’re sitting now and the furniture was just as it was when I left in 2005. The office was in the same configuration and the artwork on the walls was all the same, and then we had our first senior staff meeting and the Associate Directors came in and they were all people that I knew, that I had worked with in 2005. The continuity was really quite remarkable, and I felt immediately at home. Everyone here has been...
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They’re used to changes in administration, they’re used to new Bureau Directors coming in, and they are used to adapting to the style of a new Bureau Director.

And the processes of the Bureau have not changed. The authority is pretty well-settled. There are some new legal requirements since I was last here, such as ROSCA—the Restore Online Shoppers’ Confidence Act—but for the most part, it’s pretty similar and so I feel as though there has not really been very much changed at all since I was here last. I did serve under two different Chairmen too, Tim Muris and Debbie Majoras, and two different Bureau Directors—Howard Beales and Lydia Parnes—so I did get some sense of different management styles and the like.

ANTITRUST: Did anything surprise you about the Bureau, now that you are the one running the show, that you might not have anticipated when you were an Assistant to the Director?

ANDREW SMITH: Probably the biggest surprise is that I am now a government executive. I have always thought of BCP as a machine, and I am in charge of that machine—with the help of a very able and experienced leadership team. We keep up a steady pace of enforcement actions, rulemakings, workshops and outreach, speaking engagements, consumer education, data collection and analysis, etc. When I was outside of the agency, I always thought that BCP made it look easy, but we have 450 FTEs in eight divisions and eight regional offices that make it all happen. Although we are not large by the standards of many federal agencies, there are still plenty of management challenges in making all of this come together.

ANTITRUST: What are your top substantive priorities as Director, and how do they reflect your financial services background?

ANDREW SMITH: Most of the key consumer protection and technology issues apply in the financial services space, as well as the general market. For example, we see lead generation, internet advertising, privacy, and data security with respect to financial services, but also with respect to consumer markets more generally.

One issue that I am interested in, however, which is exclusively financial services, is small business finance. There have been many anecdotes of sharp practices in the market for financial products offered to small businesses—where the repayment terms are incomprehensible or hidden, and businesses suffer terrible financial losses as a result. These might be loan products, but also could be “merchant cash advance,” which if structured properly is not generally considered to be a loan. Because this is a small business product, and also because it is not always a loan, it is probably outside the jurisdiction of the Consumer Financial Protection Bureau, so the FTC has a special and more urgent role to play. We are having a workshop in early May to examine some of the risks to small businesses that can result from these financial products.

Another area we care about greatly is lead generation—this is where a person who is not the seller is advertising a product or service. The advertising might be over the television, via email, the internet, social media, or any other channel. Online lenders typically market through lead generation, so it is not accidental that lead generation has been a big priority of ours. We are focusing our enforcement not just on the affiliate or publisher that is displaying the advertisement to the ultimate consumer, but also the lead aggregator that aggregates those leads through their affiliate networks and the ultimate advertiser who purchases the lead. We’re looking at all of those elements of the lead generation ecosystem for deception primarily, but also unfair practices.

Another area of focus is new or novel techniques for internet advertising and the risks that they present to consumers—so you will see us bringing cases with respect to fake reviews or ratings, undisclosed connections with influencers, and undisclosed native advertising and paid content.

Privacy and data security are big priorities of ours. I spent a lot of my time in private practice working on privacy and data security issues, and the Commissioners and Congress are closely focused on these questions. To the extent that legislation is passed, we want to make clear that the FTC is more than capable and willing to shoulder its share of the enforcement and rulemaking load.

Another priority is fighting fraud—for example, the sale of a product that has no value at all, or that cannot be sold except through deception. And, when we think about fraud, we also think about the facilitators of fraud: robocalling platforms, lead generators, call centers, and payment processors. We testified this summer in support of our enforcement program against payment processors. Some members of Congress were asking questions about whether our payment processing enforcement program was motivated by animus towards certain “disfavored” industries, and we showed successfully, I think, that we only bring actions against payment processors who are processing for hardened fraudsters and are active participants in the fraud.

Developing new and improved tools for law enforcement policymaking, outreach, and education is a priority. We have done a fair amount of work enhancing our ability to collect and analyze data. For example, we have improved the...
Consumer Sentinel Network in terms of the data that we take in and the tools for law enforcement to search Sentinel. We also are improving the tools for the public. We have this new feature of our website called “Tableau Public,” where we publish Sentinel data in a more granular format on a regular, ongoing basis. We also are mining Sentinel data for better law enforcement targeting.

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ANTITRUST: You are, I believe, the first Director to appoint a Deputy for Economic Analysis. What motivated you to add that position, and what role does the Deputy for Economic Analysis play in the Bureau’s operations and decision-making?

ANDREW SMITH: I thought that it was important to have a deputy who was not a lawyer, who was an economist. So, remember when I was here the first time, the Bureau Director was Howard Beales. He was an economist, he wasn’t a lawyer. And so he looked at all of these consumer protection issues from an economic perspective. Such as, what’s the real consumer injury here? What’s the harm that we’re seeking to prevent? Will our proposed fix actually address that harm? What are the costs of our proposed fix as compared to the benefits? Would there be another way to do this, where the costs would be lower and the benefits would be greater?

Asking questions like this was foreign to me in 2001, when I first joined the FTC to work with Howard. As a lawyer, my first focus was on what the law requires. So we have brought in James Cooper, who is an economist as well as a lawyer. James has had significant experience at the FTC and is an extensively published and well-regarded economist. He is well thought of by the economists here, as well as by the Chairman and me. His job is to look at everything that comes through here through the prism of economics and whether we are being faithful to that vision of a cost-benefit analysis before we take action against companies. I can’t say that James and I always agree on everything. But he has been critically important and has enlightened me to other ways to look at cases.

We obviously have a Bureau of Economics, and one of James’s colleagues from George Mason, Bruce Kobayashi, is the head of that. The Chairman relies heavily on the Bureau of Economics for guidance, but I think that he also takes some comfort in the fact that he knows that James has been involved in a lot of our decisions. James isn’t necessarily involved in every decision, but he is always present where he and I think that it could benefit from his input, such as the bigger cases, the more controversial cases, and anything involving privacy and data protection.

ANTITRUST: So, James Cooper, your Deputy for Economic Analysis, attends meetings with outside parties on enforcement matters and is involved in decisions on enforcement actions—i.e., his role isn’t strictly policy-oriented?

ANDREW SMITH: Yes, absolutely. As you know from your experience here there are a lot of people involved in a decision, and then after a decision to make a recommendation has been made, you then forward it to the five commissioners and their offices, who offer their input. But James is an integral part of the decision, he’s always at the table and in our staff meetings. We had a meeting with outside counsel today on an important case and James was there and played an integral part in that.

ANTITRUST: After your first stint at the FTC you spent a number of years in the private sector representing companies before this agency and others. How does that affect how you approach your job? Relatedly, as Bureau Director, what have you seen that’s especially effective or ineffective in terms of advocacy by outside parties before the Bureau?

ANDREW SMITH: How does my private practice experience inform my decisions here? I think that I am probably more sensitive to the human toll of enforcement—for example, seeking ex parte relief, which can involve the full panoply of asset freeze, receivership, and temporary restraining order. These are really extraordinary remedies, and as a law enforcement agency, this is what we do. But from the perspective of the company that is the subject of the asset freeze and receivership, that’s a fairly nuclear option, so we cannot take it lightly. I tend to think really carefully about those decisions, and I try to be really sensitive to the real human effect of these remedies.

As far as advice for people who come in to meet with the Bureau Director, it is a lot easier to settle the case with the Bureau Director than it is with the Commissioners. Some folks dig in their heels, and no way, no how are they going to settle the case with me. You have every right to take your chance with the Commissioners. That’s your prerogative. And sometimes there is no way to settle, we can’t simply see eye to eye, and we’re going to go to litigation. But if you have an inkling that you’re going to settle, it’s a lot easier to do with me than with five Commissioners, and then you also make it my problem to get that settlement through the Commission.

In the Bureau Director’s Office, and in BCP generally, we try not to be so terribly adversarial. We try to work with respondents and be fairly understanding about time deadlines and burdens in the midst of production. Lawyers who practice a lot in front of administrative agencies have commented on how reasonable and humane the FTC can be. I think a lot of that is because our staff lawyers and supervisors are very experienced and sure of themselves. They are not afraid that if they give an extension that somehow will give an advantage to the other side. And we hope that it’s a two-way street. I think that people find that they get better results
when they take a similarly non-confrontational approach to CIDs and investigations and the like.

**ANTITRUST:** Any other tips for outside counsel as to how to maximize the effectiveness of their meetings with you?

**ANDREW SMITH:** In your meeting with the Bureau Director, you need to be earnest and open and transparent and engage in a discussion. We can disagree with one another, but I’m not ever going to yell, at least I hope that I don’t, because I think that confrontation in that kind of a setting really can cause people to get their back up.

The presentations that I have thought were effective—that really moved the needle for the client—were where I left feeling like they were an open book, that they weren’t hiding anything, that there wasn’t any effort to blow smoke, the presentation was very clear, and they weren’t trying to confuse or obfuscate. And even when the facts weren’t particularly favorable, I think that the lawyer may have made a difference. And I suppose on the flip side of that when there’s an effort to obfuscate, when answers to questions aren’t clear, when there is confrontation or no response to the questions that are asked repeatedly, that can have a negative effect on outcomes.

**ANTITRUST:** You are in the possibly unique position that you are the head of the Bureau when there is a brand-new slate of five Commissioners. What’s that like, and how does it affect your job and the work of the Bureau?

**ANDREW SMITH:** Right, so we have five new Commissioners and I am also new. All since May of last year. Commissioner Chopra knows a lot about consumer protection and has a distinguished history in the field. He worked at the Department of Education, and at the CFPB and at the Treasury Department on consumer protection issues. So he comes with that strong background and thinking about how best to protect consumers. He is not a lawyer by the way, but has an MBA, so he perhaps comes at it from the perspective of a business person.

The other four Commissioners are primarily antitrust lawyers by trade. I think they would tell you that they don’t have as much of a grounding in consumer protection. Although I would note that Commissioner Wilson worked here before as Chief of Staff to Chairman Muris, and both Commissioner Phillips and Commissioner Slaughter worked on Senate Judiciary, where they had exposure to these issues.

All of these Commissioners have to figure out what they think is important, and I also am new and sort of finding my way. So we all have to be understanding of one another, and give people the space and the support to figure out what they think the right answers are to some of these difficult questions.

And we’re going to be asked difficult questions by Congress, particularly in the area of data security and privacy, so there will be some effort for individuals—who may not have had any priors on these issues before eight months ago—to find their way and to think through these issues, and also some effort for the Commission to find its way with respect to consensus. We’re all trying to figure out where consensus can be found, and if it can’t be found, then how can we disagree with one another in a civil and productive way. All of the Commissioners seem to be really sensitive to that civility and seem to appreciate that the camaraderie of the individuals is important even if they can’t always agree on every issue.

**ANTITRUST:** Speaking of privacy, there seems to be greater bipartisan support for a federal baseline privacy law than we’ve seen in a while, or perhaps ever. Last fall, the Commission unanimously urged Congress to consider enacting baseline privacy legislation—which may be unprecedented. Are there particular things you’d want to see in a federal baseline privacy law?

**ANDREW SMITH:** There are two distinct issues, one is privacy and the other is data security. They are distinct insofar as we can all probably agree that we want optimal data security, even if we disagree about how to get there. For example, we might disagree about how much investment is required for optimal data security, but generally speaking, we want sensitive data to be kept secure, and we don’t want unauthorized access or acquisition of that data, particularly by bad people.

I think that privacy presents much more subjective issues, about the circumstances under which each of us thinks that collection, sharing, or use of data is appropriate.

What the Commission has said with respect to data security, is that Congress should pass data security legislation, that the FTC should have rulemaking authority under the APA, and that the FTC should have authority to seek several penalties for violations of the data security rule and that the FTC should have jurisdiction for the purposes of that rule over common carriers and nonprofits.

I imagine that a data security law would be something like our [Gramm-Leach-Bliley Act] Safeguards Rule. It might say something like companies that maintain sensitive personal information shall have in place a written plan to address the risks to that data, that the FTC shall make rules under the APA with respect to the development of that plan and shall enforce those rules like a trade regulation rule, so that you would have standard FTC civil penalties.

And then, it might say something like the FTC shall have the same authority to enforce these rules as it has under the FTC Act, without regard to the jurisdictional limitations therein. So that gives the FTC jurisdiction over common careers and not-for-profits—people that would otherwise not be subject to FTC jurisdiction under the FTC Act. This is the approach taken in some other similar statutes.

Okay, so privacy. I agree that there’s a thought that this is privacy’s moment, perhaps because of the California Con-
sumer Privacy Act. The Commissioners have said that the Congress should consider privacy legislation. But the devil is in the details. Unlike data security, privacy is not necessarily an objective good upon which we can all agree.

I could see a lot of good coming from better privacy notices, and it seems to me like privacy legislation ought to include a requirement for a clear privacy notice—a real notice, not one buried in paragraph 35 of the 28-page terms and conditions. And it should clearly tell consumers what information is being collected, how it is used, how it is shared, and any choices offered by the company, voluntarily or by statute.

This would also give us at the FTC a clear promise to consumers that we could enforce under the FTC Act. It would be really nice to have a clear, conspicuous, and prominent privacy promise that everybody can understand and with no question about whether it’s actionable.

Okay, so what else is there? Prohibitions on collection of information, maybe prohibitions on use of information, prohibitions on sharing of information, and consumer choice with respect to all of the above. From my perspective, these seem to be questions that can be best resolved legislatively. What’s most important to me about privacy legislation is that, if legislation happens and there is an agency that has to make or enforce rules, I want that agency to be the Federal Trade Commission. And I want to make sure that the FTC has the tools to be effective—that is, APA rulemaking authority and civil penalties to enforce those rules.

The FTC for better or worse has been the primary privacy agency in this country, and I think that we understand privacy better than anyone. But I am obviously a little parochial in my viewpoint. The other thing is that as the only general jurisdiction consumer protection agency, we have proven over the last hundred years remarkably immune to capture. And I think that this also counsels in favor of giving responsibility for any new authority to the Federal Trade Commission. We will take whatever authority Congress gives us, and we will execute on it. We have always done that faithfully with new privacy laws, whether it’s the FCRA, COPPA, HITECH, or GLBA.

ANTITRUST: You mentioned your work on something like 20 rules under the FACTA amendments to the FCRA in your first tour at the FTC.

ANDREW SMITH: Yes. We can make rules, and we can enforce, and we do. Whatever direction Congress gives us we will follow. There are a lot of rules that we have on the books that I don’t necessarily agree with from a philosophical perspective but that doesn’t make any difference, we enforce the law vigorously anyway.

ANTITRUST: It’s a very interesting time, and it will be fascinating to see what happens with respect to a federal baseline privacy law. One thing that comes up a great deal in enforce-ment in the privacy area is balancing the important goal of ensuring that consumers are protected without unduly hampering the ability of companies to innovate and do new things and use new technologies. How do you approach striking that balance?

ANDREW SMITH: The economists to some extent keep us honest, when it comes to not over-reaching. Legally, we will always be acting within our authority, but we’ve given a great deal of authority. Courts have generally been quite deferential to what we do. We don’t frequently lose in litigation and so we have to be aware of that, and it’s the economists that help with that. They will make sure to tell us that if we prohibit a particular practice what effect that will have on innovation and the market overall.

Here’s an example: ratings and reviews. Fake reviews and ratings are a big problem. Trip Advisor, Yelp, and so on. This is the way that people shop. This is the way that I shop. I rely on those, and if I see a restaurant that has a lot of one stars, or a hotel, I don’t go. So fake reviews are a problem.

On the other hand, reliance on reviews for advertising is a bit of a Catch-22, because if you don’t have any customers, you don’t have any reviews. So how do you get customers? One way to get customers is to give out free samples. And you might even give out a free sample and say, “Try this and give us a review.” What the economists would tell us is by being too doctrinaire or taking too broad an approach in our enforcement against ratings and reviews, we could really kill innovation. So, that’s just an example of how we might be able to consider effects on innovation in our enforcement and policy-making practices.

ANTITRUST: Interesting. I imagine that, given your strong financial services background, you have practiced quite a bit before the Consumer Financial Protection Bureau. How do you think about the FTC and the CFPB in terms of the way they each operate and approach consumer protection? Do you see any interesting differences and any areas where the FTC might seek to emulate the CFPB or, conversely, where the CFPB might seek to emulate the FTC?

ANDREW SMITH: I think the CFPB has loads to learn from us. It’s not because they’re doing anything wrong; it’s because we’re a hundred years old and they’re not. We have, in fact, worked with the CFPB from the beginning and recently,
under the new administration, we had some individuals detailed over there to work with them on how we view unfair and deceptive practices. I think that all the banking agencies and the CFPB try to adhere to FTC precedent with respect to unfairness and deception but still those concepts can be hard to implement and there are a lot of edge cases, so we do work with them on that kind of stuff.

But the CFPB has a lot of tools that we don’t have. Like civil penalty authority for unfair and deceptive practices. They also are frequently dealing with a more captive audience, at least with respect to the banks, who are used to paying big penalties and are disinclined to tangle with the CFPB because it could affect their license.

We have regular interaction with the CFPB on a lot of levels, including at the staff level, with their enforcement division, their supervision division, and consumer education. And we try to be singing from the same song book. Here at the FTC, I think that we would be reluctant to bring a case that is really squarely in the CFPB’s bailiwick. For example, they have said that they care a lot about debt collection, and it would be hard for me to imagine bringing a case against a big national debt collector unless the CFPB said it was okay.

By the same token, my hope is that they are not going to be bringing cases against people like employment background screeners, who are within our jurisdiction under the Fair Credit Reporting Act.

I don’t want to say that there’s a division of labor, because I don’t really believe in those kinds of hard and fast rules, but I hope that we at least have an understanding that we each have our respective lanes, and that consumers are best served if we try to adhere to our core competencies.

ANTITRUST: Thank you very much for being so generous with your time. It’s wonderful to have the opportunity to hear your perspective less than a year into your tenure as Bureau Director.