

Interview with Jessica Rich, Former Director, FTC Bureau of Consumer Protection

Editor's Note: This interview looks at Jessica Rich's leadership of the Federal Trade Commission Bureau of Consumer Protection, including its close attention to privacy issues. Ms. Rich served as Director of the Bureau of Consumer Protection from June 2013 until February 17, 2017. During her tenure, the Bureau brought a series of high-profile enforcement actions, including cases against Apple, AT&T, Volkswagen, DeVry University, Herbalife, Western Union, Wyndham, Amazon, Snapchat, and Uber. The Bureau also issued numerous policy reports on emerging privacy issues, such as the Internet of Things, big data, and cross-device tracking. Prior to being named Bureau Director by Chairwoman Edith Ramirez, Ms. Rich served in a number of other senior roles at the FTC, including Deputy Director of the Bureau of Consumer Protection, Associate Director of the Division of Financial Practices, and Acting Associate Director of the Division of Privacy and Identity Protection. Ms. Rich is widely credited as an architect of the FTC's privacy program.



Jessica Rich

In May of this year, Ms. Rich joined *Consumer Reports* as Vice President, Consumer Policy and Mobilization.

Associate Editor Janis Kestenbaum interviewed Jessica Rich for *ANTITRUST* on March 28, 2017.

ANTITRUST: What initially drew you to the FTC and to consumer protection law more generally?

JESSICA RICH: Finding the FTC was one of the best things that ever happened to me. I was working in New York in private practice, but I was originally from D.C. and wanted to move back and work in government. I found the FTC in a list of federal jobs. It was not nearly as well known then, and I had not even heard of it. I asked around and heard great things about it.

Consumer protection was a natural fit. My dad was an old-style, "just-the-facts" *Washington Post* reporter—national desk, same era as Woodward and Bernstein. My mom ran a non-profit. We all read *Consumer Reports*, and the job appealed to me instantly.

After bringing fraud cases for a couple of years, I soon found my way to privacy. The privacy program, as we know it now, didn't exist when I joined the FTC. But the Division of Financial Practices, where I eventually became a manager, did enforce the Fair Credit Reporting Act, one of the U.S.'s early privacy statutes. As the FTC started exploring privacy issues, I made a beeline for the program and ended up being its primary manager from 1998 to 2009, which is a long time. And then when I was David Vladeck's deputy from 2009 to 2011, I oversaw the privacy program in that capacity.

It was incredibly interesting and, we believed, important work. We did surveys and workshops, and we started applying longstanding FTC law to a new area, privacy. It was very challenging and intellectually engaging, and it attracted some of the brightest people at the FTC and to the FTC.

ANTITRUST: You are known as one of the pioneers of the FTC privacy program. You said that when the area was getting started in the late 1990s you made a beeline for it. Why?

JESSICA RICH: It was a new issue and it required creativity—how can we apply existing FTC law to this area? It required hard work—rolling up your sleeves, collaborating with the best thinkers at the agency, and making your best arguments to the Commission. And it promised to be a very important issue for consumers—where was their data going and how was it being used? Would consumers have any control over this?

ANTITRUST: How have privacy issues evolved since the late 1990s?

JESSICA RICH: There have been enormous changes. First, the experience for consumers is very different. There are so many devices now, with so many companies collecting information invisibly behind the scenes, everywhere consumers go. Companies are developing very detailed profiles—much more detailed and personalized than in the early days. It's impossible for consumers to protect themselves with the current set-up. They can't read hundreds and hundreds of privacy policies as they go about their day, and they don't even know most of the companies that collect their information. It's really absurd to put that burden on consumers, and this is one reason why I support basic privacy and data security standards that everyone should follow and expect.

Second, the role of enforcers is very different. In the early days, we put in place building blocks that simply weren't

there—privacy policies to promote accountability, basic security. Nobody had these. Now companies are a lot more sophisticated about privacy and they have many more tools to work with. But the threats are greater, too. The question now is whether companies are undertaking reasonable measures to keep pace with evolving threats, and the cases are harder.

ANTITRUST: What are the similarities between privacy issues today and those from about 20 years ago, when online privacy work began at the FTC?

JESSICA RICH: We continue to talk about fair information practices. That has remained steady, so you still hear a lot of talk about notice, choice, security, and access. The presumption has been that if you give consumers those tools, they will be able to exercise control over their privacy. But as I mentioned, that presumption is really faulty today. The practices are so much more complex, and there are so many more companies and devices and so much more data collection behind the scenes. So while we continue to talk about these same concepts, I think we really need to start thinking about new models that don't put so much burden on consumers.

ANTITRUST: In 2009, when you were Deputy Director of the Bureau of Consumer Protection (or BCP), the FTC launched a privacy “rethink” that resulted in a new privacy framework set forth in a privacy report published in 2012, *Protecting Consumer Privacy in an Era of Rapid Change*. What has been the impact of that framework and report?

JESSICA RICH: I think it was very influential. It was a nuanced discussion of privacy, an updated discussion of the fair information practices. Many companies say they follow the framework laid out in the FTC's 2012 privacy report, which discussed three basic concepts—Privacy by Design, Choice, and Transparency.

We didn't invent the concept of Privacy by Design—Ann Cavoukian, then a privacy commissioner in Canada, did. But the FTC really promoted it. Businesses need to build privacy into their products from the start, when they are designing them and developing their business plans. This is fundamental to protecting privacy.

The report's approach to choice recognized that absolute choice isn't possible in a connected world and distinguished between expected uses of data, for which offering choice would just be a burden, and unexpected uses, for which choice is needed. Now it's five years later, and the burden of reading disclosures and making choices is even greater for consumers. We need fresh thinking again.

ANTITRUST: Does that lead you to believe that the FTC should start focusing less on notice and choice and more on limits on permissible and impermissible uses of data?

JESSICA RICH: Yes, we do need to start exploring a use

model, but it isn't likely to work unless there are clear rules of the road everyone understands—what uses are permissible and what aren't? And I don't think you can get there without legislation, which seems particularly unlikely in this environment.

So until we have clear rules, I think we just need to work on ways to make it easier for consumers to exercise choice—strong enforcement when practices are deceptive or sneaky, making clear these practices violate the law. New tools to make it easier for consumers—like apps to help consumers make and track their privacy choices and ratings of products and services on privacy and security.

ANTITRUST: When you became the director of BCP in 2013, you were remarkably well prepared for the job. Given your many prior leadership positions, you already knew the commissioners, Bureau front office, and BCP staff well. Given your depth of knowledge, what if anything surprised you about running the Bureau?

JESSICA RICH: The sheer volume of work was even greater than I thought. I literally would have meetings all day, every second of the day. There was no time in the office to read the case recommendations—that was for nights and weekends. Even though I had seen other Bureau Directors work hard, I was still surprised.

But another surprise was that I thought it would be difficult for me to have so many meetings, but I truly loved it. When you're the one making the decisions, you really focus and engage. It's not like sitting in a meeting and just watching what's going on. The topics the FTC deals with are also so inherently interesting—scams of all types, and novel privacy and financial issues. And the people are great.

ANTITRUST: BCP has responsibility for a remarkably broad set of issues over vast parts of the economy. In light of that, how did you set your priorities as Bureau Director?

JESSICA RICH: We did bottom-up strategic planning in every division; every staff person in every office participated and then we put it all together and considered what was proposed. There were many inputs to the process, too—consumer complaints, enforcement partners, industry groups, consumer advocacy groups, and press reports. This has been a critical part of how BCP does business because the potential scope of our jurisdiction is so vast. It's a very meaningful process.

ANTITRUST: In the privacy area, there's a perennial debate over what constitutes cognizable privacy or data security injury under the FTC Act. How did you approach that issue as Bureau Director?

JESSICA RICH: Harm is a huge consideration in all of the areas the FTC works—in fraud, in advertising, in privacy. But

harm must be understood to include risk, especially in the data security area. We need to prevent harm before it occurs and not wait until consumers have already been injured. That's why the FTC Act specifically charges the FTC with preventing unfair and deceptive practices.

Also, deception has been widely understood to be per se harmful because it distorts the marketplace, prevents consumers from making choices, disadvantages truthful companies, and creates risk. If you put a materially false statement into the marketplace, you've injured consumers entitled to rely on it, as well as competitors acting honestly.

ANTITRUST: Where the harm is not yet realized, which is often the case with data breaches, what was your approach to determining how much risk of injury is necessary to make a practice actionable?

JESSICA RICH: It's a factual question in each case, and this issue is being litigated in two FTC cases right now, as you know. I do think there needs to be a real appreciation that consumer privacy risks are very high in today's marketplace, with the many new devices out there, the sophistication of hackers, and the extraordinary amounts of data being collected. Companies need to protect against these risks, even when it may impose some burdens on them. They're making a lot of money off consumer data, and they have their reputations to think about, too.

ANTITRUST: Putting aside data security, i.e., the unauthorized access to information, and focusing on the intentional collection and use of data—what is sometimes called “pure privacy”—the harm may be more intangible, emotional, or subjective. What was your approach to consumer injury in that context?

JESSICA RICH: It depends. Under Section 5, the FTC needs to meet the elements of deception or unfairness, and that governs the question here. If there's deception about data collection or use, that's harmful without proof of specific reliance or injury. For unfairness, the FTC needs to prove the practice is “likely to cause substantial injury.” The FTC looks at the sensitivity of the data, the risks created by the practice, and the nature of the harm, and it's brought cases involving “pure privacy” injury—for example, the posting of nude photos and spying on people through their rented computers. In today's marketplace, it would be very odd not to recognize privacy harm as actionable.

ANTITRUST: In your view, has there been an evolution in the FTC's approach to what is cognizable privacy harm under the FTC Act?

JESSICA RICH: I don't believe there's been an evolution—there's been an ongoing dialogue that's gone back and forth. Some think privacy is an important value on its own. Others

want to focus on whether privacy invasions have led to specific, tangible injury. These are different strands of thinking that inform what the FTC does in any particular situation. They're not necessarily in conflict.

ANTITRUST: Has the pendulum been swinging back and forth solely as to the *degree* or quantum of risk that is sufficient to make something actionable under Section 5?

JESSICA RICH: I think that the “quantum of risk” issue is a more recent focus, given the increased privacy and security risk in today's marketplace and, of course, recent litigation. But the “quantum of risk” is where the debate is right now.

ANTITRUST: While harm can be controversial in the privacy area, when it comes to the fraud arena, it is not. There will always be more fraud than the agency can prosecute. In light of that, how did you determine the best use of Bureau resources in the fraud area?

JESSICA RICH: In the fraud area, the FTC get lots of complaints from consumers, and these complaints are incredibly valuable in figuring out what to focus on. For example, during my tenure, we saw a large spike in complaints about imposter scams and, as result, shifted resources to that area. Of course, many consumers don't know to complain to the FTC, so we relied on other sources too—enforcement partners, consumer and business groups, and press reports.

ANTITRUST: Did you have a threshold for the dollar value of injury before the Bureau would bring the case?

JESSICA RICH: We considered the dollar value—it's very important. But if we thought there was an emerging problem and we needed to get the word out, we might also bring a case against a smaller operation. Or, if we thought we could prevent a scam in its early stages, we wouldn't wait until the injury grew, but we would try to nip it in the bud.

ANTITRUST: Turning to the international sphere, you were involved in the negotiation in the new U.S.-EU Privacy Shield that enables transfers of personal data from the EU to the United States. How in your view should the FTC approach enforcement of the Privacy Shield to help ensure that the European Union continues to support the program? Relatedly, do you think that the EU will require the FTC to bring a greater number of cases about *substantive* violations of the program than were brought under the predecessor Safe Harbor framework?

JESSICA RICH: The Privacy Shield is a huge priority for the FTC. And there are many new commitments in the Privacy Shield that weren't in the Safe Harbor, so it's a stronger program in many ways. Many of the changes revolve around a stronger referral process from the EU States, and a stronger

relationship and more ongoing discussion with the DPAs [data privacy authorities]. We got very few referrals when I was running the privacy program, and I believe all of the Safe Harbor cases we brought (39 cases) were initiated through the FTC's own investigations. For that reason, it was hard to identify substantive violations, though we did in the *Google*, *Facebook*, and *Myspace* cases. With greater engagement with the DPAs, I think it will be easier for the FTC to identify and address substantive privacy shield violations. Strengthening the FTC's relationship with the DPAs is very important.

ANTITRUST: When the Consumer Financial Protection Bureau was created in 2010, it was the cool new kid on the block with authority that the FTC lacked as well as a higher pay scale. How did you seek to distinguish the FTC's role in the financial services arena from the CFPB's role during your time as the head of the FTC's Division of Financial Practices and then later as Bureau Director?

JESSICA RICH: You're right, when the CFPB was created, there was anxiety and adjustment on the part of the FTC. The FTC had been the only game in town in consumer protection at the federal level, and here was a shiny new penny. The CFPB had a bigger budget, stronger legal authority, and higher salaries, and they recruited a bunch of our staff right off the bat. But it's important to note that we didn't lose jurisdiction in the financial area, and Dodd-Frank actually gave us more jurisdiction in the auto advertising and financing area.

After the CFPB was created, I took over the part of the agency most affected—the Division of Financial Practices (DFP). I actually sought out the job because I thought it would be challenging and much needed. My goals were to establish a good working relationship with our new partner, which we did, and to figure out what was the best role for the FTC in the financial area in light of the change.

I made changes pretty quickly to focus on what the FTC does best and where it could make the most difference. We launched the FinTech program, which focuses on consumer protection issues raised by new financial technologies like crowdfunding, Bitcoin, and mobile payments. This was important work other agencies weren't doing, and it was very well-suited to a nimble agency like the FTC. We also ramped up our presence in auto advertising and financing—an area where Congress had given us primary jurisdiction. And we reduced our role in certain areas better left to the CFPB's regulatory and examination authority like loan servicing. Finally, we embraced the enforcement role of the FTC. Whereas the CFPB is largely a regulatory agency, the FTC is largely an enforcement agency. For example, we led a huge federal-state debt collection sweep involving hundreds of defendants.

ANTITRUST: The landscape seems very different today than it did in 2010. Do you agree that the questions about the

FTC's ongoing role in the financial arena seem to have disappeared?

JESSICA RICH: I think that's correct, and I'm very happy about it. The FTC has an important role to play in the financial area, and lots of sophistication about the issues. And we have a very good partnership also with the CFPB to avoid duplication and ensure as much consistency as possible.

ANTITRUST: Let's turn to the advertising sphere. Some have argued that the FTC was too aggressive during your tenure as Director of the Bureau as well as during the tenure of your predecessor, David Vladeck, by holding companies liable even if ads did not mislead a majority of consumers, by setting substantiation requirements that were alleged to be too onerous, and by seeking equitable monetary relief even when advertisers were not accused of fraud. What's your reaction to these criticisms?

JESSICA RICH: During my tenure, we were constantly balancing the need to stop deception with the desire not to discourage legitimate truthful speech, and I think we were successful. The cases on my watch targeted unsubstantiated claims about such issues as opioid addiction, alcoholism, detecting cancerous moles, measuring alcohol content for driving, reversing cognitive decline, and curing autism. These are dangerous claims affecting consumers' health and safety and the FTC is one of the only agencies out there that can challenge them. And for every case we brought, there were hundreds we couldn't bring due to resources. This is very important work that the FTC needs to keep doing. And when companies charge consumers a lot of money for bogus products, the FTC should try to get it back.

ANTITRUST: We were talking a moment ago about the good relationship that the FTC has with the CFPB. There was a great deal of speculation about a turf battle between the FTC and the Federal Communications Commission as it began to focus on privacy issues. What was your relationship like with the FCC?

JESSICA RICH: We had a very good relationship. People like to write these articles about turf battles. I was also on some panels with Travis Le Blanc [former Director of the FCC Bureau of Enforcement] where it was purposely set up so we would spar, and we both enjoyed that. But the relationship was very solid. Chairwoman Ramirez had regular dinners and calls with [FCC] Chairman Wheeler. There were regular calls at the staff level. And we worked jointly on a number of projects, including joint settlements in the T-Mobile and AT&T cramming cases, joint work to combat robocalls, and sharing ideas on various proposals, including the [FCC's] broadband privacy rule.

Certainly, one byproduct of the FCC's reclassification of broadband was that it limited FTC jurisdiction over ISPs.

That wasn't good for the FTC or consumers, since we were the longstanding cop on the beat. But the FCC's goal wasn't to divest us of jurisdiction. It was trying to "get to yes" on net neutrality.

I would note that due to reclassification—which has been stayed but not reversed—and the adverse decision by the Ninth Circuit in the FTC's AT&T "unlimited data" case, the FTC currently lacks jurisdiction over carriers entirely. There's hope that the Ninth Circuit will change its ruling, but that would only solve part of the issue. This is a bad problem that needs to be fixed, as consumers have very little protection now when it comes to carriers.

ANTITRUST: Yes, and literally as we speak today, the rules regarding broadband privacy are changing as Congress is looking at the issue and considering whether to repeal the FCC's recently adopted broadband privacy rules for ISPs. One of the reasons cited for this push to repeal the rule is the desire for uniformity between the privacy restrictions for ISPs subject to FCC authority and the rest of the Internet ecosystem, under FTC authority. What are your thoughts about the need for a uniform privacy framework for the Internet ecosystem?

JESSICA RICH: First, I want to make clear that simply repealing the FCC's rule won't restore jurisdiction to the FTC. It's just going to leave a huge gap in consumer protection for broadband privacy since the FTC currently lacks jurisdiction over ISPs entirely and the FCC's jurisdiction is also narrow. There will be no uniformity if this gap isn't filled.

And, yes, this gap just adds to the need for baseline privacy and data security legislation. As I mentioned earlier, the current system for addressing privacy puts way too much burden on consumers and no one really knows what they can expect from companies when it comes to privacy and security. Our patchwork of sectoral laws, and the gaps between them, just add to the problem. We need consistent, baseline privacy and security standards we can all count on.

ANTITRUST: We're in a time of substantial transition in Washington—and that's probably a substantial understatement. What kind of changes are we likely to see in the consumer protection work done by the FTC?

JESSICA RICH: I'm not at the FTC right now so I don't know the details of what's going on inside the agency. But if the past is a predictor, I don't think most of the FTC's work will change. The largest program by far is the fraud program, which isn't controversial. There may be some disagreement here and there about specific cases, but everyone supports the basic program and approach. And while certain advertising and privacy cases have gotten a lot of attention, most of these cases have been unanimous at the Commission level.

All that being said, there are three open seats at the Commission—which is a large number—and much will depend on the new people who are appointed.

ANTITRUST: Looking back on your tenure as Bureau Director, what do you consider your greatest achievements?

JESSICA RICH: That's a question I like. First, we significantly expanded our presence in the tech marketplace, which is growing rapidly so the FTC really needed to be in this space. We brought cases involving deceptive mobile apps and mobile payments—*Snapchat, Apple, Google, Amazon, T-Mobile, AT&T, Lumosity*, health apps. We brought cases involving poor security by Internet of Things' devices—*Asus, TRENDnet, D-Link*. We brought cases involving surreptitious data collection by mobile ad networks and smart TVs—*InMobi, Turn, Vizio*. We addressed deceptive social networking campaigns—*Machinima* and *Lord & Taylor*. We did workshops and reports on the Internet of Things, cross-device tracking, and new privacy technologies. And we created a new office, the Office of Technology Research and Investigations, to help the Bureau with its tech investigations and do original research. Our point was to make clear that the fundamental rules of consumer protection apply to these new devices and technologies. But we were also very mindful of taking reasonable, flexible approaches to the issues.

The second thing I'm particularly proud of is that we were ready, willing, and able to take on big, tough cases if necessary to get important relief for consumers. For example, *VW, Herbalife, Wyndham, POM, Western Union, Amazon, AMG, LifeLock, DirecTV, Cancer Fund of America, DeVry*. Many of these cases involved significant harm to consumers, and significant redress. We litigated some of these cases and we were prepared to litigate all of them.

We also did unprecedented work with federal and state partners to increase our effectiveness, avoid duplication, and promote consistent approaches. We worked with our partners on cases like *Cancer Fund of America, VW, Western Union*, and auto and debt collection sweeps. We hosted dozens of Common Ground conferences across the country to talk to our partners about consumer protection problems in their regions and to develop relationships. And we developed many joint projects, like joint guidance with HHS and FDA on health apps, comments to the FCC on broadband privacy and set-top boxes, comments to NHTSA on self-driving cars, and comments to the Department of Energy on smart grid. As you can tell, I'm very excited about what we did to protect consumers during my tenure.

ANTITRUST: That is a very impressive set of accomplishments in what was just a few years. And we've only scratched the surface of your work as Bureau Director. Thank you very much for taking the time to talk, and for your leadership and years of public service at the FTC. ■