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Federal Trade Commission

President Obama's decision to elevate Commissioner Edith Ramirez to chair the Federal Trade Commission is likely to boost FTC competition enforcement in high tech, particularly concerning acquisitions and perceived abuses of intellectual property rights; data privacy and security; and health care, particularly health care provider consolidation, author Ankur Kapoor of Constantine Cannon writes.

He cites Ramirez's experience as an intellectual property litigator and her public comments about problems in the high tech patent field. Also, he notes she has led FTC efforts on international coordination of data privacy and security. And she has termed "vitally important" FTC readiness to "challenge hospital deals and other transactions in health care markets to protect competition."

Ascension of Obama's New FTC Chair, Edith Ramirez, Signals Greater Enforcement in Tech, Health Care

BY ANKUR KAPOOR

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On March 4, 2013, Edith Ramirez became the new Chair of the Federal Trade Commission. Because she was already a commissioner, President Obama's appointing her as Chair was not subject to Senate approval. Some have commented that Commissioner Ramirez's more reserved manner relative to her predecessor, Jon Leibowitz, has made it more difficult to glean her enforcement priorities and the direction in which we can expect her to guide the FTC. However, from the new Chair's background and her speeches since becoming a commissioner three years ago a clear picture emerges of the principal issues important to her and therefore those on which we can expect the FTC to focus during her term (currently set to expire on September 25, 2015). These areas are: (1) competition enforcement in high tech, particularly concerning acquisitions and perceived abuses of intellectual property rights; (2) data privacy & security; and (3) health care, particularly health care provider consolidation. While the FTC certainly has been very active in these areas, Chairwoman Ramirez's and her fellow commissioners'

intellectual firepower in these fields, particularly high tech and data privacy & security, strongly indicate that President Obama has loaded the FTC to increasingly enforce competition and data privacy & security in high tech markets.

Competition Enforcement in High Tech

Commissioner Ramirez's Keynote Address to the New York State Bar Association Antitrust Law Section Dinner on Jan. 24, 2013, opened by stating how "[w]e all operate today in a time when markets are morphing at lightning speed; when products and industries that did not exist ten years ago shape the economic landscape; when consumers' opportunities to access innovative goods and services are surpassed only by equally innovative threats to consumers' privacy and pocket-books."¹ Her statement suggests a balanced outlook, showing respect both for the realities of the high tech marketplace and for consumer welfare.

Directly addressing the high tech sector later in that same speech, the soon-to-be Chairwoman cited the FTC's extensive and ongoing study of intellectual property in high tech. According to Commissioner Ramirez—an experienced IP litigator—the study “confirmed what was already clear to market participants: firms developing new products were facing a dense thicket of overlapping patents of vague scope and ambiguous quality; they perceived themselves as litigation targets; and they relied increasingly on defensive patents. The result was a full-blown patent arms race in the tech sector with disturbing implications for innovation, competition, and consumers.”² In particular, the new Chair and her fellow commissioners are disturbed by tech firms and “patent assertion entities”—pejoratively known as “patent trolls”—“holding-up” one another at late stages of product development or after product launch to leverage “licensing terms that reflect the device maker's own [relatively substantial] investment, rather than the [relatively minimal] competitive value of the patented technology.”³

Expect the FTC to file more actions, and take positions in existing government and private cases, seeking to prevent patent owners . . . from restricting competition due to alleged patent infringement.

Such “hold-ups” can block market entry by competition or can result in higher royalty rates or restrictive li-

¹ “Looking Back to Move Forward: Preserving the Progressive Tradition at the FTC,” at 1, available at <http://www.ftc.gov/speeches/ramirez/130124nysba.pdf>.

² *Id.* at 7.

³ “Competition Policy for the IP Marketplace,” at 2, Keynote Address by Comm'r Edith Ramirez, 29th Annual Antitrust, Consumer Protection and Unfair Business Practices Seminar and Annual Meeting, Washington State Bar Ass'n (Nov. 8, 2012), available at <http://www.ftc.gov/speeches/ramirez/121108wastatebar.pdf>.

censing terms, which in turn can raise prices, lower quality, or restrict choice for consumers. In addition, firms respond by acquiring patent portfolios of their own to assert defensively, creating “a costly arms race” that “drives companies to shift their resources from productive activities, like research and development, to less productive ones, like filing a multitude of dubious patent applications and acquiring massive patent portfolios.”⁴

The mobile patent wars among Apple, Google/Motorola, Microsoft, Nokia, and Samsung have created headline after headline validating some of the FTC's predictions for high tech markets and competition. The industry should expect the FTC to file more actions, and take positions in existing government and private cases, seeking to prevent patent owners in certain circumstances from restricting competition due to alleged patent infringement. One example of such an approach was the FTC's action in *In re Motorola Mobility LLC and Google, Inc.*—a separate action from the one concerning Google search. The FTC alleged that Google, which had acquired Motorola Mobility, violated § 5 of the FTC Act by seeking injunctions for infringement by entities who had been willing to license Motorola's standard-essential patents (“SEPs”) that Motorola had promised to license on fair, reasonable, and non-discriminatory terms (“FRAND” terms) in exchange for Motorola's technology being adopted into the relevant mobile technology standards.⁵ Google/Motorola settled the action by (1) agreeing to withdraw, in the United States and globally, its requests for injunctions for infringement of patents Motorola had allegedly agreed to license on FRAND terms, and (2) agreeing “to offer a FRAND license to any company that wants to license Google's SEPs in the future,” subject to licensing dispute resolution by a neutral third party.⁶

Another area the FTC can be expected to investigate is the acquisition of patent portfolios by firms with market power in particular technologies, as evident from the above-mentioned challenge to Google's use of Motorola patents. These technologies would include, in addition to smartphones and tablets, technologies for cloud computing, social media platforms, delivery of audio/video content, and the coming “Internet of Things.”⁷

Data Privacy & Security

As a commissioner, Ramirez has been involved on the FTC's behalf in assisting with the development of the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) System. The APEC CBPR is a set of voluntary internal business rules concerning data privacy and security that was designed by APEC's member economies, including the United States, “to create more consistent privacy protections for consum-

⁴ *Id.* at 3.

⁵ Statement of the FTC, at 1, FTC File No. 121-0120 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/index.shtml>.

⁶ *Id.*

⁷ Commissioner Wright, previously a professor of law at George Mason University School of Law and also an economist, has also published and presented substantially concerning competition in high tech.

ers when their data moves between countries with different privacy regimes in the APEC region.”⁸

Companies wishing to take advantage of the APEC CBPR System must undergo an independent third-party certification process that ensures compliance with the privacy rules in the System.⁹ Once an organization has been certified as CBPR-compliant, the CBPR System privacy policies and practices become binding and enforceable by an appropriate enforcement authority.¹⁰ For example, the FTC could bring an action under § 5(a) of the FTC Act for a company’s failure to comply with the CBPR System, as an “unfair and deceptive business practice,” because a CBPR-compliant company is representing that it complies with the System.

As a commissioner, Ramirez has remarked on the “immense potential” of the APEC CBPR system and how it “reflects a consensus on what constitutes sound cross-border data protection.”

The requirements for APEC certification are exhaustive and well beyond what are required by existing data privacy and security laws in the United States. Nevertheless, many companies may want voluntarily to submit themselves to the CBPR System and the FTC’s jurisdiction over it, in order to facilitate their global collection and movement of data. As a commissioner, Ramirez has remarked on the “immense potential” of the APEC CBPR system and how it “reflects a consensus on what constitutes sound cross-border data protection.”¹¹ European regulators are also in a dialog with the APEC to determine whether the APEC CBPR Sys-

⁸ FTC Press Release, “FTC Welcomes a New Privacy System for the Movement of Consumer Data Between the United States and Other Economies in the Asia-Pacific Region” (Nov. 14, 2011). The 21 members are: Australia; Brunei Darussalam; Canada; Chile; the People’s Republic of China and Hong Kong; Indonesia; Japan; the Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; Russia; Singapore; Chinese Taipei; Thailand; the United States; and Viet Nam.

⁹ Even before a company can participate in the APEC CBPR System, that company’s APEC member economy must itself qualify for participation in the System, generally by: (1) having in place a mechanism to enforce data privacy and security within its borders; and (2) participating in the APEC Cross-Border Privacy Enforcement Arrangement, which is a multilateral arrangement enabling national privacy enforcement authorities to share information and provide assistance in cross-border data privacy and security enforcement. On July 26, 2012, the United States was confirmed as having met these conditions through the enforcement authority and activities of the FTC.

¹⁰ APEC Cross-border Privacy Rules System – Policies, Rules and Guidelines, at 4.

¹¹ Opening Remarks of Comm’r Edith Ramirez, FTC Workshop Enforceable Codes of Conduct: Protecting Consumers Across Borders, at 4 (Nov. 29, 2012), available at <http://www.ftc.gov/speeches/ramirez/121129codesconductremarks.pdf>.

tem can be brought to the EU.¹² Expect the FTC to promote the APEC CBPR principles of data privacy and security to U.S. legislators as they consider additional data privacy and security protections for U.S. consumers.¹³

Health Care

The other industry on which Commissioner Ramirez focused, in her Keynote Address to the New York State Bar Association Antitrust Law Section Dinner, was health care. While the FTC’s health care competition enforcement efforts have been substantial, Commissioner Ramirez’s passion for evidence-based enforcement (she invoked the principle multiple times in her address) and the FTC’s data on hospital mergers indicate even greater efforts to come with respect to health care provider consolidation during her tenure as Chairwoman.

Commissioner Ramirez noted how, beginning in 1994, the FTC and the Department of Justice’s Antitrust Division lost seven hospital merger cases in a row.¹⁴ In 2002, the FTC’s Bureau of Economics began an empirical study of prices and quality of care resulting from consummated hospital mergers. The FTC’s economists found that: “hospital competition was highly localized;” the mergers led to higher prices and insurance premiums without necessarily improving care; and therefore the mergers were “anticompetitive” as the antitrust agencies had unsuccessfully contended in court.¹⁵ Recently, and relying on its empirical economic study, the FTC has brought and won several challenges to health care provider consolidations.¹⁶

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COMMISSIONER RAMIREZ, SPRING 2012

In an interview last spring, Commissioner Ramirez was asked about her thoughts on merger enforcement. She cited two industries: high tech and health care. Concerning health care, she stated: “[T]he data shows that annual health care costs for consumers are approximately 18% of total GDP. Merger activity has been increasing among health care providers, and evidence shows that growing consolidation can lead to higher prices without corresponding improvements in quality of care. Against this backdrop, it is vitally important that the Commission continue to investigate and, where

¹² Sam Pfeifle, “New FTC Chair Ramirez Points to COPPA, Mobile Space, BCR-APEC Alignment as Priorities,” *The Privacy Advisor* (Mar. 8, 2013).

¹³ In addition to Commissioner Ramirez, Commissioners Brill and Ohlhausen have substantial expertise in, and have expressed their dedication to, protecting consumers’ privacy. See <http://www.ftc.gov/commissioners/brill/index.shtml>; <http://www.ftc.gov/commissioners/ohlhausen/index.shtml>.

¹⁴ *Supra* note 1, at 3.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 4-5.

appropriate, challenge hospital deals and other transactions in health care markets to protect competition.”¹⁷

Conclusion

In conclusion, it is worth noting again Commissioner Ramirez’s emphasis on evidence-based and data-based

¹⁷ “Interview with FTC Commissioner Edith Ramirez,” at 4, *The Threshold*, Vol. XII, No. 2 (Spring 2012).

enforcement. Notwithstanding the clear import to her of protecting consumer welfare in health care and high tech markets, we can expect her to take the FTC where the evidence leads. Some of the commentary on the new Chair describes her as “measured,” “trying to get input from all sides,” and “doing her homework.”

Parties appearing before the FTC would therefore be well advised to come armed with the facts, economics, and data to support their case that their actions or proposed actions inure to their customers’ and consumers’ benefit.