

Response to David Vladeck:  
The Obama Record on Consumer Protection

What David has just said about the FTC's successes over the past several years is all very nice. But I think a little fact-checking is in order.

I.

First, do the numbers support the claims that David has made about the Obama record on consumer protection? That is, has the FTC in fact been more aggressive in the past four years than in earlier periods?

As a rough measure of aggressiveness, researchers at the Berkeley Center for Malleable Statistics tracked down on Westlaw all judicial actions – decisions, orders, etc. – involving the FTC for each of the last thirty-five years (excluding those actions that referred to “merger” or “antitrust” in order to focus only on the Commission's consumer protection work). Our researchers were thereby able to get a rough comparative measure of the overall consumer protection activity for each year. Because they do not include administrative actions, among other reasons, the numbers are of dubious value in determining the absolute volume of enforcement activity. But as a comparative measure over time, the results might – we thought – have something to tell us.

And so they do.

From an average of about 27 actions a year under President Carter<sup>1</sup>, the number dove to 13 a year under President Reagan, climbed back to 22 a year under the first President Bush, rose to 27 (with the exception of one aberrantly low year) under President Clinton, rose further under the second President Bush to 36 actions a year, and continued at about that pace for the first two years of the Obama presidency – then in 2011 took a jump to 78 actions, and for 2012 appears headed at current rates to a total of 70 actions.

The average number of judicial actions for the first four years of the Obama presidency comes to about 57.5, or about a 60% increase over the Bush 2 years (and a 100% increase over Clinton and Carter).

The highest yearly total under Obama was also a 60% increase over the highest year for any previous president. And since that total occurred in 2011, and has largely been

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<sup>1</sup> The FTC is an independent agency, with commissioners serving seven-year terms, but its chair and the majority of commissioners have historically been from the same party as the president, and its high-level appointees have reflected the administration's policies, so it is not entirely incoherent to look at the FTC by “presidency.” It's true that cases brought in one administration may carry over into another. That's one reason why our intrepid researchers derived an average for each term before making comparisons.

matched this year, the number would be consistent with an explanation that more investigations were begun at the outset of the Obama presidency, leading to more judicial actions a couple of years later.

A 60% jump. The numbers, in other words, provide adequate substantiation for the claims that the Director has made.

But as they say at the Center for Malleable Statistics, who trusts numbers? Let's take a look at other, *qualitative* indications of aggressiveness:

Our researchers went through the FTC's own records and selected a month from late in the first term of the most recent three presidents. The results for the FTC under President Clinton in August 1996 included 4 major cases, including actions against well-known companies - the Ford Motor Co. and Hasbro toy company.

August 2004 under President Bush saw 12 announcements of cases, though the names of Pinnacle Marketing and the Promenade Travel Club are perhaps not so well known. Most of these defendants appear to have been fly-by-night operations rather than household names (with suspended monetary judgments because of inability to pay)—though some include million-dollar redress to consumers and one required a defendant to sell two houses to help provide that redress.

We come then to August 2012. Here – that is, last month – we have 15 announced FTC actions. There are some apparent fly-by-night fraudsters but the practice there seems to have developed a new wrinkle: in along with the suspended judgment the defendant has been required to sell his home - and (pointedly) his 2007 BMW. We see asset freezes. And we see some very big household names: A \$22.5M penalty for Google. A n order against Facebook. \$25M in redress to customers of Reebok who bought the miracle “toning shoes.” Objections to an inadequate settlement in a private suit against Verizon for cramming. \$2.1M in redress against makers of Disney Vitamins for deceptive health claims. “Your Baby Can Read”! No he can't. That's \$500,000. Warning letters to window manufacturers – letting an entire industry know about misleading claims cases that the FTC successfully brought against a few big players, for practices that seem to afflict the whole industry.

Whole industries? Large, household name companies? Asset freezes and forced BMW sales? The Reader's Digest Company sued as a “relief defendant” because its subsidiary sent profits from the (amazing weight-loss miracle) Ab Circle Pro upstream. This does begin to look ... aggressive. Maybe even ... courageous.

## II.

Our researchers could not help wondering: What might be the cause of this greater aggressiveness? To find the answer, the Berkeley Center on Miscellaneous Research went to the people on the ground – conducting an unblind, non-randomized survey of FTC employees about their job experience over the past several years. And there was –

perhaps surprisingly – a remarkable consensus on the reason for the change in the FTC’s activities and atmosphere.

I quote: “Number one, he’s brilliant. Number two, he’s an experienced litigator, so he is intimately familiar with the ropes, and with the hoops we have to jump through. Number three, he’s very savvy at dealing with personalities, which is very helpful both internally and with defendants.”

(You may have noticed that the “reason” sounds a great deal like a single individual.)

I quote again: “If you can convince him of your cause, he’ll go to the mat for you, no matter who is on the other side of the argument -- which is awesome not just because he’s an incredible advocate, but because it’s empowering to staff to have someone like that believe in and support them.... As a agency, we’ve gotten more aggressive.” What else? “The cooperation: Working with state attorneys general has been great ...” “We work really productively with the CFPB and with federal criminal authorities (the Department of Justice and US attorneys’ offices): We know how to freeze assets; they know how to seize email.” “Working with legal service providers is a charge that came directly from him – to talk to the people who are seeing what is actually happening on the ground.”

“We love him. He’s just been the best....” “We are really lucky” to have ...  
David Vladeck.

### III.

So those are the results of our research. Apparently, contrary to every expectation, what David has told you is the truth: The FTC really *has* acted aggressively against deceptive health claims and last dollar scams and privacy violations. And it turns out that much of the reason for this is, well, David.

Now, that raises some interesting questions. I’ll mention just two here:

1. How do you keep it going? Clearly the FTC has become a leader – perhaps *the* leader – in the nation’s consumer protection efforts. Equally clearly, there have been times in the past when that was not so. What will happen to the newly aggressive FTC when David (who has said he will step down at the end of the year to return to Georgetown) departs? What are the institutional changes that will remain?

2. Relatedly, what about the possibility of a backlash? As we’ve seen, there have been ebbs and flows in the Commission’s aggressiveness over the past several decades, and once, in the late 1970s and early 1980s, after a particularly active period that included calling for an end to advertising unhealthy foods to young children, the agency’s very existence was threatened by Congress. (The food and advertising industries had let their allies in Congress know their displeasure.) Well, we are in the midst of what looks to be the most aggressive period of FTC enforcement activity since at least the 1970s. In addition, three years ago, Congress called on the Commission to chair a multi-agency

task force to develop . . . nutritional standards for foods that can be advertised to children. This particular effort didn't come out so well—as David notes, the government came in second—but the food and advertising industries may not want to take the chance that it'll happen again for at least another 30 years. Is the FTC, because of its recent aggressive actions against large and influential companies, at risk of a similar backlash to what happened three decades ago?

In sum, I suppose my questions are not so much about the Obama *record* on consumer protection. As our back-of-the-envelope research suggests, that looks pretty impressive. My questions are about the Obama *legacy* on consumer protection. I realize that the answer to the question depends a lot on what happens in November. But there are so many areas that are in flux or that seem in danger of being undone as readily as they were done. Ad substantiation, cooperation with state and local agencies and legal service providers, existing FTC regulations that are all under review, the new and powerful but controversial and potentially vulnerable Consumer Financial Protection Bureau, evolving privacy standards. On all of these, beyond what the record *is* – what will the legacy *be*?