Remarks at NAD 2020

One Step Forward, Two Steps Back: Sound Policy

I. Introduction

Thank you for inviting me to speak with you today.

my strength, so sometimes I overdo it and the pain drives me back to icepacks and crutches – two steps back.

Today I'd like to highlight three key policy issues – one area where I'd like the FTC to take a step forward toward even better results for consumers, and two areas where I'd like to avoid having the FTC take a step back from this goal. First, I will describe my perspective on the appropriate role of rules and regulations in a market economy. It is my hope that the FTC can take a step forward by eliminating unduly burdensome, highly prescriptive, and outdated regulations. Next, I will explain why the Commission's historical and widespread reliance on non-monetary settlements makes sense, contrary to assertions by some of my fellow Commissioners. I would like to avoid taking one step back by insisting on monetary relief in every matter, regardless of whether that approach will require litigating more and settling fewer cases. And finally, I will discuss the FTC's traditional (and appropriately limited) approach to individual liability for corporate executives. Although I have fellow commissioners who disagree, routinely holding liable the CEOs of legitimate companies would constitute a second step back from sound enforcement.

Before I begin, I must give the standard disclaimer that the views expressed today are my own and do not reflect those of the Commission or any other Commissioner.

II. Rules and Regulations in a Market Economy

In 2016, President Donald J. Trump campaigned in favor of deregulation. As a longstanding and ardent advocate of free markets,[1] I agree wholeheartedly with the President's deregulatory

agenda.[2] As a student of economics, I learned how government intervention could distort market forces to the detriment of consumers.[3] As a practitioner, I learned from clients how incumbents could exploit existing regulatory regimes to deter the entry of would-be

The FTC systematically reviews of its rules and guides, a practice I applaud.[12] When the Commission conducts one of these reviews, it routinely asks whether the regulation is still necessary. It also inquires about the costs and benefits to businesses and consumers; potential conflicts with state, local, federal or international laws; whether consumer perceptions have changed; and how changes in relevant technological, economic or environmental conditions have impacted the regulated industry.[13] In other words, we seek information from stakeholders about the ongoing relevance of the rule, as well as its relative costs and benefits. This type of review process frequently prompts the Commission to revise its rules and guides to address evolving market forces. Recently, for example,

on changes to improve the Rule's organization.[15] I supported those changes but questioned

whether it was necessary for the Rule to prescribe the weight of the paper (58 pounds per 500

sheets) a manufacturer must use when printing the EnergyGuide labe ld[(e)4 (t)s1 (pa)-1 (ps)-1 Gu-1 (ny)-1 (d[

egregious instances of invasive regulatory zeal, I am concerned that some of my colleagues appear eager to repeat history.

For example, the Commission recently sought comment on a proposed rule regarding Made in USA labeling. The statute that authorizes us to promulgate this rule limits our authority to labels. Significant precedent exists on the definition of "label," both in the statute and

scarce resources. Non-monetary settlements halt the deceptive or unfair conduct, impose liability on a company (and in some cases individuals), and include substantial conduct relief that constrains future behavior. In addition, by resolving Commission investigations with consents, we can free up staff resources to address other unlawful conduct. The FTC's practice is not unique – the majority of federal cases end in settlement.[20] Some of my Commissioner colleagues, however, have referred to these orders as "no money, no consequence" orders. They have argued that these cases amount to no more than "a slap on the wrist" and have asserted that the Commission should pursue litigation to obtain monetary relief.[21] But litigation entails the expenditure of substantial staff time, frequently requires costly expert testimony, and imposes significant opportunity costs. For this reason, I am reluctant to pursue litigation in federal district court when the conduct relief we can obtain through a non-monetary settlement provides full and meaningful relief, together with both specific and general deterrence.

Allow me to list just a few examples of the types of non-monetary relief the FTC has obtained in its consent decrees:

- Bans on participation in certain activities: in several matters, the Commission has banned respondents from marketing or selling any weight loss product.[22] And last year the Commission entered five consents against businesses banning them from

[20] *See* Theodore Eisenberg & Charlotte Lanvers, What is the Settlement Rate and Why Should We Care?, 6 J. EMPIR. LEG. STUD. 111, 132 (2009) (Table 5, finding that 66.9% of 2,966 cases filed between January 8, 2002 and July 8, 2002 in the Eastern District of Pennsylvania and the Northern District of Georgia settled, using Pacer data.)

[21]

using form contract provisions that preclude consumers from posting negative reviews online.[23]

- Bans on particular representations: in July 2020, the Commission entered a consent banning a respondent from making claims that certain products cure cancer.[24]
- Required disclosures: the Commission has required marketers of indoor tanning products or services to make disclosures about exposure to ultraviolet radiation and safety.[25]
- Requirements to implement compliance monitoring programs: in matters involving deceptive endorsements, the Commission has required that the endorsers disclose material relationships and also required the company to develop a program to monitor and review representations and disclosures and enforce compliance.[26]
- Requirements to implement comprehensive privacy and/or data security programs: to remediate alleged privacy and data security violations, the Commission has required

[23] In the Matter of National Floors Direct, Inc. C-4684 (2019), https://www.ftc.gov/Td [(I)1.7 [a(n)-5 (c)1.7 ( )1 (r)-1.3 (t)-1.1 (.)4.98(

$5 billion civil penalty. Perhaps even more importantly, the order also includes significantly

creams can smooth over."[35] The FTC's proposed order holds liable

Non-

parties are subject to civil penalties and equitable relief for violations of administrative orders. The burden of proof to demonstrate order violations is lower for the FTC than in contempt cases for violations of district court orders – preponderance of the evidence as opposed to a clear and convincing standard.[42]

Moreover, non-monetary settlements provide general deterrence to industry. FTC enforcement actions signal to others in the industry the FTC's resolve to hold bad actors to account, and underscore the applicable legal standards to follow so as to avoid running afoul of the law.[43] In fact, many practitioners attend this conference for the purpose of learning more about FTC enforcement actions so as to counsel your clients more effectively about their legal obligations. Scholars have noted that in the wake of FTC enforcement, "[r]esponsible companies will have little choice but to conform to the new standards to avoid the risk of Commission challenges, which have substantial adverse effects on capital market values."[44]

[42] Al0Tw 13.115 o>BDC 0 ID 19 >>BDC0 0 ID d

One notable example can be found in the FTC's privacy and data security orders. Absent baseline privacy and data security legislation at the federal level, the FTC's orders have played a major role in setting the standards for industry. Professor Daniel Solove at the George Washington University Law School has explained that the FTC's settlements have created a common law of privacy. "[C]ompanies look to these agreements to guide their privacy practices. Thus, in practice FTC privacy jurisprudence has become the broadest most influential regulating force on information privacy in the United States – more so than nearly any privacy statute or any common law tort."[45] Almost all of these orders entail only injunctive relief, not monetary relief.

Accordingly, I believe that non-monetary settlements are of great consequence to respondents and a highly useful enforcement tool.

IV. Individual Liability

Turning to individual liability, the FTC sometimes seeks to hold individuals liable in its enforcement actions. Over the past two years, members of the Commission, including me, have discussed the circumstances we view as appropriate for holding individuals liable. For example, in the recent Progressive Leasing matter, a case challenging deceptive practices in rent-to-own agreements, Commissioner Slaughter and I wrote statements detailing opposing views on individual liability.[46] The Commission declined to name the CEO in that case. At approximately

---

Dos and Don'ts (March 26, 2020), https://www.venable.com/insights/events/2020/03/customer-reviews-the-dos-and-donts.

[45] Daniel J. Solove and Woodrow Hartzog, The FTC and the New Common Law of Privacy, 114 COLUMBIA L. REV. 583 (2014); *see also* Organizational Accountability in Light of FTC Consent Orders, Centre for Information Policy Leadership (Nov. 13, 2019) (discussing how FTC consent orders have precedential effect beyond the target of the investigation and set forth all of the elements of organizational accountability for privacy and data security), https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_-_organizational_accountability_in_light_of_ftc_consent_orders__13_november_2019_.pdf/.

[46]

the same time the Commission was considering Progressive Leasing, the Commission voted out another matter, Fleet Cor, in which we named the individual. The case is currently in litigation so I will refrain from discussing the merits. I will say only that I voted no in that matter and that the Fleet Cor complaint names the CEO.

My statement in Progressive Leasing explained the relevant legal standard for individual liability and its implications. To seek injunctive relief with respect to a CEO or other principal, the Commission must show only that the individual "participated directly in the deceptive practices *or* had authority to control those practices.[47] This broad standard effectively could enable the Commission to hold individually liable the CEOs of most companies against which we initiate enforcement action. As a practical matter, though, the Commission traditionally has exercised its prosecutorial discretion and considered a variety of factors when deciding whether to name a CEO or principal.

One important factor is whether individual liability is necessary to obtain effective relief. In some instances, for example, the CEO *is* the company – many FTC cases involve fraudulent or deceptive conduct by small, closely held companies that essentially serve as the alter egos of their CEO or principal. In other instances, fraudsters open and shutter companies to stay one step ahead of law enforcement, or undertake unlawful practices using multiple companies that operate as a common enterprise. In these circumstances, the Commission traditionally – and appropriately – has included the CEOs or principals in the enforcement action. I support naming

---

Regarding FTC v. Progressive Leasing (Apr. 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1571915/182_3127_prog_leasing_-_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_0.pdf.

[47] *FTC v. Ross*, 743 F.3d 886, 892-93 (4th Cir. 2014) (adopting the test for individual liability used by other federal appellate courts, including the First, Seventh, Ninth, Ten

the CEO or principal in these circumstances

for a CEO to be uninvolved and disengaged – clearly a suboptimal outcome given that a culture of compliance is strongest when compliance is prioritized by the CEO.

Alternatively, naming a CEO in those circumstances could send the opposite message – that the CEO himself is ultimately responsible for all failings even if he has undertaken objectively reasonable measures to ensure that his company follows the law. At the margins, this outcome could incentivize CEOs to devote an inefficient amount of time to compliance, at the expense of core business issues. In either scenario, CEO positions at firms posing the greatest risk will be the least appealing, deterring qualified and conscientious CEOs from accepting employment at the firms that need them most.

I also believe that there are other ways to build accountability into an order without

two steps back, and is instead moving full speed ahead with sound consumer protection enforcement.