



Office of Commissioner  
Rohit Chopra

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

## **DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA**

*In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray  
Commission File No. 1710134  
October 31, 2019*

### **Summary**

- When an investigation uncovers clear evidence of wrongdoing with no major dispute of fact or law, Commissioners should avoid entering into weak, no-consequences settlements that fail to hold a bad actor accountable or provide meaningful deterrence in the marketplace.
- Commissioners must reject the false choice between settling for nothing and litigating. Even in clear-cut matters, the Commission sometimes approaches settlement negotiations without seeking any meaningful relief or consequences. There should be a strong presumption against no-consequences settlements in these matters.
- In addition to monetary remedies, the FTC should consider seeking a broader set of remedies, such as a finding or admission of liability, formal notification to third parties, and debarments or bans in cases of clear misconduct where the law and evidence is clear.

### **Avoiding Weak Settlements**

Catching individuals and firms in the act of fixing prices and wages is extremely difficult. Given the harm that this collusion can inflict on families, the labor force, and our economy, it warrants serious consequences, including criminal sanctions.<sup>1</sup>

In very rare instances, it may be warranted for the Federal Trade Commission to resolve a matter without meaningful consequences, by entering into a settlement that simply requires a company or individual to stop breaking the law and to submit paperwork to the agency. This matter is not one of those instances. In this matter, the Commission is resolving an attempted theft of wages through a no-consequences settlement. “By neither imposing monetary penalties nor empowering the injured workers to seek legal redress, the FTC effectively signals to employers that the legal consequences

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<sup>1</sup> As I noted in a recent submission to the Department of Justice’s initiative on competition in labor markets, the Department of Justice is better suited to address illegal collusion on wages and compensation, given its ability to pursue remedies under its civil and criminal authorities. In the rare instances where the Federal Trade Commission must act alone, it is particularly important that the remedy go beyond a no-consequences settlement. *See* Comment of Comm’r Rohit Chopra, In the Matter of Dep’t of Just. Initiative on Competition in Labor Markets (Sept. 18, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1544564/chopra\\_-\\_letter\\_to\\_doj\\_on\\_labor\\_market\\_competition.pdf](https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf).

for colluding against workers are likely to be minor,” noted one response to the proposed settlement.<sup>2</sup> Our approach must change.

Settlements are important. They can help the public resolve an issue more quickly and with fewer resources. But when there is overwhelming evidence of wrongdoing, it is dangerous for government agencies to enter into weak settlements that give a violator a free pass. In settlement negotiations, the Commission may not obtain all of the relief it seeks. But when we fail to make any substantive demands at all, we guarantee that our settlements will fail to hold bad actors accountable. We need to reject the false choice between settling for nothing and litigating. Instead, we can make thoughtful demands based on rigorous analysis that lead to accountability and deterrence.

In this matter, the FTC’s investigation uncovered text messages and other unambiguous evidence that revealed a conspiracy to fix wages, a per se violation of antitrust laws that can even carry criminal sanctions. Despite these facts, the settlement carries virtually no consequences.

The vast majority of enforcement actions taken by the Commission are unanimous. Over the last year, the Commission has failed to reach a unanimous decision in only a handful of consumer protection and competition conduct cases. Where I have disagreed, it is typically because the Commission essentially demanded nothing in settlement negotiations beyond paperwork requirements and a promise not to violate the law again. Since these no-consequences settlements fail to deter bad actors, they should only be used in narrow circumstances.

### **Calibrating Consequences**

The Commission should generally presume that no-consequence settlements that simply order a Respondent to cease and desist are not in the public interest. Advocates for wrongdoers sometimes argue that violations should not carry meaningful consequences when there is no known “harm.” This logic is flawed, particularly for misconduct that has a low probability of detection and high likelihood of harm. For example, by this logic, society would never punish dangerous drivers unless they actually injured someone. In commerce, lawbreaking firms also gain a competitive advantage over firms that follow the law. Just because a harm is difficult to quantify does not mean it is nonexistent. In matters of unambiguous violations of law, the absence of known harm might help us calibrate consequences, but not exclude them altogether.

Rather than opening settlement negotiations with essentially no demand at all, below are some potential non-monetary consequences<sup>3</sup> that the Commission could seek to advance the agency’s law enforcement and compliance mission.

*Debarments and Bans.* The Commission routinely seeks debarments and bans against individual defendants, especially against those engaged in egregious conduct. The agency even maintains a

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<sup>2</sup> Comment of Marshall Steinbaum, Heidi Shierholz, and Sandeep Vaheesan, In the Matter of Your Therapy Source, LLC; Neraj Jindal; and Sheri Yarbay, FTC File No. 171-0134 at 1 (Aug. 3, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/00003-147707.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/00003-147707.pdf).

<sup>3</sup> Monetary relief is an important way for the Commission to advance goals of accountability for wrongdoing. In cases where we do not seek monetary relief, it is particularly important that we are thoughtful about other remedies to avoid a no-consequences settlement.

public database of individuals banned from debt collection.<sup>4</sup> Former FTC Commissioner Joshua Wright and former Assistant Attorney General of the Antitrust Division Douglas Ginsburg have argued that individual debarments can often be appropriate in price-fixing matters, given the low probability of detection.<sup>5</sup>

*Notice to Affected Parties.* When a wrongdoer formally notifies potential victims, customers and clients, employees, creditors, and counterparties, this facilitates transparency and follow-on actions for third parties to remedy or mitigate actual and potential harms, especially for harms that may not have been uncovered or unaddressed in an investigation.

In this settlement, the Commission includes standard language requiring the firm to notify its officers, directors, and employees about the Commission's order, but not the independent contractors targeted by the misconduct, nor the paying clients seeking these services. In a comment, Rep. David Cicilline and Sen. Cory Booker question this logic, noting that the Commission requires the violators to essentially notify themselves.<sup>6</sup> Even if the Commission's investigation did not uncover specific evidence that the conspiracy led to suppressed wages in this instance, notice to current and former contractors will help uncover if there were other instances of illegal price-fixing. Without notice, clients of these staffing agencies will also be left in the dark about the violations and may unknowingly be continuing to do business with bad actors, subjecting them to reputational damage and other risks.

*Findings or Admissions of Liability.* As I noted in *Patriot Puck*, a recent no-consequences settlement, findings and admissions can reduce the likelihood that a flagrant violator can lie about their past conduct.<sup>7</sup> Findings or admissions of facts and liability can also advance the interests of those seeking to vindicate their rights through private litigation.

## Conclusion

The conduct in question in this matter raises questions of criminal liability. Ideally, it would be resolved by an entity with both criminal and civil enforcement authority. But, when the FTC takes action, it should avoid a no-consequences settlement, especially for matters with virtually no litigation risk. The FTC is typically far harsher with small firms than with large firms, so this outcome may send a signal to those engaging in widespread wage-fixing that their illegal conduct will be worth the risk.

The 2016 Antitrust Guidance for Human Resources Professionals set expectations for greater and more effective enforcement when it comes to wage-fixing and other antitrust violations in labor

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<sup>4</sup> *Companies and People Banned From Debt Relief*, <https://www.ftc.gov/enforcement/cases-proceedings/banned-mortgage-relief-debt-relief-companies-people>, Fed. Trade Comm'n (last visited Oct. 16, 2019); see also *Banned Debt Collectors*, <https://www.ftc.gov/enforcement/cases-proceedings/banned-debt-collectors>, Fed. Trade Comm'n (last visited Oct. 16, 2019).

<sup>5</sup> Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 Competition Pol'y Int'l 3-39 (2010), [https://cpip.gmu.edu/wp-content/uploads/sites/27/2016/10/Session-7\\_Antitrust-Sactions.pdf](https://cpip.gmu.edu/wp-content/uploads/sites/27/2016/10/Session-7_Antitrust-Sactions.pdf).

<sup>6</sup> Comment of Sen. Cory A. Booker & Rep. David N. Cicilline, In the Matter of Your Therapy Source, LLC, Neraj Jindal, and Sheri Yarbay, FTC File No. 171-0134 at 2 (Aug. 30, 2019), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/00105-155425.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/00105-155425.pdf).

<sup>7</sup> Statement of Comm'r Chopra In the Matter of Patriot Puck, Comm'n File No. 1823113 (Apr. 17, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1514801/patriot\\_puck\\_chopra\\_dissenting\\_statement\\_4-17-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1514801/patriot_puck_chopra_dissenting_statement_4-17-19.pdf).

markets.<sup>8</sup> But enforcers have taken few actions to reinforce this message. Today's no-consequences settlement finalized by the FTC is a step in the wrong direction. This must change.

Given the evidence, the public comments, and public interest considerations, the Commission should not finalize this no-consequences settlement. For these reasons, I dissent.

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<sup>8</sup> Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/992623/ftc-doj\\_hr\\_guidance\\_final\\_10-20-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf).