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Office of Commissioner
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Prepared Remarks of
Commissioner Rohit Chopra[1]

Truth in Advertising Event
on the FTC's Remedial Authority

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Thank you, Bonnie, and to the entire team at TINA.org for hosting this important discussion.

This is an important week for the FTC. On Wednesday, the Supreme Court will hear arguments on whether Section 13(b) of the FTC Act permits the agency to seek refunds and monetary forfeitures from lawbreakers. As we all know, Section 13(b) has been the bedrock of our consumer protection enforcement for decades, and I am grateful to TINA.org, State Attorneys General, and many others who weighed in on behalf of the FTC and American consumers.

I will not comment on the merits of the case, but I have been able to observe the effect it has had on the FTC's work. More and more, Commissioners are hearing that the FTC should accept weak, no-money settlements, due to the threats facing Section 13(b). Clearly, there is a perception that this moment of crisis for the agency is a moment of opportunity for those hoping to avoid accountability.

This perception needs to change. It is true that over the last forty years, the FTC has relied on Section 13(b) to return billions of dollars to consumers, and losing the authority would be a blow to families and honest businesses. But I want to make clear that the Commission has other arrows in our quiver to ensure that there is meaningful accountability for corporate fraud and abuse.

Today, I want to describe some of the tools we should resurrect and some procedural reforms we should pursue in order to rebuild our credibility in the marketplace. I will provide a brief overview of our authorities, and then describe a few of them in more detail: the Penalty Offense Authority, Restatement Rulemaking, reforms to the Commission's administrative litigation process, and stronger enforcement cooperation with other agencies. I will close by arguing that regardless of how the Supreme Court rules, it is time to diversify the Commission's toolkit to ensure that we're systemically challenging market-wide abuses, rather than playing whac-a-mole.

[1] The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

Background on Section 13(b) and Other Commission Authorities

Let me start by providing some background on the FTC's various remedial tools, starting with Section 13(b), the authority under challenge. Section 13(b) authorizes the Commission to seek preliminary and permanent injunctions in federal court for violations of the FTC Act and other statutes enforced by the agency. A large body of case law developed over the last forty years has confirmed the Commission's ability to seek monetary relief under this provision, including refunds for consumers and disgorgement of ill-gotten gains.

In addition to Section 13(b), the Commission can seek monetary relief through Sections 5(l), 5(m), and 19 of the FTC Act. Section 5(l) allows the Commission to seek monetary relief for order violations – essentially, for repeat offenses. Section 5(m) allows the Commission to seek monetary relief for rule violations or for penalty offenses, which I'll describe in more detail. And Section 19 authorizes the Commission to seek monetary relief for rule violations or for dishonest or fraudulent conduct following an administrative proceeding.

Importantly, a number of these tools allow the Commission to seek civil penalties. Civil penalties are very distinct from equitable relief available under Section 13(b). Monetary relief under Section 13(b) is generally capped at victim harm, or a wrongdoer's unjust gains. This means that if a corporation cheats consumers out of $1 million, the most it will have to pay *if it is caught* is $1 million. It is not clear that this is a strong deterrent, and the Supreme Court has in fact made clear that equitable relief is not intended to deter.

In contrast, civil penalties are not capped at harm. Parties that violate a penalty statute or rule are liable for up to $43,280 per violation, which is adjusted based on factors laid out in judicial decisions and in the FTC Act. This means that penalties can be significantly more deterring than equitable relief alone. Furthermore, while penalties are returned to the Treasury rather than to consumers, in my experience most companies are willing to offer robust compensation for consumers in lieu of, or even in addition to, paying a civil penalty. Identifying authorities that trigger civil penalties for violators is therefore a key part of re-arming the FTC.

That leads me to the first authority I want to advocate for: the Penalty Offense Authority.

Penalty Offense Authority

In a recent working paper, Samuel Levine and I argued the Commission should resurrect its Penalty Offense Authority under Section 5(m)(1)(B) of the FTC Act. Under this authority, if the Commission formally condemns unfair or deceptive practices in a litigated administrative order, other companies that commit these offenses can face big penalties if they knew that the Commission already declared the conduct to be illegal.

Resurrecting the Penalty Offense Authority offers a big advantage for the FTC. In key areas, the Commission can deploy this authority almost immediately. Because the Commission has long condemned illegal practices like income misrepresentations, fake reviews, and bogus medical claims, the Commission can trigger penalty liability by notifying companies that it is illegal to

misrepresent income, generate fake reviews, misrepresent educational outcomes, or engage in other misconduct that the Commission previously declared to be illegal.

To be sure, this strategy is not a panacea, and the Commission will need to be strategic in designating penalty offenses that will be sustained in court. But there is zero downside to incorporating this authority into the FTC's toolkit.

For example, since the onset of this pandemic, the Commission has sent dozens of warning letters to firms making unsubstantiated health and income claims. By including penalty offense notifications in these warning letters, the recipients can face significant civil penalties for continuing in their violations, making it far more likely that they will come into compliance voluntarily. And if these companies continue to flout the law, the Commission will be in a much stronger position to seek meaningful relief in litigation. The FTC should routinize use of the Penalty Offense Authority by including these notifications in warning letters involving conduct that could constitute a penalty violation.

Section 18 Restatement Rulemaking

I next want to discuss Restatement Rulemaking under Section 18 of the FTC Act. Section 18 allows the Commission to write rules prohibiting unfair or deceptive practices that are prevalent in the marketplace. These rules can impose requirements on businesses, like issuing disclosures. But today I want to advocate for a different model: a Restatement Rulemaking that simply codifies well-accepted precedent, while imposing zero burden on honest businesses. Restatement Rulemaking can complement the Penalty Offense Authority, especially where there is well-developed precedent but no litigated Commission orders.

Restatement Rulemaking offers huge promise for the Commission. First, it can increase recoveries from bad actors, as rule violations allow the Commission to seek damages, penalties, and redress. This goes beyond what the Commission can recover solely using equitable authorities. Second, rules help level the playing field for companies that are not as familiar with FTC precedent, or who can't afford high-priced, politically connected lawyers. Third, rules can actually deter misconduct, as they allow the Commission to seek up to $43,280 per violation, as noted above – wiping out illegal profits, and then some. Finally, and very importantly, because a Restatement Rulemaking would simply restate existing law, it would impose no burden on honest firms.

We have a clear template for this approach in our ongoing Made in USA rulemaking. As many of you know, one of the Commission's key responsibilities is ensuring that firms do not abuse the Made in USA label, slapping it on products imported from overseas. But for decades, the Commission responded to even the most egregious fraud with no-money settlements. This enforcement approach was a failure, in my view. Since I joined the Commission, we have seen a number of cases involving blatant Made in USA violations, including by companies that had already been warned. It was clear to me that Made in USA fraud was being under-deterred.

Today, thanks to a proposed Restatement Rulemaking, the Commission can change course. In 2019, TINA.org filed a petition with the Commission, asking us to codify our existing Made in

USA guidance through a rulemaking. The Commission listened, and in June, we voted 4-1 to propose restating the existing Made in USA standard into a rule. This rule would allow the Commission to seek redress, damages, and penalties against Made in USA fraud, while imposing zero burden on firms that actually make their products here in the United States. If finalized, the rule would turn the page on the era of no-money Made in USA settlements, regardless of how the Supreme Court rules on Section 13(b).

Now, many of you know that Congress granted the Commission specific authority to write Made in USA Rules under the Administrative Procedure Act, rather than under the procedures set forth in Section 18 of the FTC Act. But I want to respond to the view out there that rulemaking under Section 18 – sometimes called Mag-Moss rulemaking – is impossible. In fact, the Commission routinely conducts rulemaking under Section 18 to update rules, and my colleague Commissioner Rebecca Kelly Slaughter has correctly pointed out that a number of the Section 18 rulemaking hurdles are self-imposed, and are not required by the FTC Act.

In my view, there are significant advantages to pursuing a Restatement Rulemaking that would address consumer harms that have already been determined to be illegal, but don't currently trigger penalties. This commonsense Restatement Rulemaking could diversify our toolkit in a broad swath of our cases, strengthen our ability to correct and deter wrongdoing, and impose no burden on honest businesses.

For example, the FTC routinely targets so-called impostor fraud, where bad actors impersonate or claim approval by the government in order to trick consumers. We see this practice both by small-time scammers and large corporations, such as a food manufacturer that falsely claimed its products were FDA-approved to treat certain medical conditions. A rule prohibiting this practice would ensure that wrongdoers face real consequences, without burdening honest firms. And in my experience, when the Commission has civil penalty authority, it becomes far more likely that firms will agree to meaningful redress, too.

Given the clear benefits a Restatement Rulemaking can confer, we should begin the rulemaking process now. That this rulemaking will trigger penalties, damages, and other relief only *after* it is finalized underscores the urgency of getting going today.

Administrative Litigation

Another key tool for the Commission is administrative litigation. Under the FTC Act, a key responsibility for Commissioners is to make conclusions about what's legal and what's not when it comes to unfair or deceptive conduct and unfair methods of competition.

However, the vast majority of consumer protection actions are brought in federal court, where a judge, rather than Commissioners, adjudicates the dispute. Undoubtedly, bringing cases in federal court has advantages: the Commission can obtain preliminary and monetary relief, and benefits from robust discovery procedures.

But, administrative litigation brings advantages that should not be overlooked. The Commission's unique vantage point allows it to develop specialized knowledge that can inform

Commission determinations around unfair or deceptive practices. This is especially important when it comes to tackling emerging challenges, like dark patterns microtargeted at individual users and algorithmic decisionmaking that discriminates. In cases like these, we shouldn't wait for bad practices to infect the market and then play a game of whac-a-mole.

While it is true that under current practice, the Commission does not order monetary relief when it issues a final order after administrative litigation, there are still pathways to recovering money for victims. For example, if the Commission's ruling involved dishonest or fraudulent conduct, Section 19 of the FTC Act allows the Commission to seek monetary relief in federal court at the conclusion of administrative litigation. Because of the availability of this two-step process, administrative settlements can also include monetary relief, as we saw in the recent LendEDU matter. In addition, under the Penalty Offense Authority, final Commission orders can bind other market participants engaged in similar conduct, allowing the Commission to seek penalties for future violations.

In spite of its advantages, administrative litigation is rarely pursued. In fact, in my years on the Commission, we've not taken oral argument in a single consumer protection matter.

The Commission needs to modernize its in-house tribunal for consumer protection and the digital economy. Currently, the rules are more suited to a fast merger trial, with a compressed schedule that can limit discovery in complex matters. The Commission can revise this schedule and make other procedural reforms to resurrect administrative litigation, particularly for emerging practices where the Commission's expertise would be beneficial.

Partnering with Civil and Criminal Law Enforcement

The final tool is really a policy change that we need to bake into the DNA of the agency. The FTC's authorities may be under threat, but there are dozens of enforcers – particularly at the state level – with similar jurisdiction, but much greater remedial authority. For example, almost every state has its own version of the FTC Act, often nearly identical to Section 5. Yet unlike the federal act, many of these states can seek civil penalties and other remedies on first offenses.

On major, market-moving cases, the FTC too often goes it alone. For example, in a major case targeting fake reviews – Sunday Riley – the FTC agreed to settle for nothing, simply requiring the company to not break the law. But many attorneys general are intensely interested in this issue, and we could have avoided this weak relief simply by partnering with one or more of them.

State AGs are not the only partners who can help us deliver stronger results. For example, state regulators often bring supervisory and licensing authorities to the table. For cases involving financial services, the CFPB can seek penalties for unfair, deceptive, or abusive practice, and make available a redress fund for victims of judgment-proof defendants. And for cases involving recipients of federal funds, like for-profit colleges, the Department of Veterans Affairs can help ensure taxpayer money isn't subsidizing fraud against veterans, and can facilitate debt relief for victims.

Perhaps most importantly, we must expand our partnerships with criminal law enforcement – and not just for small-time scams. Corporate fraud, including in the digital economy, can violate criminal statutes. We can and should do more to refer wrongdoing in the boardroom to appropriate authorities.

I think all of us agree that getting good results should take precedence over getting credit. Just as groups like TINA.org refer cases to the FTC for enforcement, even if it means sharing credit for the ultimate result, the FTC should not be afraid to reach out to state and federal partners to ensure the best possible outcome for consumers

Conclusion

I know there are many rooting against the FTC this week. They hope the Supreme Court cloud hanging over the agency will cow us into accepting subpar settlements. They hope we will slink away from challenging misconduct by major firms, and instead target small outfits less able to defend themselves. They hope we will fade further into irrelevance when it comes to addressing serious problems in the market.

I believe we can prove them wrong. While it is vital that the Commission prevail in the Supreme Court, regardless of what happens, the Commission can take steps now to diversify our toolkit and ensure we can continue to seek accountability for wrongdoers and compensation for victims. Whether it's initiating a Restatement Rulemaking, designating penalty offenses, reviving administrative litigation, or partnering with other authorities, there are tools we should resurrect today to step up our deterrence of harmful practices. By pursuing this path, I am confident the Commission can emerge from this moment of crisis stronger than ever.

Thank you again to TINA.org for hosting this important discussion. I'm happy to take your questions.