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

Office of Commissioner
Andrew N. Ferguson

Dissenting Statement of Commissioner Andrew N. Ferguson

Regarding the Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses
Matter Number P244402
July 12, 2024

The Commission issues this Policy Statement in response to comments suggesting that some franchisees might be wary of reporting potential legal violations by their franchisors, or of submitting comments critical of their franchisors in our ongoing rulemaking proceedings. At least some of these commentors say that they fear doing either of these things will violate non-disparagement or other clauses of their franchise agreements. The Policy Statement claims that "implicit or explicit threats of retaliation, by legal action or otherwise, against a franchisee for reporting potential law violations to the government are unfair."[1] I agree that is likely to be the case. I also agree that federal cases have generally treated contracts as unenforceable to the extent they forbid cooperation with law-enforcement investigations.[2] If the Commission was merely expressing its opinion on those two questions, I would vote for the Policy Statement. But the Policy Statement goes further. It suggests that franchisors violate Section 5's prohibition on unfair acts or practices by including in their franchise agreements non-disparagement or other clauses that could be misinterpreted as prohibiting the reporting of legal violations to the government.[3] This goes too far and is an attempt to announce *de facto* rules through an ostensibly nonbinding Policy Statement, bypassing the procedural safeguards that govern our rulemakings and denying regulated parties the benefit of *ex ante* judicial review. I therefore dissent.

The Policy Statement suggests that a franchisor violates Section 5 by merely including a non-disparagement, goodwill, or confidentiality clause in its franchise agreement without a disclaimer that the clause cannot apply to the reporting of legal violations to the government. But it is not plausible that a franchisor violates Section 5 merely by putting in a franchise agreement a clause as simple as "Franchisee shall not disparage Franchisor." That some franchisees might misinterpret that clause to prevent the reporting of legal violations to the government is not a Section 5 violation.[4] No contract could ever exhaustively list all of the legal limitations on every

[1] Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses ("Policy Statement") at 5, 7.
[2] Policy Statement at 5 n.23.
[3] Policy Statement at 4 & n.22.
[4] On the other hand, a clause that specifically prohibits a franchisee from reporting potential legal violations to the government would be a different story. I suspect that such a clause would in and of itself be an illegal threat of retaliation and an unfair act or practice for the reasons laid out in the policy statement.

clause's enforceability in every possible scenario. Accordingly, a clause is not void merely because it may be unenforceable in some hypothetical situations.[5]

If the Commission has evidence that this issue is important enough to require deviation from that principle, it has the authority under the Federal Trade Commission Act[6] to initiate a rulemaking proceeding to address this practice, including requiring disclosures of the limits of the non-disparagement clauses (assuming, of course, the statutory requirements for such a rule were satisfied). Alternatively, it could attempt to enforce Section 5 against particular franchisors and establish precedent as to the illegality under Section 5 of particular contract provisions.[7] But what it cannot do is enact new standards of conduct through threatening insinuations in a nonbinding policy statement.

Policy statements are a form of subregulatory guidance—like circulars, dear-colleague letters, and memoranda—that are supposed to supply nonbinding guidance on an agency's understanding of the law or regulations. They can be useful to alert regulated entities of an agency's enforcement priorities, or to provide practical suggestions for complying with settled law. But "[a]gencies … now use these [guidance documents] not just to advise the public, but to bind them."[8] Indeed, using the Policy Statement as the ground for enforcement actions—a threat this policy statement makes plain in its closing paragraphs[9]—turns this nonbinding policy statement into a type of informal law.[10] Agency enforcement actions, including unsuccessful ones,

---

[5] See Restatement (Second) of Contracts § 184 (1981) ("A court may treat only part of a term as unenforceable [on grounds of public policy]" so long as "the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing," "the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange," and the party in favor of which it is to be enforced "did not engage in serious misconduct."). The comments to the Restatement explain that "[s]ometimes a term is unenforceable on grounds of public policy because it is too broad, even though a narrower term would be enforceable" and that this section of the Restatement allows a court to enforce it in that narrower way. *Id.*

[6] 15 U.S.C. § 57a.

[7] Indeed, the main distinction the Supreme Court drew between the National Industrial Recovery Act (which it found unconstitutional) and Section 5 (which it did not) is that the precise meaning of Section 5's prohibitions would be determined by a "quasi judicial body" "in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest," in a process that allowed "for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review." Dissenting Statement of Commissioner Andrew N. Ferguson, joined by Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule ("Ferguson Noncompete Dissent") at 28–30 (June 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-matter-non (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935)). With the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Congress gave the Commission rulemaking authority, but it imposed similar procedural safeguards to protect against arbitrary Commission decisions. See 15 U.S.C. § 57a. The Commission abides by none of these today.

[8] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment).

[9] See Policy Statement at 7 ("The FTC takes seriously its statutory obligation to enforce the FTC Act.… Accordingly, any such communications must be consistent with this policy statement.").

[10] See, *e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 862–63 (8th Cir. 2013) (holding that a guidance document is binding if it is written to lead regulated entities to believe that compliance with the document is mandatory, and noncompliance will trigger enforcement proceedings); *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 227–28 (D.C. Cir. 2007) (holding that a policy statement is binding where it presents the agency's position as "settled," suggests regulatory action for failure to comply, and "reads like an ukase"); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." (citations omitted)).

impose tremendous expense on their targets. Even an investigation which never goes to court is expensive. It is often safer to comply with the policy announced in subregulatory guidance—whether that policy is lawful or not—than to resist and risk the agency's ire. And because the Commission claims the Policy Statement is nonbinding,[11] it may not be subject to *ex ante* judicial review under the APA, meaning that a party must violate the Policy Statement and risk an enforcement action in order to get a judge to weigh in on it.

This "phenomenon … is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like."[12] It then adds to those regulations with subregulatory guidance that is effectively binding, and which the agency promises to treat as binding.[13] And it does all of this outside the procedural guardrails Congress has built around our rulemaking authority—notice, an opportunity for public comment, hearings, and *ex ante* judicial review.

Rulemaking by politically unaccountable technocrats, even with all of its attendant procedural safeguards, is not good for a democracy.[14] Rules without rulemaking is even worse.

[11] Policy Statement at 1 n.1.
[12] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).
[13] *Ibid.*
[14] Ferguson Noncompete Dissent at 7–8.