Statement for the Record of
William E. Kovacic
Commissioner of the Federal Trade Commission
before the
U.S. Senate Committee on Commerce, Science, and Transportation
Subcommittee on Consumer Protection, Product Safety, and Insurance
on
"Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers"
United States Senate
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Chairman Pryor, Ranking Member Wicker, and Subcommittee Members, thank you for the opportunity to present my views on a number of proposals to augment the FTC's authority. They are the following: APA rulemaking, civil penalty authority, independent litigating authority for civil penalty actions, and aiding and abetting liability. Although I was unable to present testimony at your Subcommittee's hearing, I am grateful for the opportunity to make my views known by offering this statement for the record.

I. APA Rulemaking

The FTC's strongest policymaking tool, in addition to litigation, is rulemaking. In 1975, Congress granted the FTC express authority to issue substantive rules under Section 18 of the FTC Act, and authority under Section 5(m)(1)(A) of the Act to seek civil penalties for violations of those rules.[1] Magnuson-Moss rulemaking, as this authority is known, requires more procedures than those needed for rulemaking pursuant to the Administrative Procedure Act ("APA").[2] These include two notices of proposed rulemaking, prior notification to Congress, opportunity for an informal hearing, and, if issues of material fact are in dispute, cross-examination of witnesses and rebuttal submissions by interested persons.

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[1] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 57a, 57b).

[2] 5 U.S.C. § 551.

In addition, over the past 15 years, there have been a number of occasions where Congress has identified specific consumer protection issues requiring legislative and regulatory action. In those specific instances, Congress has given the FTC authority to issue rules using APA rulemaking procedures. A significant and recent example of APA rulemaking authority that Congress expressly granted to the FTC was the authority, under the Telemarketing and Consumer Fraud and Abuse Prevention Act, to issue rules proscribing deceptive and abusive acts or practices in telemarketing.[3] Under that authority, the Commission issued the Telemarketing Sales Rule,[4] including provisions that created the do-not-call registry, whereby consumers can protect their privacy by electing not to receive commercial telemarketing calls.

My position in the past, and to which I still adhere, is to dissent from the FTC's endorsement of authority to use, for promulgating all rules respecting unfair or deceptive acts or practices under the FTC Act, the notice and comment procedures of the APA.[5] While many other agencies do have the authority to issue rules following notice and comment procedures, the Commission's rulemaking is unique due to the range of subject matter (unfair or deceptive acts or practices) and sectors (reaching broadly across the economy, except for specific carve-outs). Except where Congress has given the FTC a more focused mandate to address particular problems, beyond the FTC Act's broad prohibition of unfair or deceptive acts or practices, I believe that it is prudent to retain procedures beyond those encompassed in the APA. As a former Bureau of Consumer Protection Assistant Director stated during a panel addressing the

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3 15 U.S.C. § 3009(a).

4 16 C.F.R. § 310.1-.9.

5 *See, e.g.*, Prepared Statement of the Federal Trade Commission Describing the Commission's Anti-Fraud Law Enforcement Program and Recommending Changes in the Law and Resources To Enhance the Commission's Ability to Protect Consumers before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation, U.S. Senate (July 14, 2009), at 3 n.4, *available at* www.ftc.gov/os/2009/07/P094402antifraudlawtest.pdf.

agency's rulemaking efforts, the Commission should wait for Congress to give the agency specific authority to issue rules in a given area because that approach results in "clearer direction" to the agency's audience.[6] The lack of a more focused mandate and direction from Congress, reflected in legislation with relatively narrow tailoring, could result in the FTC undertaking initiatives that ultimately arouse Congressional ire and lead to damaging legislative intervention in the FTC's work. This is precisely what occurred toward the end of the Carter administration. Ongoing Commission initiatives led Congress to turn against the Commission in 1979 and 1980, enacting significant legislative constraints (while individual members proposed even more significant cutbacks in Commission authority). This occurred even though many of the Commission's initiatives were undertaken with the urging of Congressional Committees, individual Senators and Representatives.[7] Through specific, targeted grants of APA rulemaking authority, Congress makes a credible commitment not to attack the Commission when the agency exercises such authority.

I would be willing to consider whether all the rulemaking requirements that are currently required by Magnuson-Moss to promulgate, amend, or repeal rules are needed, as they may be unnecessarily cumbersome and often lead to rule making proceedings that can last several years.

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6 Paul Luehr, Remarks at FTC at 100: Into Our Second Century Roundtable, Northwestern University School of Law, Chicago (Sept. 25, 2008), at 67-68 (transcript available at http://www.ftc.gov/ftc/workshops/ftc100/transcripts/chicagotranscript.pdf). For additional discussion of FTC rulemaking see A Report by Federal Trade Commission Chairman William E. Kovacic, The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices (Jan. 2009), at 124-28, *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

7 *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 Tulsa L. J. 587, 630-67 (1982). As the title suggests, my article focused on the Commission's antitrust enforcement.

II. Civil Penalty Authority

The FTC has authority to seek civil penalties in some instances. For example, the FTC can seek civil penalties against an entity that violates an FTC administrative order, to which it is subject, or a trade regulation rule promulgated by the FTC. Congress has also specifically authorized the FTC to seek civil penalties for violations of certain statutes, e.g., CAN-SPAM Act.[8] The Commission has recommended that Congress authorize the FTC to seek civil penalties for all violations of the FTC Act and the authority to prosecute civil penalty cases in federal court in its own name[9]—instead of referring such cases to the Department of Justice ("DOJ") to bring civil penalty actions on behalf of the Commission, as is discussed in part III below.[10]

In my view, the existing consequences attendant to a finding that an act or practice is unfair or deceptive under the FTC Act are generally appropriate and are consistent with the goal of developing FTC law to establish new doctrine and to reach new and emerging problems. These include an administrative order (whose violation would then subject the respondent to civil penalties) or a court-issued injunction (which can contain such equitable remedies as redress and disgorgement). The routine availability of civil penalties, even if subject to a scienter requirement, would risk constraining the development of doctrine. This is similar to what has happened in the antitrust sphere, where judicial concerns about the costs of private

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8 *See* 15 U.S.C. § 7701 et seq.

9 *See, e.g.*, Prepared Statement of the Federal Trade Commission Describing the Commission's Anti-Fraud Law Enforcement Program and Recommending Changes in the Law and Resources To Enhance the Commission's Ability to Protect Consumers Before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation, U.S. Senate (July 14, 2009), *available at* www.ftc.gov/os/2009/07/P094402antifraudlawtest.pdf.

10 In general, under the FTC Act, the Commission must notify the Attorney General of its intention to commence, defend, or intervene in any civil penalty action under the Act. *See* 15 U.S.C. § 56(a)(1).

litigation, and the effect of mandatory treble damages in antitrust cases, have led the courts to constrain the development of antitrust doctrine in ways that unduly limit the U.S. antitrust system.[11]

Additionally, if the FTC were granted civil penalty authority for consumer protection violations, another possibility is that the Commission might routinely challenge as unfair acts, under its consumer protection authority, conduct which might also be challenged under its antitrust authority as unfair methods of competition (as it did in *N-Data*[12]). Thus, it might seek (routinely or otherwise) civil penalties for competition infringements. Here, also, Judicial fears about overdeterrence could induce courts to cramp the sensible development of doctrine.

Given these concerns, instead of across-the-board civil penalty authority, Congress may consider more targeted authority to seek civil penalties where restitution or disgorgement may not be appropriate or sufficient remedies. Categories of cases where civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence include malware (spyware), data security, and telephone records pretexting.[13] What makes these cases

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11 *See, e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136–37 (1998) ("To apply the per se rule here . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases."); III PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW (1978), ¶ 625; William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 51-64.

12 *In the Matter of Negotiated Data Solutions* LLC, File No. 0510094, Complaint, Decision and Order, and other documents, *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm. In my dissent, I noted that, if unfair acts coverage extends to the full range of business-to-business transactions (as N-Data suggests it might), it would seem that the three-factor test prescribed for unfair acts (15 U.S.C. § 45(n)) could capture all actionable conduct within the FTC's competition jurisdiction, including conduct within the proscriptions of the Sherman and Clayton Acts. *See* Dissenting Statement of Commissioner Kovacic, In the Matter of Negotiated Data Solutions LLC, File No. 0510094, *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

13 *See* Prepared Statement of the Federal Trade before the Committee on Commerce, Science, and Transportation, U.S. Senate (Apr. 8, 2008), at 10-12, *available at* http://www.ftc.gov/os/testimony/P034101reauth.pdf.

distinguishable is that consumers have not simply bought a product or service from the defendants following defendant's misrepresentations and it is often difficult to calculate consumer losses or connect those losses to the violation for the purpose of determining the amount of restitution. In addition, disgorgement may be problematic. In data security cases, defendants may not have actually profited from their unlawful acts. The Commission has also found that in pretexting and spyware cases, the defendants' profits are often minor, and disgorgement would accordingly be an inadequate deterrent.

III. Independent Litigating Authority for Civil Penalty Actions

As noted above, the Commission must generally refer civil penalty actions to the DOJ.[14] The Commission has recommended to Congress that the FTC be able to bring actions for civil penalties in federal court without mandating that DOJ have the option to litigate on the FTC's behalf. I support expanding the FTC's independent litigating authority when it seeks civil penalties as it would allow the agency with the greatest expertise in the FTC Act to litigate more of its own civil penalty cases, while still retaining the option to refer matters–where appropriate–to the DOJ. This would be in line with the authority granted to other agencies, such as the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC"). The SEC has such independent authority to seek judicial civil penalties for any violation of the securities laws,[15] and may even issue administrative penalties against registered

[14] In general, under the FTC Act, the Commission must notify the Attorney General of its intention to commence, defend, or intervene in any civil penalty action under the Act. 15 U.S.C. § 56(a)(1). DOJ then has 45 days to commence, defend, or intervene in the suit. *Id.* Should DOJ not act within the 45-day period, the FTC may file the case in its own name, using its own attorneys. *Id.*

[15] 15 U.S.C. § 77t.

entities.[16] The CFTC may also seek judicial civil penalties or assess administrative civil penalties.[17]

Apart from having the efficiency of having the agency with the most expertise in the area bringing the civil penalty prosecutions, it will also result in more timely actions. Currently, once the FTC makes a referral, DOJ has 45 days to commence a civil action. This extra time, and the associated delay necessary to brief DOJ attorneys on a case already familiar to their FTC counterparts, could be easily avoided if the FTC could seek civil penalties directly.

IV. Aiding and Abetting a Violation

The Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*[18] threw the Commission's ability to pursue those who assist and facilitate unfair or deceptive acts and practices into doubt. As the Commission has recommended in the past, I believe that Congress should clarify that the Commission is able to challenge those who provide knowing and substantial assistance to others who are violating Section 5 of the FTC Act.[19]

V. Conclusion

Thank you for the opportunity to submit this statement for the record. I hope that my comments will be useful to the Subcommittee.

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16 15 U.S.C. § 78u-2.

17 7 U.S.C. § 9; 7 U.S.C. § 13a; 7 U.S.C. § 13a-1.

18 511 U.S. 164 (1994).

19 *See* Prepared Statement of the Federal Trade before the Committee on Commerce, Science, and Transportation, U.S. Senate (Apr. 8, 2008), at 22-23, *available at* http://www.ftc.gov/os/testimony/P034101reauth.pdf.