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Remarks at NAD 2020

One Step Forward, Two Steps Back: Sound Policy on Consumer Protection Fundamentals

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I. Introduction

Thank you for inviting me to speak with you today. Given the vital role that the National Advertising Division plays in our economy, it is a pleasure to join you. We at the FTC view our agency as small but mighty – my favorite analogy is the Little Engine that Could. But in a world of finite resources, there is no doubt that force multipliers like the NAD contribute significantly to the goal of protecting consumers. And those of us who are fans of smaller government appreciate the nature of the NAD as a self-regulatory body.

Notably, the cooperation between the FTC and the NAD has always been strong. While some may view the revolving door between government and the private sector with distaste, many appreciate the revolving door that the FTC shares with the NAD. Professionals like Lee Peeler and Mary Engle served with distinction at the FTC and then took their tremendous knowledge and experience to the NAD, further strengthening this important institution. Consumers benefit when they can trust that companies' claims are truthful and substantiated, and we greatly appreciate your work to advance this goal.

My talk today is titled "One Step Forward, Two Steps Back – Sound Policy on Consumer Protection Fundamentals." The title originates in part from my recent fixation with relearning how to walk properly after shattering my kneecap. Those who have known me for a long time rightly may wonder whether a mountain bike or a skateboard ramp – or, more recently, even a dirt bike – played a role in the injury. After having two surgeries to cobble my patella back together, I wish I had a cool story to go with the pain. Unfortunately, the real story is boring – I slipped off a chair during a DIY project in my daughter's townhouse. Each day, I get a little closer to walking without a limp – one step forward in the healing process. But patience is not 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

[1] Christine S. Wilson, "Milton Friedman Is Still Right: Marking the 35th Anniversary of *Free Markets for Free Men*," Remarks at CPAC Brazil, São Paulo, Brazil (Oct. 12, 2019), https://www.ftc.gov/system/files/documents/public_statements/1553170/wilson_-_cpac_brazil_remarks_10-12-19.pdf.

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 competitors or raise the costs of their rivals.[4] And when I oversaw regulatory affairs for Delta Air Lines, I saw firsthand how prescriptive regulations could limit operational flexibility and preclude sound business solutions – while rarely generating corresponding safety benefits for consumers.[5]

As you can tell, I am highly skeptical of the government's ability to enhance consumer welfare through the widespread adoption of rules and regulations. But economics literature clearly teaches that, in some instances, information asymmetries and other phenomena prevent market forces from producing the best outcomes for consumers.[6] In those instances, some

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[2] *See* Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," 82 FR 9339 (2017) (stipulating that "for every new regulation issued, at least two prior regulations [must] be identified for elimination," and calling for a new regulatory budgeting process to control the overall cost of agency regulations).

[3] Robert S. Pindyck & Daniel L. Rubinfeld, MICROECONOMICS, 342, 351, 355 (2017) (discussing price supports and production quotas; import quotas and tariffs; taxes and subsidies).

[4] Lindt, John, "Groups drop suits against Walmart In Visalia, Porterville," The Visalia Times-Delta (Nov. 3, 2016), https://www.visaliatimesdelta.com/story/news/2016/11/03/groupsdrop-suits-against-almart-visalia-porterville/93272360/ ("the mysterious groups who have bankrolled years of legal battles to stop construction of Super Walmart stores and other non-union grocers, are throwing in the towel this week – at least in the Visalia and Porterville cases. For some, the legal wrangling has gone on for a decade and together cost developers, tenants and cities millions of dollars. The mostly anonymous groups use the California Environmental Quality Act (CEQA) to slow or halt approvals – citing issues like noise and light."); Compl. ¶ 27, *FTC v. Reckitt Benckiser*, 1:2019-cv-00028 (W.D. Va., July 11, 2019) ("Invidior submitted a citizen petition requesting that the FDA reject any generic Suboxone Tablet applications or subject them to additional requirements because it knew doing so could delay approval of generics while the FDA reviewed it."); G. Richard Shell, Make the Rules or Your Rivals Will, WHARTON SCHOOL PRESS (2004) (arguing for using law, litigation, regulation and lobbying as part of competitive business strategy).

[5] Comments of Airlines for America, Proposals for Fundamental Reform of DOT Economic Regulation and Enforcement, Docket No. DOT-OST-2017-0069 (Dec. 1, 2017), available at https://www.regulations.gov/contentStreamer?documentId=DOT-OST-2017-0069-2751&attachmentNumber=1&contentType=pdf (calling on the Department of Transportation to repeal various rules and requirements).

[6] *See* George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q. J. ECON 488 (1970) (describing how adverse selection resulting from information asymmetries about quality across buyers and sellers can lead to market unraveling, in which efficient trades are not made); John G. Riley, Silver Signals: Twenty-Five Years of Screening and Signaling, 39 J. ECON. LIT. 432 (2001) (surveying literature on screening and signaling as partial remedies to the inefficiency resulting from asymmetric information); Benjamin R. Handel, Adverse Selection and Inertia in Health Insurance Markets: When Nudging Hurts, 103 AMER. ECON. REV. 2643 (2013) (describing a welfare loss from adverse selection in markets for health insurance equal to 8.2 percent of consumer premiums).

regulations may be necessary to protect health, safety, or other legitimate goals. I myself have advocated that federal privacy legislation is necessary to overcome information asymmetries between users and tech companies regarding the collection, use, sharing, and monetization of consumer data.[7] Ideally, though, market failures would be addressed surgically to avoid further distorting market forces and creating a rash of unintended consequences.[8]

It is this perspective that I bring to the table as a Commissioner. As you know, the Commission enforces a broad portfolio of rules and regulations that addresses areas ranging from children's privacy to energy labeling for appliances, and from care labels for clothing to data security for financial institutions. Some of the Commission's rules are Congressionally mandated,[9] while others have been developed voluntarily by the Commission.[10] The FTC also promulgates business guidance for specific industries that explains its view of how Section 5 applies to certain practices and representations.[11]

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[7] Christine S. Wilson, "Privacy and Public/Private Partnerships in a Pandemic," Remarks at Privacy + Security Academy, Washington, DC (May 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574938/wilson_-_remarks_at_privacy_security_academy_5-7-20.pdf, Christine S. Wilson, "A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation," Remarks at Future of Privacy Forum, Washington, DC, February 6, 2020, https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf.

[8] *See* David Hyman, OVERCHARGED Cato Institute (2018) (describing financial incentives for cardiologists to recommend stenting more often than would otherwise be optimal, saying "Unfortunately, our politically controlled, third-party payment system leaves most of that information [required to evaluate the costs and benefits of treatment] with cardiologists and hospitals, on whom the system lavishes money only when they perform aggressive procedures and regardless of the consequences for patients.")

[9] *See* Children's Online Privacy Protection Rule, 16 C.F.R. 312 (implementing the Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501, *et seq.*).

[10] *See* Use of Prenotification Negative Option Plans, 16 C.F.R. 425 (promulgated pursuant to the rulemaking procedures in the FTC Act).

[11] The Commission has industry guides for numerous industries and claims. *See* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. 260; Use of Endorsements and Testimonials in Advertising, 16 C.F.R. 255; Guides for the Jewelry, Precious Metals and Pewter Industries, 16, C.F.R. 23. Commission guides are published in the Code of Federal Regulations but do not have the force of law. They are the Commission's interpretation of what it would consider unfair or deceptive for the claims addressed. The Commission undertakes a notice and comment process to change or update its guides.

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, the Commission repealed the Nursery Guides and the TV Picture Rule based on stakeholder feedback that they had become irrelevant in today's market.[14] Given the pace of the rulemaking process, is almost inevitable that the evolution of market dynamics will outpace rulemaking procedures, rendering some rules stale almost as soon as they are enacted.

I believe that freeing businesses from unduly burdensome, outdated, and prescriptive requirements benefits consumers. As a general rule, less is more in the regulatory arena. Given this perspective, you may not be surprised to learn the following fact. Although I have dissented only rarely since joining the Commission, over half of my dissents have involved rulemaking initiatives. For example, shortly after my arrival at the Commission, I dissented from a Notice of Proposed Rulemaking ("NPRM") for the Energy Labeling Rule. The NPRM requested comment

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[12] Retrospective Review of FTC Rules and Guides, https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides. The FTC website explains: "Since 1992, the FTC has conducted a regular, systematic review of all its rules and guides on a rotating basis. Rules and guides are critically important, but need to be reviewed periodically to ensure they are up-to-date, effective, and not overly burdensome."

[13] *See, e.g.*, Health Breach Notification Rule, Request for Comment, 16 C.F.R. 318 (May 8, 2020), https://www.federalregister.gov/documents/2020/05/22/2020-10263/health-breach-notification.

[14] Guides for the Nursery Industry: Rescission of Guides, 16. C.F.R. 18 (June 4, 2019), https://www.federalregister.gov/documents/2019/05/13/2019-09745/guides-for-the-nursery-industry; Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (The Picture Tube Rule): Federal Register Notice Repealing the Rule, 16 C.F.R. 410 (Oct. 2, 2018).

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 label and to specify the minimum peel capacity of the adhesive for affixing the label to the appliance. I wanted the Commission to use that opportunity to rethink its approach to the scope and detail of the Rule's requirements. The majority declined to take that opportunity then, but recently agreed to seek comment on these requirements. In March 2020, the Commission sought comment on additional changes to the Energy Labeling Rule to incorporate conforming amendments to reflect upcoming Department of Energy changes to efficiency descriptors for central air conditioners. I am pleased to report that the March Federal Register Notice also sought comment on whether a more flexible approach to labeling obligations would provide sufficient guidance to businesses while simultaneously fulfilling the Commission's mandate under the statute.[16]

For similar reasons, together with Commission Phillips, I issued a dissent from the Commission's proposed amendments to the Safeguards Rule.[17] As written, the Rule provides

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[15] Dissenting Statement of Commissioner Christine S. Wilson, Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018), https://www.ftc.gov/public-statements/2018/12/dissenting-statement-commissioner-christine-s-wilson-notice-proposed.

[16] 16 C.F.R. 305: Energy Labeling Rule; Notice of Proposed Rulemaking; Request for Comment (March 7, 2020), https://www.federalregister.gov/documents/2020/04/10/2020-06960/energy-labeling-rule; *see also* Concurring Statement of Commissioner Christine S. Wilson, Energy Labeling Rule (March 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1569815/r611004_wilson_statement_energy_labeling.pdf. For example, the Rule specifies the trim size dimensions for labels, including the precise width and length (e.g. width 5 ¼ to 5 ½ inches (13.34 cm. to 13.97 cm.)); the number of picas for the copy set (between 27 and 29); the type style and setting; the weight of the paper stock on which the labels are printed (not less than 58 pounds per 500 sheets (25" x 38") or equivalent); and a suggested minimum peel adhesive capacity of 12 ounces per square inch. These highly prescriptive requirements depart significantly from the approach employed by other Commission Rules and Guides that contain labeling requirements. For example, the Rules and Regulations Under the Textile Fiber Products Identification Act provide simply that the "label shall be conspicuous and shall be of such durability as to remain attached to the product and its package throughout any distribution, sale, resale and until sold and delivered to the ultimate consumer." 16 C.F.R. Part 303.15. The Commission's Guides for Select Leather and Imitation Leather Products similarly require that the label "should be affixed so as to remain on or attached to the product until received by the consumer purchaser." 16 C.F.R. Part 24.2(g).

[17] Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson, Review of Safeguards Rule (Mar. 5, 2019),

guidance to financial institutions on how to protect data security – importantly, while not being overly prescriptive – in an area where standards continuously evolve. We explained in our dissent our concern that the proposal traded flexibility for a more prescriptive approach that potentially could handicap smaller players or newer entrants. Although the Notice of Proposed Rulemaking merely sought comment on proposed changes – in other words, it was not a final determination – given the momentum that gathers during the rulemaking process, I thought it important to express my reservations at the outset. Early comments in the docket provided support for the concerns that Commissioner Phillips and I expressed in our dissent, and were echoed at the subsequent FTC workshop on the proposed revisions. I hope the Commission will carefully consider the evidence and input we have received from relevant stakeholders as we move forward.

In addition to carefully reviewing our existing roster of Rules and Guides, I also believe the Commission should expand its regulatory footprint only after thoughtful deliberation and in a manner that falls squarely within the jurisdiction granted to the FTC by Congress. In the 1970s, the Commission was prolific in promulgating regulations. These activities earned it the sobriquet of the "second most powerful legislature in Washington"[18] and resulted in condemnation from the courts and Congress.[19] While the Commission long ago abandoned some of the most

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https://www.ftc.gov/system/files/documents/public_statements/1466705/reg_review_of_safeguards_rule_cmr_phillips_wilson_dissent.pdf.

[18] *See, e.g.*, J. Howard Beales III & Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 Geo. Wash. L. Rev. 2157, 2159 (2015) (describing the "disastrous failures" of the FTC in the 1970s and the 1980s from enforcement and regulatory overreach after a period of intense rulemaking activity culminating in the agency's being dubbed the "National Nanny" (quoting Jean Carper, The Backlash at the FTC, WASH. POST, Feb. 6, 1977, at C1)).

[19] *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (reforming the ability of the FTC to promulgate rules by requiring a multi-step process with public comment and subject to Congressional review). This Act also authorized $255 million in funding for the Commission and was the first time since 1977 the agency was funded through the traditional funding process after the backlash from Congress over its rulemaking activities. *See* Kinter, Earl, et al., "The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority" 58 WASH. U. LAW REV. 847 (1980); *see also* Alex Propes, Privacy and FTC Rulemaking: A Historical Context, IAB (Nov. 6, 2018) (discussing how the FTC's

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 in several analogous FTC rules and guides in a variety of contexts. The NPRM defines the term "label" far more broadly than any of this FTC precedent, and in a way that appears to exceed our statutory grant of rulemaking authority. I support the FTC's enforcement of deceptive Made in USA claims, and voted to seek comment on this proposed rule. I issued a concurring statement, however, expressing my concerns that the proposal in some ways exceeds our authority. In the face of statutory constraints, it is not our job to interpret liberally the mandate we have been given. If we are unhappy with the scope of our authority, we need to address that issue with Congress – as we have on federal privacy and data security legislation. I look forward to feedback on the Made in USA labeling issue from stakeholders.

I will continue to advocate that the Commission refresh and update its rules, regulations, and guidance so as to avoid saddling businesses with unduly burdensome, highly prescriptive, or outdated regulatory obligations. Mandates of this type ultimately harm consumers.

III. Effectiveness of Non-Monetary Relief in FTC Orders

I'll turn now to my second topic, the effectiveness of non-monetary settlements. In many enforcement actions for alleged violations of Section 5 of the FTC Act, the FTC enters into settlements that contain solely non-monetary relief. I believe that these consent decrees are an effective mechanism to bring companies into compliance and a sensible use of the agency's

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rulemaking history could be influencing Congressional comfort with vesting the FTC with additional privacy authority), https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/.

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] Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Sunday Riley (Oct. 21, 2019), https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf; Statement of Commissioner Rohit Chopra In the Matter of Aromaflage (Sept. 27, 2018), https://www.ftc.gov/public-statements/2018/09/statement-commissioner-rohit-chopra-matter-aromaflage; Statement of Commissioner Rohit Chopra In the Matter of Sandpiper/PiperGear (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514787/sandpiper_chopra_dissenting_statement_4-17-19.pdf.
[22] *See, e.g.*, In the Matter of John Matthew Dwyer III, C-4492 (2014); https://www.ftc.gov/system/files/documents/cases/141024hlsdwyerdo.pdf; In the Matter of Norm Outfitters, C-4495 (2014); https://www.ftc.gov/system/files/documents/cases/141110normthompsondo.pdf; In the Matter of Wacoal America, C-4496 (2014); https://www.ftc.gov/system/files/documents/cases/141110wacoal-americdo.pdf.

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/enforcement/cases-proceedings/182-3085/national-floors-direct-inc; In the Matter of LVTR LLC C- 4679 (2019), https://www.ftc.gov/enforcement/cases-proceedings/182-3098/lvtr-llc; In the Matter of Shore to Please Vacations LLC C-4683 (2019), https://www.ftc.gov/enforcement/cases-proceedings/182-3088/shore-please-vacations-llc-matter; In the Matter of A Waldron HVAC, LLC C-4680 (2019), https://www.ftc.gov/enforcement/cases-proceedings/182-3077/waldron-hvac-llc; In the Matter of Staffordshire Property Management, LLC C-4682 (2019), https://www.ftc.gov/enforcement/cases-proceedings/182-3084/staffordshire-property-management-llc-matter.

[24] In the Matter of Marc Ching C-9394 2020) (banning respondents from making claims that certain products cure cancer), https://www.ftc.gov/enforcement/cases-proceedings/202-3110/marc-ching-matter. Similarly, the Commission banned a respondent from claiming a dietary supplement causes weight or fat loss and another respondent from making claims that its pest control product eliminates enumerated types of pests or protects areas from pests. *See* In the Matter of HealthyLife Sciences, Inc., C-4493 (2014) (dietary supplement), https://www.ftc.gov/system/files/documents/cases/141024healthylifesciencesdo.pdf; In the Matter of Wein Products, 106 F.T.C. 51, 62 (1985) (pest control product).

[25] In the Matter of Indoor Tanning Association, C-4290 (2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/05/100519tanningdo.pdf; In the Matter of Sun Industries, Inc., 110 F.T.C. 511 (1988) (requiring notice of FDA warnings); *see also* In the Matter of Phusion Projects, LLC, C-4382 (2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130212phusiondo.pdf (requiring disclosures of alcohol facts for beverages).

[26] *See* In the Matter of Creaxion Corp, et al., C-4669 (2019), https://www.ftc.gov/system/files/documents/cases/c-4669_172_3067_inside_publications_decision_and_order_2-8-19.pdf; In the Matter of Lord & Taylor, Inc., C-4576 (2016), https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf; *see also* FTC v. Teami, LLC, No. 8:20-cv-518-T-33TGW (M.D. Fla. 2020) (requiring a monitoring program for endorsements).

> companies to establish, implement and maintain a comprehensive privacy and/or data security program. Among other obligations, companies must document the program in writing, designate an employee to coordinate and be responsible for the program, train employees and vendors, and implement processes to assess and document internal and external risks.[27]

This non-monetary relief curtails behavior and requires sometimes fundamental changes in the way companies do business. We also know that just because a settlement is non-monetary does not mean the respondent does not incur significant costs. Consent decrees also impose significant compliance costs on the parties – including staffing or procedural changes to ensure compliance; additional legal fees; substantiation expenses;[28] costs to execute consumer notices;[29] and expensive third-party audits in privacy and data security orders.[30]

The Facebook settlement that the Commission announced last year provides a salient example of the costs of compliance with non-monetary relief. This settlement arose from allegations that Facebook violated the terms of the FTC's 2012 order, and therefore resulted in a

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[27] *See, e.g.*, In the Matter of LightYear Dealer Technologies, LLC, C-4687 (2019) (requiring a comprehensive data security program); https://www.ftc.gov/enforcement/cases-proceedings/172-3051/lightyear-dealer-technologies-llc-matter-0; In the Matter of James V. Grago, Jr., C-4678 (2019) (ordering company to implement a comprehensive information security program); https://www.ftc.gov/system/files/documents/cases/172_3003_clixsense_decision_and_order_7-2-19.pdf; In the Matter of Uber Technologies, Inc., C-4662 (2018) (mandating a comprehensive privacy program), https://www.ftc.gov/system/files/documents/cases/152_3054_c-4662_uber_technologies_revised_decision_and_order.pdf.

[28] *See, e.g.*, In the Matter of Telomerase Activation Sciences, Inc., C-4644 (2018) (requiring human clinical testing to substantiate efficacy claims for covered products), https://www.ftc.gov/system/files/documents/cases/142_3103_-_telomerase_decision_and_order_final.pdf.

[29] *See* In the Matter of Unroll Me, Inc., C-4692 (2019) (requiring respondent to mail notices to consumers about how they use and share their information), https://www.ftc.gov/enforcement/cases-proceedings/172-3139/unrollme-inc-matter; In the Matter of Benjamin Moore, C-4646 (2018) (requiring a notice to distributors regarding environmental and certification claims), https://www.ftc.gov/system/files/documents/cases/1623079_benjamin_moore_decision_and_order_updated_version.pdf.

[30] The order monitoring provisions in Commission orders also impose costs for recordkeeping, order distribution, corporate status notice, compliance reports, and responding to FTC information demands. *See* Orders at *supra* notes 22-29.

$5 billion civil penalty. Perhaps even more importantly, the order also includes significantly enhanced requirements for Facebook's comprehensive privacy program, which are relevant to this discussion.[31] Facebook itself acknowledged the seismic effect of these provisions – its CEO Mark Zuckerberg stated that the company was going to make "major structural changes" that would require the efforts of "hundreds of engineers and more than a thousand people across our company."[32]

In addition to these compliance costs, non-monetary settlements impose reputational harm.[33] For example, the FTC recently issued a complaint alleging that Sunday Riley and her eponymous skincare company wrote and published fake product reviews. When the Commission simultaneously issued its proposed administrative order for public comment,[34] the *Washington Post* noted that Sunday Riley "is facing a public shaming that not even one of its best-selling

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[31] *See* Christine S. Wilson, "Remarks at the Global Antitrust Institute: FTC v. Facebook," Arlington, VA (Dec. 11, 2019) (describing the order enhancements in the Facebook settlement); *see also* In the Matter of Facebook, Inc. C-4365 (2020) (order modifying prior administrative order), https://www.ftc.gov/system/files/documents/cases/c4365facebookmodifyingorder.pdf; U.S. v. Facebook, No. 19-cv-2184 (D.D.C. 2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf.

[32] Mark Zuckerberg, Statement (July 24, 2019), https://www.facebook.com/zuck/posts/10108276550917411.

[33] *See* Jonathan M. Karpoff & John R. Lott, Jr., The Reputational Penalty Firms Bear From Committing Criminal Fraud, 36 J. LAW & ECON 757, 758 (1993) (". . .we present evidence that the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud… For a subset of firms on which we obtained sufficient data, just 6.5 percent of the loss represents court-imposed costs, with penalties and criminal fines accounting for 1.4 percent."); Jonathan M. Karpoff et al., The Cost to Firms of Cooking the Books, 43 J. FINANCIAL AND QUANTITATIVE ANALYSIS 581, 594 (2008) (Finding that only 8% of firms targeted by SEC settlements were assessed monetary penalties, while (from Table 6, at 593) the median firm targeted by the SEC lost 31% of its value due to enforcement.); *see also* Pagliery, Jose, "Whistleblower accuses cybersecurity company of extorting clients," CNN Business (May 7, 2015) (quoting CEO of LabMD stating that he refused to agree to an FTC administrative consent decree because "it would have tarnished his reputation and killed the business"), https://money.cnn.com/2015/05/07/technology/tiversa-labmd-ftc/index.html; Ruediger Bachmann et al., Firms and Collective Reputation: The Volkswagen Emission Scandal as a Case Study, NBER Working Paper, No. 26117, 9 (2019) (summarizing sentiment analysis on Twitter data finding that positive statements about Volkswagen dropped while negative statements spiked immediately following the EPA's September 18, 2015 serving of a Notice of Violation), available at https://www.nber.org/papers/w26117; J. Howard Beales, III and Timothy J. Muris, In Defense of the *Pfizer* Factors, George Mason Law & Economics Research Paper No. 12-49 (May 2012). Beales and Muris cite research indicating that "[t]he story the stock market appears to be telling is that an FTC complaint implies essentially a wiping out of the brand's advertising capital." *Id*. (citing Sam Peltzman, The Effects of FTC Advertising Regulation, 24 J.L. & ECON. 403 (1981)).

[34] FTC administrative orders are placed on the public record for comment. Following the comment period, the Commission must vote to finalize the decree. The Commission has not finalized the Sunday Riley consent.

creams can smooth over."[35] The FTC's proposed order holds liable not just the company but also Ms. Riley personally, prohibits both Ms. Riley and Sunday Riley Modern Skincare from making future misrepresentations (including through fake reviews), and requires them to instruct employees and agents about their legal responsibilities. Although Commissioner Chopra cited this order as another example of a "no money, no consequences" order, I disagree with his perspective.

For confirmation of my perspective, one needs only to look at the lengths to which some companies will go to avoid being placed under order. Pom Wonderful is an apt example. The Commission filed an administrative complaint against Pom in September 2010. The case was litigated before the FTC's Administrative Law Judge (ALJ) in 2011. The ALJ found that Pom made deceptive claims in violation of Section 5 and issued a decision and order. Pom appealed the decision to the Commission and the Commission issued an opinion in 2013.[36] Pom then appealed that decision to the D.C. Circuit Court of Appeals. In 2015 the D.C. Circuit ordered the Commission to modify one part of the Commission's order and otherwise denied Pom's petition.[37] Pom then sought review by the U.S. Supreme Court, which was denied in 2016. It defies logic that Pom and similarly situated companies would invest so heavily in litigation to avoid non-monetary judgements if that relief were truly of no consequence.

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[35] Beachum, Lateshia, "Skin-care company Sunday Riley settles FTC charges of fake product reviews," Washington Post (Oct. 22, 2019), https://www.washingtonpost.com/business/2019/10/22/sunday-riley-wanted-take-out-skincare-competition-so-it-had-employees-write-fake-reviews/, *see also* "FTC Hits Sunday Riley with Violations for Fake Reviews," Global Cosmetic Industry Business Insider Magazine (Oct. 22, 2019) (stating that the "brand's reputation has taken a significant hit"), https://www.gcimagazine.com/business/rd/regulatory/FTC-Hits-Sunday-Riley-with-Violations-for-Faked-Sephora-Reviews--563624281.html; Krause, Amanda, "Sunday Riley won't be punished for asking employees to post fake reviews of its skin-care products, but a new settlement is forcing the brand not to do it again" Insider (Oct. 21, 2019) (noting that the settlement is intended to ensure the brand's employees "do not engage in similar allegedly illegal conduct in the future" and "will have to follow some new rules"), https://www.insider.com/sunday-riley-fake-reviews-federal-trade-commission-settlement-2019-10.

[36] POM Wonderful LLC and Roll Global, LLC Case Timeline: https://www.ftc.gov/enforcement/cases-proceedings/082-3122/pom-wonderful-llc-roll-global-llc-matter.

[37] POM Wonderful LLC, et al. Case Timeline: https://www.ftc.gov/enforcement/cases-proceedings/pom-wonderful-llc-et-al.

Non-monetary orders also may limit business opportunities. In the most extreme cases, businesses that are subject to consents end up selling off assets and even going out of business following entry of an order.[38] In other instances, entire lines of business may be foreclosed by some orders. For example, the FTC has banned respondents from marketing or selling weight loss products.[39] And the fact that a company is under order serves as a red flag to third parties – respondents may have difficulty securing credit or financial services, vendors or supplies, corporate or institutional investors, and highly accomplished employees and executives.[40] Existing franchisees may lose their businesses, as some franchise agreements grant franchisors the right to terminate franchisees subject to civil, criminal, or administrative liability. And franchisors may be unsuccessful in securing franchisees, as disclosure of prior law enforcement actions may chill prospective purchasers.[41]

Non-monetary settlements also deter respondents from further violations. Orders impose reporting requirements that enable the FTC to monitor parties' compliance with order provisions, and our Division of Enforcement closely tracks the activities of parties under order. Moreover,

[38] *See, e.g.*, In the Matter of Serious Energy, Inc., No. C-4359 (2012), https://www.ftc.gov/enforcement/cases-proceedings/112-3001/serious-energy-inc; McCombe, Patrick, "Serious Materials Exits the High-Performance Window Business," Green Building News (Oct. 31, 2012) (reporting that Serious Energy plants closed and business sold), https://www.greenbuildingadvisor.com/article/serious-materials-exits-the-high-performance-window-business; In the Matter of Gorell Enterprises, Inc., No. C-4360 (2012), https://www.ftc.gov/enforcement/cases-proceedings/112-3053/gorell-enterprises-inc-matter; Spencer, Malia, "Gorell Windows & Doors bought by Ohio company," Pittsburgh Business Times (Feb. 15, 2012) (reporting that plants and businesses were closed), https://www.bizjournals.com/pittsburgh/news/2012/02/15/gorell-windows-doors-bought-by-ohio.html.

[39] *See supra* n.22.

[40] *See* American Bar Association Section of Antitrust Law, "Presidential Transition Report: The State of Antitrust Enforcement," (Jan. 2017) (detailing the enormous damage an FTC action can cause a company or individual indefinitely branding a respondent as wrongdoers, including affecting abilities to secure finance sources, vendors, or investors); *see also* Pagliery, Jose, "Whistleblower accuses cybersecurity company of extorting clients," CNN Business (May 7, 2015) (quoting CEO of LabMD stating that he refused to agree to an FTC administrative consent decree because "it would have tarnished his reputation and killed the business anyway"), https://money.cnn.com/2015/05/07/technology/tiversa-labmd-ftc/index.html; Ernest Gellhorn, Adverse Publicity by Administrative Agencies, 86 HARV. L.REV. 1380, 1388-93 (1973) (discussing the adverse effects on businesses from press announcements of FTC administrative actions), available at: https://www.acus.gov/sites/default/files/documents/1973-01%20Adverse%20Agency%20Publicity.pdf.

[41] Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. 436.5(c) (requiring disclosures of litigation, pending or prior actions); https://www.ecfr.gov/cgi-bin/text-idx?SID=74fbb9eba307a167b88ae7abbf92b42a&mc=true&node=se16.1.436_15&rgn=div8.

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]

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[42] Although we do not have public data on compliance rates with FTC orders, enforcement data in other industries supports the deterrent effect of non-monetary relief. The available evidence demonstrates that monetary penalties in settlements may constitute only a small portion of the overall cost to the targeted firm. *See* Jonathan M. Karpoff & John R. Lott, Jr., The Reputational Penalty Firms Bear From Committing Criminal Fraud, 36 J. LAW & ECON 757, 758 (1993) (". . .we present evidence that the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud… For a subset of firms on which we obtained sufficient data, just 6.5 percent of the loss represents court-imposed costs, with penalties and criminal fines accounting for 1.4 percent."); Jonathan M. Karpoff et al., The Cost to Firms of Cooking the Books, 43 J. FINANCIAL AND QUANTITATIVE ANALYSIS 581, 594 (2008) (finding that only 8% of firms targeted by SEC settlements were assessed monetary penalties, while (from Table 6, at 593) the median firm targeted by the SEC lost 31% of its value due to enforcement.); *see also* Ruediger Bachmann et al., Firms and Collective Reputation: The Volkswagen Emission Scandal as a Case Study, NBER Working Paper, No. 26117, 9 (2019) (summarizing sentiment analysis on Twitter data finding that positive statements about Volkswagen dropped while negative statements spiked immediately following the EPA's September 18, 2015 serving of a Notice of Violation), available at https://www.nber.org/papers/w26117.

[43] For example, after the announcement of the Sunday Riley order the press referred to an "FTC crackdown" and noted, for example, that "it would be naïve for companies to not start adjusting to the new standard now." Brumley, James "What Might The FTC's Crackdown On Deceptive Online Marketing Mean for Social Media Companies?" The Motley Fool (Oct. 29, 2019), https://www.fool.com/investing/2019/10/29/what-might-the-ftcs-crackdown-on-deceptive-online.aspx; *see also* Blog Post: Alexandra Mergaris, Consumer Review Fraud Top of FTC's Priority List, All About Advertising Law (Oct. 28, 2019) (noting that "the threat of an enforcement action and steep civil penalties have both a specific and general deterrent effect"), https://www.allaboutadvertisinglaw.com/2019/10/customer-review-fraud-top-of-ftcs-priority-list.html.

[44] Beales and Muris, *supra* n.33 at 37. In the months following the announcement of the Sunday Riley proposed consent, a national law firm has held training sessions for its corporate clients on how to use endorsements and reviews to promote products and services consistent with FTC law. *See, e.g.,*Venable LLP: Consumer Reviews: The

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

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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] *See* Statement of Commissioner Christine S. Wilson Regarding FTC v. Progressive Leasing (Apr. 20, 2020) (discussing individual liability), https://www.ftc.gov/public-statements/2020/04/statement-commissioner-christine-s-wilson-regarding-ftc-v-progressive; *see also* Dissenting Statement of Commissioner Rebecca Kelly Slaughter

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

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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, Tenth, and Eleventh Circuits). The Commission also can establish liability for monetary relief by showing the defendant "had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth." *Id.*

the CEO or principal in these circumstances because doing so is necessary to obtain effective relief and protect consumers going forward.

In contrast, naming the CEO or principal of a large, established company, in my view, will only rarely (if ever) be necessary to obtain effective relief. As I observed in my statement in Progressive Leasing, the currently popular notion of routinely imposing individual liability[48] – not just at the FTC, but elsewhere – appears more consistent with vilification of successful businesspeople than with an objective desire to obtain effective relief and instill effective deterrence.

When evaluating whether naming the CEO or other principal is needed for effective relief, I also evaluate – among other things – the degree of that individual's participation in the challenged practices. In larger companies, the number of issues crossing a CEO's desk is substantial and the CEO often is not directly supervising or managing the infinite details pertaining to many aspects of the business. Thus, in many instances, the CEO will have little to no involvement, and in some cases no direct knowledge, of the practices that are the subject of an FTC investigation.

My decades in the private sector have taught me that a culture of compliance must begin at the top; a CEO committed to legal compliance drives accountability throughout the organization. Accordingly, another factor I consider when determining whether individual liability is appropriate pertains to the CEO's role in fostering compliance at the relevant company. In fact, naming a CEO in those circumstances could send the message that it is better

[48] *See* Nguyen, Stephanie, "Moving Beyond Consent Models in Privacy Legislation," Digital Labs at Consumer Reports (Aug. 2020) (describing a recent Public Knowledge panel discussion in which panelists discussed accountability and proposals to send corporate leadership to prison if they lie about or violate people's privacy), https://medium.com/cr-digital-lab/moving-beyond-consent-models-in-privacy-legislation-2231cca9e356; *see also* Levin, Bess, "Elizabeth Warren Wants To Make It Easier To Throw C.E.O.S In Prison," Vanity Fair (Apr. 3, 2019), https://www.vanityfair.com/news/2019/04/elizabeth-warren-wants-to-make-it-easier-to-throw-ceos-in-prison.

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 naming the CEO. For example, the certification provisions in the Facebook settlement were designed to create accountability – Mark Zuckerberg personally must certify, on a quarterly basis, that Facebook is complying with the revised and augmented order. And finally, it is important to note that CEOs are ultimately accountable to their Boards of Directors (which typically establish senior management compensation), to their shareholders and the market, and to their many stakeholders, including employees and customers.

For these reasons, I will continue carefully to scrutinize the circumstances under which the Commission is considering holding individuals liable, and will only support that approach where it is necessary for effective relief.

V. Conclusion

Thank you for your time today. I am disappointed that we cannot be together in person, due to the pandemic sweeping the globe. But when I next see you again in person, I hope to be walking without a limp – and I hope to be able to reassure you that the FTC has avoided taking two steps back, and is instead moving full speed ahead with sound consumer protection enforcement.

Take care, everyone.