



CPI Antitrust Chronicle

August 2012 (1)

Enforcement “Plus:” The FTC’s Business Education Efforts

Kelly Signs

U.S. Federal Trade Commission

Enforcement “Plus:” The FTC’s Business Education Efforts

Kelly Signs¹

I. INTRODUCTION

Law enforcement can have obvious consequences for the targets of investigations, but it can also affect the conduct of other businesses. Research shows that the vast majority of businesses want to comply with legal requirements, not just to avoid sanctions but also to maintain a reputation as an ethical business. Informed businesses can anticipate the consequences of a particular course of action, thereby reducing uncertainty about potential legal pitfalls and increasing compliance with prevailing legal standards. Yet to comply, businesses must be aware of a wide variety of laws, rules, and guidelines governing their conduct.

As the only U.S. agency with both consumer protection and competition jurisdiction in broad sectors of the economy, the Federal Trade Commission enforces laws and regulations aimed at protecting consumers from unfair, deceptive, or anticompetitive conduct. Long ago, the FTC recognized that *preventing* law violations is even more important than detecting and punishing violators, and that educating businesses about legal requirements encourages them to avoid policies and practices that might later be found to be unfair, deceptive, or anticompetitive.² Preventing conduct that is likely to harm consumers leads to obvious, if difficult to calculate, benefits—for both consumers and the businesses themselves. Moreover, effective and efficient FTC enforcement promotes policies that encourage competition on the merits and truthful, non-deceptive information, which leads to lower prices, better service, and more choices.

Some statutes and regulations enforced by the FTC are very specific in their proscriptions, but the FTC’s primary statute, the Federal Trade Commission Act, is very broadly worded, in keeping with the common law approach to U.S. antitrust and consumer protection law. Although this allows the FTC to adapt its enforcement approach to the changing nature of competition and consumer behavior, it can present a challenge for a business that wants to remain up-to-date on legal requirements. As a result, the need for business education is particularly acute in areas of the law governed by general standards of conduct, areas such as monopolization, advertising substantiation, and consumer privacy. Here, business education can be a cost effective supplement to law enforcement by “filling in the gaps” and explaining

¹ Kelly Signs is an attorney in the FTC’s Office of Policy and Coordination for the Bureau of Competition. The conclusions set forth in this article are those of the author and do not necessarily represent the views of the Commission or any individual Commissioner.

² As President Roosevelt said at the 1937 cornerstone laying ceremony of the FTC’s building, “Most of the great Federal Commissions were set up in the belief that an ounce of prevention was worth a pound of cure. The Federal Trade Commission was no exception to that sound legislative intent. Prevention of unfair business practices is generally better than punishment administered after the fact of infringements, costly to the consuming public and to honest competitors.” Address at the Cornerstone Laying Ceremonies for the New Federal Trade Commission Building (July 12, 1937), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=15436&st=&st1=>.

sometimes esoteric legal concepts in language easy for a businessperson to understand and act upon. It can also build support for a culture of competitiveness in which every business has the same opportunity to succeed because legal standards are understood and applied uniformly to all competitors.

Businesses—and consumers—deserve assurance that law enforcement is predictable and tied to basic principles of fairness and truthfulness. To that end, the FTC makes public all of its enforcement decisions,³ and publishes many other types of documents that help to explain its work, as well as providing opportunities for formal and informal feedback on its efforts. By coupling the announcement of enforcement actions with other types of business education, the FTC leverages its limited resources to expand the reach of its law enforcement efforts and encourage compliance. And businesses that are knowledgeable about the work of the FTC and the laws it enforces are more likely to spot potential law violations or support the FTC's investigative work by providing relevant information when asked.

II. SPREADING THE WORD ABOUT LAW ENFORCEMENT ACTIONS

Public announcements of law enforcement actions, in the form of news releases, are the foundation of an effective business outreach effort. News releases describe the conduct, the law violated, and the likely or actual harm caused by the conduct in everyday, easily understandable language targeted to consumers and business executives. When issuing press releases, the FTC relies on popular media, as well as trade publications and professional associations, to spread the news about its latest cases. The FTC also uses new social media tools like Facebook and Twitter to reach additional audiences, and offers email updates of its news releases, blog posts, and newsletters.⁴

In conjunction with a news release, the FTC typically makes public other documents that provide more details that could help businesses avoid similar problems. For instance, an FTC complaint provides a roadmap through the facts that lead a majority of the Commission to determine that it had a reason to believe a law violation occurred. Although the complaint is not proof that the law has been violated, it does tell the story of what led the FTC to bring an enforcement action, and gives notice of the type of consequences that could be imposed if the charges are ultimately upheld.

When a company agrees to settle the charges against it, the FTC also issues a proposed consent order and an Analysis to Aid Public Comment.⁵ The Analysis contains a plain language description of the harm that occurred or was likely to occur so that an interested member of the public can comment on the proposed consent order in a meaningful way. Comments from the public are placed on the public record—which these days means the FTC's website—and the Commission within its discretion may modify the final order after considering the public comments. The public notice and comment process for negotiated settlements provides an

³ In certain circumstances, the Commission may also issue closing statements explaining its decision not to take an enforcement action. See, e.g., "Federal Trade Commission Closes Google/DoubleClick Investigation," news release dated Dec. 20, 2007, available at <http://www.ftc.gov/opa/2007/12/googledc.shtm>.

⁴ See links to FTC social media sites at <http://www.ftc.gov/opa/socialmedia.shtm>.

⁵ See, e.g., *In the Matter of Facebook, Inc., Analysis of Proposed Consent Order to Aid Public Comment*, available at <http://www.ftc.gov/os/caselist/0923184/index.shtm>.

important opportunity for input from similarly situated businesses, as well as from consumers or other organizations interested in effective enforcement of the laws administered by the FTC.

III. FORMAL AND INFORMAL GUIDANCE

The FTC has the authority under the FTC Act to issue general trade regulations,⁶ and Congress has from time to time delegated to the FTC direct authority to use its expertise to develop industry-specific rules.⁷ The Commission's regulations and guides serve an important public interest, protecting consumers from deceptive and unfair business practices, and creating a level playing field for legitimate businesses. For instance, the FTC has promulgated guides in areas of consumer protection, setting out the Commission's interpretation of the prohibition on deceptive practices in Section 5 of the FTC Act. Although guides are generally released after a notice-and-comment period and appear in the Code of Federal Regulations, they are not trade regulation rules, the violation of which may subject a company to civil penalties.⁸ Rather, guides help clarify the line between deceptive and legitimate conduct, thereby giving marketers greater certainty to avoid running afoul of the law. Some guides offer specific advice to companies in a particular industry.⁹ Other guides apply across the board to all entities within the FTC's jurisdiction, but address a specific marketing tactic.¹⁰

The FTC regularly reviews its rules and guides on a rotating basis to ensure that they are up-to-date, effective, and not overly burdensome.¹¹ Although each rule and guide typically undergoes review every ten years, the Commission occasionally accelerates the process if warranted by changes to technology, market conditions, or other factors.¹² The regulatory review process invites input from consumers, consumer groups, businesses, trade associations, academicians, and other interested parties. To encourage the participation of stakeholders with

⁶ Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1)(B), authorizes the FTC to issue "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5.

⁷ See, e.g., Contact Lens Rule, 16 C.F.R. §315 (2012) (implementing the Fairness to Contact Lens Consumers Act and requiring that prescribers provide patients with a copy of their contact lens prescription).

⁸ See 15 U.S.C. § 5(m)(1)(A).

⁹ For example, the Jewelry Industry Marketing Guides state that it would be an unfair or deceptive practice under Section 5 to mark a piece of jewelry as "gold" unless "a correct designation of the karat fineness of the alloy immediately precedes the word 'Gold.'" 16 C.F.R. § 23(b)(2) (2012). Thus, members of the industry are on notice that the FTC would consider it a violation of Section 5 for companies to market "gold" jewelry without specifying the alloy, e.g., 9 karat, 14 karat, 24 karat.

¹⁰ For example, under the Guides Concerning Use of Endorsements and Testimonials in Advertising, if a connection exists between the seller of a product and a person or group endorsing the product "that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed." 16 C.F.R. § 255.5 (2012).

¹¹ See <http://ftc.gov/ftc/regreview/index.shtml> for a schedule of the FTC's regulatory review program.

¹² For example, the FTC's Children's Online Privacy Protection Rule took effect in 2000. Citing rapid technological developments, the Commission announced in 2010 that it would review COPPA on an accelerated schedule. After a considering hundreds of public comments and the proceedings of a public workshop, the agency announced proposed changes to COPPA in 2011. Those suggested revisions generated additional public feedback, leading the agency to file a supplemental request for public comments in 2012. See "FTC Seeks Comments on Additional Proposed Revisions to Children's Online Privacy Protection Rule," news release dated Aug. 1, 2012, available at <http://www.ftc.gov/opa/2012/08/coppa.shtm>.

divergent perspectives, the FTC has initiated an online process to make it easier for members of the public to file and review comments. When the agency issues a new or revised rule or guide, the Federal Register notice typically includes a Statement of Basis and Purpose with detailed explanatory information.¹³

In addition, the FTC's Bureau of Consumer Protection regularly coordinates the announcement of law enforcement actions or the issuance of final rules with the release of informal brochures or videos to assist companies in meeting their legal obligations. These resources reflect the practical fact that for many smaller businesses, in-house legal departments are cost-prohibitive. Titles like *The FTC's Revised Endorsement Guides: What People are Asking*¹⁴ or *Dietary Supplements: An Advertising Guide for Industry*¹⁵ offer practical staff guidance, but are written in the to-the-point language of business executives, advertising professionals, and entrepreneurs. As an adjunct to printed materials, the Bureau of Consumer Protection has begun to produce multimedia compliance resources for smaller companies. For example, *Protecting Personal Information: A Guide for Business*¹⁶ is a 20-minute interactive online tutorial designed for companies to incorporate into their employee training efforts. These compliance resources, along with links to recent cases, relevant laws and rules categorized by industry, and the BCP Business Blog, are compiled in the BCP Business Center, which debuted in 2010.¹⁷

On the competition side, the FTC also issues guidelines that explain how the agency identifies potential law violations and the type of analysis employed by the Commission and its staff to determine whether certain business practices harm consumers. This type of guidance is particularly beneficial in explaining how the agency enforces competition laws in tandem with its sister antitrust enforcer, the Antitrust Division of the Department of Justice. Together, the FTC and DOJ have issued guidelines for horizontal mergers, collaborations among competitors, licensing of intellectual property, and health care collaborations, to name a few.¹⁸ These guidelines, especially the agencies' Horizontal Merger Guidelines,¹⁹ have helped develop a consistent approach to competition analysis that is focused on potential effects on consumers or the competitive process. Beyond building consensus among enforcers and other stakeholders, the public process of developing guidelines provides transparency and reduces uncertainty among businesses that must comply with the general standards of competition law.

¹³ See, e.g., Prohibitions on Market Manipulation in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007: Final Rule and Statement of Basis and Purpose, 16 C.F.R. § 317 (2012), available at http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf.

¹⁴ Available at <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking>.

¹⁵ Available at <http://business.ftc.gov/documents/bus09-dietary-supplements-advertising-guide-industry>.

¹⁶ Available at <http://business.ftc.gov/multimedia/videos/protecting-personal-information>.

¹⁷ The BCP Business Center is available at www.business.ftc.gov.

¹⁸ These and other competition policy guidance documents are available at <http://www.ftc.gov/bc/guidance.shtm>.

¹⁹ *Horizontal Merger Guidelines* issued by the Federal Trade Commission and the Department of Justice (August 19, 2010), available at <http://ftc.gov/os/2010/08/100819hmg.pdf>.

Businesses can also request an advisory opinion from the Commission or its staff regarding a proposed course of conduct.²⁰ Advisory opinions do not directly address the legality of the proposed conduct; rather an advisory opinion typically will set forth the Commission's enforcement intentions, allowing the requestor to better assess the potential for a law enforcement inquiry prior to commencing its business plan. Advisory opinions are made public and serve a public information function in addition to its benefit to the requestor, and can be particularly helpful if there is no clear Commission or court precedent, or the subject matter of the request is of significant public interest. FTC staff also responds to individual inquiries of a general nature by email or phone,²¹ and publishes lists of Frequently Asked Questions on a number of business topics.²²

Recognizing that individual businesses often rely on trade associations and other private organizations to assist in compliance efforts, the FTC has also been at the forefront of encouraging industry self-regulation as a complement to effective law enforcement in certain circumstances. For instance, since 1971, the National Advertising Division ("NAD") of the Council of Better Business Bureaus has provided a forum for companies to dispute advertising claims, with referral to the FTC for any disputes that cannot be resolved via the NAD process.²³ Although joint industry efforts must abide by competition principles and avoid regulations or practices that exclude or competitively disadvantage competitors, and self-regulation is no substitute for effective law enforcement by the FTC, industry self-regulation can promote compliance and free up FTC resources for other law enforcement efforts.²⁴

The FTC has also introduced innovative programs to coordinate law enforcement, self-regulation, and industry education. The Commission's Funeral Industry Practices Rule²⁵ extends protections to consumers shopping for funeral services and mandates certain price-related disclosures. The Funeral Rule Offenders Program ("FROP") is a Commission-approved education and certification program operated by the National Funeral Directors Association ("NFDA"). FROP offers a non-litigation alternative for correcting core violations of the Funeral Rule, such as the failure to provide mandatory itemized price lists. The Commission, often in coordination with state law enforcers, regularly conducts undercover "test shopping" sweeps to determine Rule compliance. If members of the funeral industry aren't in compliance with certain

²⁰ 16 C.F.R. §§ 1.1 – 1.4. See generally "Guidance from the Bureau of Competition on Requesting and Obtaining an Advisory Opinion," available at <http://www.ftc.gov/bc/healthcare/industryguide/advop-general.pdf>.

²¹ FTC contact information is available online at <http://www.ftc.gov/ftc/contact.shtm>. The FTC also operates the Consumer Sentinel, a secure online database of complaints used by law enforcement authorities worldwide to detect patterns of wrong-doing and lead to investigations or prosecutions.

²² See, e.g., *FTC Guide to the Antitrust Laws* with FAQs on topics such as "Dealings in the Supply Chain" available at <http://www.ftc.gov/bc/antitrust/index.shtm> or *Advertising FAQs: A Guide for Small Business*, available at <http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business>.

²³ See, e.g., "FTC Settlement Requires Oreck Corporation to Stop Making False and Unproven Claims That Its Ultraviolet Vacuum and Air Cleaner Can Prevent Illness," FTC News Release dated Apr. 7, 2011, available at <http://www.ftc.gov/opa/2011/04/oreck.shtm>.

²⁴ See "Self-Regulation and Consumer Protection: A Complement to Federal Enforcement," Remarks of J. Thomas Rosch before the NAD Annual Conference 2008 (Sept. 23, 2008) available at <http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf>.

²⁵ 16 C.F.R. § 453 (2012).

provisions of the Rule, the FTC may offer them the opportunity to participate in FROP rather than face FTC law enforcement action, which could result in substantial civil penalties. Violators that opt for FROP make voluntary payments to the U.S. Treasury in an amount slightly less than the civil penalty the FTC would seek in a law enforcement action, and participate in NFDA-led training and competency testing. They remain in the program for five years and certify completion of the FROP requirements to the NFDA.

IV. PUBLIC ENGAGEMENT AND FEEDBACK

Another component of FTC business outreach—policy development and research—helps the agency keep pace with new thinking and evolving business practices. The FTC often sponsors workshops or other public events to bring together interested parties with differing perspectives to ensure that existing enforcement approaches, rules, or guidance stay current without creating undue burdens on emerging business models. For instance, the FTC recently hosted a one-day workshop on new forms of mobile payments,²⁶ featuring consumer advocates, industry representatives, government regulators, technologists, and academics to examine a wide range of issues, including the technology and business models used in mobile payments, the consumer protection issues raised, and the experiences of other nations where mobile payments are more common. FTC staff members often issue reports summarizing these public events and may make recommendations to businesses about what steps they can take to ensure that they remain compliant during periods of change.²⁷

Finally, FTC commissioners and staff often speak at or attend events with business executives or their counsel to discuss the latest enforcement actions and provide an opportunity for face-to-face contact with those most affected by the law. Similarly, staff in the FTC's eight regional offices attend meetings of local business groups, and serve as additional contact points for businesses seeking more information about FTC activities.

V. CONCLUSION

With business education, there is no one-size-fits-all formula. Rather, the FTC uses a variety of non-enforcement techniques to supplement law enforcement actions. This enforcement “plus” approach can help other businesses comply with laws enforced by the FTC, and, ultimately, prevents harm to consumers.

²⁶ “*Paper, Plastic...or Mobile? An FTC Workshop on Mobile Payments*,” materials available at <http://www.ftc.gov/bcp/workshops/mobilepayments>. This event was broadcast live online, and featured a live Twitter feed; viewers submitted questions for panelists via Twitter or the FTC's Facebook page.

²⁷ See e.g. *Protecting Consumer Privacy in an Era of Rapid Change, Recommendations for Businesses and Policymakers*, FTC Report dated March 2012, available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>; *The Evolving IP Marketplace, Aligning Patent Notice and Remedies with Competition*, FTC Report dated March 2011, available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.