



Office of Commissioner
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Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding the Report to Congress on Protecting Older Consumers
Commission File No. P144400
October 19, 2020*

Today, the Commission has voted to submit a report to Congress on the agency's work to protect older Americans from fraud and abuse. The report details enforcement actions where older Americans may have been victims. It also describes the areas where older Americans most frequently report fraud, with romance scams and impostor scams leading to particularly high losses. In my view, this report suggests that the Commission should consider two shifts in strategy to better protect older Americans and other consumers from fraud:

(1) Focus on established corporate actors that facilitate and profit from fraud.

The FTC should primarily target firms that facilitate and profit from fraud at the expense of the most consumers, even if that means holding larger, established firms accountable. This is a much better use of resources than focusing on smaller-scale scammers. Many of the Commission's settlements with these fly-by-night outfits result in suspended judgments, where only a small fraction of illegal gains is returned to victims. In addition, the conduct often involves behavior that is criminal in nature, and the FTC does not have criminal law enforcement authorities. Focusing on the market players that are larger conduits of fraud targeting older Americans and other consumers is more likely to lead to effective relief and systemic impact.

There have been meaningful strides in this direction, and this work should be the new standard. This year's report, as well as past reports, have highlighted some of these actions. For example, the FTC recently sued the country's biggest operator of dating websites, Match Group (NASDAQ: MTCH).¹ The Commission alleged that business practices employed on the company's Match.com service allowed it to profit off the activities of romance scammers preying on users. The Commission has also taken action against MoneyGram (NASDAQ: MGI) and Western Union (NYSE: WU), charging them with facilitating widespread fraud, and returning hundreds of millions of dollars to consumers.² More recently, the FTC settled allegations against First Data, a payment processor now known as Fiserv (NASDAQ: FISV), for

¹ Press Release, Fed. Trade Comm'n, FTC Sues Owner of Online Dating Service Match.com for Using Fake Love Interest Ads To Trick Consumers into Paying for a Match.com Subscription (Sept. 25, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-sues-owner-online-dating-service-matchcom-using-fake-love>.

² Press Release, Fed. Trade Comm'n, MoneyGram Agrees to Pay \$125 Million to Settle Allegations that the Company Violated the FTC's 2009 Order and Breached a 2012 DOJ Deferred Prosecution Agreement (Nov. 8, 2018), <https://www.ftc.gov/news-events/press-releases/2018/11/moneygram-agrees-pay-125-million-settle-allegations-company>; Press Release, Fed. Trade Comm'n, Western Union Admits Anti-Money Laundering Violations and Settles Consumer Fraud Charges, Forfeits \$586 Million in Settlement with FTC and Justice Department (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles>.

knowingly processing payments and laundering credit card transactions for scams targeting hundreds of thousands of Americans.³ These actions, taken by the FTC's regional offices, are models for the entire agency.

(2) Restate FTC Precedent to Deter Fraud and Boost Consumer Recoveries

The Commission's report describes common frauds targeting older Americans, including lottery scams, romance scams, and tech support scams. The FTC routinely brings law enforcement actions to halt this misconduct, but we should examine whether these actions are doing enough to deter fraud in the first place. Many of the actions outlined in this year's report resulted in no-money, no-help settlements. At the same time, when lawsuits do result in monetary relief, it is typically through Section 13(b) of the FTC Act, under which compensation is often capped at direct harm. This means that victims are often being undercompensated,⁴ while wrongdoers are not actually facing any penalty.

To take one recent example, the report highlights the FTC's lawsuit against Agora Financial, which was brought under Section 13(b).⁵ The complaint alleges that the company and its leadership targeted older Americans through a program that they claimed was affiliated with the U.S. government.⁶ Because this conduct was not alleged to have violated any FTC rules, we will not be able to obtain any civil penalties or damages, even if we prevail in the litigation. Many other actions detailed in the report fall into the same category, and the Supreme Court may act next year to limit Section 13(b) even further.

Given the prevalence of fraud and limitations on our authority under Section 13(b), the FTC should consider increasing deterrence and consumer recoveries by restating existing legal precedent through rulemaking. For example, the Commission's report details how older Americans lose tens of millions of dollars each year to plainly illegal impostor fraud, such as when scammers claim affiliation with the government.⁷ The FTC targets these practices routinely, and a restatement could cite these precedents to prohibit companies from making misrepresentations, or actively facilitating misrepresentations by others, expressly or by implication, regarding:

- Affiliation with a government entity (including the military) or nonprofit organization
- Participation in a government program

³ Press Release, Fed. Trade Comm'n, Worldwide Payment Processor and Payments Industry Executive to Pay \$40.2 Million to Settle FTC Charges of Assisting Fraudulent Schemes and Credit Card Laundering (May 19, 2020), <https://www.ftc.gov/news-events/press-releases/2020/05/worldwide-payment-processor-payments-industry-executive-pay-402>.

⁴ For example, fraud targeting older Americans can lead to other losses beyond the monies paid to a bad actor, including late charges and overdraft fees. These losses are generally not recoverable under Section 13(b) of the FTC Act, but they can be recovered through Section 19, which allows the Commission to seek damages. Fraud also results in hard-to-quantify harms that underscore the need for deterrence. For example, fraud that creates fear and distrust can reduce the consumption of legitimate communications from government agencies, like the Census Bureau and the Social Security Administration. This is harmful both for the consumer and for their family and community.

⁵ PROTECTING OLDER CONSUMERS 2019-2020: A REPORT OF THE FEDERAL TRADE COMMISSION, FED. TRADE COMM'N, at 17 (Oct. 2020) (hereinafter *Protecting Older Consumers 2019-2020*).

⁶ See Compl., *Fed. Trade Comm'n v. Agora Financial, LLC et al.*, 1:19-cv-03100-JMC, ¶ 11 (Oct. 24, 2019), https://www.ftc.gov/system/files/documents/cases/agora_financial_complaint_0.pdf.

⁷ For example, the report details significant losses resulting from scammers impersonating the FTC. *Protecting Older Consumers 2019-2020*, *supra* note 5, at 14.

- Certification, licensure, or approval by the government or a nonprofit organization.

This restatement need not impose any new substantive requirements, but it would trigger damages and penalties for a wide range of conduct where FTC actions can otherwise result in no-money, no-help settlements, even against established corporate actors.⁸ Recent examples of impostor fraud that resulted in no relief for victims include:

- Disseminating automobile recall notices with a similar appearance to notices required by the National Highway Traffic Safety Administration
- Falsely claiming participation in privacy programs overseen by the Commerce Department
- Falsely implying that health claims about an infant formula are approved by the Food and Drug Administration.

Had the FTC simply restated in a rule what it has stated elsewhere repeatedly – that it is illegal to impersonate the government or falsely claim government affiliation – these actions could have resulted in real relief for victims, rather than no-money orders.

The FTC has long been reluctant to codify common-sense rules, even when Congress expressly authorizes it.⁹ Now, the agency’s ability to recover funds for consumers and adequately hold wrongdoers accountable is in jeopardy.¹⁰ It is time to change course. Regardless of how the Supreme Court interprets our authority under Section 13(b), this year’s report underscores the need for comprehensive action to deter fraud, redress victims, and make clear that corporate America will pay a price for preying on older Americans.

⁸ Like the Telemarketing Sales Rule, this can have broad application to deter scams targeting older Americans and to secure additional financial relief when companies are caught. There is also precedent for this approach, as the FTC formally determined a decade ago that claiming a false affiliation with the government is harmful and prevalent. *See* Fed. Trade Comm’n., 16 CFR Part 322, Mortgage Assistance Relief Services; Final Rule, 75 Fed. Reg. 75092 (Dec. 1, 2010), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/16-c.f.r.part-322-mortgage-assistance-relief-services-final-rule-and-statement-basis-and-purpose/r911003mars.pdf (finding widespread material misrepresentations around affiliation with governmental and nonprofit organizations).

⁹ The FTC has largely ignored many of the rulemaking authorities that Congress has expressly authorized to trigger penalties and damages for violators. For example, for 25 years, the FTC took no action to implement a Made in USA fraud rule. In addition, it has now been over a decade without comprehensive action since Congress authorized rulemaking in the auto sector.

¹⁰ In testimony to Congress in August 2020, my fellow Commissioners and I again acknowledged the “dire consequences” of legal uncertainty surrounding Section 13(b). *See* Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission, Before the Committee on Commerce, Science, and Transportation of the United States Senate, Washington D.C. (Aug. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf. However, when companies violate a rule defining specific unfair or deceptive practices, the Commission can seek civil penalties under Section 5(m) and a broad range of monetary relief, including consumer redress and damages, under Section 19. These authorities are not under challenge. Even if the legal uncertainty surrounding Section 13(b) subsides, the Commission should still pursue codifying existing legal precedent into rules, as outlined under Section 18, given the potential for more effective deterrence and more fulsome consumer relief.