

**Statement of Commissioner Roscoe B. Starek, III**  
**Concurring in Part and Dissenting in Part in**  
***America Online, Inc.***  
**File No. 952-3331**

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Although I have voted to accept for public comment the consent agreement with America Online, Inc. ("AOL"), the extensive consumer education remedy contained in paragraph XII of the proposed order is far too broad. Once again, a majority of the Commission is willing to use a negotiated settlement to compel speech that it would have virtually no chance of persuading a court to require.

The proposed consumer education program is an extremely comprehensive endeavor that no doubt will provide valuable information to consumers of online services about the use of electronic payment systems. Further, it is more closely related to the violations alleged in the complaint than the sunscreen advertising "consumer education" remedy in the proposed consent agreement with Schering-Plough Healthcare Products, Inc. accepted for comment two months ago.<sup>(1)</sup> Nonetheless, as a fencing-in remedy it is too broad to be reasonably related to AOL's alleged law violations.

The complaint alleges that AOL misrepresented and deceptively failed to disclose material information about its billing practices, misrepresented the terms of its checking account debiting program, and violated provisions of the Electronic Fund Transfer Act and its implementing Regulation E pertaining to consumer authorization of electronic payments. As fencing-in relief, the order requires AOL to establish and implement a program lasting at least one year to educate consumers about the use of electronic payment systems.<sup>(2)</sup> The program must "be of a scope and employ media reasonably necessary to reach a wide audience of Consumers [of online services], including **but not limited to**" 50,000 color brochures, the Internet, and AOL's online service. Proposed order, ♦ XII(C) (emphasis added).

The order also requires that the program include, **but not be limited to**, information about: various types of electronic payment systems available to Consumers; obligations of Consumers, merchants, and Financial Institutions in using such systems; how such payment systems are used, including the means by which Consumers may attempt to prevent the fraudulent use of those systems; various legal protections available to Consumers under each system; and organizations, including law enforcement agencies, from which Consumers may obtain further information or assistance.

Proposed order, ♦ XII(D) (emphasis added).

Although some form of consumer education program may well be warranted as fencing-in relief, this program goes too far. AOL is not so likely to engage in a whole host of future law violations that it should be required to educate consumers about how to use "various types of electronic payment systems" and how to attempt to prevent fraudulent use of those systems. Nor do I think that it is reasonable in scope to require AOL to inform consumers about their own obligations and the obligations of merchants and financial institutions generally in using electronic payment systems. Similarly, requiring AOL to educate

consumers about "various legal protections" for consumers using electronic payment systems is too broad to be reasonably related to the prevention of future deception like or related to that alleged in the complaint. That the alleged deception here involves the use of electronic payment systems is not enough of a nexus to justify a consumer education program covering all risks, obligations, and law violations involving electronic payment systems. Following that logic, information about driving a car and traffic laws would be reasonably related to a violation of the Commission's Used Car Rule.<sup>(3)</sup>

Finally, the consumer education provision would require content and dissemination "not limited to" what is stated in the order. Although it is not clear how the Commission could enforce content and dissemination requirements not described in the order, it makes little sense to accept language indicating that even the extensive dissemination measures and speech described in the proposed order may not be enough to comply with the basic requirement to establish a program to educate consumers about the use of electronic payment systems.

If this relief were sought in litigation, rather than obtained through a consent agreement, it would not withstand scrutiny under the First Amendment. The information that the order specifically requires AOL to disseminate is far more extensive than necessary to prevent future violations by AOL, and the boundaries of the "not limited to" language are unclear. Even if a respondent waives its First Amendment rights in a consent agreement, the Commission -- as a government agency acting in the public interest -- should not compel speech through negotiation that it has no colorable chance of obtaining in litigation.

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1. **See *Schering-Plough Healthcare Products, Inc.***, File No. 942-3341 (separate statements of Commissioner Azcuenaga and Commissioner Starek concurring in part and dissenting in part).

2. Within 90 days of the order's issuance, AOL must submit, for review and approval by the Associate Director of the Bureau of Consumer Protection's Division of Credit Practices, a draft plan for the program and drafts of any materials to be disseminated. Proposed order, ¶ XII.

3. **See** Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.