UNITED STATES OF AMERICA
Federal Trade Commission

Office of Commissioner
Rohit Chopra

STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matter of Speedway Motorsports
Commission File Number X010021

August 10, 2018

Questions Presented

- For parties that are subject to a Commission or court order, when is it appropriate for the Commission to reach a settlement that results in a defendant or respondent profiting from an order violation?

- When a defendant or respondent self-reports an order violation, how much leniency is warranted?

Summary

- While settlements are often a good alternative to litigation, they are not always in the public interest. Even if it's smart to settle, the settlement must be smart.

- No violator of a court order should be able to profit from misconduct. The Federal Trade Commission must avoid agreeing to settlements that result in a Defendant profiting from order violations. A rigorous analysis of these profits should include consideration not only of a Defendant's ill-gotten proceeds, but also the avoided costs of order compliance, especially when the Defendant agreed to bear those costs.

- By justifying the result in this matter on the basis of self-reporting, the Commission was overly indulgent. Self-reporting should not immunize a party from the consequences of violating an order. Promoting self-reporting is important, but should be given significant weight only under certain circumstances. To avoid missteps in the future, the Commission should issue more explicit guidance on self-reporting that considers timeliness, remediation, and other appropriate factors.

Relevant Facts

Speedway Motorsports (NYSE: TRK) is a major player in the American motorsports industry, hosting high-profile NASCAR events at its well-known racing facilities. In addition to marketing, promoting, and sponsoring these events, the corporation operates a number of businesses, including a subsidiary that markets auto lubricants.

In 2001, the FTC charged Speedway with violating the law by tricking consumers about the benefits of its zMax automobile lubricant. Specifically, the FTC alleged that the company tricked consumers into thinking zMax would increase their vehicle's performance. The Commission's complaint detailed a number of false or unsubstantiated claims made by Speedway, including that their product would improve gas mileage, reduce engine wear and corrosion, extend engine life, and reduce emissions.[1] In essence, the company made claims that would lead a consumer to think they would *save* money.

To top it off, the FTC's investigation found that the company manipulated corrosion protection test results. After independent tests showed that the company's product *doubled* the rate of corrosion rather than reducing it, Speedway allegedly used a fabricated report containing altered results in their advertising, which report included a cover sheet and letterhead ripped off from the real report.[2] Their infomercial touting the fabricated report ran more than 13,000 times.[3]

Two years later, in 2003, the FTC and Speedway entered into a consent order filed in federal court that provided $1 million in restitution for purchasers of zMax, as well as various other remedies to put a stop to Speedway's deception.

Importantly, as part of the order agreed to by both Speedway and the Commission, Speedway was required to pay *all* expenses[4] associated with distributing refunds to consumers. They were also required to ensure that the full $1 million would be paid out. To be clear, the order sought to ensure that consumers would get refunds, and that Speedway would be responsible for the costs of doing so, even if they were substantial.

While Speedway agreed to these terms, the company did not live up to them. Following the company's initial round of refunds, some funds remained unclaimed.

Under the order's clear and undisputed terms, Speedway was then required to continue distributing funds until the full redress balance was exhausted.[5] Instead, they did nothing, and sat on the balance for nearly fifteen years. Only recently did the company come forward to the FTC about this order violation.[6] In response, rather than seek fulfillment of the terms of the original order, the FTC intends to modify these terms.

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[1] Complaint at 8-9, *FTC v. Speedway Motorsports, Inc.*, No. 1:01-CV-00126 (M.D.N.C. 2001), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2001/02/010201comp0023256.pdf.

[2] *Id.* at 7-8.

[3] *Id.* at 3-4.

[4] For example, a typical redress program may require skip tracing, postage, and other related expenses.

[5] If this was impracticable, Speedway also could have sought a modification of the order. *See FTC v. Speedway Motorsports, Inc*. No. 1:01-CV-00126 (M.D.N.C. 2001), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030321stip0023256.pdf at 11.

[6] In the time since this order was entered in 2003, Commission staff have instituted new systems to track order compliance, so it is unlikely that flagrant non-compliance will go undetected.

Under the settlement approved by the Majority, the Commission is agreeing to allow Speedway to simply turn over the remaining undistributed consumer refunds to the U.S. Government, completely ignoring the costs avoided by Speedway in failing to abide by the order it agreed to. These costs are far greater than the undistributed refunds.

Meanwhile, consumers who purchased $39.95 lubricant after being misled about how it would affect their engines did not receive what was due to them under the order.[7]

Analysis and Discussion

Speedway is not a mom-and-pop business. In its 2017 fiscal year, the corporation generated over $148 million in profit.[8] When faced with charges by the FTC over fifteen years ago, it was clearly well counseled when it resolved the matter. In fact, in the original consent order between the company and the FTC, Speedway retained at least six lawyers from four different law firms.[9]

At the same time, this case is not high profile, so I appreciate the desire to resolve it expeditiously. There are good reasons for resolving it via settlement rather than litigation, given the agency's scarce resources. But we should approach settlement the same way we approach litigation: with careful analysis and a clear end goal.

With this settlement, I am concerned about the lack of analytical rigor in the determination of an acceptable range of outcomes. Rather than focusing exclusively on the undistributed consumer refunds, the Commission should have considered the full extent of the financial gains realized by flouting our order.

While the amount of money that Speedway failed to pay out was a relatively small portion of the $1 million fund, Speedway's true benefits came in the form of the costs they avoided by failing to pay out additional refunds – costs that they were explicitly required to cover.

Rather than fixating on the small pot of undistributed refunds, the Commission should have looked to Speedway's indifference point, where the benefits of noncompliance would not outweigh the results of adhering to the consent order.[10] Even a conservative analysis would suggest that Speedway's total benefits of noncompliance on a present value basis is many times the amount Speedway will turn over to the U.S. Government in this settlement. This means Speedway's financial gains from violating this order are likely in the hundreds of thousands of dollars.

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[7] The amount refunded to consumers in 2003 – $12.31 per person – was not a large sum, though it was substantial given the price of the product. But the FTC's primary goal in these orders is to remedy misconduct and ensure that deceptive advertising is not a profitable business strategy, and believing that consumers will not care whether they receive $12.31 or $13.31 is not a basis to ignore an order.

[8] Speedway Motorsports, Inc. Form 10-K, *available at* https://www.sec.gov/Archives/edgar/data/934648/000143774918004418/trk20171231_10k.htm

[9] Stipulated Final Order at 11, *FTC v. Speedway Motorsports, Inc.*, No. 1:01-CV-00126 (M.D.N.C. 2001), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030321stip0023256.pdf.

[10] Mathematically, this is the quotient of the net present value of the violator's ill-gotten proceeds and avoided costs divided by the probability of detection.

If Commission leadership relied on a more analytically rigorous dollar target for settlement, I have no doubt that our talented staff would have been able to succeed in meeting this target.[11] Of course, I would be open to considering alternative analytical approaches even if it led to a dollar target that is higher or lower than what would result from my own preferred methodology. The key is that FTC leadership must empower our staff with a rigorous framework for approaching settlement negotiations that yields a just result. This is what the public expects of us.

By accepting a settlement that is well below the sum of Speedway's avoided costs and ill-gotten gains, I fear that the Commission is establishing a precedent that it will permit large, publicly traded companies to violate orders and turn a profit in the process. We should not be bringing down the hammer on small scammers while providing white glove treatment for sophisticated corporations.

One justification put forth for the leniency in this matter is that the company self-reported its noncompliance. Self-reporting and self-policing are important values for law enforcement and regulatory agencies to promote. They aid in the pursuit of both voluntary compliance and appropriate accountability for those who violate the law.

Many agencies publish explicit guidance on self-reporting.[12] While the specific factors around the application of leniency vary, they provide valuable insights on how the Commission should weigh self-reporting. Going forward, I believe the Commission should consider publishing explicit guidance, and that this guidance should include, at a minimum, the following factors:[13]

Timeliness of the discovery. The Commission should give significant weight to self-reporting only when it is done in a prompt and timely fashion. Self-reporting that comes well after the firm becomes aware of the deficiency should get less consideration.

Independent discovery and disclosure. The Commission should consider self-reporting only when it is clear that the discovery was voluntary and not the result of a legally required audit or review, either by the Commission or by a third party.

[11] On average, the company earned more than $400,000 in profits *per day* in 2017, so the Defendants' ability to pay was not in question. In my experience, sophisticated firms, especially those that are publicly traded, would be averse to retaining a liability from a clear order violation and would be motivated to reach a settlement on fair terms.

[12] *See, e.g.*, Federal Energy Regulatory Commission, Self-Reports, Nov. 22, 2017, *available at* https://www.ferc.gov/enforcement/self-reports.asp; Environmental Protection Agency, EPA's Audit Policy, May 15, 2018, *available at* https://www.epa.gov/compliance/epas-audit-policy; U.S. Securities and Exchange Commission, Division of Enforcement, Share Class Selection Disclosure Initiative, *available at* https://www.sec.gov/enforce/announcement/scsd-initiative; Bulletin, Consumer Financial Protection Bureau, Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation, Jun. 25, 2013, *available at* https://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf. This agency also provides guidance in certain contexts. For example, for companies that fail to comply with Hart-Scott-Rodino ("HSR") reporting requirements, the FTC advises that they should remedy this failure as soon as possible, and provide an explanation of why the notification was not filed, when that failure was discovered, and what steps they have taken to prevent a future violation. Hart-Scott-Rodino Premerger Notification Program, Fed. Trade Comm'n, What is the Premerger Notification Program? (March 2009), *available at* https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf at 14.

[13] These factors are consistent with those we consider in the Hart-Scott-Rodino context.

Appropriate corrective action and remediation. The Commission should give weight to self-reporting only when the entity has made all appropriate remediation to affected consumers and businesses.

While Speedway eventually alerted the Commission to its order violation, it was certainly not timely, nor is it clear that the discovery and disclosure were not part of a requirement set forth by a third party to resolve the matter. In addition, the consumer refund process required by the original agreement will not be completed as ordered.

The leniency offered by the Majority for self-reporting seems excessive. I worry that this is a loss for consumers and for law enforcement credibility.

Conclusion

Federal law enforcement agencies must do more to avoid bad deals that rely on flawed analytical approaches.[14] If we fail to enforce our orders even when small sums of money are at stake, will we have the credibility we need to reach just outcomes in cases involving widespread failures and harm?

I appreciate that self-reporting is important, but I do not believe it should be given significant weight in this matter.[15] The Commission should clearly articulate the factors it will consider when determining whether leniency is appropriate. However, leniency should not be our default.

The Commission should be concerned by the message this sends to other companies under order, and I hope that future resolutions reflect rigorous analysis. Companies big and small think hard to protect shareholder interests when negotiating with law enforcement. Law enforcement must likewise think hard when protecting the public interest. No company, regardless of its size or clout, should be rewarded for violating a consumer protection order.

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[14] I have previously expressed concern that other federal law enforcement agencies have undermined the rule of law by allowing those who violate orders to go unpunished. *See* https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf

[15] As noted earlier, I strongly support the issuance of clear Commission guidance on self-reporting to promote responsible conduct that includes a set of factors that would be considered where leniency may be appropriate, such as the factors I have briefly articulated above.