Statement of Chairman Joseph J. Simons
FTC v. HyperBeard Inc., et al.
Matter No. 1923109

June 4, 2020

Commissioner Phillips writes that civil money penalties start with harm. I disagree. While harm is an important factor to consider, when Congress prohibits practices and directs the agency to impose civil penalties, our first priority is to use those penalties to deter those practices. Even in the absence of demonstrable money harm, Congress has said that these law violations merit the imposition of civil penalties.

I do not disagree that starting with harm is the right approach when applied to torts, contracts, or statutes seeking to balance competing costs and benefits by incentivizing efficient behavior or requiring the internalization of costs imposed on innocent third parties, but this standard is inapposite when the agency is imposing civil penalties to deter conduct specifically proscribed by Congress.[1] Congress has frequently provided us with civil penalty authority in contexts in which pecuniary harm can be difficult to calculate and may be beside the point. For example, under the telemarketing laws we do not need to determine the cost to consumers of receiving an unwanted call during the dinner hour, because we have authority to impose civil penalties.

I believe that the goal of the civil penalty should be to make compliance more attractive than violation. Said another way, violation should not be more profitable than compliance. In HyperBeard, as in YouTube, we attempted to account for this by estimating the revenue from behavioral advertising that was illegal under COPPA, as compared to the revenue that would have been earned from contextual advertising, which is otherwise legal. In my opinion, an appropriate starting point for the civil penalty was HyperBeard's gain from behavioral advertising over the relevant time period adjusted upwards by a factor to account for the likelihood of detection. I further believe that the additional factors we consider, including the proposed defendants' degree of culpability, history of prior related conduct, prior law enforcement actions, timeliness of corrective action, ability to pay, willfulness, and threat posed to consumers; the effect on the proposed defendants' ability to continue to do business; and "such other matters as justice may require," such as, cooperation with our investigation, past approaches to similar violations, and expectations of businesses and consumers, warrant the $4 million civil penalty. Further, in this case, the defendant was unable to pay the indicated civil

[1] Commissioner Phillips seems to suggest that we should distinguish conduct that violates COPPA's statutory text from conduct that (as here) violates the COPPA rule implementing the statute, because Congress specifically proscribed the first but not the second. But Congress both defined "personal information" to include "any other identifier that the Commission determines permits the physical or online contacting of a specific individual," 15 U.S.C. § 6501(8)(F), and expressly empowered the Commission to seek civil penalties for violations of the COPPA rule, *id.* §§ 6502(c), 6505(d). Congress has thus made clear that COPPA rule violations *are* COPPA statutory violations and warrant civil penalties.

penalty amount of $4 million, based on the defendants' sworn financial statements; we therefore suspended that amount upon payment of $150,000.[2]

If our goal is to make compliance more attractive than violation, we also should consider the cost and effect of the other sanctions imposed in the context of an enforcement action. These effects include the costs and constraints of complying with the injunction; the fencing in of otherwise legal conduct; the reputational effect of the sanction; the threat of follow-on actions by shareholders, private plaintiffs, and other regulators; and other collateral consequences, such as the effect on relationships with business partners, vendors, investors, and regulators. All of these non-monetary sanctions can have substantial deterrence effect on violative behavior.

Finally, I do agree with Commissioner Phillips that we should consider the likelihood of more, or less, substantial effect. Where common sense and the available evidence suggests that the particular practices in question are most likely to harm consumers, we should adjust the penalty upward in order to more strongly penalize and deter those most harmful practices. Unlike Commissioner Phillips, I believe that deterrence should come first.

Civil penalties will be an ongoing discussion here at the FTC as we attempt to do justice and achieve meaningful relief for consumers. I take our obligation to assess civil penalties seriously, just as I take seriously our responsibility to fairly administer and enforce all of the laws with which we are charged.

[2] The agency must also consider general deterrence. In some cases, a company may earn, or save, very little from misconduct for which Congress has determined there should be civil penalties. In those cases, a different approach may be appropriate.