Apologies for circulating a very rough and unfinished draft. I had hoped to disengage with my work at the FTC at the beginning of the year, but for a variety of reasons, I am still spending a great deal of time on agency matters. What you have is a rough first draft of an essay I am writing to explain how agencies go about their work in an era where regulation is difficult, or at times impossible, for agencies. The FTC is a good illustration of an agency that engages in a non-regulatory environment because unlike most of its sister agencies, the FTC has no general APA rulemaking authority. It instead has a cumbersome, hybrid rulemaking system that is so process-laden it has fallen into disuse by the agency. Thanks in advance for your forbearance.

David Vladeck

Working Draft — Do not circulate or quote without permission

Zombie Debt, "Transit Time," and Kids Apps: How the FTC Engages in Law Clarification to Carry Out its Consumer Protection Mission

David C. Vladeck[1]

Today's colloquium will focus on an issue I often grappled with in my work at the Federal Trade Commission, but the issue is hardly unique to the agency. The issue is this: When an agency wants to clarify existing law — often to respond to an emerging problem the agency has not addressed previously — what procedural vehicle is best to accomplish that clarification?[2] Under conventional administrative law doctrine, law clarification can be effected in a number of

---

[1] Professor, Georgetown Law. This essay draws on my experience as director of the Federal Trade Commission's Bureau of Consumer Protection, a position I held from June 2009 to December 2012. I remain a consultant to the agency. Nothing in this essay necessarily reflects the views of the FTC.

[2] Law clarification is a different function than the interstitial law-making function that agencies also perform, when delegated that authority by congress. Substantive or "legislative" rules are ones that regulate the primary conduct of those covered by the rule. Interpretative rules give guidance about how an agency interprets its rules or the agency's organic statute. *See generally* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) (explaining that a substantive rule is a rule that is promulgated by the agency pursuant to statutory authority to implement a specific statute. Substantive rules have the force and effect of law. By contrast, an interpretative rule advises the public of the agency construction of the statutes and rules it administers). The dividing line between the two has been described most colorfully as "enshrouded in considerable smog," *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975), an often repeated description. The best effort to draw a dividing line between the two may be the D.C. Circuit's opinion in *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997). After acknowledging that "the line between a substantive rule and an interpretative rule can be less than clear-cut," the court pointed out that a key factor is "whether the interpretation itself carries the force and effect of law," in which case it is substantive, "or rather whether it spells out a duty fairly encompassed withing the regulation that the interpretation purports to construe," in which case it is interpretative. In practice, however, the line between the two functions often is blurred, which is why agencies often resort to formal regulatory processes to engage in what the agency sees as law clarification but what regulated parties may see as the imposition of new substantive standards.

ways, with varying degree of formality. And formality matters. As a general rule, the more formal the process, the more the agency may rely on its interpretation of the law in enforcement actions and the more deference the agency's interpretation is likely to receive from reviewing courts. For that reason, it is generally assumed that the more formal the agency's action the more likely it is that regulated industry will conform its conduct to the agency's view of the law.

Agencies have a range of options for making clear the agency's view of what the law requires, each of which has virtues and vices. Part I of this essay describes the options generally available to agency policy-makers and the strengths and weakness of each option. Part II begins with a brief overview of the options available to the FTC, which in one respect are more limited than the options open to most agencies. For a variety of reasons, Congress has saddled the FTC with a form of hybrid rulemaking that is much more cumbersome than the rulemaking process spelled out in the APA. As a consequence, rulemaking at the FTC is now disfavored, unless Congress has specifically authorized the agency to engage in APA rulemaking to address an issue Congress wants the agency to tackle. With that constraint in mind, Part II then focuses on case examples of how the FTC decided to implement policy initiatives during my tenure at the agency. Part III explores whether the FTC's general inability to promulgate rules under the APA has hindered or advanced its ability to formulate and implement policy reforms that, in the agency's view, are needed to accomplish the agency's consumer protection mission.

PART I: AGENCY OPTIONS FOR LAW CLARIFICATION

A. Interpretative Rules

At one end of the spectrum, an agency's most formal option is to engage in interpretative rulemaking under the Administrative Procedure Act.[3] Interpretative rules are formulated through the APA's familiar notice and comment requirements. When an agency follows that process, the resulting interpretation is given substantial deference by reviewing courts,[4] and thus regulated entities generally adhere to them. For another, to the extent enforcement actions are required to compel compliance, the existence of the rule simplifies the agency's job in litigation. In a follow-on enforcement action, the validity of the rule is generally not subject to dispute, or if it is, the interpretation is likely to be upheld by the court. The agency is thus spared the burden of having continually to litigate the rule's validity in case after case. For this reason, where there is a definitive agency interpretation setting out the bounds of proscribed conduct, the focus in enforcement litigation is on the fact-bound question of whether the targeted entity engaged in conduct that runs afoul of the agency's interpretation. That is a question that generally can be resolved without the expenditure of substantial resources, and one that agencies are especially well-suited to handle. Thus, interpretative rules benefit agencies by spurring compliance by regulated entitles and streamlining follow-on enforcement actions.[5]

---

[3] See 5 U.S.C. 553(b)(3)(A), (d)(2) (providing that notice and comment rulemaking may be used to promulgate an interpretative rule, but that an agency may dispense with this procedure in its discretion).

[4] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984).

[5] *See generally Heckler v. Campell*, 461 U.S. 458, 467 (1983) (upholding the use of an interpretative rule to establish element of proof in an enforcement proceeding and observing that an "agency may rely on its rulemaking authority to determine issues that do not require case-by-

There are serious downsides, though, to interpretative rulemaking that often outweigh its benefits. To begin with, rulemaking is time-consuming and resource-intensive. Rulemaking is a multi-stage process requiring the agency to formulate a proposal, solicit, consider, and then respond to public comment, finalize the agency's rule and statement justifying the rule, and, throughout the process, create a record for possible judicial review.[6] For Executive Branch

---

case consideration." The Court also pointed out that "[a] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.").

There are of course other benefits to rulemaking as well. As my former Public Citizen Litigation Group colleague Alan Morrison has written: "rulemaking is likely to produce a more rationally coherent rule for general application" because the process "allows an opportunity for all interested parties to comment" and requires "the agency to take a broader look at the issue." As a result, "industry groups, consumers, labor unions, environmentalists, and other interested parties find it worthwhile to focus their efforts on a single rulemaking, although they might be unable to justify participating in any single adjudication." Rulemaking is also "more efficient over the long term" because it often obviates the need for ongoing, repetitive enforcement actions. In contrast to adjudication, which centers "on the particulars of a given case," and therefore "may require a substantial commitment of resources to establish the narrow set of facts necessary to reach a decision," rulemaking, "although it may require more effort than a single adjudication, will normally resolve a far larger range of issues." Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 447, 452-54 (1986).

[6] In addition to the procedures required by the APA, most agencies have internal review processes to ensure high-quality rulemaking, and navigating these non-statutory requirements consumes time and resources. For this reason, even before the advent of intensive, routine, centralized Executive Branch review of agency rulemaking, agencies sometimes shied away from rulemaking because of time and resources necessary to move a rule through an agency. *See, e.g.*,

agencies (but not the so-called "Independent" agencies) rulemaking is made even more cumbersome because of the extensive oversight by the Office of Information and Regulatory Affairs (OIRA) imposed by Executive Order 13422.[7] Under the Executive Order, OIRA clearance is required both prior to the publication of a notice of proposed rulemaking, and prior to the publication of the final rule.[8] For a short-term political appointee who has to decide how implement a new interpretation of the law, the reality is that a rulemaking begun on the

---

Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 Colum. L.Rev. 1231, 1245-47, 1275 (1974); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 1992 Duke L. J. 1385.

[7] During the Administration of President George H.W. Bush, the Executive Order was amended to require guidance documents to be submitted for formal OIRA review. Exec. Order 13422 (Jan. 18, 2007). President Obama revoked this provision shortly after he was sworn in as President. Executive Order 13497 (Jan. 30, 2009). But even as amended by President Obama, the Executive Order permits OIRA to deem even interpretative rules "significant" and therefore subject to intensive OIRA review. Professor Mark Seidenfeld has published an article entitled "*A Table for Requirements for Federal Administrative Rulemaking*," 27 F.S.U.L. Rev. 533 (2000), that, although somewhat out-of-date, underscores the complexity of completing *any* rulemaking proceeding.

[8] Apart from the time and resources needed to clear the hurdles imposed by the Executive Order, there are other serious concerns about centralized review of agency action that are beyond the scope of essay. As I have written elsewhere, the systematic review of agency decisions by White House staff — and make no mistake, OIRA, housed in the Office of Management and Budget, is part of the White House's political apparatus — threatens to undermine the legitimacy of agency action. After all, the creation of, and deference to, agencies was historically justified on the ground that expert agencies were needed to handle the complex technical issues that Congress had neither the time nor expertise to tackle. To then subject the decisions of agency experts to OIRA generalists carrying out the political goals of the President raises serious questions about the legitimacy of agency action. *Unreasonable Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, in Peter L. Strauss, ADMINISTRATIVE LAW STORIES (Foundation Press 2006).

appointee's watch will likely be completed, if at all, on someone else's watch. And, of course, in an era where any kind of "regulation" is controversial, regulatory proposals almost invariably bring attention (generally unwanted) from Congress.

Interpretative rules may also be subject to judicial challenge, which can delay implementation, and carries a not inconsequential risk of invalidation. Anticipatory challenges may be brought if the challengers can show that the interpretation is likely to have an immediate impact on affected firms and delaying review would be a hardship.[9] As-applied challenges may be brought when a firm faces a regulatory action by the agency.[10] Interpretative rules generally are afforded considerable deference by reviewing courts, and are upheld so long as the agency's interpretation of a statute the agency is charged with enforcing is reasonable.[11] But the possibility of litigation challenging the validity of an interpretative rule, the attendant time and resources that will need to be devoted to the rule's defense, and the lurking possibility of judicial invalidation, are factors that inevitably come into play in determining whether rulemaking is worthwhile.

---

[9] *See Abbot Labs v. Gardner,* 387 U.S. 136, 140 (1967)*; Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 463 (D.C. Cir. 2006).

[10] *See Toilet Goods Manufacturers Ass'n v. Gardner*, 387 U.S. 158 (1967).

[11] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). Although *Chevron* dealt with what the Court characterized as a "legislative rule," nothing in the Court's opinion suggests that its holding on deference was limited to legislative or substantive rules. In any event, the Court subsequently made clear that *Chevron* deference is appropriate to interpretative rules in *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001).

And rules — even interpretative rules — may generally have only a prospective effect. If an agency wants to sanction an entity for past or ongoing wrongdoing, it may use an enforcement action to do so and, at the same time, to clarify the law.[12] But, absent express congressional authorization, an agency may not use a rulemaking to formulate rules applicable to prior or ongoing conduct — the rule may apply only to conduct that occurs after the rule takes effect. [13] In contrast to the strong presumption against retroactive rulemaking, there is an equally strong presumption in favor of retroactivity for adjudications."[14] The origin of these dual presumptions lies in the Administrative Procedure Act's distinction between "rules" and "orders." "Rules" are defined by their "future effect," while, in sharp contrast, "orders" are defined as "final dispositions in matters other than rule[s]."[15] Thus, "[a]djudication deals with what the law was; rulemaking deals with what the law will be."[16] It bears emphasis, though, that there are limitations on the ability of agencies to lay down new interpretations of its rules or organic statute through enforcement litigation — limitations addressed below.[17]

---

[12] *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*).

[13] *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[14] *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

[15] *Compare* 5 U.S.C. 551(4) (defining "rule") *with id.* 551(6)(defining order").

[16] *Bowen*, 488 U.S. at 221.

[17] *See infra* at __.

B. Guidance Documents and Policy Statements

In the middle of the formality spectrum are agency efforts to clarify the agency's views of legal requirements through the dissemination of "guidance" to regulated industry. This kind of law clarification can take many forms that vary in formality — ranging from speeches by senior agency officials, press releases, agency policy statements, agency enforcement policies, staff manuals, staff or agency opinion letters addressing the legality of proposed conduct, to congressional testimony, *amicus* briefs, and publication of final agency adjudicatory orders.

How guidance documents are disseminated matters. The APA specifies that the general requirement that agencies must publish notices of proposed and final rulemaking in the Federal Register "does not apply . . . to interpretative rules, [or] general statements of policy."[18] However, under the Freedom of Information Act Amendments to the APA, "[a] final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, or cited as precedent by an agency against a party . . . only if . . . it has been indexed and either made available or published [in the Federal Register] as provided by this paragraph."[19] An agency that intends to make use of its guidance documents as precedent in enforcement proceedings generally indexes and publishes the documents in the Federal Register

[18] 5 U.S.C. 553(b).

[19] 5 U.S.C. 552(a)(2).

so the documents are readily available to interested parties.[20] To be clear, even if the guidance document may be relied on in an enforcement proceeding for its precedential or persuasive value, it is not *binding* on regulated entities.

Clarifying the agency's construction of the law through informal means has many advantages over the promulgation of interpretative rules. Most important, informal guidance can be issued quickly and without a significant expenditure of time and resources. There is no need for the cumbersome process of providing notice of the agency's proposal, soliciting comments, and then digesting and responding to the comments before finalizing the agency's

---

[20] Agencies often publish guidance documents in the Federal Register and the Code of Federal Regulation even if they do not intend to rely on them in enforcement cases. The FTC makes a practice of doing so. *See, e.g.,* 16 C.F.R. Part 255 (FTC Guides concerning the use of testimonials in advertising); Part 259 (FTC Guide concerning fuel economy advertising for new automobiles); and Part 260 (FTC Guides for the use of environmental marketing claims) (2012). After all, the point of most guidance documents is to put regulated parties on notice of the agency's view of the law, and the Federal Register has been a one-stop-shop for federal guidance documents for decades. For better or worse, it remains the main channel federal agencies use to communicate broadly to interested parties. For that reason, during my tenure at the FTC, we issued two substantial updates to guidance documents to help advertisers understand the agency's views on when common advertising claims crossed the line and were deceptive, and we published them in the Federal Register to ensure that interested parties could get access to them quickly and without cost and set out Guides, but not the accompanying analysis, in the CFR. *See, e.g.,* 77 Fed. Reg. 62122 (Oct. 11, 2012) (publication of the FTC's amended "Green Guides" addressing potentially deceptive environmental claims; the amendments will appear in the 2013 version of the CFR) and, *see* 74 Fed. Reg. 53124 (Oct. 15, 2009) (publication of the FTC's "Endorsement Guides" addressing potentially deceptive enforcement and testimonials, and set forth at 16 C.F.R. Part 255 (2012)). Federal Register publication, although expensive for agencies, still serves the important interest of ensuring that interested parties can readily gain access to the agency's guidance on topics of broad interest.

interpretation.[21] For Executive Branch agencies, they can be issued without undergoing the time-consuming and resource-intensive OIRA review process required by EO 13322 for rules. Not only does informal agency action generally escape review by OIRA and the White House, it rarely raises hackles on Capitol Hill. And informal guidance can ordinarily be changed or modified by the agency quickly, without a public notice and comment process. Especially in areas where business practices are evolving rapidly — e.g., mobile technology, social networking, biotechnology — the ability of an agency to modify its guidance to adapt to emerging or novel issues is essential.

Informal interpretations also may command considerable deference from reviewing courts.[22] This too is an important factor that weighs in their favor. But deference is far from

[21] I do not mean to suggest that agencies invariably dispense with seeking public comment prior to finalizing their interpretations. The FTC's Green Guides and Endorsement Guides were issued following an extensive notice and comment process. See supra n.18.

[22] The key case on this issue is *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), holding that an agency's construction of its own regulation should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock* has been repeatedly reaffirmed by the Court. *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997) (deferring to any interpretation set forth in an *amicus* brief). *See generally* Matthew C. Stephenson and Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449 (2011). There is an incongruity in the Court's deference doctrine that is worth noting. The Court has consistently held that agencies get great leeway when interpreting the agency's substantive rules — even if the interpretation is an informal one. *Id.* But where the agency engages in construing its organic statute, the degree of deference warranted is contingent on the formality of the construction and its fidelity to the statute and prior agency constructions. *See* n. infra. This incongruity sparked a debate within the Court in *United States v. Mead Corp.*, 533 U.S. 218, 231-35 (2001), with the majority denying *Chevron* deference to an informal agency interpretation of its statute and Justice Scalia taking the majority to task in a dissent (*id.* at 239) that has been highly influential in subsequent cases before the Court. *See, e.g., Christopher v. Smithkline*

automatic. The Supreme Court has cautioned that deference is "undoubtedly inappropriate" where the interpretation "is plainly erroneous or inconsistent with the regulation," does not "reflect the agency's fair and considered judgment on the matter," "conflicts the a prior interpretation," is "nothing more than a convenient litigating position," or is "a *post hoc* rationalization advanced by an agency seeking to defendant past agency action against attack."[23] As an example, the Court in *Mead Corporation* held that staff-generated letter rulings by the Customs Service did not warrant *Chevron* deference because of their informal nature; the Court held that they should instead be evaluated under the less deferential *Skidmore* standard.[24]

Beecham Corp., 132 S. Ct. 2156, 2166-72 (2012).

[23] *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted). *See also Wyeth v. Levine,* 555 U.S. 555, 577 (2009) (Court refused to defer to the FDA's claim that state tort law was an obstacle to achieving the agency's mandate of regulating drug safety and thus was preempted. The agency's position was articulated in a preamble to a final rule, but the proposed rule had disclaimed any preemptive effect, and thus there was no opportunity for the public to comment on the FDA's new proposal. The Court also pointed out that the agency statement was "at odds with what evidence we have of Congress' purposes, and it reverses the FDA's own longstanding position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA's regulation of drug labeling during decades of coexistence.").

[24] *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001). The Court ruled that the Custom Service's ruling "may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Id.* at 234 (citations omitted). *See generally Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (explaining that "the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

Nonetheless, in the absence of one of these danger signals, agency interpretations that are articulated in a reasonably formal manner and are not inconsistent with the agency's organic statute, regulations or prior guidance generally receive substantial deference from a reviewing court. For these reasons, to the extent one could measure that outflow of agency interpretations of the law (it could be done, it would be a Herculean task, however), by far the largest category would be informal interpretations of the kind catalogued above.[25]

To be sure, informal statements also have drawbacks. Informal interpretations may not be used to take positions that are inconsistent with existing rules;[26] the APA commands that

---

pronouncements, and all those factors which give it power to persuade, if lacking power to control."). This statement is commonly referred to as "*Skidmore*" deference.

[25] *See generally* Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 Cornell L. Rev. 397, 398-401 (2007) (discussing the widespread use of guidance documents and observing that their use is "massive" and "dwarfs' agencies production of notice and comment rules."). Professor Todd D. Rakoff looked at the FDA's regulatory output over the course of a number of years to come to the conclusion that informal guidance was replacing rulemaking as that agency's principal means of establishing policy. *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 Admin. L. Rev. 159, 167 (2000).

[26] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). It is useful to compare the decisions by the D.C. Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (1997) and the Third Circuit in *Caruso v. Blockbuster-Sony Music Entertainment Center*, 174 F.3d 1966 (1999) to see how problematic it is to draw a clear line between agency interpretations and substantive rules. Both cases involved identical challenges to the construction of public accommodations under the Americans with Disabilities Act. The Department of Justice had issue a regulation requiring arenas to provide customers who are wheelchair bound "lines of sight comparable" to other patrons. The Department then issue a Manual interpreting its regulation to require clear lines of sight over *standing* spectators. The D.C. Circuit held that the agency's more specific interpretation was not at odds with its more general regulation and did not amount to a substantive rule; indeed, the court observed that the agency "arguably could have relied on

rules must be amended or repealed through rulemaking.[27] Informal guidance may be subject to judicial review where the guidance has an immediate impact on regulated parties.[28] And informal interpretations may not be used to set binding standards — courts are alert to agency efforts to by-pass the mandatory notice and comment rulemaking process when the agency is in fact setting a substantive standard.[29] Informal interpretations do not bind regulated parties

---

the regulation itself, even without the manual interpretation, to seek lines of sight over standing spectators." In marked contrast, the Third Circuit ruled that the Department, when promulgating its regulation, had not ruled on the standing spectator question, and thus its Manual constituted a new rule, or an amendment to an existing rule, which could be accomplished only through rulemaking.

[27] *Id.*; *see also* 5 U.S.C. 551(5) (defining rulemaking to include an "agency process for formulating, amending, or repealing a rule").

[28] For instance, in *OSG Bulk Ships v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998), the court reviewed and rejected shipping company's attack on a Maritime Administration's enforcement policy that it would not enforce a restriction on the ability of certain ships not built in the United States to engage in domestic shipping activities. The court held that "an agency's adoption of a general enforcement policy is subject to review" and applied the *Chevron* analysis to conclude that the agency's reading of the underlying statute was reasonable.

[29] The classic example is *Morton v. Ruiz*, 415 U.S. 199 (1974). There the Court rejected the claim that the Bureau of Indian Affairs could rely on an informal staff Manual to make the determination of whether assistance under a federal program to help needy Indians could be denied to Indians not living on a reservation. The BIA had issued an internal Manual limiting the eligibility of Indians in Alaska and Oklahoma to only those residing on a reservation, even though it had repeatedly told Congress that benefits would be provided to needy Indians living near the reservation as well. The BIA had also committed itself to publish all directives regarding "privileges and benefits available" and "eligibility requirements." *Id.* at 233-35. The Court found that by failing to adopt eligibility requirements through rulemaking, the BIA had violated its own internal procedures. *Id.* But the Court did not stop there. It went on to suggest that the agency abused its discretion by making the "conscious choice . . . not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders its ineffective so far as extinguishing rights of those otherwise within the class

(although some agencies contend otherwise) but they may tie the agency's hands.[30] And there is always the possibility that an informal interpretation will be given less deference than an properly promulgated interpretative rule. For these reasons, the assumption is that guidance documents and enforcement statements do not command the same level of compliance as interpretative rules, although regulated firms ignore them at their peril.[31]

---

of beneficiaries contemplated by Congress is concerned." *Id.* at 236. The clear message was that the BIA abused its discretion by failing to address the eligibility issue through rulemaking. *See also Chamber of Commerce v. OSHA*, 174 F.23d 206 (D.C. Cir. 1999).

[30] The paradigmatic case on this issue involves the extensive litigation over the FDA's enforcement policy on aflatoxin (a mold that grows on corn and peanuts that is considered a human carcinogen). The FDA published Federal Register notice announcing that it would not recommend prosecution as "adulterated" shipments of corn having 20 parts per billion (ppb) or fewer of aflatoxin. Shippers could apply for exemption if they wished to exceed the FDA's 20 ppb action level. The Community Nutrition Institute (CNI) objected to what it saw as the establishment of an non-enforcement policy for shipments containing up to 20 ppb so long as the corn would not be available for human consumption. CNI contended that that level was too high and that the FDA had to undertake a formal rulemaking proceeding to establish a "tolerance level" for aflatoxin. The rulemaking would provide CNI an opportunity to makes it case that the level threatened public health, and to seek judicial review if the FDA adhered to its 20 ppb level. The Supreme Court rejected that argument. *Young v. CNI*, 476 U.S. 974 (1986). On remand, however, the D.C. Circuit found that the agency's informal establishment of the 20 ppb "action level" was tantamount to setting a substantive rule requiring notice and comment rulemaking, even though it recognized that "in a suit to enjoin shipment of allegedly contaminated corn, it appears that FDA would be obliged to prove that the corn is 'adulterated,' within the meaning of the FDC Act, rather than merely prove non-compliance with the action level. Thus the FDA's enforcement statement had the effect of binding the agency without binding the shippers. *See CNI v. Young*, 818 F.2d 943, 945-58 (D.C. Cir. 1987).

[31] Some might argue the use of guidance documents sacrifices the value of the notice and comment process of rulemaking by depriving agencies of input by interested parties. I am skeptical that agencies forego information-gathering when they opt for less formal guidance. After all, there is no guarantee that notice and comment rulemaking will generate information useful to the agency; my limited experience at the FTC suggests otherwise. More importantly,

C. Enforcement Proceedings

Another option generally available to an agency is to assert its interpretation of the law in an enforcement proceeding, with the expectation that a reviewing court will agree with the agency's construction of its statute or regulations.[32] The Court's opinion in *SEC v. Chenery Corp. II*[33] is the canonical explanation of why case-by-case adjudication has been, and will likely remain, an important tool for policy development by enforcement agencies. There the Court soundly rejected the company's claim that "the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case" by bringing an enforcement action.[34] Although the Court acknowledged the benefits of rulemaking, it emphasized that "any rigid requirement" to set policy through rulemaking "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."[35] Among these specialized

---

agencies have multiple avenues to engage with interested parties — ad hoc meetings, workshops, information requests to name just a few — and have ample tools to ensure that their policy making is sufficiently informed. That is not to suggest that agencies avail themselves of those tools as often as they should, but the information-gathering tools are there.

[32] 332 U.S. 194, 201 (1947); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[33] *Chenery II,* 332 U.S. at 201.

[34] *Id.*

[35] *Id.*

problems are "case[s] which the administrative agency could not reasonably foresee," cases in which "the agency may not have had sufficient experience . . . to warrant rigidifying its tentative judgment into a hard and fast rule," and cases where the "the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." In these situations, "the agency must retain the power to deal with the problems on a case-by-case basis if the administrative process is to be effective."[36]

Chenery II predated the enactment of the APA. But its endorsement of agency policy-making through case-by-case adjudication has endured. The Court reaffirmed *Chenery II* in *NLRB v. Bell Aerospace Co.*, underscoring that an agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within" the agency's discretion.[37] There are a number of agencies, including the NLRB, the SEC, the Commodity Futures Trading Commission, and the FTC that still rely heavily on enforcement proceedings to set out the agencies' interpretation of the statutes they enforce.[38]

---

[36] *Id.*

[37] 416 U.S. at 294.

[38] Some agencies, like the NLRB, handle adjudications within the agency. The agency's case — brought by the General Counsel, who is independent from the Board — is presented in the first instance to an Administrative Law Judge, and the losing party may appeal to the Board that sits in an adjudicative capacity and renders a decision that, once final, is subject to judicial review by a federal court of appeals. *See generally*

There are many advantages to using enforcement proceedings in this manner. For one thing, although enforcement litigation can be resource-intensive and time-consuming, it is generally less onerous than rulemaking. For another, enforcement litigation is a powerful form of signaling — the commencement of an enforcement action, heralded by an agency press release and often subject to considerable news coverage, sends a message to similarly situated parties that they may be the agency's next target.[39] Where the regulated parties have reputational

---

http://www.nlrb.gov/what-we-do/investigate-charges (last visited on Mar. 11, 2013). Other agencies rely principally on federal court adjudication. The FTC brings cases both administratively and in federal court. Because the Commission has no authority to enter preliminary injunctive relief, the FTC routinely files cases in federal court where immediate or swift injunctive relief is needed. For that reason, during my tenure at the agency, very few of the cases brought by the FTC's Bureau of Consumer Protection were filed as administrative complaints. I discuss the factors that go into that forum choice in Part II. The key point here is that the courts show considerable deference to agency positions in litigation, even if the case is brought in the first instance in federal court, no doubt because the Commission must specifically find that it "has reason to believe" a violation of law has occurred before it may authorize staff to file the case. Section 13(b), FTC Act, 15 U.S.C. 53(b).

[39] For instance, on March 7, 2013, the FTC announced that it had filed eight lawsuits against twenty-nine defendants charging them "with collectively sending more than 180 million unwanted text messages to consumers, many of whom had to pay for receiving the texts. The messages promised consumers free gifts or prizes, including gift cards worth $1,000 to major retailers such as Best Buy, Walmart and Target. Consumers who clicked on the links in the messages found themselves caught in a confusing and elaborate process that required them to provide sensitive personal information, apply for credit or pay to subscribe to services to get the supposedly 'free' cards." Press Release, *FTC Cracks Down on Senders of Spam Text Messages Promoting "Free" Gift Cards*, available at http://www.ftc.gov/opa/2013/03/textmessages.shtm. The press release received substantial media attention, including coverage by the major TV and cable channels and articles in the NY Times, LA Times, Washington Post, and dozens of other major media outlets. The New York Times reported that industry officials had detected a "noticeable drop off" of the targeted spam over the weeks preceding the agency's announcement

interests on the line, or where they may risk criminal as well as civil liability, a highly publicized enforcement action can bring about broad-scale compliance quickly and efficiently.

Enforcement actions also carry less of a political risk than rulemakings or even informal guidance. Agencies are not blind to the reality that the word "regulation" has taken on pejorative connotations, and agencies worry that regulatory proposals will bring scrutiny from OIRA (and therefore the White House), Congress, the regulated community, and political actors that might complicate or stymie the rulemaking process. Rest assured, no agency official wants to be hauled before a congressional committee to explain why the agency is proposing what are invariably described (regardless of the facts) as "burdensome and job-killing" regulations.[40] Enforcement

---

and thought it likely that the reduction was tied to the FTC's enforcement actions, which had been filed under seal in February. Edward Wyatt, *Government Takes Legal Action Over Phone Spam*, NY Times (Mar. 8, 2013), available at http://www.nytimes.com/2013/03/08/business/government-takes-legal-action-over-phone-spam.html. Agencies often use press releases for signaling purposes and the courts have upheld that practice. *See generally FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968) ("there is in fact and law authority in the Commission, acting in the public interest, to alert the public to suspected violations of the law by factual press releases whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act . . ..").

[40] I know this from personal experience. The fact that the agency was proposing unenforceable, voluntary guidelines, and did so to comply with a congressional directive, was no shield from withering congressional criticism. *See, e.g., Hearings on Food Marketing: Can "Voluntary" Government Restrictions Improve Children's Health*? House Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing and Trade, 2011 WL 4829542 (Oct. 12, 2011) (Members of Congress castigating officials from the FTC, FDA and the Department of Agriculture for proposing, in compliance with a congressional directive, voluntary nutritional guidelines for food companies to use when they directly market to children age 12 and

actions rarely entail the same risk. They are viewed as raising smaller stakes, and by their very nature, enforcement proceedings connote that the company has engaged in wrongdoing of some kind. There is more political will to intercede to champion the cause of a law-abiding entity that wants to be free of regulation than there is to defend an entity accused of wrongdoing by a federal law enforcement agency.

Enforcement actions also enable agencies to develop policies in a way that does not necessarily lock them in to one, fixed outcome. As will be explained below, in some of the enforcement campaigns pursued during my tenure at the FTC, we anticipated that as we moved forward we might fine-tune our legal interpretation to account to evolving business practices or the facts that were unearthed along the way. Enforcement actions give agencies some breathing room — flexibility that is difficult to build into a rule and is in tension with the point of informal guidance, which is generally to focus and constrain the agency's discretion. And courts give considerable, *Chevron*-style deference to agency interpretations urged in enforcement cases[41] — indeed, although it is hazardous to generalize, courts may scrutinize agency positions in

---

younger).

[41] *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 230 & n. 12 (2001) (collecting cases); *Auer v. Robbins*, 519 U.S. 452 (1997) (deference to government position articulated in an *amicus* brief).

enforcement cases less stringently than they do in challenges to agency rulemakings.[42]

Notwithstanding the virtues of enforcement cases, there are some downsides as well. For one thing, the agency could lose, especially when the agency is testing out new legal theories.[43] An isolated loss may not be fatal,[44] but it is certainly problematic. For another, case-by-case adjudication may not bring about broad-scale compliance, especially if there are large numbers of regulated firms and scarce agency enforcement resources or the firms targeted have no reputational interest in showing adherence to the law.[45] Enforcement alone is often not sufficient to bring about the level of compliance the agency wants to see.

---

[42] Professor Richard J. Pierce, Jr., has argued that courts have been "less demanding when they review agency policymaking taken through ad hoc adjudication of specific cases" than they have been when they review rules. *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, 301.

[43] FFA?

[44] Although controversial, there is a history of federal agencies refusing to acquiesce in adverse judicial rulings, including from one or more courts of appeals. *See generally* Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 Yale L.J. 679 (1989).

[45] For instance, during my tenure at the FTC the agency brought literally dozens of actions against companies and individuals engaged in "mortgage rescue scams" — scams aimed at taking advantage of home-owners desperate to avoid foreclosure. *See generally* http://www.ftc.gov/opa/reporter/finance/mortgagelending.shtml (last visited Mar. 11, 2013). The scammers generally charged the home-owners an advance fee and then did little or nothing to avert the foreclosure. This scam was so endemic that while our enforcement efforts (and those of our state Attorney General partners) stemmed the tide, I have serious doubts that the signaling function of enforcement litigation mattered.

There are also limits on the ability of agencies to use enforcement cases to achieve retroactive relief while laying down an interpretation that also operates prospectively. Although the general rule is that adjudications can have retroactive effect, courts have been vigilant to ensure that litigants are not unfairly saddled with retroactivity liability where they could not reasonably anticipate the agency's interpretation because it is a marked departure from the agency's prior position or where they had a reasonable, reliance-backed expectation in a prior agency interpretation.[46]

There are also occasions when courts believe that the agency is opting for an enforcement approach for reasons that are themselves suspect. The Ninth Circuit has developed what some commentators have dubbed an anti-circumvention rule,[47] that holds that agencies may not

---

[46] The Court in *Chenery II* voiced these concerns, but did not flesh them out. 332 U.S. at 203. The D.C. Circuit, in its en banc decision in *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081-86 (1987), relied on a five-factor test to determine whether it would be "manifestly unjust" to apply a rule adopted by an agency during the course of an adjudication. The factors identified by the court were: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." Since then, the D.C. Circuit has vacillated somewhat in its approach, but the analytic touchstone remains the same: Is there a compelling reason why retroactive application of the rule would be manifestly unjust? *See Verizon Telephone Co. v. FCC*, 269 F. 3d 1089, 1100-1112 (D.C. Cir. 2001).

[47] Cite

proceed via adjudication to bypass ongoing agency rulemakings. In *Ford Motor v. FTC*,[48] the FTC challenged the practices of auto dealers and manufacturers in setting a value for cars that were repossessed. The FTC brought actions against Ford, Chrysler and General Motors, their finance companies and two dealers claiming that they undervalued repossessed cars to the detriment of the defaulting consumer. At the same time, the FTC was engaged in a rulemaking to address the same practices. All of the companies, except one dealer, Francis Ford, settled with consent decrees. The FTC then held a formal hearing and found against Francis Ford, ordering the dealer to reform its practices in line with those proposed by the agency in its rulemaking — the same remedy the other respondents agreed to.[49] In overturning the FTC's ruling, the Ninth Circuit said that to "allow the order to stand as presented written would do far more than remedy a discrete violation" of the FTC Act, it would instead "create a national interpretation . . . and in effect enact the precise rule that the F.T.C. has proposed, but not yet promulgated."[50] The court did not say whether it would have upheld the FTC's action in the absence of the rulemaking. Judge Reinhardt dissented from the denial of rehearing en banc, pointing out that the panel's conclusion that the remedy obtained against Francis Ford "would create a national rule" was at odds with Supreme Court authority and the Ninth Circuit's jurisprudence. But the case is still

---

[48] 673 F.2d 1008 (9th Cir. 1981); id. at 1011 (Reinhardt, J., dissenting from denial of rehearing en banc), cert. denied, 459 U.S. 999 (1982).

[49] *Id.* at 1009.

[50] *Id.* at 1010.

cited in the Ninth Circuit and elsewhere for the proposition an agency may not use an adjudication "to bypass a pending rulemaking proceeding."[51]

II. Law Clarification at the FTC

A. Distinctive Attributes of the FTC's Authority.

As the preceding discussion highlights, there are many options available to agency officials seeking to clarify the law. During my nearly four year tenure at the FTC, I participated in making this choice on many occasions. I thought it might be interesting to lay bare and grapple with how the FTC made these decisions. But all agencies are idiosyncratic, and the FTC has three attributes that are uncommon and deeply inform the agency's decision-making.

First, the agency's charge from Congress is especially broad. As initially enacted in 1914, Section 5 of the Federal Trade Commission Act prohibited "unfair methods of competition." [52] In 1938, Congress amended Section 5 to prohibit as well "unfair or deceptive acts or practices" and gave the agency specific authority to prevent false advertising of foods, drugs and cosmetics.[53] The Act requires that the prohibited acts take place "in or affecting interstate commerce," and excludes from the FTC's jurisdiction a few specified economic sectors, including insurance

[51] *E.g., Union Flights, Inc. v. Federal Aviation Admin.*, 957 F.2d 685, 688 (9th Cir. 1992).

[52] Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 719 (codified as amended at 15 U.S.C. § § 41-58 (1994)).

[53] Act of March 21, 1938, ch. 49, §§ 3 & 19, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1), 52, 55 (1994)).

companies, depository institutions, common carriers, and bona fide non-profits.[54] But the FTC has jurisdiction over vast swaths of the economy, and quite a broad mandate to safeguard competition and to root out deceptive and unfair practices in the marketplace. Given Section 5's breadth and generality, the need for the agency to be able to provide guidance and clarification is especially acute.[55]

Second, no doubt in part due to the agency's expansive jurisdiction, Congress has been wary of giving the agency broad rulemaking authority, and has been uncharacteristically attentive to the agency's rulemaking efforts. Indeed, there is a rich, complex, and not entirely happy history underlying the FTC's current rulemaking authority. It is difficult to summarize, but the most salient points follow.

For most of the agency's early years, it proceeded through adjudications.[56] But proving

[54] FTC Act, §§ 4, 5(a)(2) & 6(j)(6), 15 U.S.C. 44 (definition of "commerce"), 45(a)(2) (specific exclusions), & 46(j)(6) (specific exclusions).

[55] Although it was referring to the FTC's competition authority, the remarks by the court in *Ethyl Corp. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984), apply with equal force to the Commission's consumer protection mandate: "Congress, in the process of drafting section 5 . . . abandoned a proposed laundry list of prohibited practices for the reason that there were too many practices to define and many more unforeseeable ones were yet to be created by ingenious business minds." It bears noting that the agency has been assigned authority to administer many statutes in addition to the FTC Act, and many of them provide for rulemaking under the APA. See http://www.ftc.gov/ogc/stat3.shtm (listing the consumer protection statutes the FTC administers and enforces).

[56] *See generally* Note, *Substantive Rulemaking and the FTC*, 42 Fordham L. Rev. 178 (1973) (tracing history of FTC rulemaking through the D.C. Circuit's decision in *Petroleum*

the core elements of deception or unfairness in case after case is inefficient. Although the Act clearly gave the agency authority to promulgate procedural rules to govern the agency's adjudicatory functions, it did not explicitly give the agency the power to promulgate substantive rules. Nonetheless, in 1962 the agency used its procedural rulemaking authority to permit it to promulgate trade regulation rules. Two years later, the agency began promulgating "trade regulation rules," and, following up on the just-released Surgeon General's report on smoking and health, the first trade regulation rule issued required cigarette packages and advertising to carry a warning that smoking may be dangerous to health.[57]

The lingering uncertainty over the agency's authority to engage in substantive rulemaking was finally resolved in *National Petroleum Refiners Association v. FTC*.[58] The refiners sought to invalidate an FTC rule declaring that it was an unfair or deceptive act or practice for service stations to fail to post clearly and conspicuously the minimum octane ratings of the gasoline being sold. The only issue before the court was whether the agency had the power to issue a substantive rule. The agency could have established the same rule through adjudication, though in each case the agency would have borne the burden of proving that the absence of octane postings was deceptive or unfair, and that significant numbers of consumers would be deceived

---

Refiners).

[57] *Id.* at 178.

[58] 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

or otherwise injured. Rather than doing so on a retail basis, the agency decided to go wholesale, and thus reduce its burden in enforcement cases. With a rule in place, to prevail the agency would only have to establish that the service station had failed to post ratings. In a decision that is not entirely convincing[59], the D.C. Circuit upheld the agency's power to engage in substantive rulemaking.

The agency's victory in *Petroleum Refiners* proved to be a mixed blessing. The following year Congress passed The Magnuson-Moss Warranty-Federal Trade Commission Improvements Act of 1975, giving the agency a number of important tools, including the explicit authority to engage in substantive rulemaking to implement its deception and unfairness authority and the power to seek civil penalties for violations of agency rules.[60] But Congress also saddled the agency with a hybrid rulemaking system which has many of the attributes of formal hearings, including permitting parties to make oral submissions, to provide rebuttal testimony, and, on occasion, to engage in cross-examination of witnesses.[61] Notwithstanding these constraints, the agency sought to use its new rulemaking power aggressively and instituted a large number of

---

[59] *See* Note, *Substantive Rulemaking and the FTC*, 42 Fordham L. Rev. 178, 179 & n. 9 (1973) (summarizing the arguments in support of and in opposition to the FTC's position, and citing extensive academic commentary on both sides of the debate.).

[60] 88 Stat. 2183, Pub. L. 93-637 (1973), codified at 15 U.S.C. 57a.

[61] *Id.*

rulemakings, including several covering entire industries.[62] Agency efforts to employ this hybrid were often unsuccessful.[63] Even agency successes came at a high cost, with rulemakings taking years and consuming massive agency resources.[64]

The 1975 "FTC Improvements Act" was not Congress's last effort to rein in FTC rulemaking. Unhappy with FTC attempts to regulate the funeral industry, used car sales, and vocational schools, and, most critically, television advertising — especially of junk food — to children,[65] and having been attacked by the liberal Washington Post for trying to become the

---

[62] No doubt that the agency's new-found energy was in response to intense criticism of the agency just a few years earlier from Nader and the American Bar Association over the agency's lethargy. *See* Edward F. Cox, Robert L. Fellmeth & John E. Schultz, et al., THE NADER REPORT ON THE FTC (1969); American Bar Association, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

[63] *See, e.g., American Optometric Ass'n* v. FTC, 612 F.2 658 (2d Cir. 1980) (remanding FTC rule, four years in the making, curtailing the ability of states and professional associations to restrict or burden the advertising of eye examinations or of ophthalmic goods and services for reconsideration in light of *Bates v. State Bar of Arizona*); *Katherine Gibbs School v. FTC*, 615 F.2d 658 (2d Cir. 1979) (vacating FTC rule, five years in the making, addressing unfair and deceptive advertising, sales, and enrollment practices engaged in by proprietary vocational and home study schools due to perceived procedurals violations by the agency).

[64] *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 996 (4th Cir. 1984) provides a stark illustration of the difficulties of navigating even a successful hybrid rulemaking. That action challenged an FTC rulemaking on funeral industry practices that spanned twelve years, fifty-two days of hearings involving the testimony of over 300 witnesses covering over 14,000 pages of transcripts.

[65] For a detailed history of this legislation, *see* Quentin Riegel, *The FTC in the 1980's: An Analysis of the FTC Improvements Act of 1980*, 26 Antitrust Bull. 449 (1981).

nation's "Nanny,"[66] Congress revisited the FTC's power. It enacted the "FTC Improvements Act of 1980"[67] to curb the agency's power to use its "unfairness" authority to regulate advertising to children, and to subject agency rules to a two-house Congressional veto, which Congress promptly used to invalidate the FTC's used car rule.[68]

Congress modified the statute again in 1994, enacting the "Federal Trade Commission Act Amendments of 1994," which added two more hurdles for the agency to surmount in rulemaking. One is that the agency must "make a determination that unfair or deceptive acts or practices are prevalent" by showing that it "has issued cease and desist orders regarding such acts or practices" or that it has proof of "a widespread pattern of unfair or deceptive acts or practices." The amendments also established a test for exercising the Commission's "unfairness" authority (in either rulemaking or an enforcement action), which requires the agency to weigh the costs and benefits and demonstrate that the costs of the targeted conduct outweigh

---

[66] Editorial, *The FTC as a National Nanny*, Wash. Post A14 (Mar. 1, 1978).

[67] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) codified in scattered provisions of the FTC Act.

[68] The veto provision was invalidated in *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), and subsequently affirmed by the Supreme Court *sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983), after its decision in *INS v. Chadha*, 462 U.S. 919 (1983) .

any benefits before taking action.[69] Given this welter of requirements, the agency now disfavors rulemaking. Indeed, during my tenure at the agency, it did not use its rulemaking authority at all and urged Congress to give it APA rulemaking power.[70]

Congress plainly understands the burdens placed on FTC rulemaking. Congress, with some regularity, directs the FTC to engage in rulemaking to tackle a problem identified by Congress. In those instances, Congress invariably empowers the agency to act through APA rulemaking — not the rulemaking process spelled out in the FTC Act.[71]

---

[69] Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, Sec. 5, codified at 15 U.S.C. 57a(b)(3)(prevalence requirement) & Sec. 9, codified at 15 U.S.C. 45(n) (unfairness standard).

[70] *See* Testimony of the Federal Trade Commission, Hearings on the "Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission," before the H. Comm. on Energy and Commerce, Subcomm. On Commerce, Trade and Consumer Protection 11 (July 8, 2009), available at http://www.ftc.gov/os/2009/07/090708Acfpatestimony.pdf.

[71] For instance, in March 2009, Congress directed the FTC to issue a rule to protect consumers with respect to mortgage loans; in May 2009 Congress clarified that the rule ought to address the unfair or deceptive practices engaged in by "loan modification and foreclosure rescue services." Congress wanted the Commission to Act quickly. The provision directed the Commission to use notice and comment rulemaking under the APA. The final rule was published on December 1, 2010. 75 Fed. Reg. 75092 (Dec. 1, 2010). Among other things, the rule prohibits loan modification firms from charging consumers advance fees and making false or misleading claims, and requires these firms to make a number of disclosures about their services design to alert consumers that the firms are not connected to the government and cannot promise success. *Id.* A few months earlier the FTC promulgated a similar rule to prohibit debt settlement firms from charging their clients advance fees and to require those firms to make a host of disclosures. See 75 Fed. Reg. 48458 (Aug. 10, 2010). This rule was promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6102-6108, which

Third, the agency has a long tradition of acting, as best as it can, in a bi-partisan fashion. The Act requires political diversity within the Commission[72], and the agency has, for the most part, aspired to forge consensus whenever possible. This goal was taken seriously during my tenure at the agency. FTC Chairman Jon Leibowitz made his commitment to consensus known to Congress, the public and to staff. To the extent there were disagreements within the Commission about how to proceed on a difficult case or policy-matter — and disagreements that could not be resolved were rare — the split within the Commission was just as likely to be within political camps as between them.[73]

A commitment to consensus places a discipline on the agency's action that can have

---

gives the agency authority to promulgate rules under the APA. 15 U.S.C. 6102(b). And in March 2010, the agency promulgated on an expedited basis a rule amending the Free Annual File Disclosure Rule (requiring credit reporting agencies to provide consumers a free credit report annually) to reduce consumer confusion. 75 Fed. Reg. 9726 (March 3, 2010). Congress directed the FTC to promulgate the amended rule in nine months — a deadline the agency met — and authorized the agency to use APA rulemaking. *Id.*

[72] Section 1 of the FTC Act provides that the Commission "shall consist of five Commissioners; [n]ot more than three of the Commissioners shall be members of the same political party." 15 U.S.C. 41.

[73] There are many examples of the agency's commitment to consensus, but two should suffice. One is that, in contrast to the practice at most other independent agencies, the Commission actually votes out congressional testimony so that the testimony represents the position of the Commission, and not simply the Commissioner or staff member presenting the testimony. Another is that during my tenure the Commission voted out literally hundreds of cases, guidance documents, and reports submitted by the Bureau of Consumer Protection. There were, of course, at times dissents from individual Commissioners. I do not recall a single vote that split the Commission on partisan lines.

beneficial impacts. For one thing, unanimity or at least bi-partisan support increases the political acceptability of the agency's actions. For another, consensus-driven policy-setting tends to place a brake on the pendulum-like policy lurches that some agencies face — especially when there is a change in Administration or agency leadership. And finally, consensus-building requires a rigor in the agency's own work. Instead of ignoring the objections of a single, hold-out Commissioner, the Chairman rightly insisted that staff work to allay the Commissioner's concerns or find common ground — a process that often improved the quality of the agency's ultimate work-product. Forging consensus is of course sometimes impossible; but the exercise of trying to reach consensus, in my view, makes for a higher-functioning agency, and in the end, more balanced and better outcomes.

B. Three Examples of FTC Decision-making in Practice

To illustrate the issues that arise in making these choices, I focus on three policy issues the agency wrestled with during my tenure. I have chosen these illustrations because, in my view, they are representative of the kinds of decisions the agency confronts, and because they place in sharp focus the interplay among the choices an agency has at its disposal. The examples also underscore that these options are not mutually exclusive. Agencies often use informal means to announce clarifications in their policy and then, after a decent interval, follow up with enforcement cases to drive home that the agency means business.

The three examples are:

* "Zombie Debt" — Consumer debt is a commodity that is now often bought and sold multiple times. As a result, debt collectors frequently seek to collect on debt that has passed the applicable statute of limitations. The question for the agency was how should it communicate to debt collectors that the agency considers the failure to disclose to consumers that they could not be sued if they refused to pay the debt, and that consumers may waive a statute of limitations defense if they agree to pay any portion of the debt, to be deceptive acts and practices in violation of the FTC and the Fair Debt Collection Practices Acts?

* "Transit Times" (Unsubstantiated Health Benefit Advertising Claims) — Consumers are being flooded with health claims for foods, dietary supplements, toning apparel, and exercise equipment that are based on little if any science. The question for the agency was how to ensure that advertisers making health benefit claims are on notice that the FTC Act requires that they possess adequate scientific substantiation to support their claims?

* Unlawful Collection of Children's Personal Information through Mobile Applications — The proliferation of mobile applications (apps) has brought a dizzying array of useful services to consumers' smartphones and tables. Most apps are not developed by large firms, but are instead developed by individuals or small firms, and the industry is highly diffuse. Many mobile apps developed for children age 12 and under collect personal information about the user. The question for the agency is how to communicate to mobile app developers that the Children's Online Privacy Protection Act (COPPA), which the FTC administers and enforces, requires that

games and apps designed to be used by children 12 and under may not collect personal information about children without first obtaining explicit parental consent?

1. *"Zombie Debt"*

The Debt Buying Industry — Consumer debt used to die. Creditors, for a variety of reasons, including banking regulations, would "charge off" an uncollected debt after six months or so. On occasion, the creditor would sell the debt to a debt buyer, which either used a debt collection agency to try to collect the debt, or did so on its own.[74] The buyer would then try for a few years to collect the debt. At some point, the effort would be abandoned and the debt would simply die. It simply was not worth it to collect on stale debt, and, in any event, the applicable statute of limitations would have run, making collection litigation difficult, if not impossible.

Those days are over. Debt no longer dies. That is why it is now dubbed "zombie debt." In winding down the Resolution Trust Corporation, the government auctioned off nearly $500 billion in unpaid loans. The success of these sales persuaded other creditors to sell their debt. That success, coupled with an increasing amount of revolving debt (especially credit card debt), as well as non-revolving debt (especially student loans), meant that creditors had more debt available for collection or sale.

---

[74] This discussion is based on the FTC's recent report, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 12-16 (Jan. 2013) (citations omitted) [hereinafter FTC Debt Buyer Report], available at http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf. (last visited Mar. 12, 2013).

Over the past decade, a new industry has emerged — the debt buyer industry — backed by substantial, publicly-traded companies, venture capital firms and, on occasion, law firms.[75] Consumer debt is now a long-lived commodity that has a market price for years or decades after it has been written off and sold by the initial creditor. For fresh debt (say three to six years old)[76], buyers may pay as much as $4 per $1000 worth of debt. For older debt (say six to fifteen years), the price is about $2 per $1000 worth of debt. The price of debt older than 15 years ("zombie debt") is near zero — about a penny or less on the dollar.

When debt is sold, first by the initial creditor, and then, by debt buyers/sellers, the creditor and subsequent sellers generally disclaim all warranties and make clear that the debt is sold "as is and with all faults." The contracts usually limit the right of the buyer to obtain more data by specifying the amount of time (typically between six months and three years) and a set amount of documents they may obtain from the seller at no charge. The contracts give the sellers substantial time, ordinarily 60 days, to comply with requests for further documentation. Although the purchaser's right to supplement the information are meager, those rights are rarely exercised. The contracts also generally restrict the buyer's post-sale interaction with consumers

---

[75] The industry is substantial by any measure. In 2008, for example, debt buyers purchased $72.3 billion in consumer debt; of that total $55.5 billion was credit card debt. See FTC, The Structure and Practices of the Debt Buying Industry 7 (Jan. 2013) (citations omitted), available at http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf. (last visited Mar. 12, 2013).

[76] Six years is an important cut off date, because most state statute of limitations on the collection of credit card debt run at six years or before.

to make it more difficult for consumers to learn the origins of the debt, and forbid the debt buyer from providing consumers contact information for the original creditor or other seller.[77]

The FTC's Response. When Chairman Leibowitz took the helm at the FTC in March 2009, the country was in the grips of the worst economic downturn since the great depression. Unemployment and underemployment had skyrocketed, and many consumers found themselves mired in debt. Debt, and financial vulnerability that follows, are breeding grounds for fraud. And fraud was rampant. In response, the FTC focused its anti-fraud enforcement efforts on shutting down debt settlement scams that targeted consumers on the brink of bankruptcy and mortgage rescue scams that preyed on consumers facing the loss of their homes.[78]

---

[77] The FTC Debt Buyer Report contains a detailed analysis of the contracts used to buy and sell debt. See Technical Appendix C. The effort by initial creditors to shield their identity is not hard to understand. As consumer-facing companies, creditors have reputational interests at stake and do not want to be associated with the debt collection practice of third-party collectors they do not control, and often have no relationship with. Nonetheless, the failure of debt collectors to provide consumers with that information engenders tremendous confusion and uncertainty. For these reasons, the FTC has long advocated that the FDCPA be amended to, among other things, ensure that consumers are given information about the initial creditor at the beginning of any effort to collect on that debt. [cite to reports].

[78] For a brief summary of the agency's work on debt settlement scams, see http://www.ftc.gov/opa/reporter/finance/creditanddebt.shtml; for a brief summary of the agency's work on mortgage rescue or foreclosure relief scams, see http://www.ftc.gov/opa/reporter/finance/mortgagelending.shtml. These efforts were part of the agency's main campaign to protect consumers from "last dollar frauds" — i.e., frauds aimed at taking the last dollar out of consumer's wallets. For a summary of the agency's work on last dollar frauds, see http://www.ftc.gov/opa/reporter/finance/lastdollar.shtml. Note that there is some overlap among the lists. ,

Unprecedented amounts of consumer debt also brought about an unprecedented degree of abusive debt collection practices.[79] The most common complaint from consumers was (and remains) that debt collectors were seeking to collect on debts the consumer did not owe, and that the debt collector would persist in trying to collect the debt (using tactics that are unlawful) even after the consumer contested the debt.[80] There are of course many reasons why a debt collector might mistakenly seek to collect a debt from the wrong consumer; there are also reasons why a consumer might not acknowledge owing a debt, or would not recognize the debt as theirs.[81] But

---

[79] For a brief summary of the agency's work on abusive or otherwise unlawful debt collection activity, see http://www.ftc.gov/opa/reporter/finance/debtcollection.shtml.

[80] The FTC operates "Consumer Sentinel," the largest fraud complaint data base in the world, collecting upwards of 2 million original complaints each year, and used by law enforcement agencies throughout the country to assist with enforcement efforts. The complaints come from many sources; direct complaints to the FTC, complaints to Better Business Bureaus, complaints from law enforcement partners, including eleven state Attorneys General, and many consumer, civil rights, and privacy organizations. Apart from identity theft complaints, complaints about debt collection have long been on top of the complaint category, accounting for about 10% of the complaints filed annually. See *Consumer Sentinel Network Data Book for January – December* 2012, at 3 (2013), available at http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf (last visited Mar. 12, 2013).

[81] There are many reasons why debt collectors might be seeking to collect from the wrong person. As debt ages, or passes from one debt buyer to the next, the quality of the scant information that the initial buyer obtains may deteriorate. Debt collection often takes place on the basis of rudimentary and stale information. And debt that is five, ten, or fifteen years old often contains inaccurate information — including outdated address and contact information. Common names pose similar problems. A debt collector may know that a John Smith in Dayton, Ohio, owes a debt, and may have other information about a John Smith, but the risk of seeking to collect old debt from the wrong John Smith is real, especially when the collector needs to update

given the high volume of complaints about efforts to collect debt that the consumer does not owe,[82] the FTC made it a priority to focus enforcement efforts on debt collection companies with large numbers of these kinds of complaints.

One source of these complaints, we believed, was from debt buyers seeking to collect on stale, or time-barred debt. Our conclusion was based on considerable work the agency had already done on debt collection. In February 2009, the FTC had issued a comprehensive report on debt collection, *Collecting Consumer Debts: The Challenge of Change – A Workshop*

---

contact information based on information obtained from third parties and data brokers (a process known as "skip tracing"). And some of the debt portfolios that debt buyers purchase have significant amounts of missing or unreliable data, like faulty social security numbers. See infra (discussion of Asset Acceptance's effort to collect on debt purchased from Bally Total Fitness, which proved to be filled with erroneous data).

Sometimes, of course, the consumer owes the debt but fails to recognize the debt because the debt collector does not disclose the identity of the initial creditor. Debt collectors are not required to identify the initial creditor until and unless the alleged debtor makes a written request for that information. Indeed, the contracts for the sale of debt often require the debt buyer to take pains to avoid disclosing the identity of the initial creditor. The FTC recently issued a report on the debt buying industry that addresses these issues. Federal Trade Commission, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (Jan. 2013) (citations omitted) [hereinafter "FTC Debt Buyer Report], available at http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf. (last visited Mar. 12, 2013).

[82] Data from 2009 shows that consumers filed 27,420 complaints that the FTC coded as "falsely represents character, amount, or status of debt." These complaints amounted to 31.1% of all complaints about debt collection. Another 10,158 complaints were coded as "refused to verify the debt after the debtor makes a written notice." These complaints represented an additional 11.5% of debt collection complaints. Some complaints reported both of these practices. See FTC Debt Buyer Report, at 1 n.5.

Report[83], concluding that certain debt collection litigation and arbitration practices raised substantial consumer protection concerns, and noting an emerging consensus in the courts "that suing or threatening to sue to collect time-barred debt is unlawful and unethical for debt collectors."[84] The report concluded that more information was needed before the Commission could determine what steps, if any, it needed to take to address this issue.

To gather that information, the FTC convened workshops in San Francisco, Chicago and Washington, D.C., and heard from over ninety representatives of the debt collection industry, consumer advocates, state and local consumer protection officials, private attorneys, judges, academics and others to get their views. The Commission also solicited and received extensive public comments.[85]

---

[83] Federal Trade Commission, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE — A WORKSHOP REPORT (2009), available at http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf [hereinafter Challenges of Change].

[84] *Id.* at 64.

[85] As the Commission was concluding its workshops, it then, in December 2009, issued compulsory process orders to nine of the largest debt buyers in the nation. One of the largest companies, Asset Acceptance, was not targeted for an order because the company was already under investigation for violations of the FTC Act and the Fair Debt Collection Practices Act. The agency has authority to issue compulsory orders for fact-gathering under Section 6(b) of the Act, 15 U.S.C. 46(b). We limited our request to nine companies, of the literally of hundreds of debt buyers in the nation, to avoid triggering the Paperwork Reduction Act, which requires extensive OIRA review of any broad-scale information-collection activity by federal agencies, including the independents. *See* 44 U.S.C. 3502(3)(A)(I). OIRA review would have delayed the study significantly. While the debt buyers targeted represented a small fraction of the industry, they collectively controlled more than 70% of the market. One limitation of the study is that the

Based on the information gleaned from the workshop discussions and public comment, and supplemented by information from the Commission's enforcement efforts, the Commission issued a report in July 2010, entitled *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration.*[86] After laying out the evidence received by the Commission during its extensive fact-finding, the Commission spelled out its views on the lawfulness of debt collectors' efforts to collect on time-barred debt. The Commission began by noting that "the FDCPA bars actual or threatened suit to collect on time-barred debts" but that it "took no position on whether the FDCPA should be amended to preclude collectors from collecting debt that they know or should know is time-barred."[87] The Commission then made two significant statements to signal its concerns about practices that might occur in the collection of time-barred debt that would violate the law:

First, it concluded that:

> most consumers do not know or understand their legal rights with

---

restriction on the number of entities we could study meant not including a company that specialized in buying old debt. On the other hand, Asset Acceptance specialized in buying and collecting on old debt, and the agency engaged in substantial discovery of Asset Acceptance's practices. A copy of the 6(b) order sent to debt buyers appears as Appendix A to the Debt Buyer Report.

[86] Federal Trade Commission, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010) [hereinafter Repairing a Broken System], available at: http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

[87] Repairing a Broken System, at 23, 26.

> respect to the collection of time-barred debt, [and therefore] the Commission believes that in many circumstances such a collection attempt may create a misleading impression that the collector can sue the consumer in court to collect the debt, in violation of Section 5 of the FTC Act and Section 807 of the FDCPA. To avoid creating this misleading impression, collectors would need to disclose clearly and prominently to consumers before seeking payment on such time-barred debt that because of the passage of time, they can no longer sue in court to collect the debt or otherwise compel payment.[88]

The Commission explained that it adopted this position because there was considerable evidence that debt buyers frequently threatened or filed suits to collect time-barred debt notwithstanding the existing prohibition on doing so, apparently with the expectation that the consumers would default and allow judgments to be entered against them.[89]

Second, the Commission tackled the issue of "revival" of debt. In most states, making a payment on a debt, even a trivial payment, may "revive" the debt, restarting the statute of limitations for the entire debt. A consumer who agrees to pay $10 on a $1000 "debt" to get a debt collector off his back will have inadvertently waived what would otherwise be a valid

---

[88] Repairing a Broken System, at 26 & nn. 21 & 22. Section 5(a) of the FTC Act, 15 U.S.C. 45(a), gives the Commission the authority to prevent unfair or deceptive acts or practices. The Commission's admonition made it plain that the Commission was relying principally on a deception theory. Section 807 of the Fair Debt Collection Practices Act, 15 U.S.C. 1692e, makes it unlawful for a debt collector to make false or misleading representations, including about the "legal status" of a debt" or threatening "to take any action that cannot be legally taken or that is not intended to be taken."

[89] *Id.* at 29-30

statute of limitations defense.[90] The Commission concluded that:

> In states where the law continues to provide that a partial payment on a time-barred debt revives it, the Commission believes that in many circumstances a collector's attempt to collect a debt that it knows or should know is time-barred may create a misleading impression as to the consequences of making such a payment, in violation of Section 5 of the FTC Act and Section 807 of the FDCPA. To avoid creating a misleading impression, collectors would need to disclose clearly and prominently to consumers prior to requesting or accepting such payment that (1) the collector cannot sue to collect the debt and (2) providing a partial payment would revive the collector's ability to collect the balance.[91]

There are three attributes of the Commission's statements here are worth noting. First, they were made in a formal Commission report, approved by the Commission unanimously, and not through a speech or statement by an individual Commissioner, and not through a staff report. Second, the Commission issued these statements only after a full-bore effort to collect information and engage interested parties in a robust discussion of the facts and policy considerations at stake. And third, although the Commission's conclusions were not embodied in an interpretative rule[92], they were the product of procedures that emulate those followed in the

---

[90] The Commission highlighted the fact that "[m]ost consumers do not understand that a payment will revive the statute of limitations," and that many workshop participants commented that "many consumers do not even under the basic concept that a statute of limitations prevents collectors from suing to collect on debts after the passage of a period of time." *Id.* at n. 26.

[91] Repairing the Broken System, at 27.

[92] The agency could have used its hybrid rulemaking authority under Section 5 to address this issue, but it has no rulemaking authority under the FDCPA. *See* 15 U.S.C. 1692*l*(d).

promulgation of a rule. In sum, the Commission's put the industry on notice that debt collectors using deceptive tactics to press consumers to pay stale debt, or to revive stale debt, may well be violating the law, and that, unless these practices ended, enforcement actions were imminent.

Enforcement. Having fired its warning shot, the Commission then looked to carry though on its thinly veiled threat to bring an enforcement action against a debt collector engaging in such conduct. Not coincidentally, the agency had a target in sight. Asset Acceptance is one of the large debt buyers/debt collectors in the nation[93], and it had been the subject of a high volumes of complaints by consumers. By the time the FTC sent out compulsory process to other debt buyers, the FTC had already launched an investigation into Asset Acceptance's collection practices. The investigation culminated in a nine-count complaint alleging numerous violations of Section 5 of the FTC Act, and various provisions of the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.[94]

---

[93] By way of illustration, as of September 2010, Asset held more than 34 million individual accounts for collection with an original value of more than $42 billion. Asset specialized in collecting old debt, and therefore was able to purchase this portfolio for an aggregate of 2.54% of face value. See Complaint in *United States v. Asset Acceptance, LLC*, ¶ 9 available at http://www.ftc.gov/os/caselist/0523133/120130assetcmpt.pdf (last visited Mar. 13, 2013).

[94] The complaint's main allegations — apart from those relating to the collection of time-barred debt and revival — were that: Asset Acceptance (1) failed to engage in a reasonable investigation when consumers disputed that they owed the debt; (2) failed to conduct reasonable investigations of the half-million referrals it received annually from credit reporting agencies that consumers had contested the accuracy of negative information furnished by Asset Acceptance; (3) repeatedly called the wrong consumers to collect a debt, because the original account data it

The FTC entered into a consent decree with Asset Acceptance in January 2012.[95] The settlement is a complicated one because of the extensive injunctive relief it provides, in addition to a $2.5 million civil penalty (then the largest civil penalty obtained by the Commission in a debt collection case). For our purposes, there are three key provisions in the 28-page decree. One is a requirement that the company inform consumers that their debt has passed the statute of limitation. In most cases, the company's collector is required to disclose, clearly and prominently, that "The law limits how long you can be sued on a debt. Because of the age of

---

purchased was outdated or inaccurate, or because the skip-tracing data-bases it used were inaccurate; (4) continued to collect debts based on data it knew was inaccurate (the company bought account data from Bally Total Fitness that included consumers who had signed up for a free trial membership or who had cancelled the contract— and was generally riddled with inaccuracies — but kept on collecting "debt" anyway); (5) improperly furnished information to consumer reporting agencies while knowing or having reasonable cause to believe that the information was inaccurate; and (6) failed to provide consumers notice required by the FCRA when the company reported negative information about them to a credit reporting agency. Each of these issues is addressed in the consent decree.

[95] See FTC Press Release, *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception* (Jan. 30, 2012), available at http://www.ftc.gov/opa/2012/01/asset.shtm. The United States is the nominal plaintiff in a small subset of the cases generated by the Bureau of Consumer Protection. When the agency seeks civil penalties for rule violations (and the FDCPA treats enforcement cases under that Act as if there had been a violation of an FTC rule, 15 U.S.C. 1691*l*), the case is brought in the name of the United States and the litigation is handled by the DOJ, although FTC lawyers ordinarily negotiate settlement decrees before the case is sent to the DOJ. In this case however, FTC and DOJ lawyers collaborated in the crafting of the decree.

your debt, we will not sue you for it, and we will not report it to any credit reporting agency."[96] The decree further provides that Asset Acceptance must repeat this disclosure if a communication to the consumer might be misleading without it and establishes a presumption that if more than six months have elapsed between communications, the company must repeat the disclosure.[97]

The second addresses the "revival" issue. Drafting a disclosure that would adequately communicate the intricacies of revival to consumers proved difficult, and so the decree forbids revival outright rather than regulating its use. The decree requires Asset Acceptance to forego initiating any arbitration or legal proceeding to recover on time-barred debt, and further requires the company, in the event that it sells, transfers or assigns the debt, to expressly withhold "any rights it may have to initiate any arbitration or legal action to recover the debt." The effect of this

---

[96] Consent decree in *United States v. Asset Acceptance*, ¶¶ IV D1 & D2, available at http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf (last visited Mar. 13, 2103). The last clause is significant. One piece of leverage Asset Acceptance and other debt buyers use to collect stale debt is to report it to credit reporting agencies. Reporting an unpaid debt can adversely affect a consumer's credit score. Section 605(a)(4) of the Fair Credit Reporting Act, 15 U.S.C. 1681c(a)(4), forbids reporting debts "placed for collection . . . which antedate the report by more than seven years," a period longer than most state statutes of limitations on credit card and consumer debt. Thus, in instances where the debt is past the statute of limitations but not past the date for obsolescence (the term for debt no longer reportable), the disclosure provides as follows: "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, we [Asset Acceptance] may [continue to] report it to the credit report agencies [as unpaid]." *Id.* (brackets in original).

[97] *Id.* at ¶ 4G.

provision is not just to prevent Asset Acceptance from engaging in conduct that could justify revival, but it also prevents any subsequent owner of the debt from reviving the statute of limitations. [98]

Last, but hardly least, the decree addresses the core allegation that the company failed to take reasonable measures to investigate claims by consumers that they do not owe the debt. This problem dovetails with the time-barred debt issue because older debt tends to be less reliable. The complaint alleged that no matter what the consumer's justification is for contesting the debt — that they do not owe the debt, that the debt is the result of identify theft or fraud, or that the debt has been paid — Asset Acceptance required the consumer to provide evidence proving that they do not owe the debt, an often insurmountable hurdle. Equally problematic, Asset Acceptance took no steps to verify the accuracy of its information — even when the original creditor had documents available, the company did not review them.[99]

The decree places a series of duties on the company to conduct a reasonable investigation. When a consumer, at any time, disputes or challenges the accuracy of the information on which the company is relying on to represent that the consumer owes a debt or the amount of the debt, the company must then either (1) close the account, permanently terminate collection efforts, and request the deletion of that item from the consumer's credit reporting file; or (2) report the

---

[98] *Id.* at ¶ 4G.

[99] Complaint, at ¶¶ 35-40.

information as disputed to the credit reporting agency "and conduct and complete a reasonable investigation into the accuracy or completeness of such information." The investigation required is a thorough one, extending not just to the consumer's account, but to all accounts in the portfolio. If, after the investigation, the company cannot verify the accuracy of the account data in a portfolio, the company cannot sell or transfer the portfolio to another debt buyer.[100]

Assessment. Let's start with first principles. A consent order is not a rule binding on anyone other than the defendant, but it is nonetheless a species of law and a form of regulation.[101] One need look no further than the *Asset Acceptance* decree to see how prescriptive, and rule-like, a consent order can be. The order not only binds the defendant, but it sends a signal to similarly situated parties that if they are sued the agency will seek similar (or more stringent) relief against them. It is not an overstatement, in my view, to say that the agency's consent orders in debt collection cases constitute a sort of advisory, influential, but not-quite-binding "common law." The question to be asked in assessing the success of the agency's work is whether that law has been widely adopted. And the answer, at least at this point, is less than clear.

---

[100] Consent Decree, ¶ IV.

[101] This is one teaching from the Supreme Court's preemption jurisprudence. The Court has held repeatedly that tort judgments may impose "requirements" on defendants and thus tort law may be ousted by federal statutes that expressly preempt state laws and other "requirements" or through the implied and conflict preemption doctrines. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008); *Cipollone v. Liggett Group*, Inc., 505 U.S. 504, 522, (1992) (plurality opinion).

There are reasons to think that the agency has made progress. In the year following the *Asset Acceptance* settlement, the agency has not brought another enforcement action charging a company with engaging in deceptive practices with respect to time-barred debt or revival, even though it has brought at least ten cases against debt collectors since then.[102] That may suggest that the industry has reformed its practices to conform to the Asset Acceptance order. And *Asset Acceptance* has been adopted by other federal consumer protection agencies. In a massive settlement with American Express, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of the Comptroller of the Currency, entered into consent orders in three cases with different components of American Express-related companies requiring the disclosure of time-barred debt.[103] The orders require that "the Bank [American Express] shall continue to provide disclosures concerning the expiration of the Bank's litigation rights when collecting debt that is barred by the applicable

---

[102] See http://www.ftc.gov/opa/reporter/finance/debtcollection.shtml listing cases. The Commission did close an investigation when the evidence showed that the company had not crossed the line and promised to add disclosures to avoid any deception. Staff Closing letter to RJM Acquisitions LLC (Aug. 27, 2012) available at http://www.ftc.gov/os/closings/staff/120827rjmclosingletter.pdf

[103] The CFPB's adoption of the FTC's position on time-barred debt carries a special significance. Although Section 814(d) of the FDCPA provides that no agency may promulgate rules to implement the statute, the Dodd-Frank legislation creating the CFPB gave that agency authority to issue implementing rules. [cite[It is therefore possible that if the *Asset Acceptance* position does not win widespread acceptance by the courts, the CFPB will through rulemaking impose disclosure requirements akin to those in the *Asset Acceptance* consent decree.

state statutes of limitations."[104] On the other hand, in private litigation, district courts have reached differing conclusions about whether to adopt the Commission's approach and no circuit has yet to weigh in.[105] Time will tell whether the agency has made the progress it expects in eliminating these deceptive practices. This is an issue that the agency monitors closely, and has additional tools if needed to compel compliance.

2. *"Transit Times" and Unsubstantiated Health Claims.* Health benefit claims help sell products,[106] and the food, dietary supplement and exercise equipment industries now regularly

---

[104] The CFPB's press release announcing the settlements, which links to each settlement, can be found at http://www.consumerfinance.gov/pressreleases/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers--harmed-by-illegal--credit-card-practices/

[105] Two district courts have relied on *Asset Acceptance* to reject motions to dismiss debt collection actions. The court in *McRill v. Nationwide Credit, Inc.*, 2012 U.S. Dist. LEXIS 182009 (C.D. Ill. Dec. 6, 2012) gave *Skidmore* deference to the FTC's position in rejecting a motion to dismiss in a case involving alleged deception in the collection of time-barred debt. *See also Donnelly-Tovar v. Select Portfolio Servicing, Inc.*, 2013 U.S. Dist. LEXIS 28944 (D. Neb. March 4, 2013) (citing *Asset Acceptance* favorably in denying defendant's motion to dismiss an action claiming that the defendant misrepresented the character of a debt). Two district courts have refused to defer to *Asset Acceptance*; *see McMahon v. LVNV Funding*, 2012 U.S. Dist. LEXIS 113576 (N.D. Ill. Aug. 13, 2012) (refusing to defer to *Asset Acceptance* and dismissing action claiming that defendant deceptively sought to collect on time-barred debt); *accord Magee v. Portfolio Recovery Ass'ns, LLC*, 2012 U.S. Dist. LEXIS 116666 (N.D. Ill. Aug. 15, 2012) (adopting reasoning of *McMahon*).

[106] *See* Natasha Singer, *Food With Benefits, or So they Say*, NY Times (May 14, 2011) available at http://www.nytimes.com/2011/05/15/business/15food.html?pagewanted=all&_r=0.

tout products by promising consumers substantial health benefits — ranging from weight loss and toning to cancer prevention or cure — often without adequate scientific back-up. These advertisements are everywhere: on television, on the internet, in print, on signage, and on every supermarket aisle. There is no escaping them.

Indeed, the advertisements that worried the Commission should be familiar. There are so many to choose from. Here are a few highlights — Kim Kardashian boasting that she owed her toned physique not to work-outs, but to her Skechers "Shape Up" toning shoes.[107] Jamie Lee Curtis breathlessly sharing with us that eating Dannon's Activia yogurt improved her "transit time," as an arrow moving downward miraculously appears on her bare mid-section (the context making it clear to all but the obtuse that the moving arrow was a clever euphemism for a particular bodily function).[108] Or the witty and memorable POM Wonderful (pomegranate juice) ads telling us that POM is "Off to Save Prostates," helps "Floss Your Arteries," will "Amaze Your Cardiologist," and helps you "Cheat Death."[109]

---

[107] A few of the Skechers' ads, including the famous steamy Superbowl ad, are available here: http://www.ftc.gov/opa/2012/05/consumerrefund.shtm.

[108] The Dannon case involved deceptive claims for both Activia, which was marketed to relieve irregularity, and DanActive, a dairy drink for children, that was marketed to as a cold and flu-fighter. A few of the Dannon ads can be found here: http://www.ftc.gov/opa/2012/05/consumerrefund.shtm.

[109] A few of the POM Wonderful ads can be found here (as Appendix B to the Commission's final decision) http://www.ftc.gov/opa/2013/01/pom.shtm.

Health claims based on sound evidence improve the health and welfare of consumers. But health claims that are more wishing thinking than fact harm consumers in at least two ways: first, consumers may forego more effective products or services that actually provide the desired health benefit *(e.g.*, passing up a flu shot for one's child because Kellogg's Rice Krispies or Dannon's DanActive drink claim to "support your child's immunity"); and second, if consumers are going to pay for health benefits, they ought to get them. But health claims sell products, and companies rushed to make specific health claims for their products, often without sufficient regard to whether those claims are accurate.

At the same time the agency started to take a broader look at national advertising cases, the agency also started to reexamine the relief it obtained in enforcement cases against advertisers making unsubstantiated health claims. Two companies under agency order for engaging in deceptive health advertising in the past were arguing that the orders — which required "competent and reliable evidence" to support health claims[110] — could be satisfied so long as the company had *an* expert, who conducted *a* study or could refer to *a* study, and claim

---

[110] The standard order defined the term "competent and reliable scientific evidence" to mean "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." *See, e.g.*, Order ¶ 2, In re Basic Research LLC, et al., Docket No. 9318 (June 19, 2006), available at http://www.ftc.gov/os/adjpro/d9318/060619decisionandorder.pdf.; Stipulated Order and Permanent Injunction at 2, *FTC v. Lane Labs, et al.*, Civ. Action No. 00-cv-3174 (D. N.J. July 6, 2000), available at http://www.ftc.gov/os/caselist/9823558/lanelabsord.pdf.

that the study supported the advertiser's claim, even if the study did not focus on the advertiser's product. The companies — Basic Research[111] and Lane Labs — are large companies selling weight-loss products, cancer cures and other questionable nostrums, and each company had settled cases with the Commission relatively recently.[112]

---

[111] For a fascinating profile of Basic Research, see Michael Spector, *Miracle in a Bottle: Dietary supplements are unregulated, some are unsafe—and America can't get enough of them*, The New Yorker 64-75 (Feb. 2, 2004)

[112] Lane Labs settlement covered unsubstantiated claims about the efficacy of two products — BeneFin and SkinAnswer — in the prevention, treatment and cure of cancer. In addition to the unsubstantiated efficacy claims, the defendants falsely represented that clinical studies had shown that BeneFin and SkinAnswer are effective in preventing, treating, and curing cancer, and falsely represented that the Food and Drug Administration has evaluated the effectiveness of BeneFin. The order prohibited the company from making unsubstantiated health-related claims about any food, drug or dietary supplement, and required the payment of a $1 million judgment. See FTC Lane Labs Press release, available at http://www.ftc.gov/opa/2000/06/lanelabs.shtm. By this time, the FTC had already brought a contempt action against Lane Labs, which was awaiting trial. See http://www.ftc.gov/os/caselist/9823558/9823558.shtm.

The Basic Research settlement involved unsubstantiated claims for three questionable weight-loss and fat-loss skin gels and three diet supplements. Basic Research's ads for three skin gels — Tummy Flattening Gel, Cutting Gel, and Dermalin APg — claimed they melted away fat wherever applied, including a user's thighs, tummy, even a double chin. Ads for Leptoprin and Anorex, two ephedrine pills, claimed they caused weight loss of more than 20 pounds. The advertising for PediaLean fiber pills for overweight children claimed the pills caused substantial weight loss. In addition to unsubstantiated efficacy claims, the agency alleged that the ads falsely claimed that clinical testing proved those claims and misrepresented the company's spokesperson as a medical doctor. The company paid a $3 million judgment and the order prohibits the company from making unsubstantiated claims and from misrepresenting studies or endorsements. See FTC Basic Research Press release, available at http://www.ftc.gov/opa/2006/05/basicresearch.shtm.

Concerned that the Commission's orders were being interpreted in a way that rendered them toothless, the agency concluded that, as it focused on national advertising cases, it would use enforcement and contempt cases to tighten and refine its standard order to ensure that the substantiation required for a claim was commensurate with what experts in the field would require. That standard had long been embodied in agency orders and policy statements.[113] But for companies that failed to meet that standard — like Basic Research and Lane Labs — a finer, more particularized order was needed to ensure that the agency did not have to relitigate in every case exactly what the "competent and reliable scientific evidence" standard meant. And because injunctions may be enforced only where they are crystal clear, a more definite order would end any quibbling about what level of substantiation was required.

Once that decision was made, the question then was how to signal to the industry that the agency was serious about holding advertisers to the claims they made. The agency took three

[113] There are three relevant FTC guidance documents that form the cornerstone of the agency's work on health claims. One is the agency's *Enforcement Policy Statement of Food Advertising* (May 1994), which discusses the "competent and reliable scientific evidence" standard in depth, and make clear that the level of substantiation required depends on the nature of the health claim. For example, claims that a product prevent, cure, mitigate or treat a disease require a high-degree of substantiation because the product may be used in lieu of a proven therapy. Other health benefits, like weight loss, require less substantiation. The second is the agency's "Deception Statement," which is a letter dated Oct. 14, 1983 to Rep. John D. Dingell, then Chairman of the House Committee on Energy and Commerce, which is reprinted as an appendix to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176 (1984). And third is the *FTC Policy Statement on Advertising Substantiation*, 48 Fed. Reg. 10,471 (1984), reprinted in *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)

steps.

First, pending before Commission at that time was an investigation into alleged deception involving a massive advertising campaign by Kellogg to persuade parents that eating Frosted Mini Wheats for breakfast would make their child "full and focused." The key claim was that eating Frosted Mini Wheats would improve a child's attentiveness "by nearly 20 percent" over a child who missed out on breakfast and therefore child would be better behaved and a better student.[114] And Kellogg boasted that the "nearly 20 percent" finding was based on a "clinical study."[115] The problem with these claims (apart from the comparison to water, which suggests that even giving kids a breakfast of twinkies and soda would make them more attentive), is that the study Kellogg touted did not show that kids would be "nearly 20 percent" more attentive. In fact, that study showed that only about half the kids who ate Frosted Mini-Wheat cereal showed any improvement after three hours as compared to their pre-breakfast baseline; only about one in seven kids who ate their cereal improved their attentiveness by 18% or more, and only about one

---

[114] Several of the advertisements were Exhibits to the Commission's complaint and may been seen here: http://www.ftc.gov/os/caselist/0823145/index.shtm.

[115] The claim was "Kellogg recently commissioned research to measure of the effect on kids of eating a breakfast of **Frosted Mini-Wheats**© cereal. An independent research group conducted a series of standardized, cognitive tests on children ages 8 to 12 who ate either a breakfast of **Frosted Mini-Wheats**© cereal or water. The result? The children who ate a breakfast of **Frosted Mini-Wheats**© cereal had a nearly 20% improvement in attentiveness." FTC Complaint, *In the matter of the Kellogg Company*, ¶¶ 5A-F, H, Docket C-4262 (July 31, 2009), available at http://www.ftc.gov/os/caselist/0823145/090731kelloggcmpt.pdf.

in nine improved by 20% or more.[116]

Not surprisingly, Kellogg settled the case with the Commission, and the resulting consent decree was based on the agency's prior orders.[117] But the settlement was accompanied by press release that sent a blunt message to national advertisers that the FTC was now looking over their shoulders: "'We tell consumers that they should deal with trusted national brands,' said Chairman Jon Leibowitz. 'So it's especially important that America's leading companies are more 'attentive' to the truthfulness of their ads and don't exaggerate the results of tests or research. In the future, the Commission will certainly be more attentive to national advertisers.'"[118]

Second, that message was followed up in a speech I gave to the National Advertising Division ("NAD") on October 5, 2009.[119] The speech began by saying that "National advertising is, once again, a high priority" for the FTC. It also emphasized that "[h]ealth claims are

---

[116] See FTC Complaint, *In the matter of the Kellogg Company*, supra, at ¶ 7.

[117] See FTC Order, *In the Matter of the Kellogg Company,* available at http://www.ftc.gov/os/caselist/0823145/090731kelloggdo.pdf.

[118] FTC Press Release, *Kellogg Settles FTC Charges That Ads for Frosted Mini-Wheats Were False* (April 20, 2009), available at http://www.ftc.gov/opa/2009/04/kellogg.shtm.

[119] NAD is part of the Better Business Bureaus and is the forum for advertisers to contest the accuracy of claims made by their competitors. See *About NAD*, http://www.bbb.org/us/About-NAD/About. The NAD Annual Conference is the key meeting for the advertising industry.

becoming more prevalent in food advertising" and that "the FTC is therefore giving increased scrutiny to food advertising." The speech added that "[a]dvertisers need to be very careful when they venture into this realm that they have good scientific research, that they are not overstating what the research shows, and that they are not making disease prevention or treatment claims not approved by the FDA. Health benefit claims will continue to be a high priority at the Commission — wherever they are found." The *Kellogg* case was featured as a cautionary tale about the need for a "careful and accurate portrayal of research findings when they are transformed into advertising claims." The speech also warned that the agency was "re-examining the effectiveness of our standard order provisions regarding substantiation for advertising claims." After discussing some of the problems with our existing order, the speech made clear that "[o]ne outlier study should not be the sole basis of support for a claim that a product will confer a benefit — particularly a health benefit. We need to ensure that our orders are enforceable, and I intend to seek changes to make that happen."[120]

Third, in November 2009, the Commission filed a contempt actions against Basic Research, in addition to its then-pending contempt case against Lane Labs. The Basic Research complaint challenged the substantiation for two top-selling weight-loss products: "Relacore" — a dietary supplement whose "natural anti-stress, mood-elevating formula can help alter the

---

[120] Remarks of David Vladeck, Director of the FTC Bureau of Consumer Protection (Oct. 5, 2009), available at http://www.ftc.gov/speeches/vladeck/091005vladecknationaladvertising.pdf.

underlying stress-related causes of excess belly fat . . . leaving you happier, full of energy, and with that flat, youthful tummy you thought you'd never see again;" and Akavar, a "fast acting caloric restrictor" that let's you "EAT ALL YOU WANT & STILL LOSE WEIGHT (And we couldn't say that if it wasn't true)" with a "virtually 100% success."[121]

[121] See FTC Complaint in *United States of America v. Basic Research L.L.C., et al.*, Civ. Action No. 2:09-cv-972 (D. Utah Nov. 2, 2009), available at http://www.ftc.gov/os/caselist/0023300/091102basiccmpt.pdf. The case is still pending in the district court.