

Dissenting Statement of Acting Chairman Maureen K. Ohlhausen
In the Matter of NetSpend Corporation¹
Matter No. X170006
March 31, 2017

I dissent from this settlement for two reasons. First, the majority fails to consider the context of NetSpend’s representations in concluding that NetSpend made false claims to consumers. Second, the settlement order imposes monetary relief unrelated to NetSpend’s allegedly deceptive advertising.

NetSpend offers general-purpose reloadable prepaid card products used primarily by unbanked or under-banked individuals to access convenient bank-like services, such as debit cards and paycheck direct deposit. NetSpend marketed these services through print and online advertising.

In its campaign touting its cards, NetSpend’s advertising focused largely on their use as a direct deposit vehicle and expressly represented that consumers would receive “immediate access” to their paycheck funds.² The majority isolates the phrase “immediate access” from its context. Specifically, the majority treats this phrase as a standalone guarantee that consumers’ access to direct deposit funds will never be delayed.

Context often has a significant effect on what reasonable consumers take away from representations in advertising. As FTC law has long recognized, “the tendency of advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.”³ In the context of direct deposit advertising, reasonable consumers would interpret “immediate access” to refer to the timesaving benefits of direct deposit as compared to 1) waiting for a paper check to be mailed, 2) physically depositing the check at the bank, and 3) waiting for the bank to make those funds available in an individual’s account. Banks, credit unions, and even the Social Security Administration commonly use the phrase “immediate access” to describe the timesaving benefits of direct deposit.

¹ This settlement was moved for a vote by then-Commissioner Ramirez on February 9, 2017, one day before she resigned. Under Commission rules, that motion remains active unless, after one calendar month, it has not obtained a quorum of voting Commissioners. Commissioner McSweeney voted to support the settlement on March 8, 2017, establishing both a quorum and a majority in support of the settlement. Thus the settlement would be approved regardless of whether or not I participated in the vote.

² The majority challenges as deceptive NetSpend’s marketing materials claiming that consumers would have “immediate access” to their funds; that NetSpend cards could be “use[d] immediately;” that account approval was “guaranteed;” and that NetSpend would provide provisional credits for account errors within a certain time period.

³ Deception Statement at 4 (*quoting Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977)).

Consistent with this interpretation of NetSpend's claims, and based on the evidence I have seen, I believe that the overwhelming majority of consumers received their funds on their NetSpend cards before or on the date when the payer made the funds available for transfer.⁴

Deceptive advertising claims hurt consumers and competition. Conversely, truthful advertising claims benefit consumers by helping them identify and differentiate products and services, thereby spurring competition. When, as in this case, the FTC misses the mark in its deceptive advertising enforcement and instead prohibits or limits truthful claims, we harm consumers and competition.

Even assuming NetSpend made the alleged deceptive claims, the order also imposes monetary relief that is not sufficiently related to that claim. Some consumers place money on a card but never activate it. Based on the evidence I have seen, I do not believe that consumers abandoned such funds because of NetSpend's allegedly deceptive advertising.⁵

Because the complaint challenges representations that are truthful and non-misleading when context is considered and because of the absence of a link between the allegedly deceptive conduct and some recipients of redress, I dissent.

⁴ The complaint similarly ignores the contexts of the "use it today" -style claims and the "guaranteed approval" claims, which NetSpend made in the context of disclosures and processes that would prevent consumer misunderstanding and avoid consumer injury.

⁵ Note also that the injunctive relief in the order contains no provisions relating to abandoned funds. Thus, to the extent that NetSpend's conduct relating to abandoned funds caused real consumer injury, the order will not protect consumers from this conduct going forward.