

Concurring Statement of Commissioner Christine S. Wilson

InfoTrax

Matter Number: 1623130

November 8, 2019

I concur with the Commission's decision to approve a settlement with InfoTrax, L.C. and its CEO, Mark Rawlins, to resolve allegations that InfoTrax and Mr. Rawlins unfairly failed to employ reasonable data security practices to protect personal and financial information.¹ I also concur in the Commission's decision to name Mr. Rawlins in the complaint and the order, given the facts of this case.² I write separately to raise concerns about the duration of the order, as well as the duration of certain provisions within the order.

InfoTrax is a legitimate company that has been in business for more than a decade and has not previously run afoul of the FTC. In an order that will last for 20 years, InfoTrax and Mr. Rawlins are obligated to establish, implement, and maintain a documented, comprehensive information security program; obtain assessments of the program from a third-party assessor; annually certify compliance with the program; and prepare covered incident reports. In light of the alleged data security lapses, I agree with the obligations imposed by the order. I question, though, whether the order needs to remain in effect for 20 years.

In 1995, the Commission issued a policy statement providing that administrative orders sunset after 20 years, absent any intervening enforcement action.³ Notwithstanding this policy statement, the Commission has the discretion to issue orders of shorter duration. Since I was sworn in as a Commissioner in September 2018, I have expressed internally my view that the Commission should adopt a policy of sunseting orders after 10 years, as recommended in the American Bar Association's 2017 Presidential Transition Report: The State of Antitrust Enforcement.⁴ This Report explained that 20-year administrative orders "can create a severe burden on companies involved, given the breadth and vagueness of 'fencing in' order provisions as well as burdensome affirmative obligations."⁵

¹ The security practices described in the complaint were deficient in many respects. The respondents contractually assumed responsibility for data from millions of consumers, including financial account information, social security numbers, and other sensitive data, and failed to take appropriate measures to protect the security of that data. Respondents could have addressed many of the security failures by implementing readily available and relatively low-cost security measures that were recommended by security experts and in use in the industry for several years.

² Mr. Rawlins reviewed and approved InfoTrax's information technology security policies, regularly discussed data security issues with clients, was involved in the company's long-term data security strategy, studied computer science in college, and listed his college study of computer science on the InfoTrax website as part of his biography.

³ 60 Fed. Reg. 42,481 (Aug. 16, 1995), <https://www.govinfo.gov/app/details/FR-1995-08-16/95-20144>

⁴ American Bar Association Section of Antitrust Law, 2017 Presidential Transition Report: The State of Antitrust Enforcement (January 2017), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf.

⁵ *Id.* at 32.

I believe that, in many industries, it is not realistic for the Commission to draft injunctive relief expecting that it will remain relevant and continue benefitting consumers for 20 years. The 20-year administrative consent that the Commission issued in 2012 resolving allegations against MySpace is illustrative on this point. Prior to the FTC action, MySpace was the most visited social networking site in the world, but it was subsequently overtaken by Facebook.⁶ At least one publication predicted this outcome – when reporting on the order, Forbes wryly titled its article, “The FTC Has Faith That MySpace Will Be Around In 2032.”⁷ Particularly in the dynamic and rapidly evolving tech space, the Commission should exercise its considerable discretion and negotiate orders of shorter duration.

As the ABA Report explained, “[e]specially in areas where technology is rapidly evolving, order provisions that make sense when they are entered may no longer be appropriate in 10 years, let alone 20 years later, and may serve to chill innovative and useful corporate practices.”⁸ The report also explained that although FTC rules permit parties to petition to modify an order “based on ‘changed conditions of law or fact’ or ‘that the public interest so requires,’ in practice the standard for an order modification is very high and the process often protracted and costly.”⁹

I also write separately to express concern about the length of certain other provisions in the order. Even with a 20-year order, the Commission has the discretion to use shorter durations for specific order provisions. For example, this order requires that the respondents obtain third-party assessments biennially for 20 years. I believe that 10 years of assessments would be more than sufficient to ensure that respondents have established and implemented, and are maintaining, a comprehensive information security program. I encourage the Commission to use its discretion to negotiate orders with 10-year provisions in future cases involving similar facts.

In addition, this order includes provisions intended to assist the Commission in monitoring compliance with the order (acknowledgements of the order, compliance report and notices, recordkeeping, and compliance monitoring, collectively referred to as “Scofflaw provisions”) that also have a 20-year duration. These provisions also could have been shortened while still fulfilling the FTC’s goals of ensuring order compliance and protecting consumers. Scofflaw provisions in Commission orders routinely run for shorter time periods, even in settlements of matters resolving allegations of fraud and other egregious conduct.¹⁰

⁶ Nicholas Jackson and Alexix C. Madrigal, *The Rise and Fall of MySpace*, The Atlantic (Jan. 12, 2011), <https://www.theatlantic.com/technology/archive/2011/01/the-rise-and-fall-of-myspace/69444/>.

⁷ Kashmir Hill, *The FTC Has Faith That MySpace Will Be Around In 2032*, FORBES (May 9, 2012), <https://www.forbes.com/sites/kashmirhill/2012/05/09/the-ftc-has-faith-that-myspace-will-still-be-around-in-2032/#30f4eed10de>.

⁸ ABA Report *supra* n.4 at 30.

⁹ *Id.* at 30-31 (citing FTC Rule of Practice §2.51).

¹⁰ See e.g., *FTC v. Fat Giraffe Marketing Group LLC*, No. 19-cv-00063 (D. Utah 2019) (stipulated order in business opportunity scheme, violations of FTC Act and Telemarketing Sales Rule, 15 year Scofflaw provisions); *FTC v. Musical.ly (d/b/a TikTok), et al.* No. 2:19-cv-01439 (C.D. Cal. 2019) (proposed stipulated order filed resolving violations of COPPA including reports of adults trying to contact children via the app, 10 year Scofflaw provisions); *FTC v. Hite Media Group, LLC, et al.*, No. 2:18-cv-02221 (D. AZ 2019) (stipulated orders in bogus grant services

I am interested in ensuring that the relief in Commission orders is tailored carefully to the facts and circumstances of each matter. When taking enforcement action, the Commission must take all appropriate steps to ensure that defendants and respondents halt unlawful conduct and refrain from future violations. Moreover, strong orders also deter other market participants from engaging in similar unlawful conduct. These imperatives, though, must be balanced against considerations of equity and proportionality.

In future cases, I encourage the Commission to review carefully both order duration and Scofflaw provision duration with the goals of equity and proportionality in mind. I also encourage the Commission to adopt the ABA Report's recommendation to limit the length of future administrative order to 10 years, and to sunset existing administrative orders after 10 years.

case, obtained *ex parte* preliminary relief, 10 year Scofflaw provisions); FTC v. A1Doc Prep Inc., et al., No. 2:17-cv-07044 (C.D. Cal. 2018) (stipulated order in student debt relief scam, obtained *ex parte* preliminary relief, 15 year Scofflaw provisions).