

Statement of Commissioner Roscoe B. Starek, III

Concurring in Part and Dissenting in Part in

America Online, Inc.

File No. 952-3331

Although I have voted to accept for public comment the consent agreement with America Online, Inc. ("AOL"), the extensive consumer education remedy contained in paragraph XII of the proposed order is far too broad. Once again, a majority of the Commission is willing to use a negotiated settlement to compel speech that it would have virtually no chance of persuading a court to require.

The proposed consumer education program is an extremely comprehensive endeavor that no doubt will provide valuable information to consumers of online services about the use of electronic payment systems. Further, it is more closely related to the violations alleged in the complaint than the sunscreen advertising "consumer education" remedy in the proposed consent agreement with Schering-Plough Healthcare Products, Inc. accepted for comment two months ago. [\(1\)](#)

consumers about "various legal protections" for consumers using electronic payment systems is too broad to be reasonably related to the prevention of future deception like or related to that alleged in the complaint. That the alleged deception here involves the use of electronic payment systems is not enough of a nexus to justify a consumer education program covering all risks, obligations, and law violations involving electronic payment systems. Following that logic, information about driving a car and traffic laws would be reasonably related to a violation of the Commission's Used Car Rule.⁽³⁾

Finally, the consumer education provision would require content and dissemination "not limited to" what is stated in the order. Although it is not clear how the Commission could enforce content and dissemination requirements not described in the order, it makes little sense to accept language indicating that even the extensive dissemination measures and speech described in the proposed order may not be enough to comply with the basic requirement to establish a program to educate consumers about the use of electronic payment systems.

If this relief were sought in litigation, rather than obtained through a consent agreement, it would not withstand scrutiny under the First Amendment. The information that the order specifically requires AOL to disseminate is far more extensive than necessary to prevent future violations by AOL, and the boundaries of the "not limited to" language are unclear. Even if a respondent waives its First Amendment rights in a consent agreement, the Commission -- as a government agency acting in the public interest -- should not compel speech through negotiation that it has no colorable chance of obtaining in litigation.

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1. **See *Schering-Plough Healthcare Products, Inc.***, File No. 942-3341 (separate statements of Commissioner Azcuenaga and Commissioner Starek concurring in part and dissenting in part).
 2. Within 90 days of the order's issuance, AOL must submit, for review and approval by the Associate Director of the Bureau of Consumer Protection's Division of Credit Practices, a draft plan
 3. **See** Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.