Statement of Acting Chairman Maureen K. Ohlhausen
In the Matter of Lenovo, Inc.
September 5, 2017

I support this important case and the strong settlement. I write separately to caution against an over broad application of our failure to disclose (sometimes called "deceptive omission") authority. We should hew to longstanding case law and avoid circumventing congressionally-established limits on our authority. I therefore respectfully disagree with my colleague's position that we should expand Count I to allege additional failures to disclose.

Most FTC deception cases involve an express misrepresentation ("This sugar pill cures cancer") or an express statement that gives rise to an implied claim that is false or misleading ("Many people who take this sugar pill don't die of cancer").

Although the FTC and the courts have also recognized that a failure to disclose can be deceptive, this has limits.[1] For every product there is a potentially enormous amount of information that at least some consumers might wish to know when deciding whether to purchase or use it.[2] Copious disclosures would be both impractical and unhelpful, and the law sensibly does not require sellers to disclose all information that a consumer might find important.

Thus, the FTC has generally found a failure to disclose to be deceptive in two categories of cases. First, the FTC has found "half-truths," to be deceptive, where a seller makes a truthful statement that creates a material misleading impression that the seller does not correct.[3] Most of the FTC's failure to disclose cases are half-truth cases, and many could be restyled as cases of implied false or misleading claims. For example, a complaint addressing the claim that "Many people who take this sugar pill don't die of cancer," could allege an implied false claim that the pill cures cancer, or could allege a deceptive failure to disclose that the pill does not reduce the chances of dying from cancer.

Second, and less frequently, the FTC has found a seller's silence to be deceptive "under circumstances that constitute an implied but false representation."[4] Such implied false representations can arise from "ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good."[5] Stated differently, offering a product for sale implies that the product is "reasonably fit for [its] intended uses," and that it is "free of gross safety hazards."[6] If the product does not meet ordinary consumer expectations of minimum performance, or if the product is not reasonably fit for its intended uses, the seller must disclose that. For example, it would be deceptive for an auto dealer to sell, without a disclosure, a normal-

[1] *International Harvester Co.*, 104 FTC 949 (1984), represents the Commission's most comprehensive effort to define deceptive omissions, and that framework remains in place today. *See also, Cliffdale Associates, Inc.*, 103 FTC 110, App. A at 2 (1984) ("Deception Statement").
[2] *International Harvester*, 104 FTC at 1059 (explaining why the FTC does not treat pure omissions as deceptive).
[3] *Id.* at 1057-58.
[4] *Id.* at 1058.
[5] *Id.*
[6] *Id.* at 1058-59.

looking car with a maximum speed of 35 miles per hour.[7] Consumers expect cars to be able to reach highway speeds, and thus the dealer must disclose to the buyer that the car does not meet that ordinary expectation.

In such cases, an omission is misleading under the FTC Act if the consumers' ordinary fundamental expectations about the product were violated. Mere annoyances that leave the product reasonably fit for its intended use do not meet this threshold.[8] Thus, a dealer's failure to disclose that some might find a car's seatbelt warning to be annoyingly loud would not be a deceptive omission because consumers have no ordinary expectations about car seatbelt warnings that would mislead them absent a disclosure.

As *International Harvester* sets out at length, a deceptive omission is distinct from an unfair failure to warn or other forms of unfair omissions.[9] The FTC has brought such cases under its unfairness authority where it has met the statutorily mandated higher burden of showing that the conduct causes or is likely to cause substantial consumer injury that is not reasonably avoidable by the consumer and is not outweighed by benefits to consumers or competition.[10]

Turning to the case at hand, the complaint alleges that VisualDiscovery advertising software on Lenovo laptops acted as a man-in-the-middle between consumers and the websites they visited. As such, the software had access to all secure and unsecure consumer-website communications and rendered useless a critical security feature of the laptops' web browsers. Such practices introduced gross hazards inconsistent with ordinary consumer expectations about the minimum performance standards of software. As a result, the man-in-the-middle functionality and the problems it generated made VisualDiscovery unfit for its intended use as software. Thus, Count I properly alleges that Lenovo failed to disclose, or disclose adequately, that VisualDiscovery acted as a man-in-the-middle.[11]

Although Commissioner McSweeny and I both support Count I, she would add allegations that Lenovo failed to disclose that VisualDiscovery injected ads into shopping websites and slowed web browsing. She argues that the injected ads and slowed web browsing altered the internet experience of consumers, and thus VisualDiscovery failed to meet "ordinary consumer expectations as to the irreducible minimum performance standards of [that] particular class of good."[12]

I respectfully disagree. Lenovo failed to disclose that VisualDiscovery would act as a man-in-the-middle. However, Lenovo *did* disclose that the software would introduce advertising into consumers' web browsing, although its disclosure could have been better. Furthermore, to the

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[7] *Id.* at n.29.
[8] *Id.* at 1058; Deception Statement at n.4 ("Not all omissions are deceptive, even if providing the information would benefit consumers.… Failure to disclose that the product is not fit constitutes a deceptive omission.")
[9] *Id.* at 1051 ("It is important to distinguish between the circumstances under which omissions are deceptive … and the circumstances under which they amount to an unfair practice.").
[10] 15 U.S.C. §45(n).
[11] Count I of the complaint is pled in the form of a half-truth, but could also be pled as a failure to correct a false representation implied from circumstances, and so I address Commissioner McSweeny's argument as framed.
[12] Statement of Commissioner Terrell McSweeny at 1 (*citing International Harvester*, 104 FTC at 1058).

extent ordinary consumers expect anything from advertising software, they likely expect it to affect their web browsing and to be intrusive, as the popularity of ad blocking technology shows. In addition, unlike the man-in-the-middle technique, VisualDiscovery's ad placement and web browsing effects did not introduce gross hazards obviously outside of consumers' ordinary expectations for advertising software. In short, although VisualDiscovery's ad placement and effect on web browsing may have been irritating to many, those features did not make VisualDiscovery unfit for its intended use. Therefore, I do not find Lenovo's silence about those features to be a deceptive omission.

Fortunately, the outcome in this case does not depend on resolving our disagreement on the application of deceptive omission to advertising software. My goal in writing separately is to maintain the clear distinction set forth in *International Harvester* between deceptive failures to disclose and unfair omissions.[13] When evaluating the legality of a party's silence, we must be careful not to circumvent unfairness's higher evidentiary burden by simply restyling an unfair omission as a deceptive omission.

[13] *International Harvester*, 104 FTC at 1051.