

Statement of Commissioner Terrell McSweeny
In the matter of Lenovo, Inc.
September 5, 2017

I support the Commission’s complaint against Lenovo, but I am troubled by conduct in this case that the Commission fails to challenge. According to the complaint, Lenovo, Inc. preinstalled software on computers that was designed to serve advertisements to consumers while they were browsing websites. The software, called VisualDiscovery, acted as a “man-in-the-middle” between the consumers and all of the websites with which they communicated. It allegedly actively contravened the security posture of consumers’ computers, leaving them vulnerable both to attack from cyber-criminals and to transmitting personal information across the web to Superfish, Inc. servers. These unfair practices violate the Federal Trade Commission Act and are appropriately challenged by the FTC in Counts II and III of the complaint.

But Lenovo’s unlawful conduct went beyond the data security failings alleged in the complaint. The complaint also describes how the software it preinstalled on computers would: (1) inject pop-up ads every time consumers visited a shopping website; and (2) disrupt web browsing by reducing download speeds by almost 25 percent and upload speeds by 125 percent. These facts were not disclosed to consumers and these omissions were deceptive.

Moreover, the FTC alleges that the VisualDiscovery software was designed to be difficult to discover. Consumers were initially made aware of the existence of the VisualDiscovery software via a pop-up window the first time they visited an ecommerce site. But clicking to close that window *opted consumers into the program*. The initial pop-up window failed to disclose that VisualDiscovery would follow the consumers from shopping site to shopping site; slow the performance and functionality of the web sites they visited; and compromise their security and privacy throughout each online browsing session.

Under Section 5 of the FTC Act, the failure to disclose information necessary to prevent the creation of a false impression is a deceptive practice.¹ A seller’s silence may make an implied representation “based on ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good.”² In this case, Lenovo deceptively omitted that VisualDiscovery would alter the very internet experience for which most consumers buy a computer. I believe that if consumers were fully aware of what VisualDiscovery was, how it compromised their system, and how they could have opted out, most would have decided to keep VisualDiscovery inactive.

This is an exceptionally strong case and clearly articulates how the Commission uses its unfairness tools to protect the data security and privacy of consumers. I support Count I, but believe the FTC should have included additional deceptive conduct alleged in the complaint

¹ *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)).

² *Int’l. Harvester Co.*, 104 F.T.C. 949, 1058 (1984).

within the count. The FTC should not turn a blind eye to deceptive disclosures and opt-ins, particularly when consumers' privacy and security are at stake.