

Oral Remarks – Open Commission Meeting October 20, 2022

Advance Notice of Proposed Rulemaking on Junk Fees

Advance Notice of Proposed Rulemaking on Fake Reviews and Endorsements

Advance Notice of Proposed Rulemaking on the Funeral Rule and Staff Report “Shopping for Funeral Services Online”

I. Today’s Agenda

Thank you, Chair Khan. And thank you also to the staff that worked on the three agenda items on the docket today. The staff of the Federal Trade Commission are the crown jewels of the federal government. I appreciate their expertise, tenacity, and commitment to public service. When I dissent from their recommendations, it is never because of the quality of their work.

In December 2021, I warned the public that the FTC was proposing an avalanche of rulemaking on both the competition and consumer protection fronts.¹ In 2022, including today’s proposals, the Commission has proposed six new rules for consumer protection.² The Rule-a-Palooza at the FTC has begun!

As I have stated on numerous occasions, I generally believe that rulemaking is problematic. I have detailed my concerns about rulemaking and the FTC’s troubling rulemaking history in articles and dissents, and will include citations to those materials in my posted remarks from today.³

¹ Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on December 16, 2021, Advance Notice of Proposed Rulemaking to Combat Government and Business Impersonation Fraud (Dec. 16, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598963/r207000wilsonremarksmeeting.pdf.

² Trade Regulation Rule on Deceptive or Unfair Earnings Claims, 87 FR 13951 (Mar. 11, 2022); Trade Regulation Rule on Commercial Surveillance and Data Security, 87 FR 51273 (Aug. 22, 2022); Motor Vehicle Dealers Trade Regulation Rule, 87 FR 42012 (July 13, 2022); Trade Regulation Rule on Impersonation of Government and Businesses, 87 FR 62741 (Oct. 17, 2022). Two new rules are being proposed today: Fake Reviews and Endorsements and Junk Fees. The third rule on the agenda today, the Funeral Rule, is an existing rule.

³ Dissenting Statement of Commissioner Christine S. Wilson, Annual Regulatory Plan and Semi-Annual Regulatory Agenda (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf; Christine S. Wilson & Keith Klovers, The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech, 8 J. ANTITRUST ENF’T 10 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>; Remarks of Commissioner Christine S. Wilson at British Institute of International and Comparative Law, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biicl_6-2819.pdf; Dissenting Statement of Commissioner Christine S. Wilson, Energy Labeling Rule, Comm’n Matter No. R611004 (Oct. 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf.

It is unclear whether the FTC is still a law enforcement agency, or if we are now attempting to reposition ourselves as a legislature. The six potential rules are at early stages and there is no promise that many of these misguided policy proposals will reach final rule status, but these massive regulatory undertakings still require substantial FTC resources.

This diversion of resources has a significant and measurable impact on our other work. In CY 2022, we have brought roughly 30 consumer protection enforcement actions. Compare this number to the 79 consumer protection enforcement actions we brought during CY 2020, the last full year under President Trump.⁴ In other words, we are 85 percent of the way through the calendar year and have brought fewer than half the consumer protection cases we brought in 2020.

I appreciate that we can no longer use Section 13(b) to obtain equitable monetary relief for consumers following the Supreme Court's decision in *AMG*.⁵ I understand that rules may provide avenues for meaningful relief. I know staff is seeking to employ all of the tools in our arsenal to achieve the best results for consumers. Given these circumstances, I have supported rules in areas where the conduct is fraudulent and akin to theft, and where the absence of remedies significantly impacts our ability to address consumer harm. But I cannot support a rule for every potential, let alone theoretical, type of Section 5 violation we have encountered or can imagine.

II. Advance Notice of Proposed Rulemaking on Junk Fees

Thank you to staff for their work on the Advance Notice of Proposed Rulemaking (“ANPR”) on Unfair or Deceptive Fees.

- Office of General Counsel: Austin King and former law clerk Alex Lloyd George
- Division of Advertising Practices (BCP): Stacey Cammarano, Tawana Davis, Annette Soberats, and Serena Viswanathan
- BCP Director's Office: Monica Vaca, Ben Wiseman, and Katie Worthman

Today the Commission votes to issue an Advance Notice of Proposed Rulemaking (“ANPR”) to address how prices are conveyed to consumers. I would like to note that my views on this proposed ANPR are expressed in more detail in my dissenting statement.⁶ Before discussing the substance of the ANPR, two procedural issues merit attention. First, the ANPR is based on the submission of a petition for rulemaking. I encourage consumer and industry groups to monitor the FTC's rulemaking docket and take seriously the public petitions that get published there — yesterday's petition may very well become today's ANPR.

⁴ See Daniel Kaufman, Blog Post: Tallying Complaints: Don't Count Your FTC Chickens Before They Hatch (Dec. 1, 2021), <https://www.adttorneyslawblog.com/ftc/tallying-complaints-dont-count-your-ftc-chickens-beforetheyhatch/>.

⁵ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

⁶ Dissenting Statement of Commissioner Christine S. Wilson, Advance Notice of Proposed Rulemaking – Junk Fees (Oct. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf.

Second, I was given less than three weeks to consider a rulemaking effort that, if adopted, could regulate the way prices are conveyed to consumers across nearly every sector of the economy. I understand that President Biden referenced so-called “junk fees” in remarks to the White House Competition Council on September 26.⁷ Chair Khan sits on that Council. And I recognize that some of these fees may be inadequately disclosed. But manufactured deadlines to stay in lockstep with the Biden Administration should not override our obligation to exercise our significant authority in sober and thoughtful ways. If FTC leadership truly believes that this proposal will result in a rule, then it is irresponsible to shortchange the Commission on the time required to perform our due diligence.

There are kernels of utility in the ANPR that I had hoped to explore with my fellow Commissioners and staff. I agree with ensuring that consumers (1) have access to sufficient information to make informed decisions and (2) are not charged for products or services they did not agree to purchase. I would have looked more favorably on a rulemaking effort narrowly focused on those issues, particularly where we have an enforcement track record. But the ANPR scheduled for a vote today is sweeping in its breadth; may duplicate, or contradict, existing laws and rules; is untethered from a solid foundation of FTC enforcement; relies on flawed assumptions and vague definitions; ignores impacts on competition; and diverts scarce agency resources from important law enforcement efforts. For these reasons, I cannot support the issuance of this Notice.

Given my concerns, I would like to highlight issues on which stakeholder input would be constructive.

Breadth

- U.S. GDP in 2021 totaled roughly \$23 trillion dollars. The ANPR references more than two dozen industries and likely will cover dozens more. What percentage of the goods and services for sale in the U.S. would be covered by the ANPR?⁸
- Given the potential scope of this rule, it appears likely to be exercising a claim of authority that concerns an issue of “vast economic and political significance” and thereby could implicate the Major Questions Doctrine.⁹ What precedent would support the perspective that Congress has clearly empowered the FTC to promulgate a rule that would regulate pricing disclosures for the breadth of good and services identified in the ANPR?
- Do pricing practices and fee disclosures vary across industries and markets? Do all industries lend themselves to a uniform pricing regime? How would a rule requiring that marketing materials explain the purpose of any fees, interest, charges, or other costs work

⁷ Remarks by President Biden at the Third Meeting of the White House Competition Council (referencing many industries that do not fall within the FTC’s jurisdiction) (Sept. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/26/remarks-by-president-biden-at-the-third-meeting-of-the-white-house-competition-council/>.

⁸ Trade associations and consumer groups should take a close look at this ANPR to determine whether their members’ practices could be impacted by any future rule.

⁹ *West Virginia v. EPA*, 142 S. Ct. 2587 (June 20, 2022).

with the FTC's approach to clear and conspicuous disclosures across advertising mediums (e.g., mobile screens or television ads)?

Rule Duplication

- The ANPR appears to overlap with several existing regulations related to advertising and disclosures enforced by the FTC and/or other expert agencies. How would industry and markets determine which rule controls should conflicts arise?
- The Truth in Lending Act ("TILA") and Reg Z outline advertisement terms that trigger disclosures about fees, interest, charges, or other costs. This ANPR considers requiring disclosure of *all* fees, interest, and charges regardless of whether the advertisement contains trigger terms. Are there prevalent unfair or deceptive practices that would support the FTC's adoption of more stringent advertising requirements on the marketing of consumer products, e.g., an Xbox, than the federal government imposes on the marketing of a home loan or credit card?
- The Funeral Rule's goals are to lower barriers to price competition in the funeral goods and services market and to facilitate informed consumer choice. One way the Funeral Rule helps achieve these goals is to require funeral providers to "unbundle" the goods and services they sell and instead to offer them on an itemized basis. But this ANPR takes the opposite approach by favoring up-front, all-in pricing. How might this ANPR impact price transparency and competition?

Basis for the Rule

- Section 18 rules must be based on "prevalent" deceptive or unfair practices. Notably, this ANPR references drip pricing, which has been the subject of FTC workshops and business guidance, but *not* enforcement actions. Can the FTC meet the requisite showing of prevalence without any underlying FTC enforcement?
- What evidence, beyond law enforcement, can be used to demonstrate prevalence? Can a showing of prevalence be satisfied by a workshop or roundtable? News articles?

Flawed Assumptions and Vague Definitions

- Do fees sometimes viewed as unnecessary by consumers reflect attempts by businesses to recover incremental costs? Is it reasonable for businesses to impose fees to recover incremental costs? What percentage of incremental costs can a business recover before it becomes a "junk fee"?
- The ANPR defines "junk fees" to include "goods or services that consumers would reasonably assume to be included within the overall advertised price." What evidence does the FTC need to demonstrate consumer expectations about what services, products, or fees are covered by a published price? Should the FTC be required to demonstrate quantitative or qualitative measures of consumer expectations?
- The ANPR indicates that the Commission is exploring the "costs and benefits of a rule that would require upfront inclusion of any mandatory fees whenever consumers are quoted a price for a good or service." How would this proposal work for dynamic fees, like shipping and handling, that are based on consumer input?

- The ANPR asserts that “junk fees . . . facilitate inflation.” What evidence points to a connection between fees and inflation?

Impact on Competition

- To what extent does competition discipline suboptimal pricing practices?
- Would a government requirement for all-in pricing facilitate coordination among regulated companies in the same industry?
- Could a potential rule incentivize all-in pricing and the bundling of products and services, which would then require consumers to pay for goods and services they may not want or need?

Opportunity Costs

- In 2022, including proposals that I anticipate will be voted out during today’s open Commission meeting, the FTC has initiated the rulemaking process for six new rules. These massive regulatory undertakings require substantial FTC resources. To what extent does our current rulemaking agenda divert resources from our primary law enforcement mandate? Are there other risks associated with our apparent attempt to become a powerful legislature?
 - Are there existing or emerging threats to consumers and competition we are not pursuing because resources are focused on rules instead of cases?
 - Will the credibility of the FTC be tarnished if we pursue broad rulemaking efforts without qualitative and quantitative evidence of consumer injury?

III. Advance Notice of Proposed Rulemaking on Fake Reviews and Endorsements

I would like to thank the staff who worked on this recommendation:

- Division of Advertising Practices (BCP): Michael Atleson, Richard Cleland, Michael Ostheimer, and Serena Viswanathan
- BCP Director’s Office: Rebecca Unruh, Ben Wisemen, and Katie Worthman
- Office of General Counsel: Marie Choi and Josephine Liu

My views on this proposed ANPR are expressed in more detail in my dissenting statement.¹⁰ This afternoon, I will outline my key concerns. I agree that fake and deceptive reviews and endorsements are unlawful, and I have supported the FTC’s enforcement and guidance in this area. But I do not agree that we should seek comment on a proposed rule.

The Commission already has a multi-pronged strategy in place to combat this issue. The Commission has published Guides Concerning the Use of Endorsements and Testimonials

¹⁰ Dissenting Statement of Commissioner Christine S. Wilson, Advance Notice of Proposed Rulemaking – Endorsements (Oct. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner-Wilson-Dissenting-Statement-Fake-Reviews-ANPR-10.20.22.pdf.

(“Endorsement Guides”), which it is currently revising, and a companion business guidance piece.¹¹

In October 2021, the Commission issued a Notice of Penalty Offenses which, as explained in the ANPR, may enable the Commission to obtain civil penalties from marketers that use fake or deceptive endorsements or reviews.¹² Commissioner statements issued at that time lauded the resurrection of these types of Notices, describing them as unique tools that the Commission had allowed to languish and that would allow staff to pursue the full range of actions against bad actors.¹³

The ANPR downplays their likely impact but the agency invested non-trivial resources in drafting the Notice of Penalty Offenses, identifying potential recipients, and serving it on more than 700 entities.¹⁴

Rather than churning out another proposed rule, perhaps we should stay the course on these initiatives and devote the incremental resources to enforcement in other critical areas.

The opportunity cost of launching yet another rulemaking is high. The division overseeing this rule is also charged with enforcement in the opioids arena. Our citizens who suffer from opioid addiction are some of the most vulnerable people in this country; we could use our power and authority to great benefit by devoting more resources to this area.

I appreciate that our remedial authority is limited and that a rule here could assist the Commission in obtaining redress for consumers. But the harm that results from the fake reviews or endorsements is speculative in nature, a fact that the ANPR acknowledges. In these cases, there often is no allegation that the product or service did not perform as represented. The endorsement or review in many cases is not the central claim.¹⁵

¹¹ FTC Press Release: FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews (May 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-proposes-strengthen-advertising-guidelines-against-fake-manipulated-reviews>.

¹² See www.ftc.gov/enforcement/penalty-offenses/endorsements.

¹³ For example, Commissioner Chopra wrote that “this unique authority in consumer protection enforcement . . . that past Commissioners largely ignored, depriving our hard working staff of the ability to pursue the full range of actions against bad actors . . . is particularly important given the Supreme Court’s recent ruling in *AMG Capital Management*.” Rohit Chopra, Prepared Remarks of Commissioner Rohit Chopra, *Regarding the Resurrection of the FTC’s Penalty Offense Authority to Deter False Claims by For-Profit Colleges* (Oct. 6, 2012), https://www.ftc.gov/system/files/documents/public_statements/1597178/prepared_remarks_of_commissioner_chopra_re_penalty_offense.pdf. He further observed that “[a]ctivating the FTC’s Penalty Offense Authority is one of many examples where the agency needs to put its tools to use, rather than letting them languish.” *Id.* Chair Khan agreed, tweeting that “@FTC is resurrecting its Penalty Offense Authority to put companies on notice that certain practices are unlawful and violators will be hit with significant financial penalties.” Lina Khan, @linakhanFTC, <https://twitter.com/linakhanftc/status/1445816849430634496>. The Notice of Penalty Offenses for endorsements was issued on Oct. 13, 2021.

¹⁴ FTC Press Release, FTC Puts Hundreds of Businesses on Notice about Fake Reviews and other Misleading Endorsements (Oct. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements>.

¹⁵ Last year, the Commission issued a Notice of Penalty Offenses for earnings claims and later authorized an Advanced Notice of Proposed Rulemaking seeking comment on a proposed rule. I supported both of those recommendations. Earning claims relate to the core functionality and efficacy of the product or service being marketed. The claims addressed in the earnings claims Notice of Penalty Offenses and the ANPR are typically

Although I disagree with its issuance, it is worth noting that staff’s approach to this ANPR is laudable. Rather than employing an “everything but the kitchen sink” approach, the ANPR is carefully tailored to focus on practices that are likely to be clear violations of Section 5.

For the reasons I have described, however, I cannot support its issuance.

IV. Advance Notice of Proposed Rulemaking on the Funeral Rule and Staff Report, “Shopping for Funeral Services Online”

I would like to thank the many staff for their excellent work on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule.

- Division of Marketing Practices (BCP): Melissa Dickey, Lois Greisman, Rebecca Plett, Patti Poss, and Dotan Weinman
- Regional Offices: Amy Brannon-Quale, Robert Cancellaro, Samantha Denny, Luis Gallegos, Florence Hogan, Michael Liggins, Michael Marino, Brent McPeck, Sammi Nachtigal, Kelly Ortiz, Luis Solares, and Erik Winker
- BCP Director’s Office: Elisa Jillson, Alejandro Rosenberg, and Monica Vaca
- Bureau of Economics: Margaret Patterson
- Office of General Counsel: Austin King and former counsel Kenny Wright

As the Staff Report notes, the Funeral Rule helps to ensure that (1) consumers have access to sufficient information to permit them to make informed decisions; (2) consumers are not required to purchase goods and services they do not want; and (3) misrepresentations are not used to influence consumers’ decisions. I applaud these goals. Accurate information, and more of it, enables purchasers to weigh the costs and benefits of their purchases. Although I generally disfavor rules, I believe there is a limited role for those that establish disclosure regimes where information asymmetries or other factors impede sound decision making.

Under most circumstances, people are capable of making informed decisions based on their individual preferences and budgets. But consumers may not be in the best position to make decisions that will stand the test of time when reeling from the loss of a loved one. The emotional strain of losing a friend, parent, or child may undermine logical assessments when deciding between burial or cremation, choosing a casket, and selecting the scale of funeral services. Recognizing that grief can reduce the ability of consumers to make careful, informed decisions, the original Rule focused on easing the process by ensuring that consumers have needed information and by deterring would-be bad apples who otherwise would be tempted to prey on vulnerable consumers.

The original Funeral Rule became effective nearly 40 years ago. Both the ways in which consumers shop, and the goods and services for which they are shopping, have changed

fraudulent and significant monetary harm often results from the deception. For that reason, I was comfortable seeking comment on that proposed rule.

substantially over the last three decades. The proposed ANPR is narrowly crafted to explore whether revisions are necessary to guarantee that consumers have access to sufficient information when planning a funeral. The Commercial Surveillance ANPR issued two months ago, and the Junk Fees ANPR discussed today, reflect an “everything but the kitchen sink” approach to information gathering. In contrast, the Funeral Rule ANPR is focused on eliciting responses to specific proposals to modernize the rule.

I commend staff for crafting a carefully tailored ANPR that clearly identifies potential areas and issues for updates to an important FTC rule. I support issuing the ANPR on the Funeral Rule and the Staff Report titled “Shopping for Funeral Services Online.”