

Oral Remarks of Commissioner Christine S. Wilson

Open Commission Meeting on September 15, 2022

Notice of Proposed Rulemaking on Government and Business Impersonation

Policy Statement on Enforcement Related to Gig Work

Staff Report on Dark Patterns Entitled “Bringing Dark Patterns to Light”

I. Notice of Proposed Rulemaking on Government and Business Impersonation

Thank you, Madam Chair.

Many thanks to Christopher Brown and Austin King for their work on this proposed Notice of Proposed Rulemaking (“NPRM”). Thanks also to staff in the Division of Marketing Practices, the Office of General Counsel, the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Public Affairs who assisted with this recommendation.

As I noted when the Commission voted to issue an Advanced Notice of Proposed Rulemaking (“ANPR”) for this proposed rule,¹ I generally believe that rulemaking is problematic. Even when decisionmakers are motivated by the best intentions, the costs of rulemaking – particularly in the long run – tend to outweigh its benefits. I explained my concerns about rulemaking in more detail in my dissent from the Commission’s annual regulatory plan and semi-annual regulatory agenda published in December 2021.²

Impersonation fraud, however, causes significant consumer injury. Our data reflect that impersonation fraud imposes a median harm of \$1,000. And this type of fraud has become even more common during the pandemic. Moreover, there is no legitimate business justification for engaging in fraud – impersonation fraud is akin to theft. Consequently, a carefully tailored rule prohibiting this conduct will not stifle competition or inhibit innovation but may deter unlawful activities and could enable the Commission to return money to consumer victims.

The comments submitted in response to the ANPR support the Rule and provide additional evidence of the prevalence of this unlawful conduct, which the Commission previously had found in our law enforcement and detailed in the ANPR.

¹ Christine S. Wilson, Remarks on the 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 Dissenting Statement of Commissioner Christine S. Wilson regarding the Annual Regulatory Plan and Semi-Annual Regulatory Agenda, Comm’n matter number P072104 (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf.

The Rule proposed in this Notice *is* a carefully tailored rule. It prohibits impersonation fraud in clear, simple language. Notably, the Commission was encouraged in the comments to extend coverage of this Rule to conduct that “assists and facilitates” impersonation fraud. Indeed, this kind of provision appears in the Commission’s Telemarketing Sales Rule (“TSR”).³ But, as the Notice explains, there is specific statutory authority for those provisions of the TSR. Here, the authority to promulgate the rule lies in Sections 5 and 18 of the FTC Act, which do not contain specific authority for this type of conduct. While there is some precedent to reach assisting and facilitating conduct using our unfairness authority under Section 5, we lack clear statutory authority. I agree with the decision to limit the rule to the types of conduct for which we possess statutory authority. I also support the Commission’s decision to limit this rule to areas for which we have a demonstrated record of prevalence of deceptive practices. This judicious approach should be followed in other rulemaking proceedings.⁴

For these reasons, I do not oppose an NPRM that prohibits government and business impersonation fraud. I commend staff for their excellent work on this proposed rule.

II. Policy Statement on Enforcement Related to Gig Work

Thank you, Madam Chair. I would like to thank staff from across the FTC for their work in preparing the Policy Statement, which describes in detail the FTC’s enforcement experience regarding gig work. The Policy Statement underscores that the FTC’s regional offices are engaged in some of the most interesting and challenging issues at the Commission.

There are several important aspects of the Policy Statement with which I agree.

First, as the Policy Statement describes, the gig economy is an important part of the overall economy. One study estimates the gig economy will generate \$455 billion in annual sales by 2023.⁵ The Commission long has sought to use its limited resources in ways that give the agency the biggest bang for its buck. Given its prominence in our national economy, the gig economy is clearly an appropriate area in which to concentrate investigations, which the Commission has already done. For example, the Commission in February 2021 reached a settlement with Amazon regarding payments to Amazon Flex drivers.⁶ I applaud Chairman Simons for launching that

³ See 15 U.S.C. 6102(a)(2) (“acts or practices of entities or individuals that assist or facilitate deceptive telemarketing”).

⁴ Recently, I have dissented in instances where the Commission did not follow this approach. Dissenting Statement of Commissioner Christine S. Wilson, Trade Regulation Rule on Commercial Surveillance and Data Security (Aug. 11, 20022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Wilson%20Dissent%20ANPRM%20FINAL%2008112022.pdf; Dissenting Statement of Commissioner Christine S. Wilson, Final Rule Related to Made in U.S.A. Claims (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591494/2021-07-01_commissioner_wilson_statement_musa_final_rule.pdf.

⁵ Mastercard & Kaiser Assocs., *Mastercard Gig Economy Industry Outlook and Needs Assessment*, at 2 (May 2019).

⁶ Compl. and Order, *In re Amazon.com, Inc.*, File No. 1923123 (FTC Feb. 21, 2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/1923123-amazon-flex>.

investigation, and I applaud then-Acting Chair Slaughter for getting the case across the finish line.

Second, and notably, the Policy Statement on Enforcement Related to Gig Work explains that “while online gig platforms may seem novel, traditional legal principles of consumer protection and competition apply.”⁷ I endorse applying the Commission’s traditional legal principles to evolving markets and new factual circumstances. The flexibility of the statutes that the Commission enforces, as well as the creativity and skill of FTC staff in applying those principles to novel fact patterns, are strengths of this agency. I expect to see the Commission tackle additional issues in the gig economy soon.

But that expectation highlights my concerns with the Policy Statement. First, to the extent there are ongoing harms to consumers and gig workers, the Commission should respond with enforcement actions. I wish we were seeing this discussion of policy regarding gig workers in conjunction with a press release for an enforcement action that addresses these practices (assuming, of course, that the enforcement action covers issues within our jurisdiction). Issuing yet another policy statement may generate news stories, but it does not provide relief for consumers.

Second, I am concerned that the Policy Statement is another step in the effort to shift the Commission’s attention from its traditional mission of protecting consumers and competition. Here, the Policy Statement focuses solely on gig workers and does not address harms to consumers. The Statement claims that “protecting [gig] workers from unfair, deceptive, and anticompetitive practices is a priority” for the Commission and asserts that the FTC “will use its full authority” to protect workers.⁸

On the consumer protection side, the FTC routinely brings cases challenging inflated earnings claims,⁹ deceptive franchise opportunities,¹⁰ and other unfair and deceptive practices that merit our attention. Perhaps this is a case of old wine in new wineskins. On the competition side, though, I fear we have a different story. While monopsony concerns are regularly examined under the antitrust laws, protecting workers as a goal of antitrust creates a conflict. Introducing new goals into enforcement decisions will require the Commission to accept tradeoffs that will harm consumers.¹¹

We should not abandon consumers in pursuit of prevailing but mercurial political winds. We should preserve the consumer welfare standard as the touchstone of our mission. If the people of

⁷ Policy Statement on Enforcement Related to Gig Work, at 17 [hereinafter *Policy Statement*].

⁸ Policy Statement at 1.

⁹ *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (filed C.D. Cal. 2020); *FTC v. Ragingbull.com, LLC*, No. 1:20-cv-3538 (filed D. Md. 2020); *FTC v. Moda Latina BZ Inc.*, No. 2:20-cv-10832 (filed C.D. Cal. 2020); *FTC v. Fat Giraffe Mktg. Group LLC*, No. 2:19-cv-63 (filed D. Utah 2019).

¹⁰ *United States v. BurgerIM Group USA, Inc.*, No. 2:22-cv-00825 (filed C.D. Cal. 2022).

¹¹ See Christine S. Wilson, Thomas J. Klotz, & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 *Geo. Mason L. Rev.* 1435, 1453-55 (2019).

this country share nothing else, we share the unifying characteristic of being consumers. Enforcement that looks at consumer impact in its many forms – including competition for labor as an input – protects everyone under the law.

Finally, one competition issue discussed in the Policy Statement warrants close attention. The Policy Statement explains that the “Commission will continue to investigate the effects on workers and competition of any non-compete clauses in the gig economy,” asserting that non-compete provisions may undermine labor markets, drive down wages, and degrade working conditions.¹² Non-compete agreements that are unreasonable as to temporal length, subject matter, and/or geographic scope will be found to violate both federal and state antitrust laws. To date, the economic evidence regarding the impact of non-competes on labor markets and wages is mixed.¹³ It is also important to consider the rationales and benefits of non-competes. For example, these agreements can facilitate innovation by assuring firms that trade secrets and other firm know-how will not be transferred to rivals.¹⁴ Given these many considerations, the Commission should exercise caution when reaching conclusions about non-compete clauses – particularly when substituting the FTC’s judgment for those of the states, many of which are active in this area and almost all of which have robust case law on this topic.

Consequently, I am unable to support the Policy Statement on Enforcement Related to Gig Work.

III. Staff Report on Dark Patterns Entitled “Bringing Dark Patterns to Light”

In April 2021, staff hosted a workshop to examine digital “dark patterns,” a term used to describe a range of potentially manipulative user interface designs on websites and mobile apps. I remember setting aside time to watch portions of that event live, and it was time well spent.

¹² Policy Statement at 12.

¹³ See, e.g., Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan P. Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (U.S. Census Bureau Center For Econ. Studies Paper No. CES-WP-17-09, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782 (finding that a ban on non-competes for technology workers increased mobility by 11 percent and new-hire wages by four percent); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (Dec. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240 (finding Oregon’s 2008 ban on non-competes for low-wage workers increased hourly wages by up to roughly three percent); Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, J. OF HUMAN RES. at 3 (Feb. 7, 2019), http://kurtlavetti.com/UIPNC_vf.pdf (“Using three years of longitudinal earnings data per physician, we estimate that NCAs increase the annual rate of earnings growth by an average of 8 percentage points in each of the first 4 years of a job, with a cumulative effect of 35 percentage points after 10 years on the job.”); Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. OF LAW, ECON., AND ORG. 2, at 376-425 (August 2011) (finding that non-competes increase incentives for firm-sponsored employee training).

¹⁴ OFFICE OF ECON. POLICY, U.S. DEP’T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS, 9 (March 2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> (“[N]on-competes can encourage additional economic activity and broader information sharing when trade secrets are significant.”).

Congratulations to all of the staff who worked on last year’s workshop and today’s Staff Report, *Bringing Dark Patterns to Light*. And thanks also to Stephanie Liebner and Eleni Broadwell for their informative presentation today. Businesses and consumers will greatly benefit from (1) the report’s discussion of our past enforcement efforts, (2) the summary of last year’s workshop on dark patterns, and (3) the discussion of conduct the agency will continue to prioritize in its enforcement work.

The term “dark patterns” deserves a few words of explanation. It certainly sounds ominous – but as the report explains, not all dark patterns are unlawful. And this term is typically deployed with respect to newly emerging online activities. But as the report makes clear, many dark patterns are simply common bad business practices that also occur in the brick-and-mortar context, and that the FTC has continuously addressed through enforcement and consumer education.

The concepts underlying the “dark patterns” phenomenon also merit a few words. Digital dark patterns are manipulative interfaces that can have the effect, intentionally or unintentionally, of obscuring, subverting, or impairing consumer autonomy, decision-making, or choice.

I believe in allowing people to make their own choices about how to order their lives, based on their individual assessments of benefits and costs, as long as they are not harming others. And I have confidence that, in the words of Cass Sunstein and Richard Thaler, “people make good choices in contexts in which they have lots of experience, good information, and prompt feedback.”¹⁵ But research demonstrates, again in the words of Sunstein and Thaler, that people make decisions of lower quality in “contexts in which they are inexperienced and poorly informed, and in which feedback is slow or infrequent.”¹⁶ In other words, the rational economic actor model has its limits.

Because our lives are busy, we use shortcuts to help us make quick decisions, especially concerning uncertain events. These shortcuts are referred to as rules of thumb, or “heuristics.” Although shortcuts can sometimes be helpful, insights developed decades ago by Amos Tversky and Daniel Kahneman reveal that heuristics tend to result in systematic and predictable blunders that can negatively impact health, wealth, and happiness.¹⁷

Building on this literature, in a book titled “Nudge” published in 2008, Thaler and Sunstein proposed the use of so-called “nudges” that attempt to move people in directions that will make their lives better.¹⁸ The goal of a nudge is to “help people make the choices that they would have made if they had paid full attention and possessed complete information, unlimited cognitive ability, and complete self-control.”¹⁹ A nudge is “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing

¹⁵ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: THE FINAL EDITION* 12 (2021).

¹⁶ *Id.* at 12.

¹⁷ Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, *SCIENCE* 185, no.4157 (Sept. 1974) at 1124–31, <https://www.science.org/doi/10.1126/science.185.4157.1124>.

¹⁸ THALER & SUNSTEIN, *supra* note 15 at 7.

¹⁹ *Id.* at 6.

their economic incentives.”²⁰ Examples of nudges include automatically enrolling people in retirement savings plans from which they can easily opt out, and placing candy and sugary foods out of children’s line of sight at grocery stores. Through so-called “choice architecture,” institutions can nudge people in directions that will make their lives better.

Last year, Thaler and Sunstein published an updated version of their book. This new edition includes a chapter titled “Sludge,” based on the recognition that nudges and behavioral science can be used for harmful purposes as well as benevolent ones. Characterized as “the dark side of choice architecture,” the authors define sludge as “any aspect of choice architecture consisting of friction that makes it harder for people to obtain an outcome that will make them better off (by their own lights).”²¹ Thaler and Sunstein note that many dark patterns fall within the category of sludge, including making it hard to cancel a membership or a subscription.²²

In their report, staff observe that the term “dark patterns” was first coined in 2010 to describe the ways in which software can trick users into doing things they didn’t mean to do.²³ In this context, dark patterns subvert informed choice rather than foster it. While the use of this term may be relatively new and attention grabbing, at its core the term describes practices that have long been the focus of FTC enforcement actions. For example, the agency has prosecuted companies that used ads deceptively formatted to look like news articles to drive sales;²⁴ sued websites and apps that obscured or hid fees;²⁵ and challenged efforts by companies that prevented customers from canceling memberships.²⁶

Rules of thumb and decision-making shortcuts have value. And companies legally can capitalize on common heuristics in ways that increase profits. But as today’s agenda makes clear, dark patterns that violate the law rightly constitute a priority for the agency. Many thanks to staff for their excellent workshop and insightful report, which will prove useful to legitimate companies as they consider how to design their choice architecture.

²⁰ *Id.* at 7.

²¹ *Id.* at 152.

²² *Id.* at 153.

²³ FTC, *Staff Report: Bringing Dark Patterns to Light*, 2.

²⁴ FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements (Dec. 22, 2015), <https://www.ftc.gov/business-guidance/blog/2015/12/ftc-issues-enforcement-policy-statement-and-business-guidance-native-advertising>.

²⁵ FTC Compl., *FTC v. LendingClub Corp.*, Case No. 3:18-cv-02454 (N.D. Cal.), https://www.ftc.gov/system/files/documents/cases/lendingclub_corporation_first_amended_complaint.pdf.

²⁶ *FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2014); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-RFB-GWF (D. Nev. 2016); *FTC v. NutraClick LLC*, No. 2:16-cv-06819-DMG-JPR (C.D. Cal. 2016); *FTC v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC v. Triangle Media Corp.*, No. 3:18-cv01388-LAB-LL (S.D. Cal. 2018); *In re: UrthBox, Inc.*, No. C-4676 (FTC 2019); *FTC v. Apex Capital Group, LLC*, No. 2:18-cv-09573-JFW-JPR (C.D. Cal. 2018); *FTC v. AH Media*, No. 3:19-cv-04022-JD (N.D. Cal. 2019).