

**Oral Remarks – Open Commission Meeting  
October 20, 2022**

**Advance Notice of Proposed Rulemaking on Junk Fees**

**Advance Notice of Proposed Rulemaking on Fake Review**

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.<sup>4</sup> 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*.<sup>5</sup> I understand that rules may provide



with the FTC's approach to clear and conspicuous disclosures across advertising mediums

- 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.<sup>10</sup> 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

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<sup>10</sup> 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](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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup>

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<sup>11</sup> FTC Press Release: FTC Proposes381A



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.”