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A Progress Report on Key Priorities, and a Warning on AI Self-Regulation

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It's wonderful to be back at the National Advertising Division, which for so many years has been a key partner to the FTC as we work to ensure a fair and honest marketplace for consumers and marketers alike. This is my second time addressing this group. Last year, I laid out the FTC's strategy for protecting the public from unfair and deceptive practices. Our jurisdiction is incredibly broad – from environmental claims to children's privacy – but across the board our strategy rests on three pillars.

First, we are focusing our enforcement resources on the practices that are causing the most harm to consumers. Second, in combatting these practices, we are seeking strong relief that not only halts misconduct but also shifts incentives to protect consumers going forward. And third, when we identify broader problems in the market that are not being remedied through case-by-case enforcement alone, we are deploying additional tools to protect the public.

We are delivering on that strategy across multiple program areas, and today I'd like to provide status updates on three areas where our strategy is on full display. First, we are taking action to combat

Combatting Junk Fees and Deceptive Pricing

challenged bait-and-switch advertising, such as in our recent actions against LasikPlus¹⁰ and Passport Automotive,¹¹ and have obtained forward-looking relief including compensation for wasted time. And I'd be remiss to not mention our ongoing litigation against Intuit,¹² particularly the Administrative Law Judge's recent opinion finding – after a meticulously¹³ sifting more than 200 pages – that the company's "free" ad campaign deceived the public in violation of Section 5.

But despite these actions, it is clear that the problem of deceptive pricing is not going away. That is why we are taking additional steps to root out this problem market-wide. Last year, we proposed a rule that would prohibit both hidden fees and bait-and-switch advertising in the auto sector.¹⁴ And this year, we are continuing work on a rulemaking around hidden and bogus fees.¹⁵ In both areas, we are carefully examining the comments we received as well as general trends in the marketplace to assess our next steps.

The flurry of activity in this area should send a clear message. When it comes to being honest with consumers about prices, don't wait to get a CID from the FTC. Don't wait for rules to be finalized that could trigger stiff civil penalties. Companies should act now to clean up their advertising. To disclose actual prices upfront. To not charge fees that consumers did not authorize. Firms that ignore these warnings can expect complaints from their customers, and may eventually be on the receiving end of a complaint from us.

Challenging Dark Patterns

The second major challenge we're confronting are deceptive design techniques known as dark patterns.¹⁶ Many questions have been raised about the FTC's use of this term. How are dark patterns different than ordinary deception? When are dark patterns illegal? How should companies avoid law enforcement scrutiny? I want to share my perspective on these questions.

First, while dark patterns frequently are deceptive, it is important to stress that dark patterns represent a distinct concern. In a traditional deceptive advertising case, the FTC might challenge a

¹⁰ Press Release, FTC Order Requires LasikPlus to Pay for its Bait-and-Switch Eye Surgery Ads, FTC (Jan. 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-order-requires-lasik-plus-pay-its-bait-switch-eye-surgery-ads>

¹¹ Press Release, Federal Trade Commission Takes Action Against Passport Automotive Group for Illegally Charging Junk Fees and Discriminating Against Black and Latino Customers, FTC (Oct. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-takes-action-against-passport-automotive-group-illegally-charging-junk-fees> [hereinafter Passport Automotive Matter].

¹² Press Release, FTC Sues Intuit for Its Deceptive TurboTax "free" Filing Campaign, FTC (Mar. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit>

false or unsubstantiated claim, such as being able to lose ten pounds in one week. These claims, of course, have not gone away. But digital advertising has introduced new and I think even more pernicious forms of deception. Advertising can now be highly interactive, and consumers' behaviors can be carefully tracked. Is a consumer more likely to turn over personal information when a button is green and bolded, if the alternative is faded and gray? Will a consumer be more likely to order a product if there's a ticking clock in the background, or if there's a message that 20 other shoppers have this item in their cart? Is a consumer more likely to take an action if they are repeatedly and disruptively prompted with a request?

Critically, these interactions create a feedback loop whereby companies can continuously optimize their interfaces based on consumer interactions. And for some marketers, they can even personalize their interfaces based on consumer interactions. And for some marketers, they can even personalize their interfaces based on consumer interactions.

thinking about them.²⁶ And we're also addressing these patterns through rulemaking. Our proposed click-

also challenging their enablers, particularly VoIP providers³⁶ and consent farms³⁴ – including Fluent, a publicly traded firm that sold hundreds of millions of leads to telemarketers³⁵ proud to say that while robocalling remains a scourge, and while it is fueled by many factors, we are making real progress in our war on unwanted calls. In fact, the number of telemarketing complaints to the FTC fell significantly between fiscal years 2021 and 2022, and we’re on track for another decline in 2023.³⁶

Since the onset of the pandemic, we’ve also seen a major surge in deceptive marketing schemes.³⁷ Our approach here, too, is multifaceted. We are bringing significant cases against firms like WealthPress³⁸, DK Automation,³⁹ and Automators AI.⁴⁰ And we’re adapting our approach to

Public Service Loan Forgiveness (PSLF) (Feb. 18, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-steps-up-scrutiny-of-student-loan-servicers-who-deceive-borrowers-about-public-service-loan-forgiveness/>

³³ See, e.g., Complaint, United States v. Hello Hello Miami, LLC 1:23CV-22553 (S.D. Fla. filed July 10, 2023) (filed on behalf of the FTC), https://www.ftc.gov/system/files/ftc_gov/pdf/hello_hello_miami_as-filed_complaint.pdf; Press Release, FTC Sues to Stop VoIP Service Provider That Assisted and Facilitated Telemarketers in Sending Hundreds of Millions of Illegal Robocalls to Consumers Nationwide (May 12, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-stop-voip-service-provider-assisted-facilitated-telemarketers-sending-hundreds-millions>; Press Release, FTC Sues to Stop Interconnected Web of VoIP Service Providers Carrying Robocalls Pitching Phony Debt Relief Services (Feb. 17, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-sues-stop-interconnected-web-voip-service-providers-carrying-robocalls-pitching-phony-debt-relief-services>; Press Release, I am particularly proud of our Project Point of No Entry, spearheaded by our Cleveland office, that targets providers that route millions of illegal robocalls from overseas. Press Release, FTC Ramps Up Fight to Close the Door on Illegal Robocalls Originating from Overseas Scammers and Imposters, FTC (Apr. 11, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-ramps-fight-close-door-illegal-robocalls-originating-overseas-scammers-imposters>

³⁴ See Complaint, United States v. Fluent, LLC No. 9:23cv-81045 (S.D. Fla. 2023) (filed on behalf of the FTC, stipulated order entered Aug. 11, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1923230fluentcomplaintandattachehereinafterFluentMatter; Complaint, United States v. Viceroy Media Solutions, LLC 3:23cv-3516 (N.D. Cal. 2023) (filed on behalf of the FTC, stipulated order entered July 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/ecf_1_quick-jobs_complaint.pdf

³⁵ Fluent Matter, *supra* note 34.

³⁶ Press Release, FTC Releases Updated Do Not Call Registry Data Book; Impersonator Fraud Tops List of Consumer Complaints (Nov. 21, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-releases-updated-do-not-call-registry>

ever-evolving forms of deceit. For example, in WealthPress, the defendants claimed they could earn consumers quick wealth using a proprietary algorithm – a claim we challenged as deceptive. Given the proliferation of these schemes and the massive volume of consumer complaints, we are also making use of a number of broader initiatives, including our money-making Notice of Penalty Offenses⁴¹ and our ongoing review of the Business Opportunity Rule.⁴²

As our country becomes more diverse, we are also concerned that consumers who don't speak English as a first language may face exploitation. We are undertaking important efforts to address this challenge.

First, we are significantly ramping up our consumer education and outreach efforts around fraud targeting non-English speaking consumers. I encourage you to check out ftc.gov/languages, where we provide comprehensive educational materials in a host of languages. As scammers adapt to changing circumstances, so do we. For example, following the devastating Maui wildfire, we worked with partners on the ground to translate our one-pager on avoiding scams into the top languages needed on the island. Finally, a particularly exciting development, we'll soon be announcing an exciting initiative to ensure that we can accept reports about fraud over the phone in other languages.

Second, we are making clear through our enforcement work that we will not tolerate the exploitation of non-English speakers. In our action against Ganadores, a real estate investment scheme, we alleged that it was unfair and a violation of FTC rules to advertise services in Spanish only to provide needed disclosures in English.⁴³ The FTC has long committed itself to protecting consumers in every community, and today our education and enforcement work are breaking new ground to deliver on that commitment.

Power High Earnings Through Online Stores, FTC (Aug. 22, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-stops-business-opportunity-scheme-promised-ai-boosted-tools-would-power-high-earnings> [hereinafter Automators AI Matter].

⁴¹ Press Release, FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties, FTC (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-moneymaking-claims-could-lead-big-penalties>.

⁴² Press Release, FTC Explores Changes, Possible Expansion of Its Business Opportunity Rule, FTC (Nov. 17, 2022), <https://www.ftc.gov/news-events/news/press>

is being used.⁵⁹

In a sharply divided country, the fact that so many Americans are unhappy with how the digital economy is working is a damning indictment of our experiment in self-regulation. And it should lead us to question whether anyone could honestly say that it was ~~so wise~~ to pass comprehensive privacy legislation. Wise to let a handful of tech giants decide how much information would be collected about us. Wise to count on consumers to protect themselves by reading privacy policies.⁶⁰

My own view is that these policy choices – and yes, they were ~~choices~~ grave mistakes. I think we need to accept that ~~self~~ regulation around digital privacy is not working. And I think we need to learn from these mistakes as we confront the next wave of emerging technology.

Before I get to how the FTC is learning from these mistakes, let me pause to comment on self-regulation in general – when it works and when it does not. In my view, self-regulation can be successful when there are clear, meaningful policy objectives; ~~created~~ independent institutional structure to develop and enforce rules; and, most importantly, when there is a clear legal framework underlying the scheme and an external enforcer – like the FTC – able to act as a cop on the beat to enforce the law effectively.⁶¹ This last prong is critical. In fact, we saw a generation ago how self-regulatory efforts accelerated after the FTC called on Congress to pass privacy legislation, only to collapse after we a (ke)4(ns)-1 (t)-2 (i)-4(ns)(l)-6 (l)-6 (ap)-4 (s)-5g (o 1nd [(i)-2)-2 (o2e(w)-2 (e) (nf)3eT (c

even clear consensus on what our objectives should be.

Consider how generative AI is already leading market participants to accelerate their data collection, with firm after firm changing their privacy policies to make it easier for them to collect even more data from us and use it in new ways⁶⁴. In contrast to what we see among NAD participants – where firms often challenge their competitors when their advertising steps out of line – here, firms are racing in lockstep to supercharge their data collection.

This strikes me as a particularly damning indictment of the failure – either by legislation or by self-regulatory efforts – to establish substantive protections for people’s data. We’ve allowed companies to harvest consumer data without any real limitations, and now some of these some companies are creating opaque AI systems that capitalize on – and accelerate – their earlier hoarding. It seems, in other words, like one self-regulatory failure is begetting another⁶⁵.

Given this history, we are taking a different approach than we did at the onset of Web 2.0. Let me describe three key principles that are driving our strategy.

First, the FTC recognizes that for America to remain the leader in developing cutting-edge technologies, our markets must be open, fair, and competitive. This means that fledgling upstarts should have the chance to compete with the incumbents who became dominant in the era of Web 2.0. On that score, we’re making significant progress.

For example, we successfully sued to block the largest semiconductor merger in US history – a merger that threatened to undermine competition and impede innovation in a critical market undergirding next-generation technologies⁶⁶. And earlier this year, we proposed a rule to prohibit noncompete agreements in labor contracts, which would help ensure that startups have a chance to

compete with the largest incumbents for talent.⁶⁷ Our Bureau of Competition, Bureau of Consumer Protection, and Office of Policy Planning are working more closely than ever to drive this agenda forward.

Second, we are using our existing tools – especially enforcement – to challenge unfair or deceptive practices that we’re already seeing emerge in connection with this technology. We have made clear that if you use or claim to use AI to defraud the public or help others do the same, you can be liable under the FTC Act, the TSR, or other laws we enforce. Indeed, just last month we secured a TRO against a firm that claimed to use AI to make consumers’ lives ⁶⁸more difficult. We have made clear that if you rely on algorithmic decision-making, you should be sure it’s not resulting in unlawful ⁶⁹discrimination. And we laid the groundwork for such a claim with our first case, Passport, challenging discrimination under the FTC Act.⁷⁰ We’ve made clear that AI claims need to be substantiated, and earlier this year brought our first case alleging that a claim around an algorithm is based ⁷¹on false information. As we encounter new problems in the marketplace, we will not hesitate to use the tools we have to protect the public. io (i)-2 (en.04 0 0 8.

Commission has created an Office of Technology that has been busy recruiting some of the most talented technologists in the world, who are working hand in hand with our outstanding attorneys, investigators, consumer education specialists, and economists. In fact, since Chair Khan took office, we have roughly tripled the number of cross-agency technologists at the agency.

What should be clear from these principles is we are not going to sit back and let consumers fend for themselves, or let those looking to monetize AI write their own rules. We will use every tool we have to protect the public. And when we find that our tools are falling short, we will be upfront with Congress about what we believe is needed.

Conclusion

Let me end on the same note I did last year. Our agency is confronting some of the biggest challenges in the economy, and there's no doubt we're facing a lot of scrutiny. Indeed, as a longtime reader of the Wall Street Journal, I am reminded of this almost daily. But our extraordinary staff