

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.

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”

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

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 noncompete 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.,

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.

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