



FTC Open Commission Meeting- September 15, 2022

Lina Khan:

Good afternoon everyone, thanks so much for joining us. We will come to order. We are meeting in open session today to consider three items before the commission, we'll get started by hearing from members of the public. I will turn it over to Jay Mayfield to facilitate this portion of the meeting. Jay, we're not able to hear you.

Jay Mayfield:

- may be maintained, used and disclosed to the extent authorized or required by applicable law regulation or order, and it may be made available in whole or in part in the public record in accordance with the commission's rules. At this time, we'll hear from members of the public, each member of the public will be given two minutes to address the commission. Our first speaker will Bilal Sayyed.

Bilal Sayyed:

Thank you. Tim Wu has called for overruling the North Pennington doctrine, condemning its protection of, quote, corrupt and deceptive political practices, end quote, from antitrust liability. I had the good luck to work for Tim [inaudible 00:01:14] when he was at [inaudible 00:01:15]. He guided and directed agency staff to find cases of advocacy opportunities to constrain and limit the scope of the doctrine. The agency, especially the healthcare shop, has continued to seize opportunities to resist expansion of doctrine. The commission has an easy opportunity to continue this effort. The agency's international guidelines have consistently adopted the position that the principles underlining the North Pennington doctrine applied to petitioning of foreign governments. The guidelines state that the agencies will not challenge genuine efforts to obtain or influence action by foreign government entities, even if the intent or effect of that effort is to restrain or monopolize trade in US markets.

This position is unnecessary and inconsistent with the commission's interest in limiting the scope of exemptions from the antitrust laws. The position was first adopted in the first iteration of the international guidelines because some position on the application of [inaudible 00:02:12] to the petitioning of non-US government entities was thought necessary. This position was not compelled by the case law and maintaining this position is not required by the case law either. While there was some appellate case law suggesting [inaudible 00:02:27] would apply to the petitioning of foreign governments, these cases suffer from what Tim Wu has said of the doctrine more generally. That it has grown well beyond the scope of the underlying First Amendment basis. The agencies should abandon this position and amend the international guidelines accordingly. If DOJ is unwilling to do so, the

commission can indicate it does not agree with the position and will not be bound by it. I will submit a written footnoted version of these remarks. Thank you.

Jay Mayfield:

Thank you Bilal. Our next public speaker is C. Leroy Cavazos Reyna.

C. Leroy Cavazos Reyna:

Good afternoon Commissioner Chair Khan and commissioners of the FTC. The United States Hispanic Chamber of Commerce acts as a champion, an advocate for Hispanic communities in an effort to ensure individuals, businesses and community groups are represented in all matters which affect our combined economic vitality in our country. Today, as the FTC seeks a policy on the gig economy, the Hispanic Chamber of Commerce stands before you to address the immense positive impact the gig economy has had on Hispanic communities across the country. The US Hispanic Chamber of Commerce represents the economic empowerment interests of more than 5 million Hispanic owned businesses in America, along with our network of 260 Hispanic chambers of commerce across the country. The gig economy provides people the flexibility to earn when and where they want and work in a way that fits their personal life and the evolving culture of work in America after an unprecedented global pandemic that COVID 19 showed our country.

This flexibility and ease of access has driven the appealing growth of this new dynamic industry for the very communities that we represent. Underserved communities experience an unequal burden when it comes to the economic barriers, including barriers to entry into new lines of work such as the gig economy. Furthermore, the gig economy has removed so many of these barriers and lifted our communities by increasing access to earning opportunities in a flexible manner. Gig platforms represent a sector of the economy growing at nearly three times the national average rate and offer almost limit this potential to those taking advantage of the on demand economy [inaudible 00:05:20].

Jay Mayfield:

Thank you very much. Our next speaker is Justin Nelson.

Justin Nelson:

Hey, good afternoon commissioners and thank you so much for the opportunity to address you on the same topic as my colleague from the US Hispanic Chamber of Commerce. I'm Justin Nelson, co-founder and president of the National LGBT Chamber of Commerce or NGLCC. NGLCC serves as the primary advocacy organization dedicated to expanding economic opportunities and inclusion of the LGBT community. The individuals and businesses we represent strive to gain economic access to these opportunities and experience and the opportunity to experience a high quality of life while being active participants in our local, state and national economies. Flexibility and access are key ingredients to ensuring underrepresented communities can experience upward mobility with a low barrier to entry. I joined today as the FTC considers the gig economy policy.

We urge you to acknowledge and understand that the gig economy is a crucial facet of the journey for many in our community. Gig work is predicated on the elements like flexible earning and increased business competitiveness. These elements have allowed for the gig economy to transform LGBTQ and other diverse business communities in unparalleled waves. NGLCC is a home for many individuals that have been excluded from traditional working opportunities for far too long and the gig economy has been invaluable for providing earnings opportunities that many in our communities have previously been denied. Just as the NGLCC celebrates that which makes us unique, we also champion innovation

such as the gig economy, which encourages each of us to be unique for the needs that we seek. Of the nearly 20 million LGBT adult Americans in this country that identify as LGBTQ, many of them choose the gig economy. Independence, flexibility and access to earning opportunity are all associated with the gig economy and are crucial elements to the safety and growth of underrepresented and underserved communities like mine. Thank you very much.

Jay Mayfield:

Thank you. Our next speaker will be Rich Gandhi. Rich.

Rich Gandhi:

Hello. My screen is not working properly, I don't know. So thank you for inviting me to speak over here. I am actually part of the IHG system and we recently went through a data breach worldwide and our properties are facing major issues and IHG is not taking this securities system seriously. The cyber attack devastated our business, it had made it very hard for our customers and our employees to manage the hotel, the system, the IHG reported that they were doing routine maintenance, but that was not the case, they were lying about it. They keep trying to mask the real issue, we do not know the ramifications of this issue, how far or how deep it's roots are. We are dealing with a lot of other things like the RFP season has started in the hospitality business, we cannot complete RFPs, which would be basically generating business for the future, for next year, we can't complete enough of that because the system is broken.

Customers couldn't book hotel rooms or cancel hotel rooms, they had booked hotel rooms on the website, but they would never show up on the hotel site so we didn't know if they had booked or paid or what you may have. These type of issues keep happening regularly in the hospitality space, especially with companies such as IHG who has not taken things like this seriously. But the worst part of it is that they keep charging franchisees additional franchise fees, technology fees on top of technology fees, which are not disclosed to us. When I first signed my franchise agreement, none of this was disclosed. Now what has happened is this just keeps exasperating the real problem and we don't know what the end in site is.

Jay Mayfield:

Thank you Rich. Our next speaker is Berin Szoka. Berin Szoka.

Berin Szoka:

Thank you. My camera also is not working, but I'm Berin Szoka, president of Tech Freedom and a longtime scholar of the FTCs consumer protection work. Last year the commission held a workshop on dark patterns, Professor Harry Brignull, who helped to popularize the concept, noted how useful the term dark patterns have been for marketing and spreading the word, or the idea, but, quote, from a sort of legal perspective he said it's a bit vague and sloppy and you're probably going to want to use something, a great deal more specific when writing laws and what have you. I would encourage the commission to keep that advice in mind today as it considers the staff report about dark patterns, that report certainly could help to inform the kinds of cases the commission brings under its broad authority over unfair and deceptive practices, but only if the commission gets specific about the kinds of questions the commission will have to answer in any enforcement action it brings regarding dark patterns. To start, the concept of darkness implies that consumers are necessarily unaware of what is happening.

That kind of opacity might be problematic, but by itself it's not sufficient under Section 5N of the FTC Act. An unfair practice must involve harm that is not reasonably avoidable by consumers themselves. In

other words, it's the harm, not the practice, that must be obscure to consumers and the commission will have to show that in any case it brings. Second, any enforcement action under unfairness will have to be specific about what constitutes substantial injury under Section 5. General claims about manipulating consumer preferences will not be sufficient, such claims have long and made about all forms of advertising, but the commission has never accepted them as adequate evidence of substantial injury as required by Congress when it enacted Section 5N in 1994. And finally, whatever the commission's theory of injury is, it will have to weigh such injury against counter-veiling benefits to consumers or to competition. So I hope all of those things will be addressed, at least somewhat, in the report that the commission votes on today to help guide the commission's enforcement actions regarding dark patterns.

Jay Mayfield:

Thank you, Berin. Our next speaker is Tineka Singleta.

Tineka Singleta:

Good afternoon, I am Dasher here in the Washington DC and Maryland, Virginia area. I'm speaking for this particular gig economy because it provides for us too, the flexibility is awesome. I'm a mother of an autistic child, I own two businesses and I am a Dasher and this gig economy most definitely benefits me along with many other Dashers, other women are also mothers of autistic children so we're able to juggle the responsibility of being a parent and also having the convenience to DoorDash along with running businesses at the same time. So I just wanted to speak up for the Dasher community and say what a benefit the gig economy is for us. Thank you.

Jay Mayfield:

Thank you. Our next speaker is Dwanet Perry.

Dwanet Perry:

Hi, my name is Dwanet. I am a Dasher, I've been dashing for two years. I was laid up on my job and I recently had my son and I wanted to get a job that could be flexible for me, so I wanted to spend time with him figuring out my next steps. Signing up was free and easy and it became income quickly for me, I was able to not spend time with my son because of the situations at home and candle business that I created on my own, the business is called FlameNMama.

Today I work at a car dealership delivering with DoorDash for a few hours a week and pursue my candle business as well. I know many people have questions about this type of work, but I'm millions of people of DoorDash without needing permission, I actually am able to spend time with him, do stuff with my son. I have time with my business and it gives me the ability to just do other things. So I support DoorDash, I hope you hear my story, understand how valuable it is. More than anything, it's important that you take the time to listen to those who are impacted the most, the DoorDashers, the drivers, the shoppers and more importantly, the flexibility that we have is crucial. We need this work to be protected and everyone to see that it's valuable. Thank you.

Jay Mayfield:

Thank you, Dwanet. Our next speaker is Timothy Lee. Timothy, you're muted right now.

Timothy Lee:

Okay, there we go. Sorry, I thought I already was. I'm speaking with regard to the gig economy as well on behalf of the Center for Individual Freedom and hundreds of thousands of supporters and activists across the country, and I'm going to echo a lot of the sentiments already expressed with regard to the gig economy. The main takeaway is that the gig economy works for millions of workers and consumers, and this is the worst possible time for the federal government or any level of government to potentially disrupt that amid inflation and other economic uncertainty. The gig economy is introduced a universe of new opportunities for consumers, workers and businesses, and that role will only grow in future years. Even prior to the COVID Pandemic, the US Bureau of Labor Statistics estimated that about 36% of the workforce had sought gig work and contributed \$1.3 trillion to the US economy.

Accordingly, the FTC must avoid any damaging or disruptive policy changes that might threaten that. In an era of increasingly precarious employment and social disruption, the gig economy allows Americans, including some of the people from whom you've heard already, to utilize a broad array of earning opportunities, which also allow employers flexibility in meeting a wide array of needs. Ongoing advances in app based telecommunications will only make the gig economy easier and more popular on a daily basis. For individuals, the gig economy empowers them to achieve an optimal work life balance depending on their personal and family needs, and for small businesses, especially, it allows them compete on a more even field in an increasingly global. Importantly, the gig economy also underserved and underprivileged economies access to supplemental income and employment opportunities with low barriers to entry. Thank you very much for this opportunity.

Jay Mayfield:

Thank you. Our next speaker is Kristin Sharp. Kristin.

Kristin Sharp:

Thank you. My name is Kristin Sharp and I'm a CEO of Flex. Flex represents America's ride share and delivery platforms, the workers who earn with them and the people in communities who use them. Our members include DoorDash, Gopuff, GrubHub, HopSkipDrive, Instacart, Lyft, Shipt and Uber. Flex's mission is to stand with the millions of workers who value flexibility and independence and app based work. We believe these workers deserve the opportunity to earn income on their own terms. This innovative industry offers workers an unprecedented level of control over when, where, how and crucially how much they work. Every day, workers tell us that flexibility is what brings them to these platforms and it's what they value above all else. Even in today's strong labor market, tens of millions of Americans, including those historically marginalized by traditional jobs, are voting with their feet to work through app based platforms.

They want to earn extra income, meet financial goals, support a business or accommodate life or health circumstances like those mentioned already today that conflict with traditional employment. Many choose to work across multiple platforms benefiting from the intense competition between companies in our industry. Poll after poll shows that these workers prefer independent contractor status over being classified as employees. In fact, recent research found that 82% of respondents prefer to remain independent. Policy makers who take into account what app-based workers, themselves, consistently and overwhelmingly say they want. In addition, our industry has a positive impact on communities across the country, app-based platforms are expanding money making opportunities in underserved areas, connecting consumers with new food and transit options, and advancing sustainability. As you consider our industry, we urge you to learn more about its impact and listen to the 50 million plus Americans who fundamentally value the power that app-based work puts at their literal fingertips. We

welcome the opportunity to collaborate with the FTC further and convene a discussion about our impact on workers and the communities that they serve. Thanks again.

Jay Mayfield:

Thank you, Kristin. That concludes our public comments for this meeting. I'll turn it back over to Chair Khan.

Lina Khan:

Thanks so much, Jay, and thanks to each of the speakers for sharing your feedback and concerns. We really value your input and the time that you take to come speak with us. So we will now turn to the items on the agenda, the first topic on the agenda is the commission's work to implement rules addressing government, business and nonprofit impersonation fraud. In December of last year, the commission initiated a proceeding to explore whether we should issue rules prohibiting this type of impersonator fraud that we've seen can cheat consumers out of billions of dollars annually. This would mark our first rule making under our new streamline procedures for rules that address unfair or deceptive practices. We solicited public comments and received valuable input from consumers, from businesses, from trade associations, from law enforcers, and throughout those comments, we received unanimous support for the commission now moving forward. After reviewing these comments, the commission staff is now recommending that we take the next step in the rule making process and publish a notice of proposed rule making in the federal register.

The team that has been doing this work has just done phenomenal effort here to move this proceeding efficiently. We've gone from issuing an ANPR to being ready to publish an NPRM in under 10 months, which is a real feat. So I really want to give a big thanks to the whole team, especially Christopher Brown, Lois [inaudible 00:20:51], [inaudible 00:20:52], Alejandra Rosenberg, and Monica Vaca from the Bureau of Consumer Protection, Austin King and Lindsay Wilson from the Office of General Counsel, Jan Lau and Margaret Patterson from the Bureau of Economics and Jay Mayfield from the Office of Public Affairs. I'll now turn it over to Christopher Brown from the Division of Marketing Practices who will share an overview of some of the public comments that we received in response to the advanced notice of proposal making. Christopher over to you. Christopher, you need to unmute.

Christopher Brown:

Thank you Chair Khan and Commissioners Phillips, Slaughter Wilson and [inaudible 00:21:42] for considering our recommendation that the commission approve the notice of proposed rule making on impersonation of government and businesses. I appreciate the opportunity to appear before you today to discuss the proposed rule. This presentation begins with a brief discussion of the advanced notice of proposed rule making and the public comments received in response, it then explains the rationale behind developing a proposed rule. Next, it gives a brief overview and highlights regarding the text of the proposed rule and concludes with the questions posed for public comment. On December 23rd of last year, the commission published an ANPR under its authority to promulgate trade regulation rules. This ANPR discussed the enormous injury caused by government and business impersonation fraud and the commission's efforts to combat it through law enforcement and education. In the ANPR, the commission sought public input to inform its determination about whether it has reason to believe that such impersonation is prevalent, and if so, whether and how to proceed with rule making. Next slide. After 60 days for public comment, the commission received 164 unique comments which have been thoroughly considered. These comments run the gamut from individual consumers harmed by impersonation fraud to frequently impersonated companies such as Apple and Microsoft, to a bipartisan

coalition of 49 State Attorneys General. Notably, no comment opposed proceeding with rule making. Based upon the public comic record and its own experience, staff recommends that the commission find that the impersonation of government and businesses, including affiliation and endorsement claims, is prevalent and harmful warranting the issuance of the proposed NPRM. Next slide. As proposed, the NPRM articulates reasons for proceeding by proposing a rule. Importantly, such a proposed rule would allow the commission to pursue, in federal court, civil penalties against all government and business impersonators and obtain consumer redress

For those they harm. This is particularly important in the aftermath of the US Supreme Court's 2021 decision in AMG Capital, which severely limited the monetary remedies previously available to the commission under Section 13B of the FTC Act. The proposed NPRM weighs the benefits of terminating the rule making against the potential cost of doing so. It concludes that spending resources now to promulgate the rule likely outweighs the commission's costs later of attempting to secure appropriate remedies without the benefit of this proposed rule.

The proposal also indicates that deterrence is another anticipated benefit of the proposed rule. The prospects of large civil penalties may make fraudsters think twice before embarking on their schemes. Notably, the proposed rule will impose no new burdens on honest businesses. In addition, the proposed rule would also likely provide benefits to impersonated businesses that might be able to spend less money monitoring the market to protect their good name. Next slide.

The text of the Proposed Rule is straightforward and largely based on Rule language that has been in use for many years. The Proposed Rule prohibits in plain English the impersonation of government and businesses, and the NPRM list non-exhaustive examples of conduct that would violate the Proposed Rule's prohibitions. Next slide.

The Proposed Rule borrows from the telemarketing sales rules operative prohibition and is consistent with other existing rules that address impersonation only in specific context such as the Mars rule and the R value rule. The Proposed Rule also outlaws providing the means and instrumentalities to violate the rule's prohibitions. This would impose liability on, for example, persons or entities who fabricate government credentials or badges used for impersonation, thus allowing the Commission to pursue behind the scenes enablers who give others the fraudulent tools needed to run these scams.

In response to comments, the Proposed Rule's definition of business includes both for for-profit and non-profit entities. The Commission has received several comments about the harm caused to consumers, donors, and legitimate charities from impersonators of nonprofits such as charitable organizations. Next slide.

Finally, the proposed NPRM seeks comment from members of the public on the proposed language of the rule, any issues or concerns relevant or appropriate to the Commission's consideration of the proposed rule, and includes seven specific questions about the Proposed Rule making. In conclusion, I want to thank Chair Khan, and Commissioners Phillips, Slaughter, Wilson, and Bedoya again, for the opportunity to present on this important matter today.

Chair Khan:

Thanks so much, Christopher. We really appreciate that presentation and overview. I'll just say in brief, I strongly support this effort to move forward with this notice of proposed rule making. At the Commission meeting that we had last December, we had members of the public share all sorts of really harrowing stories about how they or their loved ones had been tricked and defrauded by these imposter schemes. The written responses that we've received since then have only further illustrated the serious harm that these schemes can do, robbing people of hundreds if not thousands of dollars, and also causing a lot of anxiety and distress. I think this feedback has all confirmed that this rulemaking is much

needed and deserves serious consideration by the Commission. As I said, I'm especially grateful that our staff has been able to bring so much urgency to this work.

Even though the FTC has a long enforcement record in this area, as we heard from Christopher, our initial records suggests that these types of impersonation schemes remain highly prevalent. The fraud reports that we've received show that these types of scams constitute the largest source of total reported consumer financial losses and have done so for several years now. In particular, in the aftermath of the AMG decision, codifying this prohibition into a rule will ensure that we are not only able to obtain redress, but that we can also seek civil penalties, which will enhance our ability to deter future frauds.

So I hope that my colleagues will support this rulemaking effort, which to my mind would represent one of the most significant anti-fraud initiatives that we are taking. I'll be eager to hear from the public on this initiative if we move forward, and we would review closely any comments that we received during this proceeding. So thanks so much again to Christopher and the whole team for their efficient and dedicated work on this. I will now turn it over to my colleagues to share any remarks before the item is moved for a vote, starting with Commissioner Phillips.

Commissioner Phillips:

Thank you, Madam Chair. Can you hear me okay? Thank you, Madam Chair, including for putting this really important item on the docket today. Thank you Christopher for that great presentation. To you and Austin and the rest of the staff who worked on this notice of Proposed Rule-making.

This is a good thing and it's rule making done right, and I'm glad to support it. As I've said many times before, protecting consumers from fraud that causes serious financial harm is one of the Commission's most important duties. Fraudsters continue to pose as government agencies or legitimate businesses harming consumers and small business. Legitimate businesses don't engage in this conduct.

In the wake of the Supreme Court's AMG decision, it has become harder for us to give consumers back money stolen from them. So I support using our Section 19 authority to get consumers back their money and obtain civil penalties. Issuing a rule enables us to do that. Predicating a rule on a solid record of enforcement in evidence is the way that our rule-making was intended to work. So I want to thank all of the stakeholders who provided comments on the ANPR. They were incredibly helpful. I hope that we can count on you to provide even more feedback on the proposed language in the NPRM, the proposed rule that we're going to issue today. I'm particularly interested in any comments on the proposed section covering those entities that provide the means and instrumentalities for others to commit, impersonate, or fraud. But I encourage the public to continue to participate concerning all aspects of the rule in this rule-making process as it goes forward. Thank you, Madam Chair.

Chair Khan:

Thanks so much. Commissioner Slaughter.

Commissioner Slaughter:

Thank you so much, Madam Chair. I am also pleased to support this rule. Over the past decade, reports of impersonation scam to the Commission have continued to pile up despite multiple law enforcement actions and education efforts. In 2021, there were nearly a million impersonation scam reports to the FTCs Consumer Sentinel Network. 17% of those reported a loss totaling over \$2.3 billion. These scams included people falsely claiming to be the government, a well-known business, or a technical support expert in order to get a consumer's money, as well as scams in which people falsely pose as an individual such as a relative in distress or a romantic interest.

I'm pleased today to support the publication of a notice of proposed rulemaking on impersonation of government and business. This straightforward NPRM articulates as a rule what has always been the law. Impersonation of government and businesses violate Section 5 of the FTC Act. If finalized, the Proposed Rule would allow the commission to seek civil penalties against impersonators, more readily obtain monetary redress for their victims, and would benefit businesses whose brands are harmed by unscrupulous impersonators.

The NPRM also asks a number of questions and seeks public comment on the Proposed Rule, which is a valuable step in our rule making process. I encourage all interested stakeholders to weigh in. I want to highlight one additional area of inquiry in the NPRM: impersonation of individuals. Though the ANPR sought input on the impersonation of individuals, the comment record focused heavily on impersonation of government and businesses. In the meantime, the FTC took note of a sharp increase in the number of complaints reporting scams in which fraudsters impersonated an individual such as a romantic interest or a relative. For example, reports of the FTC's Consumer Sentinel Network reflect that in the past five years, people have reported losing a staggering \$1.3 billion to romance scams, more than any other fraud category tracked by the FTC. These numbers have skyrocketed in recent years and in 2021, reported losses hit a record \$547 million through the year, a near 80% increase compared to 2020.

The NPRM seeks further comment on impersonation of individuals including the prevalence of the practice. Whether another NPRM should be issued to prohibit impersonation of individuals, the impact of such a proposal on consumers, businesses, and governments, and what alternative proposals the Commission might consider to address this type of unlawful impersonation. I want to thank everyone in the NBCP's Division of Marketing Practices in the Office of General Counsel for their partnership and hard work in developing this NPRM. In particular, Christopher, Gutang, Austin, Lindsey, Alejandro, and the leadership in NBCP and ODC. I very much look forward to hearing more from the public. Thank you, Madam Chair.

Chair Khan:

Thanks so much, Commissioner Slaughter. Commissioner Wilson?

Commissioner Wilson:

Thank you, Madam Chair. Many thanks to Christopher Brown and Austin King for their work on this proposed notice of Proposed Rule-making. Thanks also, the staff in the Division of Marketing Practices in the Office of General Counsel who assisted with this recommendation. It is no secret that I generally believe that rule making is problematic. The costs of rule making, particularly in the long run, tend to outweigh its benefits.

So why do I support this NPRM? First, impersonation fraud causes significant consumer injury. Our data reflect that impersonation fraud imposes immediate harm of \$1,000. As others have noted, 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. So a carefully tailored rule prohibiting impersonation will not stifle competition or inhibit innovation, but the rule may deter unlawful activities. Importantly, as has been noted, a rule could enable the commission to return money to consumer victims.

Second, the comments submitted in response to the AMPR support the rule and provide additional evidence of the prevalence of this unlawful conduct. Third, 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 the rule to conduct that assists and facilitates

impersonation fraud. As Christopher mentioned, this kind of provision appears in the Commission's telemarketing sales rule. But as the notice explains, there is specific statutory authority for those provisions of the telemarketing sales rule.

While there is some precedent for reaching, assisting, and facilitating conduct using our unfairness authority under Section 5, we lack clear statutory authority for such a provision. So I agree with the decision to limit the rule to the types of conduct for which we possess clear 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. So for these reasons, I do not oppose an NPRM that prohibits government and business impersonation fraud. Thank you, Madam Chair.

Chair Khan:

Thanks so much, Commissioner Wilson. Commissioner Bedoya?

Commissioner Bedoya:

Thank you, Madam Chair. I don't plan to take too much time with most of the items on today's agenda. I think this is a terrific initiative. I'm grateful to the staff that gave the presentation and to all the commenters who have taken the time to participate in the process so far. So I do plan to vote yes. Thank you.

Chair Khan:

Great, thanks so much. So I will now move that the commission publish in the federal register the notice of Proposed Rule- making of the Trade Regulation Rule on Impersonation of Government and Business that was circulated by the Secretary on September 13th, under matter number R207000, reflecting changes made since the August 16th circulation of staff's recommendation. Is there a second?

Commissioner Phillips:

I second.

Chair Khan:

Thanks, Commissioner Phillips. The motion being seconded, I will call the vote. Commissioner Bedoya?

Commissioner Bedoya:

Yes.

Chair Khan:

Commissioner Wilson?

Commissioner Wilson:

I vote yes.

Chair Khan:

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Chair Khan:

Commissioner Phillips?

Commissioner Phillips:

Yes.

Chair Khan:

I vote yes. The motion passes unanimously. Thanks so much again to my colleagues for their support and for the team for their work on this effort. I'm really looking forward to seeing what the public comments generate.

So we will turn to the second item on the agenda. The next item is a policy statement addressing the Commission's enforcement priorities regarding gig workers. Gig workers represent a rapidly-growing sector of the US labor market with an estimated one in three American workers holding some form of employment in the gig economy. Gig workers can include independent contractors, online platform workers, contract workers, temporary workers, or on call workers that provide on demand services. As we heard from several of the public commentators today, this type of gig work can provide individuals with really important opportunities to make money and to benefit from certain flexibilities. But it's critical for enforcers and policy makers to ensure that these types of opportunities are available to people without also depriving them of key protections.

The Commission's work, along with outside research and reporting, has shown that in some instances, the conveniences afforded by the gig business model can come with particular costs and trade offs for market participants, and deprive people of some of the key protections that we expect them to have. We need to make sure that the dazzling novelty and conveniences of these services doesn't distract away from the ability to recognize what might in other instances might be more readily discernible as clear law violations.

So given the importance of the gig economy, the Commission has been taking a cross-agency approach towards investigating and, where needed, we will be enforcing the law that has spanned all 8 regional offices, the Bureau of Competition, the Bureau of Consumer Protection, the Bureau of Economics, and the Chief Technologist and her team. Building on the lessons learned from this coordinated effort, the Commission today is considering a policy statement that would highlight the relevant legal rules governing gig work, reiterate guidance about when coordination or combinations among firms offering gig work can violate the antitrust laws, and lays out the foundation for the Commission's future efforts in this space.

The hope is that by providing this guidance to the industry and to market participants, the statement can help inform company decisions and dissuade and deter unlawful practices. I'll note that the commission has already laid the groundwork for this effort. Last year before I joined the agency, the Commission challenged Amazon's alleged practice of withholding tips due to Amazon flex drivers. The company then as a result of the agency's work paid more than \$61 million to settle the FTC's charges, which was used to then compensate these gig workers. I thought this was an incredibly important effort and it's something that we're now looking to build on, including through exploring a potential rule-making that would challenge false earnings claims that defraud consumers including workers.

So I just want to say a big thank you to the team that worked on this. In addition to the cross-agency effort that we have underway at the FTC, we've also been seeking to improve our coordination and collaboration across the federal government. That's something that the policy statement highlights as well, including increasing our work with the National Labor Relations Board, which is also closely monitoring some of the developments that we see underway.

So this policy statement reflects work from across the agency. I want to give a special thanks to Nathan Nash, Sarah Schroeder, Emily Burton, Jonathan Plath, Jerelyn Trujillo, Jason Adler, Christine Tadaro, Andrew Hudson, Amanda Kolawsis, Bob Sushinski, Rosario Mendez, Leslie Fair, Brad Winter, Douglas Wolf, Kelly Signs, Josephine Lu, Shiva Cui, Dan Wood, Kathy Fam, and Elizabeth Wilkins. As that list reflects, many people were involved in this and it really reflects across agency effort. So thank you so much for everybody who's been doing this work. I'm really looking forward to what this initiative can deliver for the agency and for the consumers and workers that we are seeking to protect. So I will now turn over to my fellow commissioners to share any remarks before moving this item for a vote, starting with Commissioner Bedoya.

Commissioner Bedoya:

Thank you, Chair Khan. Ill, again, be brief, but I just want to say that I heard and listened with interest to the commenters at the top of today's session. I will say that it's precisely because of how many Americans are part of the gig economy and how critical of a lifeline it is to so many working people that I think it's helpful to clarify some of our authorities in this space. I'll add that many of the allegations that have come out in recent years are quite serious regarding allegations around systematic underpayment of workers, findings from research that roughly half of people or a little under half of gig workers, just don't understand exactly the mechanism and system that prices their pay for them.

Often it does appear that they are quite complex systems. And so, that's why I plan to vote for the statement today as a step forward in clarifying the different ways that the Commission can protect working people in this space. So, thank you Chair Khan, and thank you to all the staff who worked on this. I know that it was a number of folks spread across the commission. And so, for that I'm grateful and I plan to support the statement. I do think that folks in all the regional offices were involved and so particularly grateful to them. So, thank you.

Chair Khan:

Thanks so much. Commissioner Wilson?

Commissioner Wilson:

Thank you, Madame Chair. Let me echo my colleagues. Thanks to all of the different staff who worked on this report, which describes in detail the FTC's enforcement experience regarding gig work. 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. It's estimated that the gig economy will generate \$455 billion in annual sales by 2023. 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 focus investigations which the Commission has already done.

As Chair Khan mentioned, the Commission in February, 2021 reached a settlement with Amazon regarding payments to Amazon Flex drivers. I applaud Chairman Simons for launching that investigation and I applaud Acting Chair Slaughter for getting the case across the finish line.

Second and most important, the policy statement explains that while online gig platforms may seem novel, traditional legal principles of consumer protection and competition apply. I endorse applying our 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 I am concerned about the vision painted by the policy statement. Specifically, I'm 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. 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 anti-competitive practices is a priority for the Commission and asserts The FTC will use its full authority to protect workers.

Now on the consumer protection side, the FTC routinely brings cases, challenging inflated earnings claims, deceptive franchise opportunities, and other unfair and deceptive practices that merit our attention. Perhaps this is a case of new wine in old 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 and consumer protection creates a conflict. Introducing new goals into enforcement decisions will require the commission to accept trade-offs that will harm consumers.

We should not abandon consumers in pursuit of prevailing but mercurial political wins. We should preserve the consumer welfare standard as the touchstone of our mission. Each person in this country is at bottom a consumer, and we share that unifying characteristic. 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. Noncompete 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 noncompetes on labor markets and wages, is mixed. It's also important to consider the rationales and benefits of noncompetes. For example, these agreements can facilitate innovation by assuring firms that trade secrets and other firm knowhow will not be transferred to rivals. Given these many considerations, the commission should exercise caution when reaching conclusions about noncompete 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. Thank you, Madam Chair.

Chair Khan:

Thanks Commissioner Wilson. Commissioner Slaughter.

Commissioner Slaughter:

Thank you, Madam Chair. I am very pleased to vote for this statement on enforcement related to gig work, which makes clear that the FTC is going to use the full breadth of our authority to examine conduct related to gig work and protect gig workers from unfair, deceptive and anticompetitive conduct. I want to add my thanks to the long list of staff from throughout the agency for their joint work on this

statement. And in particular, I want to recognize the efforts that the gig work at FTC team for their initiative. I also want to particularly thank the dashers who spoke earlier during the public comment portion of our meeting. I was especially moved by your comments, that the value of gig work to you, in terms of providing flexibility and opportunity to spend time with your families and your other professional pursuits. And to be clear, I think workers should have flexibility and opportunity. Our job as enforcers is to make sure that you get what you've been promised and that you aren't taken advantage of in the gig economy.

I strongly support the benefits you've discussed and object only to the idea that in order to get those benefits, workers have to be denied all other protection and fair competition for their labor. This statement, today's statement, is one of many ways our staff has been collaborating across missions to identify how we can deploy our authority, to protect the public from unfair, deceptive and anticompetitive conduct in all of their roles in the marketplace, as purchasers, as small business owners, as workers and as consumers.

Just as consumers deserve the benefits of competition when it comes to purchasing goods and services, gig workers deserve the benefits of competitive markets for their labor. Robust competition for workers' labor can help boost wages, improve benefits and lead to better working conditions. Scrutiny of business practices and enforcement against law violations are key components in this effort. The Bureau of Competition has reoriented in recent years to pay closer attention to mergers and conduct that may harm workers and especially workers who are disproportionately people of color, as is the case with gig workers. Competition and labor experts can help us think about how labor law and antitrust law might compliment one another to protect workers.

I'm really pleased the FTC recently entered into a memorandum of understanding with the national labor relations board and want to particularly compliment the chair for that initiative. Worker classification, including worker misclassification as independent contractors instead of employees, is not only deeply troubling from a labor law standpoint. It can adversely affect competition. As I told the last administration's Department of Labor in a comment, on what I believed was a horribly misguided rule regarding worker classification, confirms that misclassified workers may gain an unfair, competitive advantage over their rivals, reducing worker bargaining power and increasing the likelihood of more workers being subjected to anticompetitive contract terms. Today's statement notes that the commission will not focus this attention on organizing efforts by gig workers. I want to add that I personally would oppose devoting any resources, policy or investigative, to challenging gig workers who engage in collective action to fight back against unfair labor practices and to seek better wages, terms of employment and working conditions.

For example, I would not have supported the FTC's Amicus Brief in support of the Chamber of Commerce in its case against the city of Seattle for an ordinance enacted to permit independent for-hire drivers to collectively negotiate their contracts with taxi cab associations and transportation network companies, such as Uber and Lyft. I also think there's a case to be made that even properly classified independent contractors should get the benefit of the labor exemption for their labor organizing efforts. On the consumer protection side, the Bureau of Consumer Protection has long looked at conduct that harms people simply trying to earn a living and specifically challenged, false and deceptive earnings claims, which are some of the most pernicious and financially ruinous schemes. I'm especially proud of our staff's work on the Amazon Flex case. In 2021, we brought suit against Amazon for allegedly keeping a portion of driver's tips. As alleged in the complaint, Amazon actively concealed its conduct and only stopped after becoming aware of the FTC's investigation.

The FTC recovered over \$60 million from Amazon to pay back the more than 140,000, excuse me, Amazon Flex drivers whose tips were withheld. Returning lost money to workers and consumers has

been a mainstay of where our enforcement until the Supreme Court eliminated the commission's primary and best tool to seek monetary remedies for violations of the FTC act. In response, as the chair mentioned, the commission has issued an advanced notice of proposed rule making regarding earnings claims. This inquiry means we can gather evidence on how best to protect against these scams and begin to think about how a possible trade regulation rule could help level the playing field between workers and those that employ them. Pursuing rule violations would also reopen an avenue to return stolen money to these workers. Something we can no longer do under section 13-B until Congress steps in to fix it. Moving forward in this rule making maybe another way we can ensure gig workers get fair compensation for their labor. So with that Madam Chair, I'm pleased to support today's statement and will yield back to my other colleagues.

Chair Khan:

Thanks so much. Commissioner Phillips.

Commissioner Phillips:

Thank you, Madam Chair. And thanks to all the staff who work diligently on this document. By my count, in little over a year, this will be the sixth enforcement policy statement that the commission has voted out with only a handful of enforcement actions following. We are making announcements, but not bringing as many cases, which I think ought to be the priority. Our job at the FTC is to investigate deceptive and unfair practices in the marketplace, and to bring cases against those who violate the statutes that we enforce. To the extent that the document to be voted on sets forth enforcement priorities within that statutory authority, I generally agree with. I have voted in favor of the cases cited in this position paper, including the last case we brought involving gig workers, the Amazon Flex case resolved in June of 2021. To the extent that the FTC has authority, I support monitoring the space and bringing enforcement actions where appropriate.

But I cannot vote in support of this document. In addition to being a poor substitute for enforcement, it suffers from critical flaws. It lacks a definition of gig work, gets basic facts wrong about the markets in question, it meanders in and out of our jurisdiction into matters of employment law, collective bargaining and labor regulation while insinuating that all sorts of conduct is illegal and unfair without any basis to conclude that it actually is. In so doing, the document trades the kind of legal and factual care we actually need to bring cases for one-sided descriptions of business practices and suggestions that they quote, unquote, "may" be illegal. I'm worried we are writing a check that we cannot and should not cash. To be clear, we have uncovered unfairness and deception concerning gig work in the past. And I would imagine there is more work to do, but the document to be issued today, insinuate such conduct is endemic and fails to articulate and consider the multitude of benefits that gig work brings to consumers, workers and the marketplace.

I don't think that's a fair assessment. And I very much doubt that the enforcement record will match the soaring rhetoric. The picture the document paints of gig work is very dark and many of the criticisms have little to do with gig work itself or unfairness or deception. It states that gig workers lost their jobs because the pandemic lessened demand. They did, but that was true for many kinds of work. It also states that gig workers are often forced to work to make ends meet, so are most people. I believe there is great dignity in work, gig and otherwise.

We heard earlier remarks from true, tremendous dashers whose gig work clearly helps them. We should listen to that. But even if you don't agree, it remains true that not every aspect of work that someone might criticize is the result or, sorry, not every negative aspect of work that some might criticize is the result of the legal conduct or market failures. I think we should do more investigation and bring more

cases and write fewer policy papers. I think we should level with the public about what our statute covers and what it doesn't. I don't think that what we're doing today meets that basic test and so I can't support it. Thank you, Madam Chair.

Chair Khan:

Thanks Commissioner Phillips. And just want to give a big thanks, again, to the team that put this policy statement together. As I noted, this team is also primarily devoted to enforcement work, including investigations. So I trust that if they do file legitimate law violations that we will see due follow up. So I will now move this policy statement for a vote. I move that the commission approved and issue the policy statement on enforcement related to gig work that was circulated by the secretary on September 14th under matter number P227600, reflected changes made since the August 30th circulation of staff's recommendation. Is there a second?

Commissioner Slaughter:

I will second.

Chair Khan:

The motion being seconded, I will call for a vote. Commissioner Phillips?

Commissioner Phillips:

I vote, no.

Chair Khan:

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Chair Khan:

Commissioner Wilson?

Commissioner Wilson:

I vote, no.

Chair Khan:

Commissioner Bedoya?

Alvaro Bedoya:

Yes.

Chair Khan:

And I vote, yes. The motion passes by three to two.

We'll now turn to the third and final item on our agenda. Staff's recommendation that the commission authorize the release of its report on dark patterns. Dark patterns are digital design practices that trick

or manipulate users into making choices that they would otherwise not make and that could cause harm. Examples of these dark patterns include pre-check boxes on a subscription form, fine print disclosures, or complicating online navigation paths to make it difficult for consumers to cancel recurring charges.

In April of 2021, the commission brought together researchers, legal experts, consumer advocates, and industry professionals for a workshop to examine what dark patterns are and how they affect consumers in the marketplace. The report describes and categorizes dark pattern practices, discusses learnings from last year's workshop and synthesizes our existing enforcement efforts in the area, as well as identifying key lessons and takeaways for market participants. There were many staff involved in preparing this effort. I want to give a particular thanks to Stephanie Liebner, Brittany Frassetto, Eleni Broadwell, Samuel Jacobson, and Malini Mithal from the Division of Financial Practices, as well as staff from across the Bureau of Consumer Protection and the Bureau of Economics. We are fortunate to have Stephanie and Eleni with us today to present some of the findings from this report. So I will now turn it over to them.

Stephanie Liebner:

Thank you, Chair Khan and Commissioners, Phillips, Slaughter, Wilson, and Bedoya for your consideration of our recommendation to release the staff report on dark patterns. We appreciate the opportunity to appear before you today to present on this issue.

Next slide. On April 29th, 2021, the FTC hosted a public workshop on digital dark patterns and explored how they can obscure, subvert or impair consumer autonomy and decision making. The workshop featured a variety of speakers, including consumer advocates, members of Congress, researchers, legal experts, and other industry professionals. In our staff report, we discuss key topics from the workshop, recent FTC enforcement actions and relevant academic literature, including common types of dark patterns and their rise in the digital marketplace.

Next slide. The term dark patterns has been used to describe design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm. They often take advantage of consumers' cognitive biases to steer their conduct or delay access to information needed to make fully informed decisions. Dark patterns often are not used in isolation and tend to have even stronger effects when they're combined.

Next. So what is the FTC's role? As the nation's leading consumer protection agency, the FTC plays an essential role in stopping deceptive or unfair business practices, including those that take the form of dark patterns. For decades retailers have relied on design tricks and psychological tactics to get consumers to part with their money or data. As the tools of deception and unfairness have evolved so too has the FTC's enforcement. The FTC will continue to bring enforcement actions against companies who engage in dark patterns that violate the law, no matter the form they take.

Next slide. So what's new? As more and more commerce has moved online, a new tool has come on the scene, manipulative digital design practices. And compared to their brick and mortar analogs, these digital tools can be deployed at a much larger scale and with more sophistication, creating ever greater challenges for consumers. Data collection has become pervasive. Companies now have techniques that allow them to gather massive amounts of information about consumers' identities and online behavior. They can use that data to target their tactics at particular demographic groups or even individual consumers. Plus, companies that market online can experiment with digital dark patterns more easily, frequently and at a much larger scale than traditional brick and mortar retailers to determine which design features most effectively influence consumer behavior. Finally, as consumers increasingly use new technologies, this will affect the number and types of dark patterns they may encounter.

Next slide, the staff report is organized around four categories of consumer protection harms implicated by dark patterns. These include design elements that induce false beliefs, that hide or delay the disclosure of material information, that lead to unauthorized charges and that obscure or subvert consumers' privacy choices. My colleague, Eleni Broadwell, will discuss the first two categories.

Eleni Broadwell:

Good afternoon. Next slide, please. Some dark patterns manipulate consumer choice by inducing false beliefs. A company may make an outright false claim or used designs that create a misleading impression to spur a consumer into making a purchase they would not otherwise make. Classic examples of these types of dark patterns include advertisements, deceptively formatted to look like independent, editorial content and purportedly neutral comparison shopping sites that actually rank companies based on compensation.

Next slide, please. Here is an example, the FTC's recent action against Credit Karma. Credit Karma conducted testing to compare how consumers reacted to being told that they had been pre-approved for a credit card, an allegedly false claim, versus being told that they had excellent odds of being approved. The company ultimately decided to employ the false pre-approved claim, which testing had shown yielded a greater click rate. This type of design experimentation, if used to deceive consumers or manipulate them into taking unwitting or detrimental actions, is a signal of dark patterns at work. If approved, the final order against Credit Karma will stop their deceptive claims, require them to preserve the results of all digital experimentation and they'll pay \$3 million that we'll send to consumers for their lost time.

Next slide, please. Onto the second of our four categories. Some dark patterns operate by hiding material information from consumers, such as varying key limitations of a product in dense terms of service documents that consumers don't see before purchase. Two other big examples from this category are hidden fees and drip pricing. Some design elements trick people into paying hidden fees, such as by hiding them behind obscure hyperlinks, in long blocks of text or at the bottom of a website requiring lots of scrolling to find. And some companies engage in drip pricing, in which firms advertise only part of a product's total price to lure in consumers and do not mention other mandatory charges until late in the buying process.

Next slide, please. For example, the FTC charged that Lending Club deceived consumers about hidden fees associated with its online loans. We allege that Lending Club used prominent visuals, promising loan applicants that they would receive a specific loan amount and pay no hidden fees. Then hid mention of fees in places consumers were unlikely to find or click on. In reality, the company deducted hundreds or even thousands of dollars in hidden fees from the loans it dispersed. Consumers frequently reported they only discovered the fee after Lending Club dispersed their loan proceeds, when they noticed that the dispersal amount was smaller than expected.

Back to Stephanie.

Stephanie Liebner:

Next slide, please. I will talk now about our third category of the four. Another common dark pattern involves tricking someone into paying for goods or services that they did not want or intend to buy. An example would be if companies automatically add items to a consumer shopping cart without their permission. Another example is when a company deceptively offers a free trial period, but the consumer isn't clearly informed that the trial is followed by a recurring subscription charge if they fail to cancel. A related dark pattern makes it hard for consumers to cancel existing subscription services, resulting in unwanted, ongoing recurring charges.

Next slide, please. The FTC's lawsuit against Amazon is instructive here. Amazon billed parents and other account holders millions of dollars in unauthorized, in-app charges incurred by children. While the apps appeared free when parents downloaded them, once children began playing the game, they could rack up in-app purchases by tapping buttons without the account holder's knowledge. Additionally, many of these purchases were disguised as play, blurring the line for children between what cost virtual currency and what cost real money. Ultimately, Amazon was forced to make more than 70 million in refunds available to consumers.

Next slide, please. For our fourth and final category, another pervasive dark pattern involves design elements that obscure or subvert consumers' privacy choices. Because of dark patterns consumers may be unaware of the privacy choices they have online or what those choices might mean. This may result in a significant deviation from consumers' actual privacy preferences. Another variation involves lead generators that convey a false affiliation to manipulate consumers into sharing personal information.

Next. The FTC took action against smart TV manufacturer, Vizio, for using dark patterns to subvert consumers' privacy choices. We alleged that Vizio enabled a default setting called Smart Interactivity, which allowed Vizio to comprehensively collect and share consumers TV viewing activity with third parties. Vizio, allegedly, provided no notice of this setting to many consumers and at best provided a nondescript pop-up on the TV that timed out after one minute.

Next slide. While dark patterns may manipulate consumers in stealth, these practices are squarely on the FTC's radar. The FTC's dark patterns workshop, related cases, and this new report represent the agency's longstanding efforts to study and combat dark patterns and to raise awareness about the dangers they pose to consumers. And where these practices violate the FTC act, ROSCA or other laws we enforce, the FTC will be prepared to act.

Eleni Broadwell:

This was a multi-division effort across the Bureau of Consumer Protection. So we would like to thank everyone else who worked on the dark patterns report as well. And we would also like to say, thank you, Chair Khan and Commissioners Phillips, Slaughter, Wilson, and Bedoya for the opportunity to present today on the dark patterns report. Next, please. And for people interested in learning more about these types of issues, you can visit consumer.ftc.gov. Thank you so much.

Chair Khan:

Thanks so much for the presentation. And I'm so glad you had that final slide up because I think it really just showcased how many people were involved with this really important effort. I'm happy to support this report. Dark patterns represent an evolving business practice that implicates a whole set of our enforcement priorities, particularly in our consumer protection work. And it's really terrific that we've already built this expertise and that it'll continue to be an area of focus for us. I thought the whole variety of practices described really surface important and interesting issues. To my mind, one that is especially interesting for us is dark patterns that obscure or subvert consumer privacy choices, given that these design choices, the ramifications

... implications of making a choice, of allowing a firm to collect all sorts of data that people might not be aware of, can have huge downstream effects. We heard the example for the TV viewing, but we know that location data and all sorts of other sensitive information can also be captured. And unlike, say, unauthorized billing, which at some point or another, somebody may have a more natural opportunity to identify, these types of data collection practices may not be as evident to people. And so, the degree to which dark patterns are being used to potentially manipulate people into surrendering more data than they otherwise would, I think, is especially important for us to grapple with. So I will now turn it

over to my fellow commissioners to share any remarks before moving it for a vote, starting with Commissioner Phillips.

Noah Phillips:

Thank you, Madam Chair, and thanks, Stephanie and Eleni, for that great presentation. Also, thanks to all the many staff who worked on the April 2021 workshop and the report that we're putting out today. I'm going to vote to approve the issuance of this report because it is a staff report, not a commissioned one. To me, that distinction matters because it allows me to vote to make Steph's great work public, even though I have some quibbles with it. I do want to spend a minute on those.

To start, I just don't think the term dark pattern is very helpful, at least with respect to giving clarity about the law. It reduces rather than adds clarity for consumers, for businesses, and even for us, law enforcers. We all might agree on some practices that qualify, but there's very little agreement on the full scope of what is in and what is out of the category of dark pattern. So the term succeeds in painting an ominous picture of the practices it is used to describe, but it fails in helping businesses and consumers identify those practices that are illegal, and to me, that's what really matters.

The term also does not line up with the definitions of unfairness and deception, which is what we have the authority to police and regulate. Some of the practices described in the report are not unfair or deceptive. We may not like it when declining to provide an online retailer with our email address requires us to click a message saying, no, I don't want to save 25%, but it's just not a violation of section five.

The report also suggests that collecting information for advertising purposes could be itself a dark pattern. I know there are some who dislike targeted advertising, but personalized ads do not violate section five. I'm concerned at the commission's recent tendency to use pejoratives to refer to a wide array of practices, only some of which are illegal, so calling conduct a dark pattern or commercial surveillance is not a replacement for the legal and factual analysis required in order for us to show that a practice is deceptive or unfair, and it does little to add clarity for enforcers, or the public, or again, for the businesses who are trying to follow the law and get things right.

For the most part, the report provides an overview of the workshop and contains examples of cases the FTC has brought against companies like Credit Karma, we saw that slide earlier, and LendEDU. For practices that are deceptive or unfair, highlighting these cases does help provide guidance for businesses, and I wholeheartedly support providing that kind of practical education both to consumers and to businesses, and that's why I'm going to vote in favor of it. Thank you, Madam Chair.

Chair Khan:

Thanks, Commissioner Phillips. Commissioner Slaughter?

Commissioner Slaughter:

Thank you, Madam Chair. I am also pleased to vote in favor of this report. In the spring of 2021, during my tenure as acting chair, the FTC hosted the public workshop, about which we've heard on, digital dark patterns, and explored how these manipulative tactics can obscure, subvert, or impair consumer autonomy and decision making. The Bureau of Consumer Protection staff have prepared a very excellent report that synthesizes what we have learned from the workshop, our cases, and relevant research, and summarizes lessons for business. The report is also accompanied by a helpful appendix that seeks to identify and explain a number of common dark patterns, a helpful catalog for consumer groups and reporters, researchers, legislators, and businesses looking to clean up their act.

And I just want to take a moment to respond to Commissioner Phillips', I think, fair concern about the term dark patterns. I'll make a couple points. The staff who worked on this workshop and the report did not come up with this term. I agree that it is not the most precise term, and I would love it if a more precise term existed in the world because I think precision matters. But sometimes, in the absence of a perfect term, we have to use what we have. And I think this term has a generally common meaning that is understood, perhaps more so than other terms that we, in our universe, use commonly, like consumer welfare standard, which I've heard AAG Kanter say several times, is a term that, if you ask six different attorneys, you'll get six different definitions of it. So I think grappling with precision of language is something we have to do all the time, and sometimes we have to use the best-fit term that we have available. So with that caveat and an understanding that if a better term emerges, I would be happy to adopt it.

I do want to highlight one use of dark patterns that's particularly troubling to me, digital dark patterns designed to manipulate kids and teens. The report does an excellent job of outlining the types of child-directed dark patterns at work in the FTC's in-app purchase actions against Amazon, Apple, and Google. These types of interfaces lured kids into making purchases through play, such as enticing kids to rack up virtual gold stars while incurring actually-incurring charges in real life.

We know, however, that the dark patterns directed at our kids and teens also operate on a much larger scale. For example, in connection with the dark patterns workshop, Common Sense Media proffered that one of the most problematic categories of dark patterns are those designed to extend engagement because they can make it difficult for young people to find balance and time away from devices. Common Sense Media identifies autoplay features as an example of a potentially unfair, manipulative design when directed at children. Campaign for a Commercial-Free Childhood and the Center for Digital Democracy also submitted comments contending that a variety of dark patterns and manipulative design techniques aimed at children and teens constitute unfair or deceptive practices in violation of the FDC Act, from endless treadmill gaming features to purposeful obfuscation of the real-world value of in-game currency.

And I will just add that, as a parent, I see these things at play in my young kids' lives already, and it is really concerning and something that deserves a lot of attention, so I strongly support use of our authority to target unlawful, manipulative dark patterns aimed at kids and teens. And I want to call attention to the fact that the commission seeks comment on the types of manipulative techniques aimed at kids and teens in our recently announced Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security. Specifically, the commission invites comment on the following. Do techniques that manipulate consumers into prolonging online activity, for example, video autoplay, infinite or endless scroll, quantified public popularity, facilitate commercial surveillance of children and teenagers? If so, how?

In which circumstances, if any, are a company's use of those techniques on children and teenagers an unfair practice? For example, is it an unfair or deceptive practice when a company uses these techniques despite evidence or research linking them to clinical depression, anxiety, eating disorders, or suicidal ideation among children and teenagers? And are children and teenagers more likely than adults to be manipulated by practices designed to encourage the sharing of personal information? Dark patterns, by design, can have a profound impact on kids and teens that we are only just beginning to fully realize. I want to encourage all stakeholders with information or comments related to the impact of dark patterns and manipulative design on kids and teens to file comments in response to our Commercial Surveillance and Data Security ANPR on or before October 21st of this year.

Thanks, again, to the Bureau of Consumer Protection for convening an illuminating workshop and preparing this excellent report. The chair listed almost all of the amazing staff that worked on this. I

want to make sure we also recognize the work with Sandy Brown and everyone who was on the slide that we just saw. We're really grateful to have such smart, thoughtful, and hardworking people devoting their attention to this incredibly important area. This was really a bureau-wide collaboration and I want to especially thank the leadership from the Division of Financial Practices, so thank you, Madam Chair.

Chair Khan:

Thanks, Commissioner Slaughter, and thanks, in particular, for calling out the specific questions in the ANPR that relate to dark patterns. And I couldn't agree more that we are extremely eager for public comment on that issue, as well as the whole set of issues laid out there, and really eager to hear from folks. Commissioner Wilson?

Commissioner Wilson:

Thank you, Madam Chair. I remember setting aside time last year to watch Steph's workshop examining digital dark patterns. The presentations were fascinating and I considered it time well spent. For those in the audience who may have missed the all-day workshop, I'd recommend accessing the video or transcript of the event on the FTC's website. Congratulations to all of the staff across the Bureau of Consumer Protection who worked on this staff report, and to Stephanie and Eleni for their informative presentation. Businesses and consumers will benefit greatly from the report's discussion of our past enforcement efforts, the summary of last year's workshop on dark patterns, and the discussion of conduct the agency will continue to prioritize in its enforcement work.

The term dark patterns deserves a few words of explanation. As Commissioner Phillips noted, it certainly sounds ominous, but it is important to note. And the report underscores that not all dark patterns violate the law, and while digital dark patterns occur online, many dark patterns are simply common bad business practices. And the FTC has continually addressed these bad acts, whether they occur in the brick and mortar context or online. The concepts underlying the dark patterns phenomenon also merit a few words. Digital dark patterns are defined by our staff as manipulative user interfaces, and they've noted that the effect of dark patterns is to obscure, subvert, or impair 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 in the process. 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. 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.

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 Tversky and Kahneman reveal that heuristics tend to result in systematic and predictable blunders that can negatively impact health, wealth, and happiness. Building on this literature in a book titled *Nudge*, Sunstein and Thaler propose the use of so-called nudges that attempt to move people in directions that will make their lives better. The goal of a nudge is to help people make choices they would have made if they had paid full attention and possessed complete information, unlimited cognitive ability, and complete self-control. 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.

I mention all of this background on heuristics to stress that not all of the dark patterns deployed on websites and in apps are illegal, but many are certainly problematic. Thaler and Sunstein even updated their seminal book just last year to include a chapter titled Sludge, based on the recognition that nudges and behavioral science can be used for harmful purposes as well as benevolent ones. Thaler and Sunstein note that many dark patterns fall within the category of what they call sludge, including making it hard to cancel a membership or a subscription. Yes, 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.

Thanks, again, to staff across the Bureau of Consumer Protection for their excellent workshop and insightful report, which will prove useful to legitimate companies as they consider how to design their choice architecture. For these reasons, I support issuance of the staff report. Thank you, Madam Chair.

Chair Khan:

Thanks, Commissioner Wilson. Commissioner Bedoya?

Commissioner Bedoya:

Thank you, Chair Khan. I want to start by warning that you're going to hear a lot of echos from Commissioner Slaughter's comments, both her focus on what dark patterns mean for children, and also, her gratitude for the comments of organizations like Fairplay and the Center for Digital Democracy.

Just wanted to hit on three points that are behind... well, three points, and overall, express my support for this staff report. The first reason I support is because it underscores the dangers that dark patterns present, and I think it's valuable to underline the fact that certain design decisions, not all of them, but certain design decisions can harm people and can have a particular harm for particular groups.

And to echo Commissioner Slaughter, I'm also particularly interested in those patterns that extend engagement among children. And readers of the ANPR will note that it cites to a large body of growing evidence. It's not uniform, it's nuanced, but the research claims that there are certain trends that apply to certain uses of the technology, particularly around duration and length of time people spend on the platform. And our enforcers across the Atlantic and the United Kingdom, our colleagues there, and folks in California, are increasingly trying to ensure that children are protected online, in a sense. And so, I think that the report underlining these problems is valuable.

I will add that the question that Commissioner Slaughter references, question 17, and the reason I'm calling it out by number is, I think there might be a misconception out there that, oh, I don't work in privacy, I don't work in surveillance, what have you. The ANPR, we very much want to solicit comments from children's groups, people who work with kids, teachers, parents. And question 17 speaks to the issues around the alleged manipulation of children into extending their use of a platform, which some research claims has a very negative impact on them. Number one.

Number two, my friend, Baron Soka, whose opinion I'll always be interested in, comment about the fit between dark patterns and unfairness. And the only thing I want to say is that Baron is right that not everything in this report sounds in unfairness, but I do think an awful lot of it sounds in unfairness or deception or ROSCA or COPPA. And so, I think it is valuable to underline that omission can be a critical contributor to deception. And so, in that way, dark patterns isn't always a perfect term, but I do think that omission can certainly be a part of a violation of the law.

Thirdly, one thing I appreciate about this report is the legal nudge, to quote Commissioner Wilson, that it gives on the deception policy statement, and underlining the fact that when companies target a

particular audience, such as kids and teens, they need to consider how claims and design affect an ordinary member of that targeted group. So to counsel representing companies that are listening, this, I think, is an important reminder that when your clients are designing apps for kids, they need to consider those claims and design choices with an ordinary child in mind. And the failure to do that could lead to liability in different contexts. So with that, I want to express my gratitude for all of those who worked on this report, you, Chair Khan, for moving it forward, and for my colleagues for supporting, and I have... Oh, yes.

Chair Khan:

Thanks so much, Commissioner Bedoya. We'll now move this motion officially for a vote, so I move that the commission authorized the release and publication of the staff report titled Bringing Dark Patterns to Light that was circulated by the secretary on September 14th, under matter number P214800, reflecting changes made since the August 11th circulation of staff's recommendation. Is there a second?

Commissioner Slaughter:

I will second.

Chair Khan:

The motion being seconded. I will call for a vote. Commissioner Bedoya?

Commissioner Bedoya:

Yes.

Chair Khan:

Commissioner Wilson?

Commissioner Wilson:

I vote yes.

Chair Khan:

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Chair Khan:

Commissioner Phillips?

Noah Phillips:

I vote yes.

Chair Khan:

And I vote yes. The motion passes unanimously. So thanks, again, to the team for the presentation and all of the terrific work leading up to the workshop and the publication of this important report. I'm so glad that everybody will get to read it.

This takes us to the end of the agenda we had set out for today's meeting. I want to, again, thank the staff across the agency for their terrific work on all of the matters that were on the agenda for today. Also, want to thank my fellow commissioners, for their thoughtful engagement and remarks, as well as to our public speakers for their insights and sharing their concern. So we are now adjourned. Thanks so much, everybody. Take care.