

Dissenting Statement of Commissioner Christine S. Wilson

Advance Notice of Proposed Rulemaking – Endorsements

October 20, 2022

Today the Commission votes to issue an Advance Notice of Proposed Rulemaking (“ANPR”) seeking comment on a proposed rule addressing fake and deceptive reviews and endorsements. The FTC has challenged these practices, and platforms have sought to combat them, but deception continues to flourish. I agree that these practices are unlawful, and I have supported the FTC’s enforcement and guidance in this area. Notably, the Commission recently authorized additional tools to address these issues — tools that we were chastised for not deploying sooner. Given recent deployment of those tools, as well as ongoing efforts to update our Endorsement Guides, I do not believe that initiating yet another Section 18 rulemaking is the best use of our scarce resources, particularly given the nature of the harm at issue here. And the opportunity cost of launching yet another rulemaking is high, because the division overseeing this rule is also charged with enforcement in the opioids arena. For these reasons, I dissent.

I appreciate that our remedial authority is limited. The Commission cannot obtain civil penalties for first-time violations of Section 5 of the FTC Act, and the Supreme Court’s decision in *AMG* ended the Commission’s use of Section 13(b) to obtain equitable monetary relief.¹ But the harm that results from the deception at issue is speculative in nature. The ANPR acknowledges that redress in matters involving deceptive review practices can be difficult to calculate, and we know that many retailers and platforms have procedures in place to screen out and reject fake reviews. An endorsement or a review may sway a consumer to purchase a product or service, in part, and should be truthful. But, in cases involving deceptive endorsements or fake reviews, there often is no allegation that the product or service did not perform as represented. The endorsement or review in many cases is not the central claim.²

Moreover, the Commission already has a multi-pronged strategy in place to combat this issue. To educate businesses regarding their obligations, the Commission has published Guides Concerning the Use of Endorsements and Testimonials (“Endorsement Guides”) and a companion business guidance piece. Earlier this year, the Commission sought comment on potential updates and revisions to the Endorsement Guides.³ In October 2021, the Commission issued a Notice of Penalty Offenses which, as explained in the ANPR, may enable the Commission to obtain civil penalties from marketers that use fake or deceptive endorsements or

¹ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

² Last year, the Commission issued a Notice of Penalty Offenses for earnings claims and later authorized an Advanced Notice of Proposed Rulemaking seeking comment on a proposed rule. I supported both of those recommendations. Earning claims relate to the core functionality and efficacy of the product or service being marketed. The claims addressed in the earnings claims Notice of Penalty Offenses and the ANPR are typically fraudulent and significant monetary harm often results from the deception. For that reason, I was comfortable seeking comment on that proposed rule.

³ FTC Press Release: FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews (May 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-proposes-strengthen-advertising-guidelines-against-fake-manipulated-reviews>.

reviews.⁴ Commissioner statements issued at that time lauded the resurrection of these types of Notices, describing them as unique tools that the Commission had allowed to languish and that would allow staff to pursue the full range of actions against bad actors.⁵ While the ANPR now downplays their likely impact, the agency invested non-trivial resources in drafting the Notice of Penalty Offenses, identifying potential recipients, and serving it on more than 700 entities.⁶ Rather than churning out another proposed rule, perhaps we should stay the course on these initiatives and devote the incremental resources to enforcement in other critical areas.

The opportunity cost of yet another rulemaking should not be understated. Importantly, as noted above, the division that has responsibility for endorsements also oversees enforcement of the Opioid Addiction Recovery Fraud Prevention Act. Last year, after a 18 month delay not caused by staff, the Commission announced its first case under this statute.⁷ For the second consecutive year, deaths from overdoses rose dramatically and now exceed the country's peak deaths from AIDS, car crashes, and guns.⁸ Our citizens who suffer from opioid addiction are some of the most vulnerable people in this country; we could use our power and authority to great benefit by devoting more resources to this area.

Although I disagree with its issuance, it is worth noting that staff's approach to this ANPR is laudable. Rather than employing an "everything but the kitchen sink" approach, the ANPR is carefully tailored to focus on practices that are likely to be clear violations of Section 5. For the reasons described in this statement, I cannot support its issuance.

Accordingly, I dissent.

⁴ See www.ftc.gov/enforcement/penalty-offenses/endorsements.

⁵ For example, Commissioner Chopra wrote that "this unique authority in consumer protection enforcement . . . that past Commissioners largely ignored, depriving our hard working staff of the ability to pursue the full range of actions against bad actors . . . is particularly important given the Supreme Court's recent ruling in *AMG Capital Management*." Rohit Chopra, Prepared Remarks of Commissioner Rohit Chopra, *Regarding the Resurrection of the FTC's Penalty Offense Authority to Deter False Claims by For-Profit Colleges* (Oct. 6, 2012), https://www.ftc.gov/system/files/documents/public_statements/1597178/prepared_remarks_of_commissioner_chopra_re_penalty_offense.pdf. He further observed that "[a]ctivating the FTC's Penalty Offense Authority is one of many examples where the agency needs to put its tools to use, rather than letting them languish." *Id.* Chair Khan agreed, tweeting that "@FTC is resurrecting its Penalty Offense Authority to put companies on notice that certain practices are unlawful and violators will be hit with significant financial penalties." Lina Khan, @linakhanFTC, <https://twitter.com/linakhanftc/status/1445816849430634496>. The Notice of Penalty Offenses for endorsements was issued on Oct. 13, 2021.

⁶ FTC Press Release, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and other Misleading Endorsements* (Oct. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements>.

⁷ Christine S. Wilson, Concurring Statement of Commissioner Christine S. Wilson, *R360 LLC* (May 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022-05-17-R360-Commissioner-Wilson-Statement-FINAL.pdf

⁸ Noah Weiland and Margot Sanger-Katz, "Overdose Deaths Continue Rising, With Fentanyl and Meth Key Culprits," *NY Times* (May 11, 2022), https://www.nytimes.com/2022/05/11/us/politics/overdose-deaths-fentanyl-meth.html?action=click&pgtype=Article&state=default&module=styln-opioid&variant=show®ion=MAIN_CONTENT_1&block=storyline_levelup_swipe_recirc.