

Oral Remarks – Open Commission Meeting
October 20, 2022

Advance Notice of Proposed Rulemaking on Junk Fees

Advance Notice of Proposed Rulemaking on Fake Review

It is unclear whether the FTC is still a law enforcement agency if we are now attempting to reposition ourselves as a legislature. The six potential rules are at early stages and there is no promise that many of these misguided policy proposals will reach final rule status, so the massive regulatory undertakings still require substantial FTC resources.

This diversion of resources has a significant and measurable impact on our other work.

Second, I was given less than three weeks to consider a rulemaking effort that, if adopted, could regulate the way prices are conveyed to consumers ~~across~~ every sector of the economy. I understand that President Biden referenced ~~called~~ “junk fees” in remarks to the White House Competition Council on September 26. Chair Khan sits on that Council. And I recognize that some of these fees may be inadequately disclosed. But manufactured deadlines to stay in lockstep with the Biden Administration should not override our obligation to exercise our significant authority in sober and thoughtful ways. If FTC leadership truly believes that this proposal will result in a rule, then it is irresponsible to shortchange the Commission on the time required to perform our due diligence.

There are kernels of utility in the ANPR that I had hoped to explore with my fellow Commissioners and staff. I agree with ensuring that consumers (1) have access to sufficient information to make informed decisions and (2) are not charged for products or services they did not agree to purchase. I would have looked more favorably on a rulemaking effort narrowly focused on those issues, particularly where we have an enforcement track record. But the ANPR scheduled for a vote today is sweeping in its breadth; may duplicate, or contradict, existing laws and rules; is untethered from a solid foundation of FTC enforcement ~~methods~~ on flawed assumptions and vague definitions; ignores impacts on competition; and diverts scarce agency resources from important law enforcement ~~efforts~~. For these reasons, I cannot support the issuance of this Notice.

Given my concerns, I would like to highlight issues on which stakeholder input would be constructive.

Breadth

with the FTC's approach to clear and conspicuous disclosures across advertising mediums(e.g., mobile screens or television ads)?

Rule Duplication

- The ANPR appears to overlap with several existing regulations related to advertising and disclosures enforced by the FTC and/or other expert agencies. How would industry and markets determine which rule controls should conflicts arise?
- The Truth in Lending Act ("TILA") and Reg Z outline advertisement terms that trigger disclosures about fees, interest, charges, or other costs. ANPR considers requiring disclosure of *all* fees, interest, and charges regardless of whether the advertisement contains trigger terms. Are there prevalent unfair or deceptive practices that would support the FTC's adoption of more stringent advertising requirements on the marketing of consumer products, e.g., an Xbox, than the federal government imposes on the marketing of a home loan or credit card?
- The Funeral Rule's goals are to lower barriers to price competition in the funeral goods

- The ANFR asserts that “junk fees . . . facilitate inflation.” What evidence points to a connection between fees and inflation?

("Endorsement Guides"), which it is currently revising, and a companion business guidance piece.¹¹

In October 2021, the Commission issued a Notice of Penalty Offenses which, as explained in the ANPR, may enable the Commission to obtain civil penalties from marketers that use fake or deceptive endorsements or reviews. 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.¹³

The ANPR downplays their likely impact but the agency invested ~~minimal~~ resources in drafting the Notice of Penalty Offenses, identifying potential recipients, and serving it on more than 700 entities.⁴

Rather than churning out another proposed rule, perhaps we should stay the course on these initiatives and devote the incremental resources to enforcement in other critical areas.

The opportunity cost of launching yet another rulemaking is high. The division overm0d tng poteonaiiii

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 I have described, however, I cannot support its issuance.

IV. Advance Notice of Proposed Rulemaking on the Funeral Rule and Staff Report "Shopping for Funeral Services Online"

I would like to thank the many staff for their excellent work on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule.

- Division of Marketing Practices (BCP): Melissa Dickey, Lois Greisner, Rebecca Plett, Patti Poss, and Dotan Weinman
- Regional Offices: Amy BrannoQuale, Robert Cancellaro, Samantha Denny, Luis Gallegos, Florence Hogan, Michael Liggins, Michael Marino, Brent McPeek, Sammi Nachtigal Kelly Ortiz, Luis Solares, and Erik Winker
- BCP Director's Office: Elisa Jillson, Alejandro Rosenberg, and Monica Vaca
- Bureau of Economics: Margaret Patterson
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substantially over the last three decades. The proposed ANPR is narrowly crafted to explore whether revisions are necessary to guarantee that consumers have access to sufficient information when planning a funeral. The Commercial Surveillance ANPR issued two months ago, and the Junk Fees ANPR discussed today, reflect an “everything but the kitchen sink” approach to information gathering. In contrast, the Funeral Rule ANPR is focused on eliciting responses to specific proposals to modernize the rule.

I commend staff for crafting a carefully tailored ANPR that clearly identifies potential areas and issues for updates to an important FTC rule.