Oral Remarks – Open Commission Meeting
April 28, 2022

Advance Notice of Proposed Rulemaking/Notice of Proposed Rulemaking
Telemarketing Sales Rule

Presentation on Section 13(b) of the FTC Act

I. Telemarketing Sales Rule

Thank you, Chair Khan, for giving staff the opportunity to present their excellent work on these proposed Notices. Many thanks to Benjamin Davidson from the Division of Marketing Practices in the Bureau of Consumer Protection for the informative presentation this afternoon. Thanks also to the broader array of staff who worked on the proposed Advance Notice of Proposed Rulemaking (ANPRM) and Notice of Proposed Rulemaking (NPRM):

- BCP Division of Marketing Practices: Patricia Hsue, Benjamin Davidson, Kati Daffan, and Lois Greisman
- BCP Front Office: Sam Levine, Monica Vaca, Michael Atleson, Leah Frazier, and Alejandro Rosenberg
- Bureau of Economics: Daniel Wood and Patrick McAlvanah
- Office of General Counsel: Josephine Liu, Kenny Wright, and Richard Gold

As I will explain, the approach proposed by staff is carefully tailored to addressing identified and prevalent harms and avoids amendments unsupported by evidence in the record.

As a general matter, I believe that rulemaking is problematic. The Telemarketing Sales Rule, however, is a notable exception. In addition to disturbing consumers in their homes, deceptive telemarketing calls frequently involve fraud and cause significant financial harm. To address these harms, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act) in 1994 to curb deceptive and abusive telemarketing practices.[1] The Telemarketing Act directed the Commission to adopt a rule prohibiting deceptive or abusive telemarketing practices and to consider including recordkeeping requirements.[2]

[1] 15 U.S.C. 6101-6108. Specifically, as noted in the Commission's Notice, the Act directed the Commission to adopt a rule prohibiting telemarketers from undertaking a pattern of unsolicited calls that reasonable consumers would consider coercive or abusive of their privacy, restricting the times of day telemarketers may make unsolicited calls to consumers, and requiring telemarketers to promptly and clearly disclose that the purpose of the call is to sell goods or service. 15 U.S.C. 6102(a)(3). The Act also generally directed the Commission to address in its rule other acts or practices that it found to be deceptive or abusive, including acts or practices of entities or individuals that assist and facilitate deceptive telemarketing and, as noted above, to consider recordkeeping requirements. 15 U.S.C. 6101(a).

[2] 15 U.S.C. 6101(a). *See also* 2002 Notice of Proposed Rulemaking, 67 FR 4492, 4510 (Jan. 30, 2002).

We have a long history of enforcement under this Rule. In fact, the Commission first promulgated the Do Not Call provisions of this Rule during my tenure as Chief of Staff to FTC Chairman Tim Muris roughly 20 years ago.[3]

The revisions proposed in the Notice of Proposed Rulemaking, or NPRM, seek to improve protections for consumers and enable the FTC more effectively to investigate potentially illegal conduct. For example, the Notice proposes modifying the exemption to the current Rule with respect to business-to-business (B2B) calls. As Mr. Davidson explained, the proposal would modify the Rule to apply to B2B calls the prohibitions on both material misrepresentations and on false or misleading statements. The NPRM explains, in detail, how our law enforcement cases for over a decade have shown a prevalence of unfair or deceptive conduct in B2B telemarketing. Although the Commission has authority to bring law enforcement actions under Section 5 of the FTC Act to address these activities, removing the exemption for this conduct from the Rule would allow the Commission to seek additional remedies for consumers for these violations, and hopefully would result in greater deterrence. Given the well-documented history of unlawful practices in this area, I support this proposal. The proposed recordkeeping provisions similarly result from extensive experience in our law enforcement work.

The staff recommendation also includes an Advance Notice of Proposed Rulemaking, or ANPRM, that seeks comment on whether to propose additional revisions. For example, the Notice asks whether the Rule should continue to exempt inbound telemarketing calls regarding technical support services, negative option offers, and B2B calls. Here, in lieu of proposing amendments, the ANPRM seeks additional comment on the prevalence of unfair and deceptive practices, and asks about the benefits and harms to consumers, businesses, and competition that might flow from further revisions. I commend this carefully tailored approach that is designed to develop the data on prevalence and fully understand the potential market effects before proposing changes to the Rule.

Historical experience reveals that a heavy-handed regulatory approach can cause significant harm.[4] I will continue to look closely at any proposed rule. But here, the proposals are grounded in our law enforcement experience and draw on the expertise of our seasoned staff who address these issues daily on the front lines. To staff, thank you again for your thoughtful work on this proposed rule.

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[3] *See, e.g.*, Public Papers of the Presidents of the United States: George W. Bush, Remarks on the Creation of the National Do-Not-Call Registry (June 27, 2003), https://www.govinfo.gov/content/pkg/PPP-2003-book1/html/PPP-2003-book1-doc-pg702.htm (commending the FTC for the creation of the Registry); Press Release, Do Not Call Registrations Exceed 10 Million (June 27, 2003), https://www.ftc.gov/news-events/news/press-releases/2003/06/do-not-call-registrations-exceed-10-million (discussing the millions of registrations for the registry since the launch).

[4] Christine S. Wilson & Keith Klovers, The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech, 8 J. ANTITRUST ENF'T 10 (2019), https://academic.oup.com/antitrust/article/8/1/10/5614371; Dissenting Statement of Commissioner Christine S. Wilson Energy Labeling Rule, Comm'n Matter No. R611004 (Oct. 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf.

II. Section 13(b) of the FTC Act

Thank you, Chair Khan, for putting this important issue on today's agenda. Thank you to Audrey Austin for the informative presentation this afternoon; thanks also to staff from across the agency involved in this presentation.

- BCP Front Office: Audrey Austin, Bikram Bandy, Ian Barlow, and Elisa Jillson
- BCP Division of Enforcement: James Kohm
- BCP Division of Consumer and Business Education: June Chang, Karen Hobbs, and Jennifer Leach
- BCP Division of Consumer Response and Operations: Nicole Christ, Aaron Hutchinson, and Maria Mayo
- Office of the General Counsel: Josephine Liu and Elizabeth Tucci
- Bureau of Competition Healthcare Division: Bradley Scott Albert

I would also like to acknowledge the work of countless other professionals across the agency who have been working on 13(b) issues and strategies both in anticipation of and following the Supreme Court's decision.

I want to share a few words regarding my views on the Supreme Court's decision in *AMG*,[5] 13(b), and potential Congressional legislation. I support the FTC's use of Section 13(b) to seek equitable monetary relief, in appropriate cases, and also to challenge conduct that wrongdoers already have halted. I also support working with Congress to restore the ability of the FTC to use Section 13(b) to pursue wrongdoers – with appropriate guardrails.

As I have acknowledged previously, stakeholders have expressed concerns regarding various aspects of Section 13(b).[6] Some are concerned about the absence of a statute of limitations. I support including one in legislative revisions to 13(b). Others are concerned about the unbounded use of 13(b) to achieve disgorgement in antitrust cases. I agree that guiding principles on when the FTC will seek disgorgement, perhaps as detailed in the FTC's now-rescinded 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, would be constructive. And yet others have expressed concern about the application of Section 13(b) in consumer protection cases that involve not fraud but legitimate companies selling legitimate products, albeit with deceptive claims. Congress could set forth a framework in 13(b) under which courts must evaluate the value consumers may have retained from the product or service despite the deception. This approach has support in the case law and could assuage those concerns.[7]

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[5] *AMG Capital Management, LLC v. FTC*, 593 U.S. __ (2021).

[6] *See* Oral Statement of Commissioner Christine S. Wilson, Before the U.S. Senate Committee on Commerce, Science and Transportation (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf.

[7] *See, e.g.,* FTC v. Commerce Planet, Inc., 878 F. Supp. 1048 (C.D. Cal. 2012), *aff'd,* 815 F.3d 593, 603 (9th Cir. 2016) (affirming the district court decision that "relied on the testimony in question to *reduce* the award from $36.4 million to $18.2 million"); FTC v. Lane Labs-USA, Inc., 2014 WL 268642, *2 (D.N.J. 2014) (explaining that the

I share these concerns but believe they can be addressed. But I also have another concern. In the wake of the Supreme Court's decision in *AMG*, the agency naturally has sought to identify other avenues to obtain relief for consumers. Yes, the *AMG* decision has impacted our ability to return money to consumer victims. And yes, we need to evaluate carefully our existing authority to ensure we are using it fully, but appropriately, in furtherance of our mission. But the Commission must avoid using its authority in ways that exceed the boundaries of underlying statutes and corresponding Congressional intent.

The recently promulgated Made in the USA Rule provides one example of overreach. There, the Commission exceeded its statutory authority to regulate *labeling* claims.[8] And there have been other proposals behind the scenes that fortunately have not come to pass. If we engage in rulemaking and enforcement actions that exceed our jurisdiction, we will not engender confidence among members of Congress who have expressed qualms about the FTC's history of frolics and detours.[9] But we need Congress to clarify our 13(b) authority, so we must demonstrate that we will be careful stewards of that authority. Unfortunately, I am not confident that current Commission leadership has demonstrated a desire to walk that path – which will be to the detriment of the FTC, and ultimately consumers.

For this reason, I urge my colleagues to tread carefully.

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court has discretion in determining how to compensate consumers for the violations, was not constrained to total revenues, and could consider an award of the premium Defendants charged for the product over comparable products during the relevant period as well as Defendants' profits traced to only the offending advertisements); FTC v. Bronson Partners, LLC, 674 F. Supp. 2d 373, 384 (D. Conn. 2009) (explaining that "[t]he formula for calculating redress for consumer injury is straightforward: "(1) calculate the gross receipts received from all consumers subjected to the contumacious acts of the defendants, (2) offset gross receipts to the extent the defendants prove that consumers either received refunds or were satisfied with their purchases, [and] (3) order the liable defendants to pay the resulting amount. . . .") (citation omitted); FTC v. Kuykendall, 371 F.3d 745, 766 (10th Cir 2004) (describing the calculation of consumer loss and explaining that "defendants might be able to show that some customers received full refunds of their payments or that others were wholly satisfied with their purchases and thus suffered no damages.")

[8] Dissenting Statement of Commissioner Christine S. Wilson, Final Rule related to Made in U.S.A. Claims (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591494/2021-07-01_commissioner_wilson_statement_musa_final_rule.pdf; *see also* Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on the Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf (discussing that the Policy Statement applies the Health Breach Notification Rule in a manner that appears to exceed the FTC's authority).

[9] *See* Transcript: Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security (May 8, 2019), *available at*: https://docs.house.gov/meetings/IF/IF17/20190508/109415/HHRG-116-IF17-Transcript-20190508.pdf. At this Hearing, Rep. McMorris Rogers stated: "In various proposals, some groups have called for the FTC to have additional resources and authorities. I remain skeptical of Congress delegating broad authority to the FTC or any agency. However, we must be mindful of the complexities of this issue as well as the lessons learned from previous grants of rulemaking authority to the Commission." Transcript at 8-9. Rep. Walden similarly stated: "it has been a few decades, but there was a time when the FTC, as we heard, was given broad rulemaking authority but stepped past the bounds of what Congress and the public supported. This required further congressional action and new restrictions on the Commission." Transcript at 62.