

Oral Remarks of Commissioner Christine S. Wilson
Open Commission Meeting on December 16, 2021

**Advance Notice of Proposed Rulemaking to Combat Government and Business
Impersonation Fraud**

Thank you, Madam Chair.

Many thanks to Christopher Brown and Austin King for their work on this proposed Advance Notice of Proposed Rulemaking and for the excellent presentation today. Thanks also to staff in the Division of Marketing Practices and the Office of General Counsel who assisted with this recommendation.

As a general matter, I believe that rulemaking is problematic. Even when decisionmakers are motivated by the best intentions, the costs of rulemaking – particularly in the long run – tend to outweigh its benefits. I explained my concerns about rulemaking in more detail in my dissent¹ from the Commission’s annual regulatory plan and semi-annual regulatory agenda published last Friday.²

Given the facts surrounding impersonation fraud, I do not oppose seeking comment on this proposed rule. Impersonation fraud causes significant consumer injury. As staff reported, impersonation fraud imposes a median harm of \$1,000. And 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. Consequently, a carefully tailored rule prohibiting this conduct will not stifle competition or inhibit innovation but may deter unlawful activities and could enable the Commission to return money to consumer victims. I have supported the Commission’s law enforcement actions in this area³ and will continue to do so.

¹ Dissenting Statement of Commissioner Christine S. Wilson, *Annual Regulatory Plan and Semi-Annual Regulatory Agenda* (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf.

² FED. TRADE COMM’N, *Semiannual Regulatory Agenda* (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Preamble_3084_FTC.pdf; FED. TRADE COMM’N, *Statement of Regulatory Priorities* (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf; FED. TRADE COMM’N, *Agency Rule List - Fall 2021 Federal Trade Commission*, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3084&csrf_token=725F7489E8CE6%203966A90F47AA96F620D4FF82CF1F33A4B6C36F2FB5309BADA7630A0704DC44C40E535F019F69%20D2683CDDDF58.

³ See, e.g. *FTC v. Associated Cmty. Servs., Inc.*, No. 2:21-cv-10174-DML-CI (E.D. Mich. filed Jan. 26, 2021) (fake charity scammers “spoofed” caller ID to show names like “Breast Cancer” or “Volunteer Fire” and local area codes); *FTC v. Ponte Invs., LLC*, No. 1:20-cv-00177-JJM-PAS (D.R.I. filed Apr. 17, 2020) (callers misrepresented affiliation with the Small Business Administration); *FTC v. Forms Direct*,

I want to draw a bright line between my support for this proposal and my dissent from the regulatory agenda published last Friday. That plan proposes an avalanche of rulemaking on both the competition and consumer protection fronts. You’ve heard of Lollapalooza? We’re going to be hosting Rule-a-Palooza here at the FTC.

Our historical experience reveals clearly the harm of a heavy-handed regulatory approach. The elaborate regulatory frameworks for airlines and railroads stifled innovation, increased costs, raised prices, limited choice, and decreased output. Because those frameworks harmed the very parties they were intended to benefit, they were repealed on a bipartisan basis.⁴ The FTC’s existing rules provide a similar cautionary tale. Our Care Labeling Rule has been criticized for excluding new competition in the form of wet cleaners that would compete with dry cleaners.⁵

Competition rulemaking presents unique concerns. It isn’t clear that we have legal authority to undertake substantive competition rulemaking,⁶ but we’re gearing up for a ton of it. My concerns with this plan begin with the underlying rationale. Specifically, advocates say we need competition rulemaking because we have a “hyper-concentrated” economy.⁷ Those assertions rely on flawed data, and have been heavily criticized by leading scholars and economists.⁸ But

Inc., No. 3:18-cv-06294 (N.D. Cal. Filed Oct. 15, 2018) (government impersonator used domains including www.usimmigration.us and www.uscitizenship.info).

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>; Remarks of Commissioner Christine S. Wilson at British Institute of International and Comparative Law, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiicl_6-28-19.pdf; 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.

⁵ See Christine S. Wilson, Remarks for the Federalist Society at the Future of Rulemaking at the FTC Event, Hey, I’ve Seen This One: Warnings for Competition Rulemaking at the FTC (June 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf.

⁶ *Id.*

⁷ FED. TRADE COMM’N, Statement of Regulatory Priorities at 1 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

⁸ See, e.g., Joshua D. Wright et al., Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust Jan. 9, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Joshua D. Wright, Market Concentration, Note submitted to the Hearing on Market Concentration, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Michael Vita & F. David Osinski, John Kwoka’s Mergers, Merger Control, and Remedies: A Critical Review, 82 ANTITRUST L.J. 361 (2018); Greg Werden & Luke Froeb, Don’t Panic: A Guide to Claims of Increasing Concentration (Oct. 22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912; Carl

they provide a convenient fig leaf for people who believe a central planning regime will generate better results than our market-based economy. In fact, a rules-based approach will diminish the effects-based analysis built through more than four decades of careful assessment. This approach is not compatible with today’s sound, fact-specific and evolving approach to antitrust law.

And rulemaking presents endless opportunities for incumbents to raise their rivals’ costs and insulate themselves from competition. Our planned rulemaking extravaganza will incentivize companies to shift resources from competition and innovation to rent-seeking and regulatory gamesmanship – to the detriment of the very consumers our agency was created to protect. For colorful examples, check out “Make the Rules or Your Rivals Will,” a book by Prof. Shell of Wharton.⁹

Finally, we know that staff throughout the agency have been asked to pitch in on our merger review work, given the uptick in merger filings.¹⁰ It seems counter-intuitive to undertake a resource-intensive avalanche of rulemakings while failing to meet our timing obligations for merger review under the HSR Act.

So, while I am voting yes to seek comment on the proposed impersonation rule to address conduct that is essentially theft, I remain highly skeptical of rulemaking and our planned regulatory extravaganza.

Thank you again to staff for their excellent work on this proposed rule. If we are going to engage in rulemaking, it is appropriate that the effort be guided by our experienced staff.

Shapiro, Antitrust in a Time of Populism, (Oct. 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

⁹ G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL 1057 (2004) (“Market failures explain a great deal of regulation. But politics explains even more.”). Professor G. Richard Shell asserts that “[f]or every simple, neutral law we pass, there are ten designed to tilt the playing field. In other words, laws and legal institutions can make or break a business—or an entire industry.” *Id.*

¹⁰ See Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021) https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (“The current deal volume is imposing huge demands on our staff, and I’m very grateful to the merger shops for the heavy load they are carrying, as well as to the attorneys from OPP and OIA who have graciously stepped up to help.”)