



UNITED STATES OF AMERICA
Federal Trade Commission

Keynote of Commissioner Noah Joshua Phillips

**The FTC and the Digital Marketplace: Highlights from the Last Year
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Thank you for the introduction and to Baker Hostetler, and in particular, Amy Mudge, for inviting me.

Before I start, I would just like to mention that the remarks I give today are my own and do not necessarily reflect the views of the Federal Trade Commission or any of my fellow Commissioners.

Since the “new” Commissioners arrived at the Federal Trade Commission in May 2018 (and Commissioner Wilson in September 2018), consumer protection cases involving marketing, advertising, privacy and data security have been some of our most interesting and challenging. As in-house counsel, I suspect that many of you are dealing with these very same things. Technology is changing how we learn and communicate, and new platforms are allowing less traditional communicators as well as novel types of messaging. These developments offer great opportunities for businesses and consumers alike; but they also present risks. I am pleased to be

here today to highlight how the FTC is navigating this evolving terrain and to assist you with some “rules of the road”.

Let me start with some table setting. The somewhat convoluted – yet interesting – history of the FTC informs how the agency approaches issues in the marketplace. In 1914, President Woodrow Wilson signed the Federal Trade Commission Act into law, creating the FTC, which then absorbed its predecessor organization, the Bureau of Corporations – which had been housed within the Department of Commerce and Labor – in 1915. The FTC’s original purpose was to prevent unfair methods of competition in commerce as part of the battle to “bust the trusts”, that is, antitrust law. Recognizing that unfair and deceptive practices also can distort a competitive marketplace, in 1938, Congress amended the FTC Act and granted the FTC authority to stop “unfair or deceptive acts or practices in or affecting commerce”. Our competition and consumer protection staff, working with our Bureau of Economics, support the FTC’s vision of a vibrant economy characterized by vigorous competition and consumer access to accurate information.¹ Both are critical for a well-functioning marketplace.

Consumer access to accurate information in the marketplace – increasingly the digital marketplace – is important for a number of reasons. First, free markets rely upon effective competition, which in turn is grounded upon the merits and value of competing products and services. An essential element of effective competition is the availability of information that consumers can use to evaluate

¹ Federal Trade Commission, Strategic Plan for Fiscal Years 2018 to 2022, Feb. 12, 2018, https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf.

competing products to make the best possible choices. Second, competition in the marketplace can be distorted when consumers do not receive accurate and material information, which can result in diminished comparison shopping, unwarranted competitive parity, or even advantage for inferior products.² Without accurate and material information, competition and consumers are harmed.

On the competition side, the FTC examines advertising markets to ensure that they are robust and well-functioning. For example, in a recent administrative action, the FTC alleged that 1-800 Contacts, the largest online retailer of contact lenses, orchestrated a series of trademark agreements with rival online contact lens sellers that suppressed competition in certain online search advertising auctions and restricted truthful and non-misleading internet advertising to consumers.³ I dissented because I did not agree with a number of aspects of the decision, including the analytical approach taken by the majority and the notion that these trademark agreements hurt competition. But I do believe that scrutinizing online markets for anticompetitive manipulation of consumer information is very important.⁴

On the consumer protection side, the FTC actively polices the marketplace to promote the dissemination of accurate information. On one hand, we enforce statutes and rules that require the disclosure of information, such as the Franchise Rule, the R-Value Rule for Home Insulation Products, the Care Labeling Rule, and

² See Statement of Basis and Purpose, Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50218, 50223 (Aug. 27, 1979).

³ FTC Press Release, *FTC Commissioners Find that 1-800 Contacts Unlawfully Harmed Competition in Online Search Advertising Auctions, Restricting the Availability of Truthful Advertising to Consumers*, Nov. 14, 2018, <https://www.ftc.gov/news-events/press-releases/2018/11/ftc-commissioners-find-1-800-contacts-unlawfully-harmed>.

⁴ Commissioner Noah Joshua Phillips, Dissenting Statement in the Matter of 1-800 Contacts, Inc., [Redacted Public Version], Nov. 14, 2018, <https://www.ftc.gov/public-statements/2018/11/dissenting-statement-commissioner-noah-joshua-phillips-redacted-public>.

the Energy Labeling Rule. On the other, we monitor the marketplace and bring enforcement actions against individuals and companies that are providing misleading or deceptive information to consumers.

At the Commission, we are applying this long-standing enforcement policy in a variety of new venues and to a new set of actors. One area is fake online reviews. About a year ago, the FTC brought its first case challenging fake paid reviews on an independent retail website, alleging that Cure Encapsulations, a dietary supplement marketer, and its owner paid a third-party website to write and post fake reviews on Amazon.com. The complaint alleged that the defendants hired a third party and instructed them to obtain reviews to attain an average rating of 4.3 out of 5 stars in order to have sales and to, “Please make my product ... stay a five star”.⁵

In another recent high-profile case, the FTC charged cosmetics firm executive Sunday Riley and her eponymous skincare company with misleading consumers by posting fake reviews of the company’s products on Sephora.com. The FTC complaint alleged that, between November 2015 and August 2017, Sunday Riley Skincare managers, including Ms. Riley herself, posted reviews of their branded products on the Sephora site using fake accounts created to hide their identity, and requested that other employees do the same. The complaint further alleged that, after Sephora removed fake reviews, Sunday Riley employees suspected this was because Sephora recognized the reviews as coming from their IP addresses. The company then

⁵ FTC Press Release, *FTC Brings First Case Challenging Fake Paid Reviews on an Independent Retail Website*, Feb. 26, 2019, <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-brings-first-case-challenging-fake-paid-reviews-independent>.

obtained, according to one of the company’s managers, “an Express VPN account [to] . . . allow us to hide our IP address and location when we write reviews”. A VPN (virtual private network) lets users access the internet privately, by using separate servers to hide their online activity.⁶

Most recently, the FTC settled with LendEDU, operators of a website that compares student loans and other financial products.⁷ In that case we alleged that LendEDU misled consumers to believe its website provided objective product information, when in fact it offered higher rankings and ratings to companies that paid for placement. In addition, we alleged that the company touted fake positive reviews of its website. In most instances, instead of being objective and independent, reviews were written or made up by LendEDU employees, their family or friends, or other individuals with relationships with LendEDU.

A note on those two cases, one of which drew quite a bit of attention. In both *Sunday Riley* and *LendEDU*, the Commission alleged that the defendants deceived consumers through their use of fake reviews. However, while the LendEDU defendants were required to pay \$350,000, the Sunday Riley settlement did not involve a monetary remedy. Andrew Smith, the Director of the Bureau of Consumer Protection, recently explained the distinction between these two cases, noting that, “[w]ith LendEDU, we know clearly that the company made money by providing []

⁶ FTC Press Release, *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO’s Direction*, Oct. 21, 2019, <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

⁷ FTC Press Release, *Operators of Comparison Shopping Website Agree to Settle FTC Charges Alleging Deceptive Rankings of Financial Products and Fake Reviews*, Feb. 3, 2020, <https://www.ftc.gov/news-events/press-releases/2020/02/operators-comparison-shopping-website-agree-settle-ftc-charges>.

rankings and earning payments from the various advertisers. That was its business model. Its revenue was a result of the deceptive practice. That is the basis for the \$350,000.”⁸ To paraphrase Andrew, the FTC cannot just require a monetary remedy without a basis for doing so. In order to get money in *Sunday Riley*, the FTC would have had to tie earnings of the company to the fake reviews, which we lacked an evidentiary basis to do. In *LendEDU*, the business practice of charging for placement – rather than its practice of using fake reviews – gave the FTC the hook to obtain monetary relief.

Another set of defendants took deception to the next level. Devumi LLC and its owner and CEO sold fake indicators of social media influence, including fake followers, subscribers, views, and “likes” to users of social media platforms. The FTC complaint alleged that defendants sold fake Twitter followers to actors, athletes, musicians, writers, and others who wanted to increase their appeal as online influencers. They also sold fake Twitter followers to motivational speakers, investment professionals, and others who wanted to boost their credibility to potential clients. By the way, that included some law firm partners. Clients for faked LinkedIn followers included marketing, advertising, and public relations firms; companies offering computer software solutions; banking, investment, and other financial services firms; human resources firms; and others. Devumi also allegedly had more than 4,000 sales of fake YouTube subscribers and over 32,000

⁸ FTC Watch, *Push for tough penalties by Chopra, Slaughter pays off in LendEDU case*, Feb. 14, 2020, https://www.mlexwatch.com/ftcwatch/articles/7504/push-for-tough-penalties-by-chopra-slaughter-pays-off-in-lendedu-case?nl_pk=d1accd28-b808-438f-89b3-678432b54c5a&utm_source=newsletter&utm_medium=email&utm_campaign=ftcwatch.

sales of fake YouTube views to its clients, including musicians who wanted to increase the apparent popularity of their songs.⁹ Again, this is another example of where the FTC was able to obtain a monetary remedy because we could track the company's revenue from its illegitimate practices. The order required Devumi's owner and CEO to pay \$2.5 million, the amount that the FTC alleged that he was paid by Devumi. That judgment was suspended upon a payment of \$250,000, based on his inability to pay.

Influencer marketing is a hot topic and the FTC is committed to helping marketers get it right. Hopefully you are familiar with a terrific group of people at the FTC – the Division of Consumer and Business Education. Late last year, they spearheaded the release of educational materials geared toward keeping influencers on the right side of the law.¹⁰ Our “Disclosures 101 for Social Media Influencers” is a brochure that lays out the agency's rules of the road for when and how influencers must disclose sponsorships and relationships to their followers. For example, it suggests the words that influencers might use, as well as where in their social posts a disclosure should appear. Our team also put together a great video providing advice. All of these materials are available on our website.

In addition to our law enforcement and educational efforts, the FTC also works to stay current and to understand consumer expectations and marketplace

⁹ FTC Press Release, *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction*, Oct. 21, 2019, <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

¹⁰ FTC Press Release, *FTC Releases Advertising Disclosures Guidance for Online Influencers*, Nov. 5, 2020, <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers>.

developments. To that end, in February, the agency published a Federal Register notice requesting comment on our “Endorsement Guides”.¹¹ In place since 1980 and revised in 2009, the Endorsement Guides offer guidance to businesses about how established FTC advertising principles apply in this form of marketing. In the notice, we posed a list of questions for stakeholders. One area of particular interest is the Guides’ requirement that material connections – connections between an endorser and a seller of a product that could affect the weight or credibility of the endorsement – must be clearly and conspicuously disclosed. I encourage you all to take a look at the notice and weigh in with your expertise.

Posting deceptive or inaccurate information online, or engaging in other deceptive conduct like selling fake followers, distorts the online marketplace, preventing consumers from making informed decisions and creating an uneven playing field. When I was in private practice, I spent just enough time looking at a company offering products like these to know that in-house counsel need to keep an eye out for contractors offering marketing help that, in fact, crosses the line.

From our perspective, fostering the flow of accurate information also is critical. When companies prevent consumers from posting accurate reviews of products and services, this decreased flow of truthful information harms both consumers and competition. The FTC first waded into this territory in 2015 when we brought an action against weight-loss supplement marketer Roca Labs Nutraceutical and its principals. The defendants represented their products as safe

¹¹ FTC Press Release, *FTC Seeks Public Comment on its Endorsement Guides*, Feb. 12, 2020, <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides>.

and effective alternatives to gastric bypass surgery. They also claimed that users could lose as much as 21 pounds in one month, and that users have a 90 percent success rate in achieving substantial weight loss. Defendants apparently didn't want real life experiences with the product to dispel this fantasy. Among other charges, the FTC's complaint alleged that through contract provisions and other intimidating behavior, the defendants' attempts to prohibit purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews was unfair.

This practice caught the attention of Congress, and in 2016, the Consumer Review Fairness Act was enacted. The CRFA generally makes certain form contract provisions invalid. Form contracts between sellers and individual consumers cannot prohibit or restrict individuals from reviewing sellers' goods, services, or conduct; impose penalties or fees on individuals for such reviews; or require individuals to transfer intellectual property rights in such reviews.¹²

The FTC's first CRFA case took on a particularly egregious scheme run by Sellers Playbook, a get-rich-quick business opportunity based in Minnesota. The FTC, and the Minnesota Attorney General's Office, alleged that Sellers Playbook lured consumers into buying its expensive "system" by claiming that purchasers were likely to earn thousands of dollars per month selling products on Amazon. Few, if any, consumers achieved the promised results, and most lost money. To make matters worse, the defendants also allegedly violated the CRFA by using form contracts that improperly sought to restrict their victims' right to review the

¹² Consumer Review Fairness Act, 15 U.S.C. § 45b.

products and services they purchased.¹³ The Utah Division of Consumer Protection, the U.S. Marshals Service for the District of Minnesota, Amazon.com, Inc., the Better Business Bureau of Minnesota and North Dakota, and the Electronic Retailing Self-Regulation Program were all indispensable in the assistance they provided the FTC.

Consumers' unfettered ability to provide truthful reviews and information is crucial to a well-functioning marketplace and the FTC is committed to halting violations of the CRFA. Last spring we brought five administrative cases exclusively enforcing the CRFA, alleging that these defendants illegally used non-disparagement provisions in consumer form contracts in the course of selling their products and services.¹⁴ The defendants included a Pennsylvania-based HVAC and electrical provider, a Massachusetts-based flooring firm, a Nevada-based horseback trail riding operation, a Florida-based vacation rental company, and Maryland-based residential property management company.

The law enforcement work I have described, and indeed the enactment of the CRFA itself, illustrates the important role of the digital marketplace as a conduit for information. The ubiquity of smartphones and other personal computing devices has only made communication and information flow easier and more efficient than ever. Whether you are counsel for a Fortune 500 company or a start-up with a

¹³ FTC Press Release, *FTC and State of Minnesota Halt Sellers Playbook's Get Rich Scheme*, Aug. 6, 2018, <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-state-minnesota-halt-sellers-playbooks-get-rich-scheme>.

¹⁴ FTC Press Release, *FTC Announces First Actions Exclusively Enforcing the Consumer Review Fairness Act*, May 8, 2019, <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-announces-first-actions-exclusively-enforcing-consumer-review>; FTC Press Release, *FTC Announces Two Actions Enforcing the Consumer Review Fairness Act*, June 3, 2019, <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-announces-two-actions-enforcing-consumer-review-fairness-act>.

brand new innovation, the Internet is a crucial component for sales and marketing. And while consumers may still learn about or get a recommendation for a product or service from a neighbor or family member, they very often discover and investigate that product or service while they are surfing the Internet.

We all recognize that as technology continues to develop, now unimaginable products and services will emerge. So what does that mean for us going forward?

First, the digital marketplace facilitates an exchange of information that benefits both providers and consumers. I think it behooves everyone in this room to work on protecting the integrity of that information flow. There are a number of ways to do this. For advertisers and their affiliates, adhering to the tenets of responsible corporate citizenship can go a long way. Pay attention to how your contractors are getting out your message. Not only does it enhance your reputation and protect your consumer relationships, it will keep you out of the crosshairs of agencies like the FTC. I commend those of you that have taken this to heart and recommend to others the value in this approach.

Second, the development of, and adherence to, industry best practices can lessen the possibility that legislators or regulators will feel the need to draft legislation or rules to reach the same results. Well-defined industry best practices can help companies avoid pitfalls that might result in law enforcement actions. Developing, implementing, and updating self-regulatory initiatives can protect and improve an industry's reputation and goodwill with consumers. When done

properly, self-regulation can be pro-competitive – providing an even playing field for all industry participants.

Self-regulation cannot work, however, without your ongoing participation and cooperation. Utilizing experienced industry members to help develop best practices ensures that industry expertise, knowledge, and judgment are incorporated. This can be especially beneficial when the business practices or technology involved is complex and industry members have the most expertise. I encourage you to consider ways that self-regulation can foster innovation and new products.

Finally – and we hear this all the time in other contexts – but I really believe it applies here: if you see something, say something. The FTC and other enforcers rely on you in the trenches for information about deceptive and unfair acts or practices in the marketplace – or competition issues you see. Please reach out to us, whether it be a concern about competition, a troubling practice in which others are engaged, or information about trends and developments that would help inform the work of the FTC. In addition, your participation in the agency’s various comment processes is also critical. The review of the Endorsement Guides that I mentioned earlier is but one example of where your input is needed. We value your observations and feedback.

And with that, I’ll end. Thanks very much for your time today.