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A Progress Report on Key Priorities, and a Warning on AI Self-Regulation

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It's wonderful to be back at the National Advertising Division, which for so many years has been a key partner to the FTC as we work to ensure a fair and honest marketplace for consumers and marketers alike. This is my second time addressing this group.¹ Last year, I laid out the FTC's strategy for protecting the public from unfair and deceptive practices.² Our jurisdiction is incredibly broad – from environmental claims to children's privacy – but across the board our strategy rests on three pillars.

First, we are focusing our enforcement resources on the practices that are causing the most harm to consumers. Second, in combatting these practices, we are seeking strong relief that not only halts misconduct but also shifts incentives to protect consumers going forward. And third, when we identify broader problems in the market that are not being remedied through case-by-case enforcement alone, we are deploying additional tools to protect the public.

We are delivering on that strategy across multiple program areas, and today I'd like to provide status updates on three areas where our strategy is on full display. First, we are taking action to combat junk fees and deceptive pricing – an effort that is not only protecting consumers but is also promoting fair competition. Second, we are challenging the use of online interfaces – often known as dark patterns – that frustrate and harm consumers. And finally, despite the major blow of *AMG*, we are taking aggressive action to halt and deter emerging and evolving forms of fraud.

That should offer a good segue to the final portion of my remarks – how the FTC is adapting our strategy to confront emerging challenges, especially challenges posed by new technology. There I'll describe our approach to artificial intelligence, and how we are learning from the mistakes of the past to deploy an approach that is proactive, pro-innovation, and that protects consumers and honest businesses.

¹ I wish to thank Adam Wesolowski for his substantial assistance in preparing these remarks. The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

² Remarks of Samuel Levine at the National Advertising Division Annual Conference 2022 (Sept. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks_of_samuel_levine_at_nad_2022.pdf.

Combatting Junk Fees and Deceptive Pricing

The first area of focus is on junk fees and deceptive pricing, a growing problem throughout the economy.³ Increasingly, consumers are swamped by fees that are buried at the end of the transaction process or are otherwise advertised in such a way that most consumers cannot actually realize the fee or the true total cost.

This practice distorts the marketplace in serious ways. Consumers are harmed because they unwittingly overpay for goods and services.⁴ Honest businesses are harmed because they suffer a competitive disadvantage for advertising prices honestly.⁵ And the whole market suffers when consumers cannot effectively comparison shop and companies are no longer competing on quality and price but rather on their ability to sneak fees onto consumers – what economists have called “exploitative innovation.”⁶

As I’m sure all you know, agencies across the government are working to combat these practices – particularly what have become known as junk fees.⁷ But it is important to stress that the FTC’s strategy to drive price competition involves not only junk fees per se but also other forms of deception that harm consumers and competition by obscuring actual prices. This strategy is built on the pillars I described earlier – vigorous enforcement, forward-leaning remedies, and market-wide initiatives when appropriate.

For example, we recently charged Vonage⁸ and Publishers Clearing House⁹ with surprising consumers with expensive fees relating to cancellation and shipping and handling charges, and we recovered \$100 million and \$18.5 million, respectively, to be used for consumer redress. We’ve also

³ See Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87 Fed. Reg. 67413, 67414 (advanced notice of proposed rulemaking, Nov. 8, 2022) (to be codified at 16 C.F.R. pt. 464) [hereinafter Hidden and Junk Fee Proposed Rulemaking].

⁴ Hidden and Junk Fee Proposed Rulemaking, *supra* note 3 at 67414; Brian Deese et al., *The President’s Initiative on Junk Fees and Related Pricing Practices*, The White House (Oct. 26, 2022), <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/> [hereinafter President’s Initiative on Junk Fees].

⁵ Hidden and Junk Fee Proposed Rulemaking, *supra* note 3 at 67422; President’s Initiative on Junk Fees, *supra* note 4.

⁶ President’s Initiative on Junk Fees, *supra* note 4. Hidden and Junk Fee Proposed Rulemaking, *supra* note 3 at 67422.

⁷ President’s Initiative on Junk Fees, *supra* note 4.

⁸ Press Release, *FTC Action Against Vonage Results in \$100 Million to Customers Trapped by Illegal Dark Patterns and Junk Fees When Trying to Cancel Service*, FTC (Nov. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-action-against-vonage-results-100-million-customers-trapped-illegal-dark-patterns-junk-fees-when-trying-cancel-service> [hereinafter Vonage Matter].

⁹ Press Release, *FTC Takes Action Against Publishers Clearing House for Misleading Consumers About Sweepstakes Entries*, FTC (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-publishers-clearing-house-misleading-consumers-about-sweepstakes-entries> [hereinafter PCH Matter].

challenged bait-and-switch advertising, such as in our recent actions against LasikPlus¹⁰ and Passport Automotive,¹¹ and have obtained forward-leaning relief including compensation for wasted time. And I'd be remiss to not mention our ongoing litigation against Intuit,¹² particularly the Administrative Law Judge's recent opinion finding – after a meticulous analysis running more than 200 pages – that the company's "free" ad campaign deceived the public in violation of Section 5.¹³

But despite these actions, it is clear that the problem of deceptive pricing is not going away. That is why we are taking additional steps to root out this problem market-wide. Last year, we proposed a rule that would prohibit both hidden fees and bait-and-switch advertising in the auto sector.¹⁴ And this year, we are continuing work on a rulemaking around hidden and bogus fees.¹⁵ In both areas, we are carefully examining the comments we received as well as general trends in the marketplace to assess our next steps.

The flurry of activity in this area should send a clear message. When it comes to being honest with consumers about prices, don't wait to get a CID from the FTC. Don't wait for rules to be finalized that could trigger stiff civil penalties. Companies should act now to clean up their advertising. To disclose *actual* prices upfront. To not charge fees that consumers did not authorize. Firms that ignore these warnings can expect complaints from their customers, and may eventually be on the receiving end of a complaint from us.

Challenging Dark Patterns

The second major challenge we're confronting are deceptive design techniques known as dark patterns.¹⁶ Many questions have been raised about the FTC's use of this term. How are dark patterns different than ordinary deception? When are dark patterns illegal? How should companies avoid law enforcement scrutiny? I want to share my perspective on these questions.

First, while dark patterns frequently *are* deceptive, it is important to stress that dark patterns represent a distinct concern. In a traditional deceptive advertising case, the FTC might challenge a

¹⁰ Press Release, *FTC Order Requires LasikPlus to Pay for its Bait-and-Switch Eye Surgery Ads*, FTC (Jan. 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-order-requires-lasikplus-pay-its-bait-switch-eye-surgery-ads>.

¹¹ Press Release, *Federal Trade Commission Takes Action Against Passport Automotive Group for Illegally Charging Junk Fees and Discriminating Against Black and Latino Customers*, FTC (Oct. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-takes-action-against-passport-automotive-group-illegally-charging-junk-fees> [hereinafter *Passport Automotive Matter*].

¹² Press Release, *FTC Sues Intuit for Its Deceptive TurboTax "free" Filing Campaign*, FTC (Mar. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign>.

¹³ ALJ Initial Decision, *In re Intuit, Inc.*, Docket No. 9408 (FTC Sept. 6, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/intuit_initial_decision_public_redacted_1.pdf.

¹⁴ Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012 (notice of proposed rulemaking July 13, 2022) (to be codified at 16 C.F.R. pt. 463) [hereinafter *Auto Rule*].

¹⁵ Hidden and Junk Fee Proposed Rulemaking, *supra* note 3.

¹⁶ See *Bringing Dark Patterns to Light*, FTC Staff Report (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [hereinafter *Dark Patterns Report*].

false or unsubstantiated claim, such as being able to lose ten pounds in one week. These claims, of course, have not gone away. But digital advertising has introduced new and I think even more pernicious forms of deception. Advertising can now be highly interactive, and consumers' behaviors can be carefully tracked. Is a consumer more likely to turn over personal information when a button is green and bolded, if the alternative is faded and gray?¹⁷ Will a consumer be more likely to order a product if there's a ticking clock in the background, or if there's a message that 20 other shoppers have this item in their cart?¹⁸ Is a consumer more likely to take an action if they are repeatedly and disruptively prompted with a request?¹⁹

Critically, these interactions create a feedback loop whereby companies can continuously optimize their interfaces based on consumer interactions. And for some marketers, they can even personalize their interfaces to target individual consumers or discrete classes of consumers. We see firsthand in our investigations how user experience designers and others carefully craft user interfaces to, for example, slow down or frustrate cancellation efforts or induce snap purchases.²⁰ Likewise, we have seen employees sound the alarm that these techniques are causing consumer harm, only to be overruled when the impact on conversion and profits is considered.²¹

I'm sure you've noticed the flurry of enforcement activity in this area. In the Epic matter, we took on harmful privacy settings and unauthorized purchases.²² In PCH, we challenged a manipulative website design that led to surprise fees and other harms.²³ And in our ongoing litigation against Amazon, we've alleged that the company duped consumers into unknowingly sign up for Amazon Prime while making it difficult for consumers to cancel their memberships.²⁴

As important as the cases we've brought are the remedies we've secured. Recent orders have required clear and unambiguous design interfaces and disclosures, affirmative express consent that does not rely on deceptive design, simple cancellation processes like click-to-cancel, and the preservation of records relating to behavioral testing techniques.²⁵

As with junk fees and subscription traps, we are not limiting our work to enforcement. Last year, we published a major report on where we're seeing these patterns in the marketplace, and how we're

¹⁷ Dark Patterns Report, *supra* note 16 at 25-26.

¹⁸ *Id.* at 21-22.

¹⁹ *Id.* at 24.

²⁰ See, e.g., Press Release, *Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges*, FTC (Dec. 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations> [hereinafter Epic Games Matter].

²¹ *Id.*

²² *Id.*

²³ PCH Matter, *supra* note 9.

²⁴ Press Release, *FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime Without Consent and Sabotaging Their Attempts to Cancel*, FTC (June 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their>.

²⁵ Epic Games Matter, *supra* note 20; PCH Matter, *supra* note 9; Vonage Matter, *supra* note 8.

thinking about them.²⁶ And we're also addressing these patterns through rulemaking. Our proposed click-to-cancel rule not only would require simple cancellation but also makes clear that consent for charges cannot be obtained through using deceptive design interfaces.²⁷ Likewise, our proposed auto rule would prohibit the use of techniques designed to frustrate consumer choice in order to obtain consent.²⁸

I am proud of our work to root out these deceptive designs in every corner of the marketplace. Innovation in digital design is welcome, and indeed, it is an area where I believe the government can learn a lot from the private sector. But that innovation needs to be for the benefit and not to the detriment of consumers and competition.

Halting and Detering Emerging and Evolving Forms of Consumer Fraud

One type of innovation that does not benefit consumers is around fraud, where we see bad actors constantly refining and updating their tricks. Only three years ago, we had a strong, versatile tool to halt these frauds and return funds to consumers – Section 13(b) of the FTC Act.²⁹ With the loss of that authority,³⁰ our work has become much harder, but I am proud of how we adapted to this changing landscape through the same strategy we are using in other areas.

Consider first our approach to telemarketing. Over the summer we announced the largest crackdown on unwanted calls in U.S. history, with more than 100 enforcers bringing more than 180 actions.³¹ Our strategy in this area is multifaceted. We are challenging telemarketers themselves, such as those who are looking to exploit struggling student borrowers as the pandemic loan pause ends.³² We're

²⁶ Dark Patterns Report, *supra* note 16; Press Release, *FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers*, FTC (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers>.

²⁷ Press Release, *Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to "Click to Cancel" Recurring Subscriptions and Memberships*, FTC (Mar. 23, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>; Negative Option Rule, 88 Fed. Reg. 24716 (notice of proposed rulemaking Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 425).

²⁸ Auto Rule, *supra* note 14; Press Release, *FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers*, FTC (June 23, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers>.

²⁹ 15 U.S.C. § 53(b).

³⁰ *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

³¹ Press Release, *Law Enforcers Nationwide Announce Enforcement Sweep to Stem the Tide of Illegal Telemarketing Calls to U.S. Consumers*, FTC (July 18, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-law-enforcers-nationwide-announce-enforcement-sweep-stem-tide-illegal-telemarketing-calls-us>.

³² See, e.g., Press Release, *FTC Stops Scammers Charged with Preying on Students Seeking Debt Relief*, FTC (Aug. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-stops-scammers-charged-preying-students-seeking-debt-relief>; Press Release, *FTC Stops Student Loan Debt Relief Schemes that it Says Bilked Students Out of Millions*, FTC (May 8, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-stops-student-loan-debt-relief-schemes-it-says-bilked-students-out-millions>. It is not only confusion around the loan program that these scammers exploit. Persistent problems in student loan servicing – reminiscent of what was observed in mortgage servicing during the foreclosure crisis – continues to fuel this fraud. Press Release, *CFPB Steps Up Scrutiny of Student Loan Servicers That Deceive Borrowers About*

also challenging their enablers, particularly VoIP providers³³ and consent farms³⁴ – including Fluent, a publicly traded firm that sold hundreds of millions of leads to telemarketers.³⁵ I am proud to say that while robocalling remains a scourge, and while it is fueled by many factors, we are making real progress in our war on unwanted calls. In fact, the number of telemarketing complaints to the FTC fell significantly between fiscal years 2021 and 2022, and we’re on track for another decline in 2023.³⁶

Since the onset of the pandemic, we’ve also seen a major surge in deceptive money-making schemes.³⁷ Our approach here, too, is multifaceted. We are bringing significant cases against firms like WealthPress,³⁸ DK Automation,³⁹ and Automators AI.⁴⁰ And we’re adapting our approach to

Public Service Loan Forgiveness, CFPB (Feb. 18, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-steps-up-scrutiny-of-student-loan-servicers-who-deceive-borrowers-about-public-service-loan-forgiveness/>.

³³ See, e.g., Complaint, *United States v. Hello Hello Miami, LLC*, No. 1:23-CV-22553 (S.D. Fla. filed July 10, 2023) (filed on behalf of the FTC), https://www.ftc.gov/system/files/ftc_gov/pdf/hello_hello_miami_as-filed_complaint.pdf; Press Release, *FTC Sues to Stop VoIP Service Provider That Assisted and Facilitated Telemarketers in Sending Hundreds of Millions of Illegal Robocalls to Consumers Nationwide*, FTC (May 12, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-stop-voip-service-provider-assisted-facilitated-telemarketers-sending-hundreds-millions>; Press Release, *FTC Sues to Stop Interconnected Web of VoIP Service Providers Carrying Robocalls Pitching Phony Debt Relief Services*, FTC (Feb. 17, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-sues-stop-interconnected-web-voip-service-providers-carrying-robocalls-pitching-phony-debt>. I am particularly proud of our Project Point of No Entry, spearheaded by our Cleveland office, that targets VoIP providers that route millions of illegal robocalls from overseas. Press Release, *FTC Ramps Up Fight to Close the Door on Illegal Robocalls Originating from Overseas Scammers and Imposters*, FTC (Apr. 11, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-ramps-fight-close-door-illegal-robocalls-originating-overseas-scammers-imposters>.

³⁴ See Complaint, *United States v. Fluent, LLC*, No. 9:23-cv-81045 (S.D. Fla. 2023) (filed on behalf of the FTC, stipulated order entered Aug. 11, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1923230fluentcomplaintandattachment.pdf [hereinafter *Fluent Matter*]; Complaint, *United States v. Viceroy Media Solutions, LLC*, No. 3:23-cv-3516 (N.D. Cal. 2023) (filed on behalf of the FTC, stipulated order entered July 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/ecf_1_quick-jobs_complaint.pdf.

³⁵ *Fluent Matter*, *supra* note 34.

³⁶ Press Release, *FTC Releases Updated Do Not Call Registry Data Book; Impersonator Fraud Tops List of Consumer Complaints*, FTC (Nov. 21, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-releases-updated-do-not-call-registry-data-book-impersonator-fraud-tops-list-consumer-complaints> (noting a decline from 3.4 million complaints in FY 2021 to 1.8 million complaints in FY 2022).

³⁷ Emma Fletcher, Data Spotlight, *Social media a gold mine for scammers in 2021*, FTC (Jan. 25, 2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/01/social-media-gold-mine-scammers-2021>.

³⁸ Press Release, *FTC Suit Requires Investment Advice Company WealthPress to Pay \$1.7 Million for Deceiving Consumers*, FTC (Jan. 13, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-suit-requires-investment-advice-company-wealthpress-pay-17-million-deceiving-consumers> [hereinafter *WealthPress Matter*].

³⁹ Press Release, *FTC Takes Action to Stop DK Automation and Kevin David Hulse From Pitching Phony Amazon and Crypto Money-making Schemes*, FTC (Nov. 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-takes-action-stop-dk-automation-kevin-david-hulse-pitching-phony-amazon-crypto-money-making>.

⁴⁰ Press Release, *FTC Action Stops Business Opportunity Scheme That Promised Its AI-Boosted Tools Would*

ever-evolving forms of deceit. For example, in *WealthPress*, the defendants claimed they could earn consumers quick wealth using a proprietary algorithm – a claim we challenged as deceptive. Given the proliferation of these schemes and the massive volume of consumer complaints, we are also making use of a number of broader initiatives, including our money-making Notice of Penalty Offenses⁴¹ and our ongoing review of the Business Opportunity Rule.⁴²

As our country becomes more diverse, we are also concerned that consumers who don't speak English as a first language may face exploitation. We are undertaking important efforts to address this challenge.

First, we are significantly ramping up our consumer education and outreach efforts around fraud targeting non-English-speaking consumers. I encourage you to check out [ftc.gov/languages](https://www.ftc.gov/languages), where we provide comprehensive educational materials in a host of languages.⁴³ And as scammers adapt to changing circumstances, so do we. For example, following the devastating Maui wildfire, we worked with partners on the ground to translate our one-pager on avoiding scams⁴⁴ into the top languages needed on the island. Finally, in a particularly exciting development, we'll soon be announcing an exciting initiative to ensure that we can accept reports about fraud over the phone in other languages.

Second, we are making clear through our enforcement work that we will not tolerate the exploitation of non-English speakers. In our action against *Ganadores*, a real estate investment scheme, we alleged that it was unfair and a violation of FTC rules to advertise services in Spanish only to provide needed disclosures in English.⁴⁵ The FTC has long committed itself to protecting consumers in every community, and today our education and enforcement work are breaking new ground to deliver on that commitment.

Power High Earnings Through Online Stores, FTC (Aug. 22, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-action-stops-business-opportunity-scheme-promised-its-ai-boosted-tools-would-power-high-earnings> [hereinafter *Automators AI Matter*].

⁴¹ Press Release, *FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties*, FTC (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties>.

⁴² Press Release, *FTC Explores Changes, Possible Expansion of Its Business Opportunity Rule*, FTC (Nov. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-explores-changes-possible-expansion-its-business-opportunity-rule>; Business Opportunity Rule, 87 Fed. Reg. 72428, (regulatory review; advanced notice of proposed rulemaking, Nov. 25, 2022) (to be codified at 16 C.F.R. pt. 437).

⁴³ *Consumer Education in Multiple Languages*, FTC, <https://www.ftc.gov/languages>.

⁴⁴ Colleen Tressler, Consumer Alert, *Picking up the pieces after the Maui wildfires*, FTC (Aug. 11, 2023), <https://consumer.ftc.gov/consumer-alerts/2023/08/picking-pieces-after-maui-wildfires>; *Picking Up the Pieces After a Disaster*, https://www.consumer.ftc.gov/sites/www.consumer.ftc.gov/files/disaster_recovery_infographic_508.pdf.

⁴⁵ Press Release, *FTC Acts to Stop Real Estate and Online Commerce Coaching Scheme 'Ganadores' Targeting Spanish-Speaking Consumers With Brazen Money-Making Pitches*, FTC (June 13, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-acts-stop-real-estate-online-commerce-coaching-scheme-ganadores-targeting-spanish-speaking>.

AI and Self-Regulation⁴⁶

I think it's clear from my remarks that we're seeing major successes in the strategy I laid out last year for tackling the biggest challenges facing consumers. But today I want to add a fourth prong to that strategy – how we are responding to emerging technology in a way that protects consumers and ensures markets are fair, open, and competitive. The rise of generative AI is leading us to confront that question quite squarely, and I will use the remainder of my remarks to describe how the FTC is taking a comprehensive and proactive approach to this issue.

First, I want to zoom out and explain why we've chosen to be active in this space, rather than leaving consumers to fend for themselves. And the short answer is that we are learning from history. As Chair Khan noted in a recent New York Times op-ed, the moment we confront today in many ways resembles where we stood a generation ago, as we confronted the rise of what became known as Web 2.0.⁴⁷

As is the case today, the FTC back then stood at an inflection point. There were vigorous debates within the Commission about whether the agency should embrace a self-regulatory regime or should call on Congress to pass legislation.⁴⁸ In 2000, the Commission voted 3-2 to recommend that Congress codify fair information principles.⁴⁹ But less than eighteen months later, the Commission abandoned calls for Congress to pass legislation, noting the progress made around ongoing self-regulatory efforts.⁵⁰ Instead, the Commission announced an initiative to ensure that online services

⁴⁶ As we noted in a major report last year and numerous blog posts since, AI has become a buzzy term, and it can mean different things to different audiences—an academic discipline, a concept, or applications and tools that use machine learning or other computational technologies. *Combatting Online Harms Through Innovation: Federal Trade Commission Report to Congress 1-2* (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Combating%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf. See, e.g., Michael Atleson, Business Blog, *Keep your AI claims in check*, FTC (Feb. 27, 2023), <https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check>. But an exact definition is not as important as the output and impact of the emerging technology, whether one considers it strictly “AI” or not.

⁴⁷ Lina M. Khan, *We Must Regulate A.I. Here's How.*, N.Y. TIMES, May 3, 2023, <https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>.

⁴⁸ Chris Jay Hoofnagle, *Privacy Regulation: A Decade of Disappointment 4-5*, Electronic Privacy Information Center (Mar. 4, 2005), <https://archive.epic.org/reports/decadedisappoint.pdf>.

⁴⁹ Press Release, *FTC Recommends Congressional Action To Protect Consumer Privacy Online*, FTC (May 22, 2000), <https://www.ftc.gov/news-events/news/press-releases/2000/05/ftc-recommends-congressional-action-protect-consumer-privacy-online>; FTC, *Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress 36-38* (May 2000), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf>.

⁵⁰ Timothy J. Muris, Former Chairman, FTC, *Protecting Consumers' Privacy: 2002 and Beyond: Remarks at The Privacy 2001 Conference* (Oct. 4, 2001), <https://www.ftc.gov/news-events/news/speeches/protecting-consumers-privacy-2002-beyond> [hereinafter *Muris 2001 Privacy Remarks*]. See also John Schwartz, *F.T.C. Plans to Abandon New Bills On Privacy*, N.Y. TIMES, Oct. 3, 2001, <https://www.nytimes.com/2001/10/03/business/ftc-plans-to-abandon-new-bills-on-privacy.html>; Edmund Sanders, *FTC to Drop Push for More Privacy Laws*, L.A. TIMES, Oct. 2, 2001, <https://www.latimes.com/archives/la-xpm-2001-oct-02-fi-52289-story.html#:~:text=Reversing%20a%20Clinton%20administration%20policy,rules%20and%20boosting%20e>

disclosed and adhered to their privacy policies.⁵¹

A decade later, the Commission would change course once more – calling on Congress to pass privacy legislation.⁵² While that was a major step forward, it may have been too late – I needn't remind you that in the decade since, Congress has yet to pass such legislation. As a result, we have put to the test whether self-regulation in the absence of substantive protections can really protect consumers' privacy. Or to channel the FTC's 1980 Policy Statement on unfairness, we've put to the test whether markets can really “self-correct[]” to address harms to consumers and competition.⁵³

So let's consider how it's gone. We now live in a world where companies can routinely surveil consumers around the most intimate details of our lives, from where we worship to whether we're trying to conceive.⁵⁴ We live in a world where fraudsters have harnessed the power of digital advertising so effectively that the FTC saw an 18-fold increase in fraud losses originating on social media from 2017 to 2021.⁵⁵

We live in a world where local media – once key guardians of our democracy and our civic cohesion – has been decimated, often replaced by clickbait finetuned by digital surveillance to manipulate rather than inform us.⁵⁶ And we live in a world where teens, especially teenage girls, are experiencing a mental health crisis that many attribute in part to social media.⁵⁷

Are we happy with this state of affairs? Public opinion research makes clear that the answer is no. To rattle off just a few alarming figures, more than 2/3 of Americans think tech companies have too much power over our economy.⁵⁸ Eight in ten adults feel they have little or no control over how these

[education%20efforts](https://www.wired.com/2001/10/ftc-refocuses-privacy-agenda/); Jeffrey Benner, *FTC Refocuses Privacy Agenda*, *Wired* (Oct. 5, 2001), <https://www.wired.com/2001/10/ftc-refocuses-privacy-agenda/>.

⁵¹ Muris 2001 Privacy Remarks, *supra* note 50.

⁵² Press Release, *FTC Issues Final Commission Report on Protecting Consumer Privacy*, FTC (Mar. 26, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/03/ftc-issues-final-commission-report-protecting-consumer-privacy>; *Protecting Consumer Privacy in an Era of Rapid Change – Recommendations for Businesses and Policymakers*, FTC Report (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

⁵³ FTC Policy Statement on Unfairness, appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1074 (1984) (December 17, 1980 letter from the FTC to Senators Wendell Ford and John Danforth).

⁵⁴ See *Big Data: A Tool for Inclusion or Exclusion?* – Understanding the Issues, FTC Report (Jan. 2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

⁵⁵ See Fletcher, *supra* note 37.

⁵⁶ Judy Woodruff et al., *The connections between decline of local news and growing political division*, PBS NewsHour (Aug. 30, 2023), <https://www.pbs.org/newshour/show/the-connections-between-decline-of-local-news-and-growing-political-division>.

⁵⁷ See, e.g., Derek Thompson, *Why American Teens Are So Sad*, *THE ATLANTIC*, Apr. 11, 2022, <https://www.theatlantic.com/newsletters/archive/2022/04/american-teens-sadness-depression-anxiety/629524/>.

⁵⁸ Emily A. Vogels, *56% of Americans support more regulation of major technology companies*, Pew Research Center (July 20, 2021), <https://www.pewresearch.org/short-reads/2021/07/20/56-of-americans-support-more-regulation-of-major-technology-companies/>.

companies use their personal information.⁵⁹ And a strong majority of Americans support across the political spectrum believe that tech companies have too much power.⁶⁰

In a sharply divided country, the fact that so many Americans are unhappy with how the digital economy is working is a damning indictment of our experiment in self-regulation. And it should lead us to question whether anyone could honestly say that it was wise to not pass comprehensive privacy legislation. Wise to let a handful of tech giants decide how much information would be collected about us. Wise to count on consumers to protect themselves by reading privacy policies.⁶¹

My own view is that these policy choices – and yes, they were choices – were grave mistakes. I think we need to accept that self-regulation around digital privacy is not working. And I think we need to learn from these mistakes as we confront the next wave of emerging technology.

Before I get to how the FTC is learning from these mistakes, let me pause to comment on self-regulation in general – when it works and when it does not. In my view, self-regulation can be successful when there are clear, meaningful policy objectives; a dedicated, independent institutional structure to develop and enforce rules; and, most importantly, when there is a clear legal framework underlying the scheme and an external enforcer – like the FTC – able to act as a cop on the beat to enforce the law effectively.⁶² This last prong is critical. In fact, we saw a generation ago how self-regulatory efforts accelerated after the FTC called on Congress to pass privacy legislation, only to collapse after we abandoned that call.⁶³

NAD is a great example of how self-regulation can serve the public well. The organization enjoys an independent institutional structure and displays a willingness to make tough calls that may not please participants.⁶⁴ In addition, NAD benefits from there being a strong enforcement background, with the FTC and other enforcers having spent years laying out the rules of the road for honest advertising. Finally, and perhaps most importantly, NAD operates in a generally well-functioning market where companies are incentivized to bring challenges when their competitors are engaged in dishonest advertising.

Unfortunately, some of the key ingredients to NAD’s success simply are missing when it comes to

⁵⁹ Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, Pew Research Center (Nov. 15, 2019),

<https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/>.

⁶⁰ Jordan Marlatt, *Bipartisan Support for Big Tech Regulation Adds to the Sector’s 2023 Challenges*, Morning Consult Pro (Jan. 18, 2023), <https://pro.morningconsult.com/analysis/big-tech-regulation-2023-challenges>.

⁶¹ Although 97% Americans report having been asked to agree to privacy policies, only about one in five read them regularly. Auxier, *supra* note 59.

⁶² See Chris Jay Hoofnagle, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 176-77 (2016).

⁶³ *Id.* at 178 (citing Robert Gellman & Pam Dixon, Many Failures: A Brief History of Privacy Self-Regulation in the United States, World Privacy Forum (Oct. 14, 2011), <https://www.worldprivacyforum.org/wp-content/uploads/2011/10/WPFselfregulationhistory.pdf>).

⁶⁴ See, e.g., Samuel Butler & Katie Bond, *The NAD Has Become More Challenger Friendly*, Law360 (Aug. 28, 2023), <https://www.law360.com/articles/1714955/the-nad-has-become-more-challenger-friendly>. I am heartened by NAD’s rigorous approach to policing deceptive advertising, and appreciative of the organization’s referrals of matters to the FTC.

artificial intelligence. For example, NAD has a clear policy objective – ensuring truthfulness in advertising. But when it comes to key policy questions surrounding AI – such as tradeoffs around transparency, how to report on vulnerabilities and limitations, and the rights of creators – there is not even clear consensus on what our objectives should be.

Consider how generative AI is already leading market participants to accelerate their data collection, with firm after firm changing their privacy policies to make it easier for them to collect even more data from us and use it in new ways.⁶⁵ In contrast to what we see among NAD participants – where firms often challenge their competitors when their advertising steps out of line – here, firms are racing in lockstep to supercharge their data collection.

This strikes me as a particularly damning indictment of the failure – either by legislation or by self-regulatory efforts – to establish substantive protections for people’s data. We’ve allowed companies to harvest consumer data without any real limitations, and now some of these some companies are creating opaque AI systems that capitalize on – and accelerate – their earlier hoarding. It seems, in other words, like one self-regulatory failure is begetting another.⁶⁶

Given this history, we are taking a different approach than we did at the onset of Web 2.0. Let me describe three key principles that are driving our strategy.

First, the FTC recognizes that for America to remain the leader in developing cutting-edge technologies, our markets must be open, fair, and competitive. This means that fledgling upstarts should have the chance to compete with the incumbents who became dominant in the era of Web 2.0. On that score, we’re making significant progress.

For example, we successfully sued to block the largest semiconductor merger in US history – a merger that threatened to undermine competition and impede innovation in a critical market undergirding next-generation technologies.⁶⁷ And earlier this year, we proposed a rule to prohibit

⁶⁵ Geoffrey A. Fowler, *Your Gmail and Instagram are training AI. There’s little you can do about it.*, WASHINGTON POST (Sept. 8, 2023), <https://www.washingtonpost.com/technology/2023/09/08/gmail-instagram-facebook-trains-ai/>.

⁶⁶ In thinking about this issue, I am reminded of a statement by then-Commissioner Pamela Jones Harbour in connection with a 2009 FTC report recommending a self-regulatory approach around behavioral advertising. Concurring Statement of Commissioner Pamela Jones Harbour Regarding Staff Report, “Self-Regulatory Principles for Online Behavioral Advertising” (Feb. 12, 2019), https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-statement-commissioner-pamela-jones-harbour-ftc-staff-report-self-regulatory-principles/p085400behavadharbour.pdf. There she made quite clear that while self-regulation offers advantages in terms of flexibility, “[t]he Commission should not endorse self-regulation under circumstances where industry still has not articulated meaningful standards or agreed to be held accountable.” *Id.* at 2. And she went on to warn that this trend threatened competition as well, as the market for consumer data was consolidating rapidly. *Id.* at 7-9. In making this point, Commissioner Harbor cited her dissent in the Google/DoubleClick matter. Dissenting Statement of Commissioner Pamela Jones Harbour In the Matter of Google/DoubleClick, F.T.C. File No. 071-0170 (Dec. 20, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf. It is worth a read.

⁶⁷ Press Release, *Statement Regarding Termination of Nvidia Corp.’s Attempted Acquisition of Arm Ltd.*, FTC (Feb. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding->

noncompete agreements in labor contracts, which would help ensure that startups have a chance to compete with the largest incumbents for talent.⁶⁸ Our Bureau of Competition, Bureau of Consumer Protection, and Office of Policy Planning are working more closely than ever to drive this agenda forward.

Second, we are using our existing tools – especially enforcement – to challenge unfair or deceptive practices that we’re already seeing emerge in connection with this technology. We have made clear that if you use or claim to use AI to defraud the public or help others do the same, you can be liable under the FTC Act, the TSR, or other laws we enforce. Indeed, just last month we secured a TRO against a firm that claimed to use AI to make consumers rich.⁶⁹ We have made clear that if you rely on algorithmic decision-making, you should be sure it’s not resulting in unlawful bias.⁷⁰ And we laid the groundwork for such a claim with our first case, Passport, challenging discrimination under the FTC Act.⁷¹ We’ve made clear that AI claims need to be substantiated, and earlier this year brought our first case alleging that a claim around an algorithm is baseless.⁷² As we encounter new problems in the marketplace, we will not hesitate to use the tools we have to protect the public.

That brings me to our third principle. We are not only prepared to use the tools we have but are also adapting and expanding our toolkit to confront emerging threats. First, we have proposed market-wide rules that could help prevent some of the more harmful uses of AI. Our proposed impersonator rule would allow us to seek civil penalties and money for harmed consumers against those who use voice-cloning and other technologies to defraud the public.⁷³ Our proposed fake review rule would up the ante for using AI to generate fake reviews.⁷⁴ And we will continue to review comments on whether we should propose rules addressing algorithmic decision-making.⁷⁵

[termination-nvidia-corps-attempted-acquisition-arm-ltd.](#)

⁶⁸ Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>; Non-Compete Clause Rule, 88 Fed. Reg. 3482, (notice of proposed rulemaking, Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

⁶⁹ See *Automators AI Matter*, *supra* note 40.

⁷⁰ Press Release, *FTC Chair Khan and Officials from DOJ, CFPB and EEOC Release Joint Statement on AI*, FTC (Apr. 25, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-chair-khan-officials-doj-cfpb-eoc-release-joint-statement-ai>.

⁷¹ See *Passport Automotive Matter*, *supra* note 11.

⁷² See *WealthPress Matter*, *supra* note 38.

⁷³ Press Release, *FTC Proposes New Rule to Combat Government and Business Impersonation Scams*, FTC (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-proposes-new-rule-combat-government-business-impersonation-scams>; Trade Regulation Rule on Impersonation of Government and Businesses, 87 Fed. Reg. 62741, (notice of proposed rulemaking, Oct. 17, 2022) (to be codified at 16 C.F.R. pt. 464).

⁷⁴ Press Release, *Federal Trade Commission Announces Proposed Rule Banning Fake Reviews and Testimonials*, FTC (June 30, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-proposed-rule-banning-fake-reviews-testimonials>; Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364 (notice of proposed rulemaking, July 31, 2023) (to be codified at 16 C.F.R. pt. 465).

⁷⁵ Press Release, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, FTC (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>; Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (advanced notice of proposed rulemaking,

Of course, our most important tool of all is our people, and since we spoke last year, the Commission has created an Office of Technology that has been busy recruiting some of the most talented technologists in the world, who are working hand-in-hand with our outstanding attorneys, investigators, consumer education specialists, and economists.⁷⁶ In fact, since Chair Khan took office, we have roughly tripled the number of cross-agency technologists at the agency.

What should be clear from these principles is we are not going to sit back and let consumers fend for themselves, or let those looking to monetize AI write their own rules. We will use every tool we have to protect the public. And when we find that our tools are falling short, we will be upfront with Congress about what we believe is needed.

Conclusion

Let me end on the same note I ended on last year. Our agency is confronting some of the biggest challenges in the economy, and there's no doubt we're facing a lot of scrutiny. Indeed, as a longtime reader of the Wall Street Journal, I am reminded of this almost daily. But our extraordinary staff are staying laser-focused on the work, and they're getting the job done. Despite the blow dealt by *AMG*, the pace of enforcement is rising significantly. Between FY21 and FY22, the number of enforcement actions coming out of BCP jumped by more than 70%,⁷⁷ and we'll soon be able to report on another jump this fiscal year.

Many of these cases have been groundbreaking. Over the last year, we've secured our largest COPPA judgment ever,⁷⁸ our largest ROSCA judgment ever,⁷⁹ and our largest administrative judgment ever.⁸⁰ And it's not only monetary judgments where we're notching wins. A recent article described this summer's string of privacy enforcement actions as "among the most consequential three months in US privacy enforcement history" that "may someday be seen as a moment of transformation in American data privacy enforcement."⁸¹ That we are undertaking this ambitious agenda even as we pursue important rulemaking, consumer protection, and 6(b) initiatives shows that we are truly firing on all cylinders.

Aug. 22, 2022).

⁷⁶ Press Release, *FTC Launches New Office of Technology to Bolster Agency's Work*, FTC (Feb. 17, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work>.

⁷⁷ See FTC, Federal Trade Commission Annual Performance Report for Fiscal Year 2022 and Annual Performance Plan for Fiscal Years 2023 to 2024 10, https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy22apr_fy23-24app.pdf; FTC, Federal Trade Commission Annual Performance Report for Fiscal Year 2021 and Annual Performance Plan for Fiscal Years 2022 to 2023 10, https://www.ftc.gov/system/files/ftc_gov/pdf/21apr_22-23app.pdf.

⁷⁸ Epic Games Matter, *supra* note 20.

⁷⁹ Vonage Matter, *supra* note 8.

⁸⁰ Epic Games Matter, *supra* note 20.

⁸¹ Mike Swift, *Comment: FTC consumer protection chief Levine sees 'paradigm shift' in US privacy enforcement*, MLex (Aug. 2, 2023), <https://mlex.shorthandstories.com/ftc-consumer-protection-chief-levine-talks-privacy-enforcement-with-MLex/>.

Our staff's ability to deliver in such big ways for the public is a testament to their deep dedication to the mission of our agency. I expect 2024 to be another significant year for the FTC, and I look forward to updating you on our progress.