

# What the FTC Could Be Doing (But Isn't) To Protect Privacy

The FTC's Unused Authorities

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# INTRODUCTION

Despite an ever-deepening crisis of exploitative personal data practices, the United States remains one of the few developed countries in the world with no national data protection agency.<sup>1</sup> To date, Congress has failed to heed calls to establish such an agency—or indeed to enact comprehensive data protection legislation at all.

In the absence of a U.S. data protection agency, the task of regulating and safeguarding data privacy has been spread across various state and federal entities. For general online privacy enforcement, the regulatory responsibility has fallen chiefly to the Federal Trade Commission. The FTC’s mandate includes the power to prohibit unfair and deceptive trade practices, including the unfair and deceptive collection, use, or transfer of personal data. The Commission is also responsible for combatting unfair methods of competition and has specific authority to enforce and issue rules under several targeted privacy laws.

Beginning in the mid-1990s, the FTC took an active interest in the emerging issue of online privacy and held a series of workshops that led, in part, to the passage of the Children’s Online Privacy Protection Act (“COPPA”), the issuance of reports critical of the data practices of early internet companies, and demand for additional regulatory authorities. Unfortunately, the FTC’s early internet privacy proceedings also led to a reframing of privacy law in the United States as being a matter of “notice and choice” and deference to industry-backed “self-regulation.”

Nevertheless, the Commission began in the 2000s to expand the scope of its privacy investigations and eventually formed a Division of Privacy and Identity Protection within the Bureau of Consumer Protection. Since then, the FTC has led significant investigations into privacy violations by both small entities and some of the largest technology companies in the world. But many of these cases did not lead to substantial

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<sup>1</sup> EPIC, *The U.S. Urgently Needs a Data Protection Agency* (2020), <https://epic.org/dpa/>.

changes in business practices or monetary penalties, and the agency's dreams of industry self-regulation have gone largely unfulfilled.

Defenders of the FTC's lack of effective privacy enforcement have argued that the agency does not have sufficient regulatory or penalty authorities to address the privacy threats posed by modern internet services. And it is true that there are significant limitations in the patchwork of data protection authorities at the FTC's disposal. For example, the procedures by which the FTC can define unfair and deceptive practices are unnecessarily onerous, and the Commission is limited in its ability to penalize first-time data protection offenders. For these (and many other) reasons, Congress must move quickly to establish a strong, independent, and adequately funded data protection agency.

But the FTC's failure to rein in the widespread misuse of personal data is not just a function of its limited statutory powers. Too often, the FTC has neglected to use the authority Congress has already given it. The Commission's repeated failure to take meaningful enforcement action and to block harmful mergers has allowed abusive data practices by Facebook, Google, and other industry giants to flourish. Some statutory authorities, including the FTC's power to promulgate trade rules, have simply never been used to advance the Commission's data protection mission.

The purpose of this report is to highlight some of the unused and underused authorities in the FTC's toolkit. Until Congress acts to create a modern data protection agency in the United States, it is critical that the Commission deploy every available tool to safeguard privacy rights and stem the tide of exploitative data practices. This report is meant as a starting point for the FTC to make the most of the data protection authority it already has.

# OVERVIEW OF THE FTC'S AUTHORITY

The Federal Trade Commission was established in 1914 to prevent unfair methods of competition in commerce.<sup>2</sup> Congress expanded the FTC's mandate in 1938 to include a broad prohibition against unfair and deceptive business practices and has since charged the Commission with enforcing a variety of consumer protection laws.<sup>3</sup> Today, the FTC's overarching mission is to “[p]rotect[] consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”<sup>4</sup>

The Commission's powers can be broadly grouped into investigative authority, enforcement authority, and rulemaking authority. The FTC is empowered to “prosecute any inquiry necessary to its duties in any part of the United States”<sup>5</sup> and to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management” of any entity engaged in commerce.<sup>6</sup> Section 9 of the FTC Act authorizes the Commission to “require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.”<sup>7</sup> Section 6(b) of the FTC Act also authorizes the Commission to require “reports or answers in writing to specific questions” from a company about its business practices.<sup>8</sup>

Following an investigation, the Commission may initiate an enforcement action under an administrative or judicial process if it has “reason to believe” that a legal violation has

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<sup>2</sup> *About the FTC*, Fed. Trade Comm'n (2021), <https://www.ftc.gov/about-ftc>.

<sup>3</sup> *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Fed. Trade Comm'n (Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [hereinafter *FTC Authority Overview*].

<sup>4</sup> *About the FTC*, *supra* note 2.

<sup>5</sup> 15 U.S.C. § 43.

<sup>6</sup> 15 U.S.C. § 46(a). *But see id.* (excluding banks, savings and loan institutions, and certain activities of common carriers).

<sup>7</sup> 15 U.S.C. § 49; *see also FTC Authority Overview*, *supra* note 3.

<sup>8</sup> 15 U.S.C. § 46(b).

occurred.<sup>9</sup> Consumer protection enforcement generally falls under section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>10</sup> The Commission enforces antitrust violations under a variety of antitrust statutes, but most notably under section 5<sup>11</sup> and the Clayton Act.<sup>12</sup>

Finally, the Commission has considerable rulemaking authority. The most significant example of this authority is section 18 of the FTC Act, which authorizes the Commission to promulgate trade regulation rules “defin[ing] with specificity . . . unfair or deceptive acts or practices in or affecting commerce” (a procedure commonly known as Magnuson-Moss rulemaking).<sup>13</sup> The statute requires that the Commission have reason to believe the practices addressed by the rulemaking are “prevalent”<sup>14</sup> and mandates a hearing with an opportunity for cross-examination, among other steps.<sup>15</sup> Once the Commission has prescribed a trade regulation rule, any person who violates the rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule” is liable for up to \$10,000 per violation.<sup>16</sup>

## UNUSED AND UNDERUSED AUTHORITIES

In recent years, the Commission has faced criticism over its failure to fully use its existing authorities to protect consumers and combat anticompetitive practices. The Commission is in a poor position to request more authority from Congress when it fails to fully exercise the power it already has. This section discusses several authorities that the Commission can use to increase its impact and be a more effective defender of

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<sup>9</sup> 15 U.S.C. § 53; *see also FTC Authority Overview, supra* note 3.

<sup>10</sup> 15 U.S.C. §. 45(a)(4)(A).

<sup>11</sup> 15 U.S.C. § 45(a) (prohibiting unfair methods of competition).

<sup>12</sup> 15 U.S.C. § 18 (prohibiting corporate acquisitions that may substantially lessen competition).

<sup>13</sup> 15 U.S.C. § 57a; *see also FTC Authority Overview, supra* note 3.

<sup>14</sup> 15 U.S.C. § 57a(b)(3).

<sup>15</sup> 15 U.S.C. § 57b; 5 U.S.C. § 57c(2)(B).

<sup>16</sup> 15 U.S.C. § 45(m)(1)(A).

privacy and consumer rights. It is past time for the Commission to dust off these tools and make full use of each one to prevent commercial abuses of personal data.

## 1. Section 5(b): Administrative Proceedings

Section 5(b) of the FTC Act authorizes the Commission to initiate an administrative proceeding to halt unfair or deceptive practices and unfair methods of competition.<sup>17</sup> If the Commission has “reason to believe” that a party has engaged or is engaging in an unlawful business practice, the Commission can serve a complaint on the offending party.<sup>18</sup>

If the party contests the charges (rather than settling with the Commission), the complaint is adjudicated by an Administrative Law Judge (ALJ), who has the authority to issue a cease and desist order prohibiting the party from continuing its unlawful course of conduct.<sup>19</sup> Although section 5(b) generally only permits injunctive relief in an administrative proceeding,<sup>20</sup> section 5(l) authorizes the Commission to seek civil penalties, equitable monetary relief, further injunctive relief in federal court when a party violates one of the Commission’s administrative orders.<sup>21</sup>

As the Supreme Court noted recently in *AMG Capital Management, LLC v. Federal Trade Commission*, the Commission has often chosen direct litigation under section 13(b) to resolve consumer protection violations rather than proceeding through the ALJ process.<sup>22</sup> The Commission issued only 21 new administrative complaints and 21 final

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<sup>17</sup> 15 U.S.C. § 45(b).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority* 23 (Oct. 29, 2020), 169 U. Pa. L. Rev. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3721256](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256).

<sup>21</sup> 15 U.S.C. § 45(l).

<sup>22</sup> 141 S. Ct. 1341, 1347 (2021).

administrative orders in 2019 compared to 49 complaints filed in federal court and 81 permanent injunctions and orders obtained by the Commission.<sup>23</sup>

But in light of the Supreme Court’s holding in *AMG Capital Management* that section 13(b) does not authorize court-ordered monetary relief,<sup>24</sup> it is particularly important that the FTC make full use of its powers under section 5(b) and section 5(l) to halt and penalize abusive data practices. And there is no shortage of compelling targets for the Commission to choose from: the FTC has failed to exercise its section 5 authority in response to dozens of consumer protection complaints concerning data collection, marketing to children, cross-device tracking, consumer profiling, user tracking, discriminatory business practices, and data disclosure to third-parties.<sup>25</sup>

## 2. Section 5(m): Penalty Offense Authority

Section 5(m) of the FTC Act empowers the Commission to seek civil penalties in federal court in certain circumstances. Section 5(m)(1)(A) authorizes the Commission to pursue civil penalties when a party has violated a Commission rule.<sup>26</sup> Section 5(m)(1)(B), the penalty offense authority, authorizes the Commission to seek penalties against a party that has engaged in conduct that it knows the Commission has determined to be unlawful in a Commission order (other than a consent order).<sup>27</sup> The FTC has rarely used this penalty offense authority over last four decades.<sup>28</sup>

In response to criticisms that the FTC was failing to address unlawful trade practices in late 1960s and early 1970s, Congress enacted the Magnuson-Moss Warranty Act in 1975.<sup>29</sup> The Act reaffirmed the Commission’s rulemaking power and provided new

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<sup>23</sup> *Id.*

<sup>24</sup> 141 S. Ct. at 1344.

<sup>25</sup> EPIC, *supra* note 1.

<sup>26</sup> 15 U.S.C. § 45(m)(1)(A)

<sup>27</sup> 15 U.S.C. § 45(m)(1)(B)

<sup>28</sup> Chopra & Levine, *supra* note 20, at 24.

<sup>29</sup> *Id.* at 22; see also J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(B) of the FTC Act*, 79 Antitrust L.J. 1, 22-8 (2013) at 8–21.

authorities to pursue civil penalties against those who violate FTC rules or who knowingly engage in practices previously determined to be unfair or deceptive by the FTC.<sup>30</sup> As FTC Commissioner Rohit Chopra and FTC Attorney Advisor Samuel A.A. Levine recently explained in an article on the penalty offense authority:

Under the Penalty Offense Authority, the Commission can seek civil penalties against violators of Commission orders if:

- The Commission has issued a final cease and desist order, other than a consent order, following an administrative proceeding under Section 5(b) of the FTC Act; and
- The Commission has determined in that order that a particular practice is unfair or deceptive and therefore unlawful; and
- A party has engaged in that practice after the Commission’s cease-and-desist order became final, with actual knowledge that the practice is unfair or deceptive.<sup>31</sup>

Put differently: parties commit penalty offenses when they engage in certain practices that the Commission has condemned and are on notice that the Commission has condemned them.<sup>32</sup> The Commission can provide notice by informing parties of its prior determinations, which exposes those parties to penalties if they engage in similar conduct.<sup>33</sup> There is no statute of limitations on previous Commission findings; once a practice is determined to be deceptive, a company can be held liable even decades later as long as it is on notice of the Commission’s determination.<sup>34</sup>

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<sup>30</sup> Chopra & Levine, *supra* note 20, at 22.

<sup>31</sup> *Id.* at 23.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also *Fed. Trade Comm’n. v. Sears, Roebuck & Co., v. Sears, Roebuck & Co.*, No. 81-A-503, 1983 WL 1889, at \*3 (D. Colo. Oct. 18, 1983) (rejecting claims that orders issued before the codification of section 5(m)(1)(B) cannot trigger penalty liability).



When this authority was first enacted, the Commission sent synopses of applicable Commission case law to dozens of businesses informing them which practices were unlawful and put them on notice that violations could subject them to civil penalties.<sup>35</sup> Within five years, the Commission sent notifications to over 2,000 firms across multiple industries.<sup>36</sup>

Testifying before Congress in 1982, FTC Commissioner Patricia Bailey described the penalty offense authority as “an extremely effective and efficient way to enforce the law.”<sup>37</sup> Yet in the last decade, the Commission has used this authority once.<sup>38</sup>

Chopra and Levine identify three key advantages for using the penalty offense authority: deterrence, reduced litigation risk for the Commission, and market-wide impact.<sup>39</sup> First, the penalty offense authority provides strong deterrence against wrongdoing because it allows for civil penalties.<sup>40</sup> Importantly, this authority allows penalties that exceed ill-gotten gains.<sup>41</sup> These punitive fines can disincentivize parties from engaging in wrongdoing instead of writing off smaller fines as the cost of doing business.

Second, “the Commission’s authority to obtain monetary relief under its Penalty Offense Authority is beyond dispute.”<sup>42</sup> That stands in marked contrast to the FTC’s 13(b) authority, which the Supreme Court recently held does not authorize court-ordered monetary relief.<sup>43</sup>

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<sup>35</sup> *Id.*; see also David O. Bickart, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act*, 44 U. Chi. L. Rev. 761, 768 (1976).

<sup>36</sup> Chopra & Levine, *supra* note 20, at 25.

<sup>37</sup> Testimony of Commissioner Patricia P. Bailey Before the Subcomm. on Com., Tourism and Transp. of the Comm. on Energy and Com. of the H.R. Concerning the 1982 Reauthorization of the Fed. Trade Comm’n, at 11 (Apr. 1, 1982).

<sup>38</sup> Chopra & Levine, *supra* note 20, at 25.

<sup>39</sup> *Id.* at 26–31.

<sup>40</sup> Chopra & Levine, *supra* note 20, at 26–27.

<sup>41</sup> *Id.* at 27.

<sup>42</sup> *Id.* at 29–30.

<sup>43</sup> *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1344 (2021).

Third, the Commission can correct market-wide illegal practices by serving notice of a Commission determination on firms across an industry.<sup>44</sup> For example, the Commission previously used the penalty offense authority to prevent deceptive sales of textile products labeled as bamboo but actually made of rayon.<sup>45</sup> Initially, the Commission challenged the deceptive acts without seeking redress or disgorgement,<sup>46</sup> but the Commission later served dozens of retailers with synopses of its previously litigated determination about the products.<sup>47</sup> This led to four large retailers settling with the Commission, including both civil penalties and injunctive relief.<sup>48</sup>

Notably, the penalty offense authority also affords companies due process protections. Companies can only be held liable when they are proven to have had actual knowledge of the Commission's determination.<sup>49</sup> Even when actual knowledge can be proven, defendants are entitled to a *de novo* hearing on any issue of fact, which includes a hearing to determine whether their conduct was sufficiently similar to the previously condemned practices.<sup>50</sup> When this authority was employed more frequently in the years after its enactment, "most companies that received penalty offense notifications appear to have come into compliance voluntarily."<sup>51</sup>

The Commission's continued failure to use the penalty offense authority threatens both consumers and the FTC's own authority. For example, the Commission failed to use its

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<sup>44</sup> *Id.* at 30.

<sup>45</sup> *Id.* at 25.

<sup>46</sup> See Press Release, Fed. Trade Comm'n, FTC Charges Companies with 'Bamboo-zling' Consumers with False Product Claims (Aug. 11, 2009), <https://www.ftc.gov/news-events/press-releases/2009/08/ftc-charges-companies-bamboo-zling-consumers-false-product-claims>.

<sup>47</sup> Chopra & Levine, *supra* note 20, at 26.

<sup>48</sup> Chopra & Levine, *supra* note 20, at 26; see also Press Release, Fed. Trade Comm'n, Four National Retailers Agree to Pay Penalties Totaling \$1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Actually Were Rayon (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million>.

<sup>49</sup> Chopra & Levine, *supra* note 20, at 23.

<sup>50</sup> *Id.* at 23–24.

<sup>51</sup> *Id.* at 31 n.99 (citing Testimony of FTC Comm'r Patricia P. Bailey, *supra* note 37, at 11).

unfairness authority to challenge child-directed tobacco advertising in the early 1990s.<sup>52</sup> Ultimately, state attorneys general were forced halt these practices, not the FTC.<sup>53</sup> Similarly, the Commission lost its rulemaking authority over the financial sector, including on mortgages, debt collection, and credit reporting, after failing to address systemic failures in the lending industry prior to the mortgage meltdown.<sup>54</sup> The Commission has largely ignored the expansion of predatory for-profit colleges that have driven many student loan defaults,<sup>55</sup> leaving consumers and taxpayers to shoulder the enormous costs.<sup>56</sup>

The Commission should deploy this authority more frequently, especially against industries in which major market participants have learned to factor the cost of FTC fines into their business model. In particular, this authority should be used to penalize major tech firms for profiting off abusive uses of personal data and to put companies on notice of their exposure to potentially destructive penalties for unfair and deceptive privacy practices.

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<sup>52</sup> *Id.* at 6; see also John Harrington, *Up in Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising*, 47 Fed. Comm. L.J. 593, 595 (1995) (detailing the Commission's 3-2 vote to close its investigation of R.J. Reynolds in spite of substantial evidence that its marketing practices were unfair); Dara J. Diomande, *The Re-Emergence of the Unfairness Doctrine in Federal Trade Commission and State Consumer Protection Cases*, 18 Antitrust 53, 55 (2004) (noting that the Commission's revised unfairness standard helped doom its initial investigation of R.J. Reynolds).

<sup>53</sup> Chopra & Levine, *supra* note 20, at 6; see also Press Release, Fed. Trade Comm'n, Joe Camel Advertising Campaign Violates Federal Law, FTC Says (May 28, 1997), <https://www.ftc.gov/news-events/press-releases/1997/05/joe-camel-advertising-campaign-violates-federal-law-ftc-says>; Press Release, Fed. Trade Comm'n, Federal Trade Commission Dismisses Joe Camel Complaint (Jan. 27, 1999), <https://www.ftc.gov/news-events/press-releases/1999/01/federal-trade-commission-dismisses-joe-camel-complaint>.

<sup>54</sup> Chopra & Levine, *supra* note 20, at 6; see also Improving Consumer Protections in Subprime Lending Before the Subcomm. on Interstate Com., Trade, and Tourism, of the S. Comm. on Com., Sci., and Transp., 110 Cong. 9 (2008), <https://www.govinfo.gov/content/pkg/CHRG-110shrg75345/pdf/CHRG-110shrg75345.pdf>.

<sup>55</sup> Chopra & Levine, *supra* note 20, at 8.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.* at 8; see also Statement of Rohit Chopra, *In re University of Phoenix*, FTC File No. 1523231 (Dec. 10, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1557180/152\\_3231\\_statement\\_of\\_commissioner\\_rohit\\_chopra\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1557180/152_3231_statement_of_commissioner_rohit_chopra_0.pdf).

### 3. Section 18: Trade Regulation Rulemaking

Section 18 of the FTC Act authorizes the Commission to prescribe market-wide trade rules that “define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of section 5(a)(1).<sup>57</sup> This rulemaking authority is a key tool to protect consumers by addressing widespread misconduct. Rulemaking is especially important because the process gives market participants clear guidance about what constitutes an unfair or deceptive practice.<sup>58</sup>

In order to begin a rulemaking proceeding, the Commission must have reason to believe that the deceptive or unfair practices to be addressed by the rulemaking are “prevalent.”<sup>59</sup> Before promulgating a rule, the Commission is required—among other steps—to hold an informal hearing that gives interested parties an opportunity for cross-examination.<sup>60</sup> After the Commission has established a trade regulation rule, any party who violates the rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule” is liable for civil penalties for each violation.<sup>61</sup> Further, any party who violates a rule, regardless of their state of knowledge, is liable for consumer injuries caused by the rule violation.<sup>62</sup> Because the maximum civil penalty amount is currently \$43,280 for each violation,<sup>63</sup> these penalties can add up quickly to provide strong deterrence against unlawful trade practices.

It is critical that the Commission use this rulemaking authority to establish baseline standards concerning data protection, data discrimination, commercial AI systems, and cybersecurity. As Commissioner Chopra has explained, “The FTC’s early failure to

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<sup>57</sup> 15 U.S.C. § 57a(1)(B); see also *FTC Authority Overview*, *supra* note 3.

<sup>58</sup> See *Rules*, Fed. Trade Comm’n (2021), <https://www.ftc.gov/enforcement/rules>.

<sup>59</sup> 15 U.S.C. § 57a(b)(3); see also *FTC Authority Overview*, *supra* note 3.

<sup>60</sup> *FTC Authority Overview*, *supra* note 3.

<sup>61</sup> 15 U.S.C. § 45(m)(1)(A); see also *FTC Authority Overview*, *supra* note 3.

<sup>62</sup> *FTC Authority Overview*, *supra* note 3.

<sup>63</sup> Commission Rule 1.98(d), 16 C.F.R. Sec. 1.98(d); see also Press Release, Fed. Trade Comm’n, FTC Publishes Inflation-Adjusted Civil Penalty Amounts (Jan. 13, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts>.

develop its unfairness authority left it unprepared to tackle emerging harmful practices, forcing other enforcers to step into the void.”<sup>64</sup> Companies engaged in abusive data practices have come to count on the Commission’s inaction.

Promisingly, Acting FTC Chairwoman Rebecca Kelly Slaughter recently announced a new FTC working group tasked with “taking a strategic and harmonized approach to rulemaking across [the Commission’s] different authorities and mission areas,” with the goal of allowing the FTC “to undertake new rulemakings to prohibit unfair or deceptive practices and unfair methods of competition.”<sup>65</sup> The Commission must follow through on the promise of this working group, use its section 18 power to define unfair and deceptive data practices, and give itself a regulatory footing to reverse the FTC’s long history of lax privacy protection.

#### 4. Section 19: Civil Actions and Consumer Redress

Under section 19 of the FTC Act, the Commission can bring civil suits against (1) those who violate FTC trade regulation rules regarding unfair or deceptive acts, and (2) those who violate an applicable cease and desist order from the FTC (upon a showing that a reasonable person “would have known under the circumstances” that the original conduct was “dishonest or fraudulent”).<sup>66</sup> The Commission may obtain relief from the court for injured consumers damaged by the violation or trade practice, including but not limited to (1) rescission or reformation of contracts, (2) refund of money or return of property, (3) payment of damages, and (4) public notification respecting the rule violation or unfair/deceptive act or practice.<sup>67</sup>

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<sup>64</sup> Comment of Rohit Chopra, FTC Comm’r, Docket No. DOT–OST–2019–0182 at 5-6 (May 28, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1576174/chopra\\_comment\\_to\\_us\\_department\\_of\\_transportations\\_dot-ost-2019-0182.pdf](https://www.ftc.gov/system/files/documents/public_statements/1576174/chopra_comment_to_us_department_of_transportations_dot-ost-2019-0182.pdf)

<sup>65</sup> Press Release, Fed. Trade Comm’n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

<sup>66</sup> 15 U.S.C. § 57b(a).

<sup>67</sup> 15 U.S.C. § 57b(b).

Section 19, properly used, can give the administrative process in section 5 real power and consequence.<sup>68</sup> However, as noted above, the section 5 process is itself significantly underused: the Commission almost always settles administrative complaints without any monetary relief.<sup>69</sup> Although the “reasonable [person]” standard under section 19 may pose a hurdle to recovery, the Commission should make greater use of both section 19 and section 5, particularly in light of the Supreme Court’s recent decision sharply limiting the scope of section 13(b).<sup>70</sup>

The FTC has successfully secured multi-million-dollar awards for consumers under section 19. In *Figgie International v. FTC*, the Commission obtained a cease-and-desist order against the company for unfair and deceptive advertisements that contained knowing misrepresentations.<sup>71</sup> After the cease-and-desist order became final, the Commission pursued consumer redress under section 19 in a federal district court.<sup>72</sup> The court granted summary judgment for the FTC and awarded over \$7 million to consumers, agreeing that Figgie had engaged in dishonest or fraudulent business practices.<sup>73</sup> In affirming, the Ninth Circuit relied on the findings of the ALJ in *Figgie*, holding that “[w]hen the findings of the Commission in respect to defendant’s practices are such that a reasonable person would know that the defendant’s practices were dishonest or fraudulent, the district [court] need not engage in further fact finding other than to make the ultimate determination that a reasonable person would know.”<sup>74</sup>

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<sup>68</sup> 15 U.S.C. § 57b(e).

<sup>69</sup> Chopra & Levine, *supra* note 20, at 15.

<sup>70</sup> *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341 (2021).

<sup>71</sup> *Figgie International v. Fed. Trade Comm’n*, 994 F.2d 595 (9th Cir. 1993).

<sup>72</sup> *Id.* at 601

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 603.

The FTC’s experience in *Figgie* demonstrates that an action under section 19 can be effective in obtaining consumer redress.<sup>75</sup> The FTC should deploy this tool more frequently against companies engaged in abusive data practices.

## 5. Section 6(b): Power to Order Reports

Under section 6(b) of the FTC Act, the Commission has authority to demand reports on the business practices of persons, partnerships and corporations of interest to the FTC, even without a specific law enforcement goal.<sup>76</sup> Section 6(b) authorizes the FTC to require individuals and companies to provide reports or answers to specific questions under oath.<sup>77</sup>

In the past, the Commission has used its section 6(b) power against the meatpacking, tobacco, oil, and retail industries to influence legislation, improve market performance, provide support for litigation, and supply information needed for important governmental functions.<sup>78</sup> Recently, the FTC used section 6(b) to seek information about the data practices of social media, messaging, and video streaming platforms including Facebook, WhatsApp, Snap, Twitter, YouTube, ByteDance, Twitch, Reddit and Discord.<sup>79</sup> The Commission inquired about the “full scale and scope” of the platforms’ collection and monetization of user data, including the number and activity of each platform’s users, what the platforms know about their users, how they know that information, and how they continue to engage their users.<sup>80</sup> The Commission’s goal is to

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<sup>75</sup> See John E. Villafranco & Glenn Graham, *What If . . . Section 19 of the FTC Act Becomes the FTC’s Best Path to Monetary Relief: Revisiting Figgie International*, Ad L. Access (Jan. 12, 2021), [https://www.adlawaccess.com/2021/01/articles/ftc\\_section\\_19/](https://www.adlawaccess.com/2021/01/articles/ftc_section_19/).

<sup>76</sup> 15 U.S.C. § 46(b).

<sup>77</sup> *Id.*

<sup>78</sup> Fed. Trade Comm’n, *History of Section 6 Report-Writing at the Federal Trade Commission, Office of Police Planning* (Apr. 1981). <https://www.ftc.gov/sites/default/files/documents/reports/history-section-6-report-writing-federal-trade-commission/231984.pdf>.

<sup>79</sup> Joint Statement of FTC Commissioners Chopra, Slaughter, and Wilson, *In re Social Media and Video Streaming Service Providers’ Privacy Practices*, FTC File No. P205402 (Dec. 14, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1584150/joint\\_statement\\_of\\_ftc\\_commissioners\\_chopra\\_slaughter\\_and\\_wilson\\_regarding\\_social\\_media\\_and\\_video.pdf/](https://www.ftc.gov/system/files/documents/public_statements/1584150/joint_statement_of_ftc_commissioners_chopra_slaughter_and_wilson_regarding_social_media_and_video.pdf/).

<sup>80</sup> *Id.* at 2.

understand how the platforms' business models are compiling, organizing and harnessing users' personal data and to better understand the relevant financial incentives.<sup>81</sup>

As illustrated by the FTC's recent use of section 6(b), the Commission has the ability to compel companies to provide vital information about their operations. The Commission should continue to expand its use of this tool to strengthen "its perennial pursuit of learning to inform its policy and enforcement approaches."<sup>82</sup>

## 6. Equal Credit Opportunity Act

In 2010, Congress gave the FTC authority to prevent discrimination and related civil rights injustices in the financial markets through the Equal Credit Opportunity Act (ECOA) and regulations thereunder (known as Regulation B).<sup>83</sup> The FTC is responsible for enforcing the ECOA against most non-bank financial service providers.<sup>84</sup> However, the FTC has devoted resources to just a few ECOA actions per year. In its 2020 report, the FTC outlined its ECOA activities in enforcement, research and policy developments, which included just one enforcement action in federal court, an amicus brief, and a comment to the CFPB addressing the FTC's work with Regulation B on disparate impact analysis and small-business lending.<sup>85</sup>

The FTC could and should do more to prevent discrimination under the ECOA. And despite the Commission's failure to fully capitalize on existing ECOA authority, the FTC may soon gain new ECOA powers through pending legislation<sup>86</sup> and a possible revival

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 15 U.S.C. §§ 1691–91f; 12 C.F.R. Part 1002.

<sup>84</sup> 15 U.S.C. § 1691c(c).

<sup>85</sup> Fed. Trade Comm'n, *Staff Comment Regarding Regulation B and Equal Credit Opportunity Act*, (Jan. 26, 2021), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-cfpb-regarding-regulation-b-equal-credit-opportunity-act-ecoa/p154802cfpbecoareport.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-cfpb-regarding-regulation-b-equal-credit-opportunity-act-ecoa/p154802cfpbecoareport.pdf).

<sup>86</sup> See Fair Lending for All Act, H.R. 166 (117th Cong.) (2021) (expanding ECOA to cover discrimination on the basis of the sexual orientation, gender identity, zip code, or census tract of the applicant); Equality Act, H.R. 5 (117th Cong.) (2021) (expanding ECOA to cover discrimination on the basis LGBTQ status).



of the disparate impact doctrine.<sup>87</sup> The prospect of this additional authority is all more reason for the FTC to step up EOCA enforcement.

## 7. Health Breach Notification Rule

Under the Health Breach Notification Rule, the Commission is tasked with promulgating rules and enforcing the requirement that vendors of personal health records and related entities (including mobile apps) notify users and the FTC following a breach personal data.<sup>88</sup> If a service provider is subject a breach, it must notify the vendor, who must then inform the user and the FTC.<sup>89</sup> Failure to provide notice makes a company liable under the rule.<sup>90</sup>

Despite requesting more authority to police private violations, the FTC recently faltered in wielding its pre-existing authority when it failed to enforce the Health Breach Notification Rule against Flo Health, Inc. (“Flo”) for sharing users’ menstruation and fertility information without consent.<sup>91</sup> While the Commission has urged regulated entities to review the requirements of the Rule, it has never brought an enforcement Action.<sup>92</sup> As more apps and services are collecting health and health-related data, it is imperative that the FTC make use of one of the few federal privacy laws designed to limit breaches of consumer health data.<sup>93</sup> If the FTC continues to neglect its

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<sup>87</sup> Katherine Kirpatrick, Margaret McPherson, Andrew Michaelson, & Brian Thavarajah, *The Implications of a Revived Disparate Impact Doctrine Under a Biden CFPB*, King & Spalding (Dec. 18, 2020), <https://www.jdsupra.com/legalnews/the-implications-of-a-revived-disparate-48461/>.

<sup>88</sup> 16 C.F.R. § 318.

<sup>89</sup> 16 C.F.R. § 318.3.

<sup>90</sup> *Id.*

<sup>91</sup> Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter Concurring in Part, Dissenting in Part, *In re Flo Health, Inc.*, FTC File No. 1923133 (Jan. 3, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1586018/20210112\\_final\\_joint\\_rcrks\\_statement\\_on\\_flo.pdf](https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rcrks_statement_on_flo.pdf).

<sup>92</sup> *Id.* at 2.

<sup>93</sup> Congress has urged the FTC to enforce the Health Breach Notification Rule against health apps transferring personal information to third parties given the growing use of such apps. See Jessica Davis, *Congress Urges FTC Crackdown on Health Apps Via Breach Notice Rule*, Health IT Security (Mar. 8, 2021), <https://healthitsecurity.com/news/congress-urges-ftc-crackdown-on-health-apps-via-breach-notice-rule>.

responsibility to give the Health Breach Notification Rule real teeth through enforcement, companies will continue to ignore their obligations to protect user data.

## 8. Children's Online Privacy Protection Act

The Children's Online Privacy Protection Act (COPPA) was enacted in 1998 to protect minors online. COPPA requires the Commission to promulgate regulations for internet services and websites to give parents of minors control over and information about the collection of their children's information online.<sup>94</sup> In the two-plus decades since COPPA's enactment, the internet has transformed into the primary forum for teenagers and younger children to interact with their peers.<sup>95</sup> This shift was accelerated recently by the COVID-19 pandemic, which forced even more interaction between minors online, including school and other social and educational activities.<sup>96</sup>

Given the growing reliance on online platforms for many aspects of day-to-day life, minors' personal data is at exceptional risk.<sup>97</sup> It is more important than ever that the FTC aggressively enforce COPPA to protect minors on the internet.<sup>98</sup> Fortunately, there are encouraging signs about the FTC's willingness to do so: the Commission is currently undertaking a regulatory review of its COPPA rules and has signaled a plan to increase enforcement.<sup>99</sup>

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<sup>94</sup> See 16 C.F.R. § 312 (1998).

<sup>95</sup> Letter from Sen. Edward J. Markey et al. to Fed. Trade Comm'n (May 8, 2020), [https://www.markey.senate.gov/imo/media/doc/Markey%20letter%20to%20FTC%206\(B\)%20on%20children's%20privacy.pdf](https://www.markey.senate.gov/imo/media/doc/Markey%20letter%20to%20FTC%206(B)%20on%20children's%20privacy.pdf).

<sup>96</sup> Ryan P. Blaney & Brooke G. Gottlieb, *The Future of the FTC*, Nat'l L. Rev. (Feb. 24, 2021), <https://www.natlawreview.com/article/future-ftc-part-i>.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.*

<sup>99</sup> Richard B. Newman, *FTC Signals Increased Enforcement for COPPA Violations*, Nat'l L. Rev. (Mar. 24, 2021), <https://www.natlawreview.com/article/ftc-signals-increased-enforcement-coppa-violations>.

## 9. Gramm-Leach-Bliley Act

Under the Gramm-Leach-Bliley Act (GLBA), the FTC is required to issue regulations ensuring that financial institutions protect the privacy of consumer personal financial information.<sup>100</sup> The FTC has contemplated changes to the GLBA Safeguards Rule, which requires financial institutions to develop, implement, and maintain data security measures.<sup>101</sup> There is room for the Commission to increase enforcement under the Safeguards Rule, particularly on third-party vendor oversight. This point is reflected in Commissioner Chopra’s dissent in a 2020 settlement against a mortgage analytics company that failed to oversee the data security practices of a third-party vendor.<sup>102</sup>

In his dissent, Commissioner Chopra argued that the settlement held the wrong party accountable, as the order was only binding on Ascension.<sup>103</sup> Because the settlement did not require parent company Rocktop Partners to change practices, a culpable party “evade[d] accountability through a game of corporate musical chairs.”<sup>104</sup> In addition, Chopra noted that the Commission declined to include a charge of unfair trade practices. According to Chopra, this failure to charge was not only “inconsistent with prior practice but also undermines ability to hold company accountable for its failures.”<sup>105</sup> Finally, Chopra concluded that the settlement neither redressed consumer harm nor deterred other firms from similar behavior in the future.<sup>106</sup> He urged the

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<sup>100</sup> 15 U.S.C. §§ 6801 et seq.

<sup>101</sup> Press Release, Fed. Trade Comm’n, FTC Releases Agenda for Safeguards Rule Virtual Workshop (July 1, 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/ftc-releases-agenda-safeguards-rule-virtual-workshop>.

<sup>102</sup> Dissenting Statement of Commissioner Rohit Chopra, *In re Ascension Data & Analytics*, FTC File No. 1923126, Fed. Trade Comm’n (Dec. 14, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1584706/final\\_chopra\\_statement\\_on\\_ascension\\_redacted.pdf](https://www.ftc.gov/system/files/documents/public_statements/1584706/final_chopra_statement_on_ascension_redacted.pdf).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

Commission to engage state attorneys general in FTC investigations and enforcement efforts to obtain additional relief in data security actions.<sup>107</sup>

For these reasons, the FTC should increase enforcement under the GLBA concerning operational awareness of third-party vendor security measures and appropriate contracting based on the types of data involved.<sup>108</sup>

## 10. Collaboration Between Bureaus and Agencies

Finally, the Commission should work to increase collaboration between its bureaus and with other agencies. The FTC is unique in its dual authority to address consumer protection violations and anticompetitive practices. When business practices implicate both privacy and antitrust violations—as the business practices of major online platforms often do—the FTC should seek out coordinated enforcement strategies leveraging the power of both the Bureau of Consumer Protection and the Bureau of Competition.<sup>109</sup> The FTC should also enhance its cooperation with other federal agencies to ensure complementary enforcement of privacy, consumer protection, antidiscrimination, and antitrust laws.<sup>110</sup> And the Commission should identify more opportunities to collaborate with state attorneys general, including through coordinated

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Some have argued that the FTC should create a separate data protection bureau that would incorporate staff from both the Bureau of Consumer Protection and the Bureau of Competition. Jessica Rich, *Five Reforms the FTC Can Undertake Now to Strengthen the Agency*, Brookings Institution (Mar. 1, 2021), <https://www.brookings.edu/blog/techtank/2021/03/01/five-reforms-the-ftc-can-undertake-now-to-strengthen-the-agency/>.

<sup>110</sup> See, e.g., Statement of Commissioner Rohit Chopra, *In re Midwest Recovery Services*, FTC File No. 1923042 (Nov. 25, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1583802/chopra\\_statement\\_for\\_midwest\\_recovery\\_systems.pdf](https://www.ftc.gov/system/files/documents/public_statements/1583802/chopra_statement_for_midwest_recovery_systems.pdf) (“[W]e must take stock of our enforcement and rulemaking tools to ensure that agencies are delivering meaningful redress, deterring misconduct, and correcting systemic abuses. This will require careful collaboration across many government agencies with relevant authorities, rather than relying on a go-it-alone approach.”).

consumer protection and antitrust enforcement actions.<sup>111</sup> Although there is pending legislation to facilitate precisely this type of FTC-state cooperation,<sup>112</sup> the Commission need not wait for Congressional approval.

## CONCLUSION

The Federal Trade Commission plays a key role in establishing and enforcing consumer protection regulations in the United States. And the Commission is currently the most prominent federal privacy regulator. But the FTC has not kept Americans safe in the face of mounting threats to their personal data. Companies have radically expanded data collection and surveillance systems over the last two decades, and Americans do not feel that their data is secure or that their privacy is adequately protected.

A common refrain from the Commission during this period is that it lacks the authority to address these mounting threats to individual privacy. But the FTC has not made full use of the authorities that it already has, so the Commission is not in a strong position to defer action until new authorities are granted. As described above, there are numerous authorities the Commission presently has in its toolbox that remain significantly underused or unused entirely. The Commission can and must use all of its powers as a regulator and enforcer to protect consumers.

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<sup>111</sup> See, e.g., Rohit Chopra, *Statement of Commissioner Regarding the Review of the FTC's Pharmaceutical Merger Enforcement Program*, (May 11, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589927/statement\\_of\\_commissioner\\_rohit\\_chopra\\_regarding\\_the\\_review\\_of\\_the\\_ftcs\\_pharmaceutical\\_merger.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589927/statement_of_commissioner_rohit_chopra_regarding_the_review_of_the_ftcs_pharmaceutical_merger.pdf) ("Given their concurrent jurisdiction, the state attorneys general are key partners in competition enforcement. Coordination and cooperation can include sharing documentary evidence, conducting joint interviews and investigational hearings, and pooling resources on expert analysis. The FTC should do more to strengthen these partnerships.").

<sup>112</sup> FTC Collaboration Act of 2021, H.R. 1766 (117th Cong.) (2021).