

**PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION
on
Oversight of the Federal Trade Commission
Before the
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE
Washington, D.C.
September 27, 2016**

I. INTRODUCTION

Chairman Thune, Ranking Member Nelson, and members of the Committee, the Federal Trade Commission (“FTC” or “Commission”) is pleased to appear before you today to testify about the FTC’s work to protect consumers and promote competition.¹

The FTC is a highly productive, bipartisan independent agency with a broad mission. It is the only federal agency with jurisdiction to both protect consumers and maintain competition in most sectors of the economy. The agency enforces laws that prohibit business practices that are unfair or deceptive to consumers, or anticompetitive, and seeks to do so without impeding legitimate business activity.² The FTC also educates consumers and businesses to encourage informed consumer choices, compliance with the law, and public understanding of the competitive process. Through its research, advocacy, education, and policy work, the FTC promotes consumer protection and competitive markets in the United States.

The impact of the FTC’s work is significant. During the last fiscal year alone, the agency estimates that it saved consumers over \$3.4 billion through its competition enforcement efforts and over \$717 million through its consumer protection law enforcement actions.³

The FTC is committed to addressing the impact of technology and globalization as part of our law enforcement, rulemaking, and policy work. But even as commerce and technology continue to evolve, many of the fundamental problems we see in the marketplace remain the

¹ This written statement presents the views of the Federal Trade Commission. Our oral statements and responses to questions are our own and do not necessarily reflect the views of the Commission or of any other Commissioner.

² The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and enforces a wide variety of other laws ranging from the Clayton Act to the Fair Credit Reporting Act. In total, the Commission has enforcement or administrative responsibilities under more than 70 laws. See <http://www.ftc.gov/ogc/stats.shtm>.

³ See Summary of Performance and Financial Information Fiscal Year 2015 (Feb. 2016), available at <https://www.ftc.gov/reports/ftc-fy-2015-summary-performance-financial-information>.

same: consumer fraud schemes, deceptive advertising, unfair practices causing substantial consumer harm with little or no benefits to consumers or competition, as well as mergers and conduct that harm or threaten to harm competition. The agency tackles these challenges through targeted law enforcement. Our structure, research capacity, and committed staff enable the FTC to continue to meet its mandate of protecting consumers and competition in an ever-changing marketplace.

Our testimony today highlights some of the agency's major recent activities and initiatives. It also identifies certain challenges that affect the Commission's ability to protect U.S. consumers and competition.

II. FTC Accomplishments

A. Consumer Protection

As the nation's consumer protection agency, the FTC has a broad mandate to protect consumers from unfair, deceptive, or fraudulent practices in the marketplace by, among other things, taking law enforcement actions to stop unlawful practices and educating consumers and businesses about their rights and responsibilities. The FTC targets its enforcement and education efforts to achieve maximum impact and works closely with federal, state, international, and private sector partners in joint initiatives. The agency also convenes workshops with various stakeholders to examine emerging consumer protection issues and releases reports on a variety of consumer protection topics. In addition, last year we created an Office of Technology Research and Investigation comprised of technologists and researchers. The office plays an important role by engaging in research and supporting our work in, among other areas, privacy, data security, emerging payment systems, big data, and the Internet of Things.

During fiscal years 2013 through 2015, the FTC filed over 160 new consumer protection complaints in federal district court and obtained over 300 permanent injunctions and orders requiring defendants to pay over \$1.6 billion in consumer redress or disgorgement of ill-gotten gains. In addition, the FTC's consumer protection cases that were referred to the Department of Justice resulted in over 40 court judgments for civil penalties totaling almost \$43 million. The FTC also filed 116 new administrative consumer protection actions and obtained 114 administrative orders.

During the same timeframe, the Commission hosted almost 40 workshops, conferences, and roundtables, and issued 18 reports on a variety of consumer protection topics, released 141 new or revised consumer and business education publications, and released almost 30 consumer and business education videos.

We recently have brought several high profile cases that illustrate two important goals: stopping unfair and deceptive practices, and returning money to consumers who are harmed. For example, earlier this year the FTC entered into a settlement that requires Volkswagen to create a \$10 billion compensation fund – the largest consumer refund program in the FTC's history – to resolve allegations that the company unfairly sold cars with illegal defeat devices that cheated emissions tests and deceptively advertised these cars with claims that they were “clean.”⁴ And in July, the FTC obtained an order requiring multi-level marketing company Herbalife to fully restructure its U.S. business operations and pay \$200 million in consumer redress to settle allegations that the company deceived consumers into believing they could earn substantial

⁴ *FTC v. Volkswagen Group of Am., Inc.*, No. 3:15-md-02672-CRB (N.D. Cal. filed June 28, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3006/volkswagen-group-america-inc>.

money selling diet, nutritional supplements, and personal care products.⁵

In recent years, the FTC’s consumer protection initiatives have focused primarily on addressing trends we see in the marketplace: protecting consumers on all platforms, protecting consumer privacy and data security, prosecuting false or deceptive health claims, safeguarding children in the marketplace, and stopping fraud in every community. Many of our cases have involved more than one of these trends. Each initiative is discussed in more detail below.

1. Protecting Consumers on All Platforms

In recent years, we have seen remarkable growth in the use of smartphones and connected devices, which enable consumers – from any location – to find information, contact friends, shop and pay for goods and services, update their social networks, monitor their health and fitness, and access devices in their cars and homes remotely, among many other benefits and conveniences. But the growth of technology provides new mechanisms for engaging in unfair or deceptive practices – for example, unauthorized payments, false advertising, and basic fraud. Protecting consumers as they use and benefit from new technologies and platforms has been a chief FTC priority in recent years.

For example, the FTC has taken action against numerous companies – including T-Mobile⁶ and AT&T⁷ (with all 50 states and the Federal Communications Commission) – for allegedly “cramming” unauthorized third-party charges on consumers’ mobile phone bills. In addition, the Commission has settled charges against TracFone,⁸ which was accused of making

⁵ *FTC v. Herbalife of Am., Inc.*, No. 2:16-cv-05217 (C.D. Cal. filed July 25, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3037/herbalife-international-america-inc-et-al>.

⁶ *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-0097-JLR (W.D. Wash. filed Dec. 19, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3231/t-mobile-usa-inc>.

⁷ *FTC v. AT&T Mobility, Inc.*, No. 1:14-cv-3227-HLM (N.D. Ga. filed Oct. 8, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3248/att-mobility-llc>.

⁸ *FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-00392 (N.D. Cal. filed Jan. 28, 2015), available at

misleading claims about “unlimited data” internet service to subscribers.⁹ Thus far, the agency has obtained hundreds of millions of dollars for consumers from these cases.

The Commission has also brought several actions challenging fraud on new platforms. For example, the FTC challenged the alleged deceptive tactics of Erik Chevalier, a project creator who raised money from consumers through a Kickstarter campaign by promising to provide rewards related to a board game, but instead used most of the funds on unrelated personal items, such as rent.¹⁰ The agency also took action against the operators of Prized, a mobile gaming app that promised it would be free from malware. We alleged that it instead loaded consumers’ mobile phones with malicious software to mine virtual currencies.¹¹

In addition, the FTC has focused resources to challenge deceptive endorsements online. For example, the Commission alleged that Warner Bros. Home Entertainment deceived consumers during a marketing campaign for a video game by failing to adequately disclose that it paid online “influencers” thousands of dollars to post positive gameplay video review on YouTube and social media.¹² And in *Roca Labs*, the Commission filed a case in federal court

<https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc>. See also *FTC v. DirectTV*, No. 3:15-cv-01129 (N.D. Cal. filed Mar. 11, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/102-3141/directv> (alleging company misrepresented costs of its cable service).

⁹ The Court of Appeals for the Ninth Circuit recently held that the FTC could not bring a case similar to the *TracFone* matter against AT&T because the common carrier exception in Section 5 of the FTC Act precluded FTC enforcement of the Act against any company with the status of a common carrier, even if the case involved non-common-carrier service.

¹⁰ *FTC v. Erik Chevalier, Co.*, No. 3:15-cv-1029-AC (D. Ore. filed June 11, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3061/erik-chevalier-forking-path>.

¹¹ *FTC v. Equiliv Investments*, Matter No. 142-3144 (D.N.J. filed June 29, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3144/equiliv-investments-prized>; see also *FTC v. BF Labs, Inc.*, No. 4:14-cv-00815-BCW (W.D. Mo. Feb. 18, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3058/bf-labs-inc> (settling allegations that the company deceptively marketed computers designed to produce Bitcoins).

¹² See *Warner Bros. Home Entertainment, Inc.*, Matter No. 1523034 (July 11, 2016) (proposed consent), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter>.

against the marketers of a line of weight-loss supplements who allegedly made baseless claims for their products, and then threatened to enforce “gag clause” provisions against consumers to stop them from posting negative reviews and testimonials online.¹³

Last year, the Commission issued an Enforcement Policy Statement and accompanying guidance on native advertising, content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online.¹⁴ The policy statement explains how established truth-in-advertising principles apply to different ad formats, including native ads. Following the policy statement, the FTC brought its first native advertising case against national retailer, Lord & Taylor.¹⁵ The Commission alleged that the company deceived consumers by paying for native ads, including a seemingly objective article in the online publication Nylon, without disclosing the ads were actually paid promotions for a 2015 clothing launch.

Finally, the Commission has continued its efforts to stop illegal robocalls, which continue to top our complaint list. For example, the Commission and ten state attorneys general took action against Caribbean Cruise Line, and seven other assisting companies, for an alleged massive telemarketing campaign resulting in billions of robocalls.¹⁶ Recognizing the need to spur the marketplace to develop technical solutions that protect American consumers from illegal robocalls, the FTC has led four public challenges to help tackle the unlawful robocalls that

¹³ *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231-MSS-TBM (M.D. Fla. Sept. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3255/roca-labs-inc>.

¹⁴ See *Commission Enforcement Policy Statement on Deceptively Formatted Advertisements* (Dec. 2015), available at <https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted>; *Native Advertising: A Guide for Businesses* (Dec. 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

¹⁵ *Lord & Taylor, LLC*, Matter No. 152 3181 (Mar. 15, 2016) (proposed consent), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter>.

¹⁶ *FTC v. Caribbean Cruise Line, Inc. et al.*, No. 0:15-cv-60423 (S.D. Fla. Mar. 4, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3196/caribbean-cruise-line-inc>.

plague consumers.¹⁷ And the FTC has developed numerous educational materials to deliver the key message to consumers: if you answer a call and hear an unwanted recorded sales message – hang up.¹⁸

2. Protecting Consumer Privacy and Data Security

The FTC has unparalleled experience in consumer privacy enforcement. The Commission has used its core enforcement authority – Section 5 of the FTC Act – to take action against companies engaged in unfair or deceptive practices involving the privacy and security of consumers’ information.¹⁹ If a company makes materially misleading statements or omissions about a product or service, including its privacy or data security features, and such statements or omissions are likely to mislead reasonable consumers, such statements or omissions can be found to be deceptive and in violation of Section 5.²⁰ Further, if a company’s privacy or data security practices cause or are likely to cause substantial injury to consumers that is neither reasonably avoidable by consumers nor outweighed by countervailing benefits to consumers or to competition, those practices can be found to be unfair and in violation of Section 5.²¹ The FTC also enforces sector-specific statutes that protect certain health,²² credit,²³ financial,²⁴ and

¹⁷ See, e.g., Robocalls: Humanity Strikes Back Challenge, at <https://www.ftc.gov/news-events/contests/robocalls-humanity-strikes-back>; Detectarobo Challenge, at <https://www.ftc.gov/news-events/contests/detectarobo>; Zapping Rachel Challenge, at <https://www.ftc.gov/news-events/contests/zapping-rachel>; FTC Robocall Challenge (2012-2013), at <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>.

¹⁸ See, e.g., FTC Robocall Microsite, <https://www.consumer.ftc.gov/features/feature-0025-robocalls>.

¹⁹ 15 U.S.C. § 45(a).

²⁰ See FTC Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

²¹ See FTC Policy Statement on Unfairness, *appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>; 15 U.S.C. §45(n).

²² 16 C.F.R. Part 318.

²³ 15 U.S.C. §§ 1681-1681x.

²⁴ 16 C.F.R. Part 314, implementing 15 U.S.C. § 6801(b).

children's information.²⁵

The FTC's current privacy enforcement priorities include health privacy, the Internet of Things, big data, and data security. Over the past few years, the Commission has brought several cases to stop illegal practices that compromise health information.²⁶ For example, the FTC alleged that PaymentsMD and its former CEO misled thousands of consumers who signed up for an online billing portal.²⁷ According to the complaint, the defendants used the registration process for the billing portal as a way to deceptively seek consumers' consent to obtain highly-detailed medical information about the consumers from pharmacies, medical labs, and insurance companies to facilitate the launch of a separate online medical records service. The Commission also alleged that Practice Fusion, a company that provides management services to physicians, deceived hundreds of thousands of consumers by soliciting reviews about their doctors without adequately disclosing that the reviews would be posted publicly on the internet.²⁸ As detailed in our complaint, many of the posted reviews included consumers' full names, medications, health conditions, and treatments received.

The Internet of Things is also an expanding part of the Commission's privacy work. For example, the FTC announced a settlement with computer hardware company ASUS for allegedly failing to take reasonable steps to secure the software on its routers.²⁹ According to the

²⁵ 15 U.S.C. §§ 6501-6506; *see also* 16 C.F.R. Part 312.

²⁶ *See, e.g., Henry Schein Practice Solutions, Inc.*, No. C-4575 (May 23, 2016), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/142-3161/henry-schein-practice-solutions-inc-matter>; *GMR Transcription Servs., Inc.*, No. C-4482 (Aug. 21, 2014), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/122-3095/gmr-transcription-services-inc-matter>.

²⁷ *PaymentsMD, LLC*, No. C-4505 (Jan. 27, 2015), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/132-3088/paymentsmd-llc-matter>.

²⁸ *Practice Fusion, Inc.*, Matter No. 1423039 (June 8, 2016) (proposed consent), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/142-3039/practice-fusion-inc-matter>.

²⁹ *ASUSTeK Computer Inc.*, No. C-4587 (July 28, 2016), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter>.

complaint, the company’s failures to timely address vulnerabilities or notify consumers about the availability of security updates resulted in critical security flaws in its routers that put the home networks of consumers at risk. The complaint also alleged that the routers’ insecure “cloud” services led to the compromise of thousands of consumers’ connected storage devices, exposing their sensitive personal data on the internet.³⁰ Last year, the FTC also issued a report addressing how longstanding privacy principles can be adapted to Internet of Things devices and recommending best practices for companies to follow.³¹

Another area of interest is big data, specifically the vast collection of data about consumers and enhanced capabilities to analyze data to make inferences and predictions about consumers. In January the Commission issued a report entitled *Big Data: A Tool for Inclusion or Exclusion?* addressing how the categorization of consumers may be both creating and limiting opportunities for them, with a focus on low-income and underserved consumers.³² A key message in the report is that there are laws— including the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the FTC Act – that address some of the concerns raised by big data. The report also suggests questions businesses should ask to maximize the benefits of big data and reduce the risk of biases or inaccurate results about certain groups of consumers. The FTC also continues to focus on data brokers³³ and, among other things, the role they may play in

³⁰ See also *TRENDnet, Inc.*, No. C-4426 (Jan. 16, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter>.

³¹ FTC Staff Workshop Report, *The Internet of Things: Privacy and Security in a Connected World* (Jan. 2015), available at <https://www.ftc.gov/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things>.

³² FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, (Jan. 2016), available at <https://www.ftc.gov/reports/big-data-tool-inclusion-or-exclusion-understanding-issues-ftc-report>.

³³ See, e.g., FTC Report, *Data Brokers: A Call For Transparency and Accountability* (May 2014), available at <https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014>.

facilitating fraud.³⁴ For example, last year, the Commission brought two cases against data brokers LeapLab and Sequoia One, alleging that both purchased the payday loan applications of financially strapped consumers – including names, addresses, phone numbers, Social Security numbers, and bank account numbers – and then sold them to scam artists who used the data to withdraw millions of dollars from consumers’ accounts.³⁵ The FTC has also hosted public workshops on big data issues such as the growing use of online lead generation in various industries³⁶ and cross-device tracking.³⁷

Finally, data security continues to be a crucial part of the FTC’s privacy work.³⁸ To date, the Commission has brought approximately 60 cases alleging that companies failed to implement reasonable safeguards for the consumer data they maintain.³⁹ For example, the Commission secured its largest data security judgment this year, \$100 million, against LifeLock based on allegations the company violated a 2010 federal court order by, among other things, failing to establish and maintain a comprehensive information security program to protect its customers’

³⁴ See, e.g., *FTC v. Bayview Solutions LLC*, No. 1:14-cv-01830-RC (D.D.C. filed Oct. 31, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3226-x140062/bayview-solutions-llc>; *FTC v. Cornerstone & Co.*, No. 1:14-cv-01479-RC (D.D.C. filed Aug. 27, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3211-x150005/cornerstone-company-llc>.

³⁵ *FTC v. Sitemsearch Corp., LLC*, No. CV-14-02750-PHX-NVW (D. Az. Feb 5, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3192/siteseach-corporation-doing-business-leaplab>; *FTC v. Sequoia One, LLC*, No. 2:15-cv-01512-JCM-CWH (D. Nev. filed Aug. 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3253/sequoia-one-llc>.

³⁶ FTC Workshop, *Follow the Lead: An FTC Workshop on Lead Generation* (Oct. 30, 2015), available at <https://www.ftc.gov/news-events/events-calendar/2015/10/follow-lead-ftc-workshop-lead-generation>.

³⁷ FTC Workshop, *Cross Device Tracking* (Nov. 16, 2015), available at <https://www.ftc.gov/news-events/events-calendar/2015/11/cross-device-tracking>.

³⁸ See, e.g., *FTC v. Wyndham Worldwide Corp.*, No. 2:13-CV-01887-ES-JAD (D.N.J. Dec. 11, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1023142-x120032/wyndham-worldwide-corporation>. In 2015, the Third Circuit affirmed the Commission’s authority under the FTC Act to challenge data security failures. See *FTC v. Wyndham Worldwide Corp.*, No. 14-3514 (3d Cir. Aug. 24, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1023142-x120032/wyndham-worldwide-corporation>.

³⁹ See generally www.ftc.gov/datasecurity.

sensitive personal information.⁴⁰ And, the Commission continues to reiterate its longstanding, bipartisan call for federal legislation that would (1) strengthen its existing data security authority and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach.⁴¹

Additionally, the agency has placed considerable emphasis in this area on education. Last year, for example, the Commission announced its *Start with Security* initiative, which includes a guide for businesses that summarizes the lessons learned from the FTC's 60 data security cases,⁴² as well as videos.⁴³ As part of this initiative, the FTC has organized one-day conferences in Austin, San Francisco, Seattle, and Chicago, bringing business owners and developers together with industry experts to discuss practical tips and strategies for implementing effective data security.⁴⁴ The FTC has also launched an improved version of IdentityTheft.gov⁴⁵ (robodeidentidad.gov in Spanish⁴⁶), a free, one-stop resource consumers can use to report and recover from identity theft. As part of the relaunched site, identity theft victims can use the site to create a personal recovery plan based on the type of identity theft they face, and get pre-filled letters and forms to send to credit bureaus, businesses, and debt collectors.

⁴⁰ *FTC v. Lifelock*, No. CV-10-00530-PHX-JJT (D. Az Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation> (Commissioner Ohlhausen dissenting).

⁴¹ Legislation in both areas – data security and breach notification – should give the FTC the ability to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking authority under the Administrative Procedure Act.

⁴² *Start with Security: A Guide for Business* (June 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>.

⁴³ *Start with Security: Free Resources for Any Business* (Feb. 19, 2016), available at <https://www.ftc.gov/news-events/audio-video/business>.

⁴⁴ See, e.g., FTC Event, Start with Security – Seattle, Feb. 9, 2016, available at <https://www.ftc.gov/news-events/events-calendar/2016/02/start-security-seattle>.

⁴⁵ See <https://identitytheft.gov/>.

⁴⁶ See <https://robodeidentidad.gov/>.

3. Prosecuting False or Deceptive Health Claims

The FTC has a long history of targeting deceptive health claims, which can result in serious harm to consumers. For example, as part of a joint law enforcement sweep with the Department of Justice and other federal agencies targeting illegal dietary supplement marketing, the FTC settled allegations that Sunrise Nutraceuticals deceptively claimed its supplement would alleviate opiate withdrawal symptoms and increase a user’s likelihood of overcoming opiate addiction.⁴⁷ The Commission is also targeting unsubstantiated health claims in the mobile space. The FTC charged two app developers with deceptively claiming that their mobile apps – Mole Detective and MelApp – could detect symptoms of melanoma, even in the early stages.⁴⁸ The Commission alleged the companies lacked scientific evidence to support their claims. Similarly, the Commission sued the marketers of an app called Ultimeyes for deceptive claims that they had scientific proof the app could “turn back the clock” on consumers’ vision through a series of visual exercises available on the app.⁴⁹ The Commission has also taken action against deceptive cognitive benefits claims. For example, this January, Lumosity agreed to pay \$2 million in redress to settle FTC charges that Lumosity deceptively claimed its “brain training” program could help users perform better at work and in school, and could stave off memory loss, dementia, and even Alzheimer’s disease.⁵⁰

⁴⁷ *FTC v. Sunrise Nutraceuticals, LLC*, No. 9:15-cv-81567 (S.D. Fla. filed Nov. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3208/sunrise-nutraceuticals-llc>.

⁴⁸ *Health Discovery Corp.*, No. C-4516 (Mar. 13, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3211/health-discovery-corporation-melapp-matter> (Commissioner Ohlhausen dissenting); *FTC v. New Consumer Solutions LLC et al.*, No. 15-C-1614 (N.D. Ill. filed Feb. 23, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3210/new-consumer-solutions-llc-mole-detective> (Commissioner Ohlhausen dissenting).

⁴⁹ *Carrot Neurotechnology, Inc.*, No. C-4567 (Feb. 23, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3132/carrot-neurotechnology-inc-matter-ultimeyes> (Commissioner Ohlhausen concurring).

⁵⁰ *FTC v. Lumos Labs, Inc. d/b/a Lumosity*, No. 3:16-cv-00001 (N.D. Cal. filed Jan. 5, 2016), available at

Deceptive weight loss claims continue to be an enforcement priority. In 2015, the Commission brought a number of cases against companies touting the slimming effects of various products. For example, the FTC obtained an \$11.9 million dollar judgment against affiliate marketing network LeadClick Media for using fake news sites to convince consumers that acai berry and colon cleansing weight loss products were proven effective.⁵¹ The FTC also obtained a federal court order against Lunada Biomedical and its principals settling allegations that they deceptively advertised that their dietary supplement Amberen caused substantial weight loss for women over 40, and that the weight loss was clinically proven.⁵²

4. Safeguarding Children in the Marketplace

The FTC also spends significant resources to safeguard children in the marketplace. For example, the Commission announced cases against Apple,⁵³ Amazon,⁵⁴ and Google⁵⁵ for allegedly billing parents without their consent for items kids bought in mobile apps. We alleged that the companies either failed to require a password for in-app purchases or failed to alert parents that entering a password opened a significant window of time where kids could rack up charges. Apple and Google agreed to change their billing practices and pay at least \$32.5 million and \$19 million, respectively, as redress to consumers. A federal judge granted the FTC's

<https://www.ftc.gov/enforcement/cases-proceedings/132-3212/lumos-labs-inc-lumosity-mobile-online-cognitive-game>.

⁵¹ See *FTC & Connecticut v. Leanspa, LLC*, No. 311-cv-01715 (D. Conn. Apr. 6, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1123135/leanspa-llc-et-al> (Commissioner Ohlhausen dissenting in part and concurring in part).

⁵² *FTC v. Lunada Biomedical, Inc.*, No. 2:15-cv-03380-MWF (PLAx) (C.D. Cal. filed May 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3067/lunada-biomedical-inc>.

⁵³ *Apple, Inc.*, No. C-4444 (Mar. 25, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3108/apple-inc>.

⁵⁴ *FTC v. Amazon.com*, No. 2:14-cv-01038 (W.D. Wash. filed July 10, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc>.

⁵⁵ *Google, Inc.*, No. C-4499 (Dec. 2, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3237/google-inc>.

request for summary judgment in the case against Amazon.⁵⁶

The Commission has also focused its resources on deceptive health claims involving children. The FTC's case against NourishLife challenged allegedly unsubstantiated claims for a supplement purporting to treat childhood speech and behavioral disorders, including those associated with autism.⁵⁷ Similarly, the Commission took action against the makers of the *Jungle Rangers* computer game for making false and unsubstantiated claims that the game permanently improves children's focus, memory, behavior, and school performance – including for kids with ADHD.⁵⁸

The Children's Online Privacy Protection Act of 1998 ("COPPA") generally requires websites and apps to obtain parental consent before collecting personal information from children under 13. In 2013, the FTC updated its regulatory rule that implements COPPA to address new developments – such as social networking, mobile apps, and the ability to use geolocation information – that affect children's privacy. Since 2000, the FTC has brought over 20 COPPA cases and collected millions of dollars in civil penalties. For example, the COPPA cases against app developers LAI Systems⁵⁹ and Retro Dreamer⁶⁰ alleged that the companies

⁵⁶ *FTC v. Amazon.com*, No. 2:14-cv-01038 (W.D. Wash. Apr. 27, 2016) (summary judgment decision), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc>.

⁵⁷ *FTC v. NourishLife, LLC*, No. 1:15-cv-00093 (N.D. Ill. filed Jan. 7, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3152/nourishlife-llc>; *Legacy Learning Systems, Inc.*, No. C-4323 (June 10, 2011), available at <https://www.ftc.gov/enforcement/cases-proceedings/102-3055/legacy-learning-systems-inc-et-al-matter>.

⁵⁸ *Focus Education, LLC*, No. C-4517 (Apr. 9, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3153/focus-education-llc-matter>. See also *Learning Rx Franchise Corp.*, No. 1:16-cv-01159-RM (D. Colo. May 24, 2016) (alleging the defendants deceptively claimed that their programs were clinically proven to permanently improve serious health conditions like ADHD and autism, and that the training substantially improved school grades and college admission test scores).

⁵⁹ *U.S. v. LAI Systems, LLC*, No. 2:15-cv-09691 (C.D. Cal. filed Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3261/lai-systems-llc>.

⁶⁰ *U.S. v. Retro Dream et al.*, No. 5:15-cv-02569 (C.D. Cal. filed Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3262/retro-dreamer>.

created a number of apps directed to children that allowed third-party advertisers to collect personal information from children in the form of persistent identifiers without obtaining parental consent. Most recently, mobile advertising company InMobi agreed to pay \$950,000 in civil penalties to settle FTC allegations that it deceptively tracked the locations of hundreds of millions of consumers – including children – without their knowledge or consent to serve them geo-targeted advertising.⁶¹

5. Stopping Fraud in Every Community

Stopping fraud is the FTC’s largest consumer protection program, and for good reason: fraud causes enormous harm to consumers. The Commission’s work has targeted many different forms of fraud – including sham charities,⁶² illegal robocalling,⁶³ phony business opportunities,⁶⁴ investment schemes,⁶⁵ bogus business coaching and mentoring,⁶⁶ and imposter scams.⁶⁷

⁶¹ *U.S. v. InMobi Pte Ltd.*, No. 3:16-cv-03474 (N.D. Cal. filed June 22, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd>.

⁶² See, e.g., *FTC v. Cancer Fund of America, Inc. et al.*, No. CV15-884 PHX NVW (D. Az. filed May 18, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3005/cancer-fund-america-inc>.

⁶³ See, e.g., *FTC v. Lifewatch Inc.*, 1:15-cv-05781 (N.D. IL. Jul. 14, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3123/lifewatch-inc>; *FTC v. Life Management Services, Inc.*, 6:16-cv-982 (MD. Fla. Jun. 14, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3216/life-management>; *FTC v. Caribbean Cruise Line, Inc. et al.*, No. 0:15-cv-60423 (S.D. Fla. Mar. 4, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3196/caribbean-cruise-line-inc>.

⁶⁴ See, e.g., *FTC v. Money Now Funding, LLC*, No. CV-13-01583 (D. Ariz., June 3, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3216-x130063/money-now-funding-llc>; *FTC v. The Online Entrepreneur, Inc.*, No. 812-cv-2500-T-27MAP (M.D. Fla. July 30, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3186/online-entrepreneur-inc-et-al>.

⁶⁵ See, e.g., *FTC v. Consumer Collection Advocates, Corp.*, No. 0:14-cv-62491-BB (S.D. Fla. Nov. 3, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3082/consumer-collection-advocates-corp>.

⁶⁶ *FTC v. Apply Knowledge, LLC*, 2:14-cv-00088 (D. UT., Mar. 2, 2016) (final orders), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3121-x140018/apply-knowledge-llc>; *FTC v. Top Shelf Marketing Corp.*, 1:16-cv-00206 (S.D.N.Y. Jan. 12, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3228/top-shelf-marketing-corp>.

⁶⁷ See, e.g., *FTC v. Centro Natural Corp.*, No. 14:23879 (S.D. Fla. June 30, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3159/centro-natural-corp>; *FTC v. First Time Credit Solution, Corp.*, No. CV15-01921-DDP-PJW (C.D. Cal. filed Mar. 16, 2015), available at

Through the agency's *Every Community Initiative*, the FTC has conducted outreach and education, developed partnerships with trusted community advocates, and brought cases to stop fraud targeting certain groups of consumers like the elderly, low-income consumers, or minorities. The FTC has hosted over a dozen major conferences to learn more about consumer protection issues in a wide range of communities.⁶⁸ FTC regional offices have brought together key players in consumer protection for what we call "Common Ground" conferences in their communities.⁶⁹ In December, the FTC will bring together researchers, marketers, community groups, and law enforcement to examine the changing consumer demographics in this country and how they will affect the FTC's future work.⁷⁰

Over the past year, the FTC has also expanded its outreach to older adults, service members and veterans, and people in African-American, Native American, immigrant and Latino communities. For example, the FTC has partnered with the Navajo Human Rights Commission to reach the Navajo Nation,⁷¹ and with the NAACP to reach African Americans.⁷² In addition, to

<https://www.ftc.gov/enforcement/cases-proceedings/152-3114/first-time-credit-solution-corp-ftc-credit-solutions>.

⁶⁸ See, e.g., FTC Workshop, *Fraud Affects Every Community*, Oct. 29, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/10/fraud-affects-every-community>; FTC Roundtable, *Debt Collection & the Latino Community Roundtable*, Oct. 23, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/10/debt-collection-latino-community-roundtable>; FTC Conference, *Working Together to Advance Protections for Immigrant Consumers*, Apr. 21, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/04/working-together-advance-protections-immigrant-consumers>.

⁶⁹ See, e.g., *Colorado Common Ground Conference: Working Together to Protect Colorado Consumers*, Apr. 24, 2015, available at <https://www.ftc.gov/news-events/events-calendar/2015/04/colorado-common-ground-conference-working-together-protect> (joint event with Colorado Attorney General's Office); *NW Common Ground Conference*, Nov. 18-19, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/11/nw-common-ground-conference> (joint event with Washington State Attorney General's Office).

⁷⁰ See FTC Workshop, *Changing Consumer Demographics*, Dec. 6, 2016, available at <https://www.ftc.gov/news-events/events-calendar/2016/12/changing-consumer-demographics>.

⁷¹ FTC Roundtable, *Navajo Consumer Credit Seminar and Roundtable*, Apr. 17, 2015, available at <https://www.ftc.gov/news-events/events-calendar/2015/04/navajo-consumer-credit-seminar-roundtable>.

⁷² *Obstacles to Economic Opportunity: A Joint Conference of the FTC and the NAACP Examining*

encourage more attention to consumer protection issues in diverse communities, the FTC began a new project to reach ethnic media outlets by hosting roundtables with them in cities across the country. These ethnic media events highlight scams, frauds, and illegal practices affecting the relevant communities. The Bureau of Consumer Protection and its Regional Offices have participated in over 170 outreach events, including webinars, trainings, presentations, exhibits, and Twitter chats.

And the Commission has used its strongest tool – enforcement – to protect communities that have been specifically targeted by fraudsters. Most cases affect a broad cross-section of people, but scams are increasingly targeting specific groups, aided by the widespread availability of data profiles and leads on consumers. For example, the Commission halted the operations of a company that used false affiliation with the FTC – calling itself “FTC Credit Solutions” – to market bogus credit repair services to Spanish-speaking consumers.⁷³ Scams targeting the Spanish speaking population are pervasive, and the FTC has taken action to address many different kinds – involving pyramids and business opportunities,⁷⁴ unordered merchandise,⁷⁵ fraudulent debt collection,⁷⁶ and bogus health insurance.⁷⁷ The Commission is also stopping

Frauds that Affect the African American Community, May 19, 2015, *available at* <https://www.ftc.gov/news-events/events-calendar/2015/05/obstacles-economic-opportunity-joint-conference-ftc-naacp>.

⁷³ *FTC v. First Time Credit Solution, Corp.*, No. CV15-01921-DDP-PJW (C.D. Cal. Aug. 3, 2015), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/152-3114/first-time-credit-solution-corp-ftc-credit-solutions>.

⁷⁴ *See, e.g., FTC v. Oro Marketing, Inc.*, No. 2:13-CV-08843 (C.D. Cal. Dec 22, 2015), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/132-3047-x140010/oro-marketing-inc-et-al>; *FTC v. Fortune Hi-Tech Marketing, Inc.*, No. 5:13-cv-00123-GFVT-REW (N.D. Ill. May 9, 2014), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/112-3069/fortune-hi-tech-marketing-inc-et-al>.

⁷⁵ *See, e.g., FTC v. Herbalife of Am., Inc.*, No. 2:16-cv-05217 (C.D. Cal. July 25, 2016), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/142-3037/herbalife-international-america-inc-et-al>; *FTC v. Hispanic Global Way Corp.*, No. 14-22018-CIV-ALTONGA/O’Sullivan (Feb 26, 2015), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/132-3113/hispanic-global-way-corporation>.

⁷⁶ *See, e.g., FTC v. Centro Natural Corp.*, No. 14:23879-CIV-ALTONAGA/O’Sullivan (S.D. Fla. June

scams that target older consumers, including two sweepstakes that used personalized letters to seniors to trick them into paying to claim their prizes and took in more than \$28 million in one scam and over \$17 million in another.⁷⁸ Other frauds targeting seniors have involved tech support to fix nonexistent computer problems,⁷⁹ recovery scams purporting to recoup losses from other frauds,⁸⁰ and fraudulent health and safety schemes.⁸¹

The FTC has also brought actions against companies that target military service members. For example, for-profit school Ashworth College recruited service members and their families and accepted their military benefits as payment.⁸² The FTC alleged Ashworth misrepresented that students would get the training and credentials needed to switch careers or get a new job, and that the course credits they earned would transfer to other schools. In fact, the FTC alleged, neither claim was true. This fall, the FTC, in cooperation with the Department of

30, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3159/centro-natural-corp>.

⁷⁷ *FTC v. Partners in Health Care Association, Inc.*, No. 1:14-CV-23109 (S.D. Fla., July 21, 2016) (summary judgment), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3122/partners-health-care-association-inc>.

⁷⁸ *FTC v. Mail Tree Inc.*, No. 0:15-cv-61034-JIC (S.D. Fla. June 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3068/mail-tree-inc>; *FTC v. Dayton Films*, No. 2:97-CV-00750-PMP (LRL) (D. Nev. January 28, 2013), available at <https://www.ftc.gov/enforcement/cases-proceedings/x970058/dayton-family-productions-inc-et-al>.

⁷⁹ See, e.g., *FTC v. Help Desk National*, 1:16-cv-06607 (N.D. IL. Jul. 8, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3042-x160045/help-desk-national>; *FTC v. Boost Software, Inc.*, 14-cv-81397 (Feb. 12, 2016) (final orders), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3283-x150040/boost-software-inc>; *FTC v. Inbound Call Experts, LLC*, No. 9:14-cv-81395-KAM (S.D. Fla. Nov. 10, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3135/inbound-call-experts-llc>.

⁸⁰ See, e.g., *FTC v. Consumer Collection Advocates, Corp.*, No. 0:14-cv-62491-BB (S.D. Fla. Nov. 3, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3082/consumer-collection-advocates-corp>.

⁸¹ See, e.g., *FTC v. Sunbright Ventures LLC*, No. 8:14-cv-02153-JDW-EAJ (M.D. Fla. July 22, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3217/sun-bright-ventures-llc-gmy-llc>; *FTC v. Instant Response Systems LLC*, No. 1:13-cv-00976 (E.D.N.Y. Apr. 14, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1223041/instant-response-systems-llc-et-al>.

⁸² *FTC v. Professional Career Development Institute, LLC*, No. 1:15-cv-01872-WSD (N.D. Ga. June 4, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3225/ashworth-college>.

Defense and other organizations, will release a consumer protection toolkit for servicemembers and their families.

The FTC is also fighting scams that specifically target consumers already facing financial difficulties. The *HOPE Services* case – just one example – involved a sham operation that allegedly told financially distressed homeowners it would help reduce their mortgages, but instead effectively stole their mortgage payments, leading some to foreclosure and bankruptcy.⁸³ And the Commission has brought several cases involving abusive debt collection that victimized consumers already in debt.⁸⁴

B. Competition

The Commission seeks to promote competition through vigorous law enforcement. The FTC enforces U.S. antitrust law in many sectors that most directly affect consumers and their pocketbooks, such as health care, consumer products and services, technology, manufacturing, and energy.⁸⁵ In addition, the FTC undertakes competition policy research to improve agency decision-making, and engages in competition advocacy and education initiatives to encourage

⁸³ See *FTC v. Sameer Lakhany*, No. 8:12-cv-00337-CJC-JPR (C.D. Cal. Apr. 29, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/court-halts-mortgage-relief-operation-targeted-homeowners-facing>. See also *FTC v. C.C. Enterprises, Inc.*, No. 8:15-cv-00585-CJC-JPR (C.D. Cal. Apr. 16, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3136-x120014/householdrelief>; *FTC v. Wealth Educators Inc.*, No. cv15-2357 (C.D. Cal. Apr. 10, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1523004/wealth-educators-inc>.

⁸⁴ See e.g., *FTC v. Lanier Law, LLC*, No. 3:14-cv-00786-MMH-PDB (M.D. Fla. Sept. 1, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3038-x140039/lanier-law-llc>; *FTC & CFPB v. Green Tree Servicing, LLC*, No. 0:15-cv-02064 (D. Minn. filed Apr. 21, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3008/green-tree-servicing-llc>; *FTC v. Asset & Capital Mgmt. Group*, No. CV13-5267 (C.D. Cal. May 19, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3031/asset-capital-management-group-dba-acm-group>.

⁸⁵ For a more detailed discussion of the FTC's recent antitrust enforcement matters, see Prepared Statement of the Federal Trade Commission On "Oversight of the Enforcement of the Antitrust Laws," Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary, United States Senate (Mar. 9, 2016), https://www.ftc.gov/system/files/documents/public_statements/934563/160309enforcementantitrustlawstest.pdf.

state, local and foreign jurisdictions to adopt policies that promote competition and consumer welfare.

One of the agency's principal responsibilities is preventing mergers that may substantially lessen competition. Over the past two fiscal years, premerger filings under the Hart-Scott-Rodino Act have increased significantly; they are up approximately 36 percent in FY 2015 as compared to FY 2013 and have more than doubled over the past five years.⁸⁶ The vast majority of reported transactions, approximately 95 percent, do not raise competition concerns, and the Commission clears those transactions expeditiously. However, when the evidence has shown that the merger could be anticompetitive, the Commission has intervened. Since the beginning of fiscal year 2015, the Commission has challenged 44 mergers, including eight cases in which the Commission voted to initiate litigation to block the transactions.⁸⁷ This includes significant trial victories stopping both the Sysco/US Foods⁸⁸ and Staples/Office Depot⁸⁹ mergers. The Commission has been especially vigilant in response to heightened merger activity in the hospital and pharmaceutical sectors. In the last two years alone, the Commission has taken action in 13 pharmaceutical industry mergers, ordering divestitures of more than a hundred branded and generic drugs used to treat a variety of conditions.⁹⁰

⁸⁶ In FY 2015, the Agencies received notice of 1,801 transactions, compared with 1,326 in FY 2013 and 716 in FY 2009.

⁸⁷ Complete data on the FTC's competition workload is available on its website at <https://www.ftc.gov/competition-enforcement-database>.

⁸⁸ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

⁸⁹ *FTC v. Staples, Inc.*, --- F. Supp. 3d --- (D.D.C. 2016), available at <https://www.ftc.gov/system/files/documents/cases/051016staplesopinion.pdf>.

⁹⁰ See, e.g., FTC News Release, FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business (Jul. 27, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle>.

The Commission also maintains a robust program to identify and stop anticompetitive conduct. For nearly 20 years, the Commission has prioritized ending anticompetitive reverse-payment patent settlements in which a brand-name drug firm pays its potential generic rival to delay entering the market with a lower cost, generic product. Following the Supreme Court’s 2013 decision in *FTC v. Actavis, Inc.*,⁹¹ the Commission is in a much stronger position to protect consumers. Last June, for example, the FTC obtained a landmark settlement in its litigation against Cephalon, Inc.⁹² when Cephalon’s parent, Teva Pharmaceuticals, agreed to stop using certain types of anticompetitive patent settlements and pay up to \$1.2 billion in ill-gotten gains to reimburse drug wholesalers, pharmacies, insurers, and others who overpaid for the blockbuster sleep disorder drug Provigil.

To complement our enforcement efforts, the FTC pursues a robust policy and research agenda. The FTC promotes competition principles in advocacy comments to state lawmakers and regulators as well as our sister federal agencies. The FTC also organizes public workshops and issues reports on cutting-edge topics, including workshops on solar distributed generation and the so-called “sharing economy.” The Commission’s current competition research projects include a remedy study to evaluate the effectiveness of the Commission’s orders in past merger cases, which builds on a similar effort conducted in the 1990’s that led to important improvements in the Commission’s orders.⁹³ We are also in the final stages of a landmark study of patent assertion entities (PAEs) that will provide unique insights into PAE business models

⁹¹ *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).

⁹² FTC News Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics* (May 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.

⁹³ FTC News Release, *FTC Proposes to Study Merger Remedies* (Jan. 9, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

and activity.⁹⁴

With the expansion of global trade and the operation of many companies across national borders, the FTC and the Antitrust Division of the Department of Justice increasingly engage with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound competition policies and procedures.⁹⁵ The FTC effectively coordinates reviews of multijurisdictional mergers and continues to work with its international counterparts to achieve consistent outcomes in cases of possible unilateral anticompetitive conduct. The U.S. antitrust agencies also facilitate dialogue and promote convergence through multiple channels, including through strong bilateral relations with foreign competition agencies, and an active role in multilateral competition organization projects and initiatives. When appropriate, we also work with other agencies within the U.S. government to advance consistent competition enforcement policies, practices, and procedures in other parts of the world.

III. Challenges Facing the FTC

The FTC has worked to keep pace with the vast changes of the ever-changing marketplace. We recognize the agency must remain nimble to anticipate and respond to future marketplace changes and other challenges. However, two particular challenges are of concern: jurisdictional limitations over common carriers and nonprofits.

A. The FTC Act's Exception for Communications Common Carriers

The FTC Act exempts common carriers subject to the Communications Act from the FTC's enforcement of its prohibitions on unfair or deceptive acts or practices and unfair methods

⁹⁴ FTC News Release, *FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition* (Sept. 26, 2013), available at <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>.

⁹⁵ In competition matters, the FTC also seeks to collaborate with the state attorneys general to obtain the best results and maximize the use of limited resources in the enforcement of the U.S. antitrust laws.

of competition. The FTC has long called for the repeal of the common carrier exception. This carve-out originated in an era when telecommunications services were provided by highly-regulated monopolies. The exception no longer makes sense in today's deregulated environment where the lines between telecommunications and other services are increasingly becoming blurred, such as when telecommunications companies are buying edge providers and consumers increasingly communicate over online social networks instead of landlines.

As the telecommunications and Internet industries continue to converge, the common carrier exception is increasingly likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to a wide array of activities. That is particularly so if the Ninth Circuit's recent decision in the AT&T case stands.⁹⁶ As a result of that decision, the common carrier exception may disable the FTC from enforcing Section 5 of the FTC Act not only against common carriage activities, but also against non-common-carriage activities engaged in by an entity with merely the "status" of a common carrier, even if that is not its principal line of business. For example, the AT&T decision could prevent the FTC from bringing "cramming" cases against telephone companies and could have other farther-reaching effects as well on FTC programs ranging from Do Not Call to COPPA. The FCC's authority over common carriers is limited to the provision of services for or in connection with common carriage. If common carriers are providing non-common carrier products or services, one outcome might be that neither the FCC nor the FTC would have jurisdiction to respond to practices that harm consumers. And even in cases where the FCC can respond, it lacks authority to seek consumer redress.

⁹⁶ See *Federal Trade Comm'n v. AT&T Mobility LLC*, No. 15-16585 Slip Op. (9th Cir. Aug. 29, 2016).

This problem is intensified by the FCC’s reclassification of broadband Internet access service as a common carriage service.⁹⁷ Because broadband providers are now deemed common carriers, not only is their broadband service beyond the reach of FTC enforcement, but other, non-broadband activities may be as well. Any company that has or acquires the status of a common carrier will be able to argue that it is immune from FTC enforcement against *any* of its lines of business by virtue of its common carrier status.

Even apart from the effect of the AT&T decision, unless the common carrier exception is repealed, the Commission will no longer be able to bring cases like the “throttling” actions against AT&T⁹⁸ and TracFone.⁹⁹ In both cases, we alleged that the companies promised their customers unlimited data but in reality severely limited data usage by reducing – or throttling – the data speeds of high-usage customers to the point that many common mobile phone applications, like web browsing, GPS navigation, and streaming video, became difficult or nearly impossible to use.

This type of basic consumer protection issue falls squarely within the core mission of the FTC. Such matters are emerging with increasing regularity in the telecommunications industry as major telecommunications and broadband companies increasingly diversify. Yet the common carrier exception may prevent the FTC from protecting consumers from these problems and emerging issues presented by new technologies and the blurring of industries. And under the AT&T decision, we could wind up in a situation where the same service or product (no matter

⁹⁷ See *In re Protecting and Promoting the Open Internet*, FCC 15-24 (2015) (report and order) (GN Docket No. 14-28).

⁹⁸ *FTC v. AT&T Mobility, Inc.*, <https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service>.

⁹⁹ *FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-00392 (N.D. Cal. filed Jan. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc>.

how far afield from telecommunications) sold by two different companies, one with common carrier “status” and one without it, will be subject to unequal enforcement.

Removing the exception from the FTC Act would enable the FTC to bring its extensive law enforcement experience to bear in protecting consumers of common carriage services (and non-common-carriage services offered by common carriers) against unfair and deceptive practices in the same way that it can protect against unfair and deceptive practices for other services. For example, we have a long history of privacy and data security enforcement against a wide range of entities under our jurisdiction that operate in the technology and communications industries – companies like Microsoft, Facebook, Google, HTC, and Twitter, app providers like Snapchat, Fandango, and Credit Karma, and cases involving the Internet of Things, mobile payments, retail tracking, crowdsourcing, and lead generators. Removing the exception is the simplest, cleanest way to ensure continued consumer protection.

B. Jurisdiction over Nonprofit Entities

Currently, the FTC’s jurisdiction over non-profits is limited.¹⁰⁰ The FTC Act applies to “persons, partnerships, or corporations,”¹⁰¹ and the Act defines “corporation” as an entity that “is organized to carry on business for its own profit or that of its members.”¹⁰²

¹⁰⁰ The Commission has jurisdiction over most non-profits in several discrete areas, for example, under certain consumer financial statutes such as the Truth in Lending Act and the Equal Credit Opportunity Act. The Commission also has jurisdiction over non-profit entities for purposes of the Clayton Act, most notably Section 7, which prohibits mergers or acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

¹⁰¹ 15 U.S.C. § 45(a)(2).

¹⁰² 15 U.S.C. § 44. Under this framework, the Commission can reach “sham” non-profits, such as shell non-profit corporations that actually operate for profit; for-profit entities falsely claiming to be affiliated with charitable organizations who affirmatively misrepresent that “donations” collected will go to charity; and organizations such as trade associations that engage in activities that provide substantial economic benefit to their for-profit members, for example, by providing advice and other arrangements on insurance and business matters, or engaging in lobbying activities.

We recommend that our jurisdiction be extended to certain non-profit entities. In healthcare provider markets, where the Commission has particular expertise, the agency's inability to reach conduct by various non-profit entities has prevented the Commission from taking action against potentially anticompetitive behavior of non-profits engaged in business.¹⁰³ These concerns also apply to our consumer protection mission. For example, despite many publicized data breaches at nonprofit hospitals and universities, the FTC cannot challenge unfair or deceptive data security or privacy practices of these entities.¹⁰⁴ These breaches have exposed the sensitive data of millions of consumers, yet the Commission cannot act due to the non-profit status of these entities. Further, while the Commission can use Section 5 to reach "sham" non-profits, such as shell non-profit corporations that actually operate for profit¹⁰⁵ and sham charities,¹⁰⁶ these investigations require resource-intensive factfinding to satisfy this standard.

¹⁰³ For example, the Commission generally cannot challenge anticompetitive conduct, such as collusive behavior, by non-profit hospitals. In three past enforcement actions, the Commission alleged that groups of physicians and hospitals had participated in unlawful price-fixing arrangements, but was able to sue only the physicians and a for-profit hospital. *See Piedmont Health Alliance*, 138 F.T.C. 675 (2004) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/0210119i/piedmont-health-alliance-inc-et-al-matter>; *Tenet Healthcare Corp./Frye Regional Medical Center*, 137 F.T.C. 219 (2004) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/0210119h/tenet-healthcare-corporation-frye-regional-medical-center-inc>; *Maine Health Alliance*, 136 F.T.C. 616 (2003) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/0210017/maine-health-alliance-william-r-diggins-matter>.

¹⁰⁴ A substantial number of reported breaches have involved non-profit universities and health systems. *See* Privacy Rights Clearinghouse Chronology of Data Breaches (listing breaches including breaches at non-profits, educational institutions, and health facilities), available at <http://www.privacyrights.org/data-breach/new>.

¹⁰⁵ *See, e.g., FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 460-62 (D. Md. 2004) (denying motion to dismiss where FTC complaint alleged that purported credit counseling organization incorporated as a non-profit entity was a "de facto for-profit organization"). The history of the FTC's case is available at <https://www.ftc.gov/enforcement/cases-proceedings/0223171/ameridebt-inc>.

¹⁰⁶ *See, e.g., FTC et al. v. Cancer Fund of America, Inc. et al.*, No. CV15-884 PHX NVW (D. Az. filed May 19, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3005-x150042/cancer-fund-america-inc>.

IV. CONCLUSION

Thank you for the opportunity to provide the Commission's views. We appreciate Congress's confidence in the FTC's ability to protect consumers and, through our enforcement, education, and policy efforts, we will ensure that your confidence is well-placed. The FTC remains committed to finding ways to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. We look forward to continuing to work with the Committee and Congress, and we would be happy to answer any questions that you and other Members may have about the FTC.