FTC Enforcement Priorities in the New Administration

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FTC Settlement Leads to a 24/7 Shutdown of a Mobile Banking App

By Leonard L. Gordon, Mary M. Gardner & Nikita Bhojani on March 31, 2021

On March 29, 2021, the FTC **announced** a settlement with Beam Financial Inc. (Beam) and its founder and CEO, Yinan Du, over allegations that the mobile banking app company deceived consumers about their access to funds and interest rates. The settlement included a far-reaching conduct ban. As the non-bank financial services continue to grow, the action and settlement underscore the role the FTC seeks to play in policing that sector.

By way of background, on November 18, 2020, the FTC filed a **complaint** against Beam, alleging that Beam and Mr. Du falsely promised users of their banking app that they would earn high interest rates on the funds maintained in their Beam accounts and have "24/7 access" to their funds. Beam was not a bank; rather, it promised to place funds at banks and provide consumers access to those funds through the app. The FTC alleged that Beam promised users would receive "the industry's best possible rate"—at least 0.2% or 1%—when users actually received a much lower rate of 0.04% and stopped earning interest entirely after requesting that Beam return their funds. The FTC's complaint also alleged that Beam misrepresented that consumers could easily move funds into and out of their accounts and that they would receive their requested funds within three to five business days. According to the FTC, users reported that their emails, texts, and phone calls to the company went unanswered; some users even allegedly waited weeks or months to receive their money, while others never received it. The FTC alleged that this was particularly difficult for consumers experiencing serious financial hardship during the COVID-19 pandemic.

Under the terms of the **settlement**, Beam and Mr. Du are banned from operating a mobile banking app or any other product or service that can be used to deposit, store, or withdraw

funds. They are also prohibited from misrepresenting consumers' access to funds, interest rates, and other aspects of any financial product or service. In addition, defendants must provide full refunds to customers, currently valued at approximately $2.6 million.

Interestingly, the proposed settlement was approved by a 3-1 vote, with Commissioner Rohit Chopra voting against it. Even though Commissioner Chopra did not issue a statement to explain his vote, it is safe to assume, given his recent advocacy, that he likely preferred a settlement that included additional financial consequences to the defendants, including civil penalties, perhaps through a referral to the Consumer Financial Protection Bureau (CFPB), which he may soon lead.

As most readers know, the FTC lacks jurisdiction over banks. Non-bank financial services, however, continue to grow. Many of those services are aimed at consumers who are under-banked or not banked. Providers in that sector need to remember that traditional FTC advertising principles apply to these novel services.

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Setting Some Ground Rules: Commissioner Nominee and a New Working Group May Steer the FTC Down a New (Actually an Old) Road

By Leonard L. Gordon, Michael A. Munoz & Nikita Bhojani on March 26, 2021

For those who follow the Federal Trade Commission and are anxiously awaiting the Supreme Court's decision in *AMG Capital Management v. FTC*, several recent developments at the Commission may foreshadow the enforcement road that lies ahead. In many ways, the future may look a lot like the past, especially the 1960s and 1970s, when the FTC pumped out rules regulating many aspects of economic activity, including **frosted cocktail glasses**.

First, earlier this month, President Biden nominated Lina Khan, an associate professor of law at Columbia Law School, to replace departing Commissioner Rohit Chopra, who has been nominated to lead the CFPB. At 32 years of age, Khan would be the youngest FTC commissioner in the agency's history.

Acting Chairwoman Rebecca Kelly Slaughter has **lauded** Khan's "creative energy, groundbreaking antitrust work, and passion for the FTC's mission," which includes her previous role as counsel to the House Antitrust Committee, where she assisted in producing a **400-page report** on antitrust enforcement against tech companies. Prior to that role, she served as a legal advisor to Commissioner Chopra, with whom she **authored an article** arguing for expanded use of the FTC's Section 5 rulemaking authority to supplement antitrust adjudication.

Given Khan's relevant experience and publications, it is likely that, as an FTC commissioner, she will seamlessly transition into Commissioner Chopra's role in advocating for creative and

aggressive enforcement efforts, on both the antitrust and consumer protection sides of the FTC.

Second, Acting Chairwoman Slaughter seemingly acted on Khan's and Chopra's calls for reinvigorating the FTC's rulemaking authority when she **announced on Thursday** that the FTC will now have a dedicated "rulemaking group" in the Office of the General Counsel. Currently, the FTC's bureaus and divisions maintain decentralized authority over the periodic review of existing rules. According to the announcement, the creation of the rulemaking group will not only assist in strengthening existing rules, but will undertake new rulemaking to prohibit unfair or deceptive practices and unfair methods of competition.

The consolidation of rulemaking in one office is interesting on multiple levels. In their article, Chopra and Khan argued that the FTC could use Section 5 of the FTC and the Administrative Procedures Act to engage in notice and comment rulemaking to regulate unfair methods of competition. Suffice it to say that the subjects of that regulation may take the view that the FTC must follow the far more onerous requirements of the Magnuson-Moss Warranty Federal Trade Commission Improvements Act, which requires the FTC to (1) show that the conduct at issue is "prevalent" and (2) conduct informal hearings that allow interested parties to cross-examine. Chopra and Kahn argue that the FTC only needs to follow Magnuson-Moss rulemaking in regulating unfair or deceptive acts or practices, not unfair methods of competition. If Chopra and Khan are correct, the new office will be promulgating rules under two different standards.

Furthermore, the FTC frequently touts its status as an expert agency and would certainly do so in defending any regulations it issued. That expertise would seem to be diminished if rules are pumped out by one office for the entire agency rather than by the specific "shops" within the FTC with subject matter expertise.

As Acting Chairwoman Slaughter alludes to in the press release, the rulemaking group's creation gets out in front of an adverse ruling in *AMG Capital Management*. The acting commissioner has **previously voiced concerns to Congress** about the FTC's need for more enforcement authority, and the rulemaking group is a step in that direction that the Commission can take on its own.

Venable has the experience needed to help clients navigate these issues as the FTC transitions to new enforcement priorities and procedures. We will continue to monitor

developments relevant to the FTC's enforcement authority on this blog.

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Superglue Manufacturer Stuck with $1.2 Million Judgment for Made in USA Violations

By Leonard L. Gordon on February 17, 2021

Last week the FTC announced it had settled with Chemence, Inc. ("Chemence") and the company's president over deceptive "Made in USA" claims. The company was required to pay $1.2 million to the FTC, which amounts to the highest monetary judgment ever for a Made in USA case.

By way of background, unqualified Made in USA claims require that all or virtually all of the product is made in the United States. Previous FTC guidance stemmed from a 1997 Enforcement Policy Statement, but last year the FTC announced a **Notice of Proposed Rulemaking for the Made in USA Labeling Rule**, which would codify much of the Enforcement Policy. Notably, the proposed Rule would allow the FTC to seek civil penalties for each violation. The Rule has not yet been made final, but the opportunity to comment ended in September 2020.

In keeping with its products, Chemence struggled to separate itself from FTC scrutiny in recent years. In February 2016, the FTC filed a complaint in the Northern District of Ohio alleging that Chemence violated Section 5(a) of the FTC Act by deceptively representing that its cyanoacrylates (i.e., superglues), including the materials used to make the glues, were all or virtually all made in the United States. On October 13, 2016, the Northern District of Ohio entered a Stipulated Order for Permanent Injunction and Monetary Judgment, which permanently enjoined Chemence from representing, expressly or by implication, that a product or service is of U.S. origin unless: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and

sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing. The order also enjoined Chemence from providing others with the "means and instrumentalities" to make any representation prohibited above.

Despite the FTC's Order, Chemence remained bonded to its unqualified Made in USA claims. During compliance reports required by the Order, Chemence maintained that it altered the labeling of its adhesive products. However, Chemence did not stick to its word. On February 9, 2021, the FTC filed a complaint against Chemence, and this time included the company's president as a defendant, alleging that in numerous instances, post Order, Chemence supplied trade customers with pre-labeled and pre-packaged superglues containing unqualified "Made in USA" claims on promotional materials or labels.

Similar to the 2016 Order, the Final Order prohibits Chemence and its president from making (1) unqualified U.S. origin claims for any product, unless they can show that the product's final assembly or processing—and all significant processing—takes place in the United States and that all or virtually all ingredients or components of the product are made and sourced in the United States; (2) any qualified Made in USA claim that doesn't include a clear and conspicuous disclosure about the extent to which the product contains foreign parts, ingredients, components, or processing; (3) a claim that a product is assembled in the United States unless it is last substantially transformed in the United States, its principal assembly takes place in the United States, and U.S. assembly operations are substantial, among other things.

The FTC continues to target companies that make misleading Made in USA claims, and the FTC's proposed rule would only increase its firepower. The Order also highlights the FTC's recent push to include individual defendants in a Final Order for additional deterrent effect. Therefore, any Made in USA representations should be closely reviewed by counsel to avoid a sticky situation with the FTC.

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Ninth Circuit Rejects Challenge to FTC Administrative Proceedings

By Leonard L. Gordon & Megan K. Hynes on February 3, 2021

While we anxiously await the Supreme Court's decision on whether the FTC can obtain equitable monetary relief pursuant to Section 13(b) of the FTC Act in the *AMG* case, a defendant's challenge to the FTC administrative litigation process appears to be struggling. As administrative litigation may be used more frequently by the FTC if it loses the *AMG* case, the case is worth following.

Axon Enterprises makes body cameras for police use and in May 2018 purchased one of its competitors. The FTC investigated the consummated merger and had concerns that the merger reduced competition. In January 2020, Axon filed a lawsuit in the District of Arizona, and on the same day the FTC filed a complaint against Axon. In its complaint, Axon argued that the FTC's in-house litigation procedure violates due process and equal protection rights because the FTC controls all aspects of the proceeding, effectively making the FTC judge, attorney, and jury in these cases. Additionally, the complaint disparaged the FTC for the clearance process by which the FTC and Department of Justice decide which agency should handle a merger, claiming that the process lacks transparency. In support of its claim that these proceedings violate constitutional rights, Axon alleged that the FTC has not lost a single case in its in-house proceedings in 25 years. The FTC did not contest this statistic.

In the District Court's decision, Judge Dominic W. Lanza acknowledged the significance of Axon's claims but ultimately decided that Axon will need to raise these issues through the administrative litigation process. For more information on this case, look at our earlier blog on the case **here**.

Things started to look up for Axon when the Ninth Circuit stayed the administrative trial pending the appeal. That victory, however, was short-lived. On January 28, 2021, a split Ninth Circuit affirmed the District Court decision and ruled that Axon would have to go through the FTC's in-house proceedings before presenting its challenge to the FTC's procedures to the District Court. Although the Court did note some "serious concerns about how the FTC operates," it ultimately decided that Axon must go through the FTC's administrative proceedings before it could challenge the administrative litigation process in federal court. Ultimately, the Ninth Circuit decided, "The FTC Act reflects a fairly discernible intent to preclude district court jurisdiction, and Axon can ultimately obtain meaningful judicial review of its claims before this court once the FTC administrative proceeding concludes."

The panel joined every other circuit that considered a similar issue and held that Congress implicitly stripped the district court of jurisdiction. "The Court found that while the FTC Act does not expressly state that a party cannot pursue a case in federal court, Congress "impliedly precluded district court jurisdiction." Undeterred in its challenge to the FTC, Axon's Vice President of Litigation revealed that Axon may pursue an appeal with the full Ninth Circuit or the Supreme Court."

For now, the FTC's administrative litigation process appears safe from collateral attack. The FTC may need that process if the Supreme Court strikes down the FTC's use of Section 13(b) as its preferred method of litigation.

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So…What If the FTC Loses *AMG Capital Management v. FTC*?

By Leonard L. Gordon & Mary M. Gardner on January 19, 2021

Last week, the Supreme Court heard oral argument in *AMG Capital Management v. FTC*. As we've previously **discussed**, the Supreme Court is set to decide whether Section 13(b) of the FTC Act, which expressly grants the FTC the right to obtain "a permanent injunction," also grants the FTC the authority to obtain "equitable monetary relief." During oral argument, certain Justices expressed doubt that the plain language of Section 13(b), when viewed in the context of the entirety of the FTC Act, authorized the FTC to obtain "equitable monetary relief" when proceeding under Section 13(b). While none of us can predict the future, after last Wednesday's oral argument, we can't help but wonder: What will happen if the FTC loses? Below, we have outlined the potential avenues for the FTC if the decision doesn't go its way.

First, Congress could revise the language of Section 13(b) to allow the FTC to seek equitable monetary relief, a request the FTC made in **October 2020**. There's precedent for such a move. After the Supreme Court significantly curtailed the SEC's calculation of equitable monetary relief in ***Liu***, Congress codified the SEC's authority to seek disgorgement in federal district court as part of the 60th annual National Defense Authorization Act in January 2021, by amending the Securities Exchange Act of 1934. Congress could pass a similar amendment to the FTC Act to unambiguously allow the FTC to obtain equitable monetary relief under Section 13(b) or otherwise. Whether that potential authority would come with a statute of limitations, allow for joint and several liability, or be subject to other restrictions will be important in assessing any potential legislation.

Second, the FTC could bring more cases in administrative litigation obtaining cease and desist orders. After obtaining, and defending on appeal, an administrative order, the FTC could then pursue monetary relief in federal court, using Section 19 of the FTC Act. However, the Commission must demonstrate that "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent."

Third, the FTC could refer more cases involving alleged wrongful conduct in the consumer financial space to the CFPB. Commissioner Chopra—who Biden recently tapped to lead the CFPB—has **previously advocated** for precisely that approach. His rationale is that, particularly in cases where there are little funds to distribute from defendants, victims could qualify for redress through the CFPB's Civil Penalty Fund. Whether these recommendations become a reality will likely be a question for the new Chair, but it could be one avenue by which the FTC could continue to obtain redress for consumers—albeit indirectly.

Fourth, Section 19 of the FTC Act also authorizes the FTC to go directly to federal court to obtain restitution and redress for violations of rules enforced by the FTC (such as the Telemarketing Sales Rule (TSR)) and some statutes (such as the Restore Online Shoppers Confidence Act (ROSCA)).

Fifth, the FTC could refer more cases to the Department of Justice (DOJ) to pursue civil penalties for rule violations and certain statutory violations that provide for civil penalties. The FTC's core statute, Section 5 of the FTC Act, does not provide for civil penalties. Those penalties vary depending on the statute or rule involved and go all the way **up to $43,792 per violation**.

Finally, the FTC could utilize a somewhat unused avenue for obtaining redress—the Penalty Offense Authority, which we've previously discussed **here**. This Authority authorizes the FTC to seek civil penalties (directly not through the DOJ) against a defendant in federal court where (1) the FTC has obtained a litigated cease and desist order against another party through an administrative proceeding pursuant to Section 5(b) of the FTC Act; (2) the cease and desist order identifies a specific practice as unfair or deceptive; and (3) a party on notice of the order (i.e., someone with actual knowledge that the practice is unfair or deceptive) then engages in that same violating conduct after the order is final.

The Supreme Court should issue its decision in *AMG Capital Management* prior to the end of its term on June 28, 2021. If the Supreme Court does close the door on the FTC's ability to

seek equitable monetary relief through Section 13(b) in federal court, the FTC will not be defunct. Its response will be interesting to watch.

Interested in an in-depth discussion of the Supreme Court's oral argument in *AMG* and its potential impact on the FTC? Register for our February 11 webinar: **Reading Tea Leaves: Breaking Down Oral Argument in *AMG Capital Management v. FTC***.

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FTC Takes Aim at Facial Recognition Claims in Latest Deception Settlement

By D. Reed Freeman Jr. & Kathryn B. Marshall on January 14, 2021

On January 11, 2021, the Federal Trade Commission (FTC or the "Commission") announced it reached a **proposed settlement** with Everalbum, Inc. ("Everalbum"), a developer of a photo app, to resolve allegations that the company deceived consumers about its use of facial recognition technology.

The settlement highlights the FTC's focus on biometric data and increased scrutiny regarding facial recognition technology. Specifically, in announcing the settlement, the FTC stated that facial recognition technology can turn photos into "sensitive biometric data" and emphasized that ensuring companies keep their promises regarding the use of biometric data will be a "high priority for the FTC." Additionally, while the proposed settlement was approved by all five FTC Commissioners, Commissioner Rohit Chopra issued a **separate statement** criticizing facial recognition technology and expressing support for a moratorium or restrictions on the use of such technology.

Everalbum provides a photo storage and organization app called "Ever," which allows users to upload photos and videos to be stored and organized using the company's cloud-based storage service. Starting in 2017, Ever launched its "Friends" feature, which uses facial recognition technology to group users' photos by the faces of people appearing in the photos. Initially, the feature was automatically enabled for all users and could not be turned off, although the company later allowed users located in Illinois, Texas, Washington, and the EU to choose whether to turn on the feature. However, according to the **FTC's complaint**, Everalbum's website represented that Everalbum was not using facial recognition technology unless a user affirmatively enabled or turned on the technology. As the technology was

instead enabled by default for users located outside of Texas, Illinois, Washington, and the EU, the FTC alleged that this representation was deceptive, in violation of Section 5(a) of the FTC Act.

In addition, the FTC's complaint alleged that Everalbum made deceptive representations regarding the deletion of Ever users' photos upon account deactivation. For example, according to the complaint, Everalbum represented that deactivating an Ever account would "permanently delete all photos and videos stored on your account[.]" However, the FTC alleged that Everalbum continued to indefinitely retain photos and videos after a user deactivated his or her account until at least October 2019. The FTC therefore found that the representations regarding deletion were deceptive.

The proposed stipulated settlement requires Everalbum to obtain affirmative express consent from users prior to using biometric information—defined in the proposed settlement to include depictions of an individual's facial features—for certain purposes. Specifically, Everalbum must obtain consent to create data derived in whole or in part from an image of an individual's face ("Face Embedding") or to train, develop, or alter facial recognition models or algorithms. In addition, Everalbum must delete (1) the photos and videos associated with deactivated accounts; (2) Face Embeddings derived from photos of Ever users who have not provided affirmative express consent as required by the proposed settlement; and (3) facial recognition technologies enhanced by any improperly obtained photos. However, no financial penalty is imposed in the proposed settlement.

The obligation to delete facial recognition technologies, including algorithms and models, enhanced by improperly obtained photos was noted as an "important course correction" in Commissioner Chopra's **statement**, as he highlighted that Commissioners have previously allowed "data protection law violators" to retain technologies that derive value from "ill-gotten data." In addition to addressing specific aspects of the proposed settlement, Commissioner Chopra used his statement as an opportunity to discuss broader concerns regarding facial recognition technology and to emphasize the importance of maintaining "states' authority to protect personal data." The statement concluded by stating that it will be critical for the Commission, states, and other regulators to pursue further enforcement actions to ensure that providers of facial recognition technology are held accountable for false claims and unfair conduct.

Although the Everalbum settlement marks only the first action brought by the FTC that addresses claims regarding facial recognition technology, the settlement represents continued focus by the FTC on facial recognition technology and biometric data. The FTC has held workshops focused on potential privacy concerns posed by facial recognition technologies **since at least 2011** and continues to issue **guidance** (see also **here**) to companies regarding the use of such technologies.

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Office of Acting Chairwoman
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Protecting Consumer Privacy in a Time of Crisis

Remarks of Acting Chairwoman Rebecca Kelly Slaughter
As Prepared for Delivery

Future of Privacy Forum
February 10, 2021

Thank you for inviting me to speak with you all today. The President named me as Acting Chair just a few weeks ago, and I'm incredibly excited about the opportunity to lead the FTC in these challenging times. It is fitting that one of my first speeches in this new capacity will be about privacy and data security, because these issues are so important to consumers, to the FTC, and to today's information economy.

I want to direct my remarks today to some questions you may be asking—where is the FTC headed? What's new and different at the FTC under the new administration? With the reminder that my colleagues on the Commission have their own strong opinions on these questions, let me talk a bit, at a high level, about my own priorities. I'll start by talking about my interest in more effectively deterring problematic privacy and data security practices generally. Then, I'll say a few words about two substantive priority areas: responding to COVID and combatting racism.

I. Efficient and Effective Enforcement

Back in August—so, approximately six pandemic years ago— I testified before our Senate oversight committee in support of comprehensive data-privacy legislation.[1] The pandemic has only amplified the need for strong legislation at the federal level as it has pushed more of our work, our children's education, and even our personal interactions online, exacerbating data risks.[2]

In the meantime, I want to think creatively about how to make our current enforcement efforts even more effective. The FTC has worked hard to curb abuses in this space without the

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[1] Hearing on Oversight of the Fed. Trade Comm'n: Before the S. Comm. on Commerce, Science, and Transportation, *Opening Statement of Commissioner Rebecca Kelly Slaughter*, Fed. Trade Comm'n (Aug. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578979/opening_statement_of_commissioner_rebecca_slaughter_senate_commerce_oversight_hearing.pdf.
[2] *See, e.g.*, Christine Wilson, *Coronavirus Demands a Privacy Law*, Wall Street Journal (May 13, 2020), https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686.

benefit of a federal privacy law, and, for most of the statutes we enforce, without civil penalty authority. But the questions I care most about as we move forward are:

1. Are we doing everything we can to deter future violations, both by the particular company at issue and by others in the market?
2. Are we doing everything we can to help wronged consumers?
3. Are we using all the tools in the FTC's toolbox to fully charge offenses and pursue misconduct?

I've supported many of the Commission's privacy and security cases, like Equifax and TikTok, but for those of you who have followed the FTC's privacy and security work closely, you'll know that I dissented in cases like Facebook,[3] YouTube,[4] and Zoom.[5] When I dissented, in most instances it was because I believed that the Commission should have obtained stronger relief for consumers, including by pursuing litigation if we were unable to negotiate sufficient relief in settlement.

Two types of relief I want us to seek and believe we can achieve are meaningful disgorgement and effective consumer notice. The Commission achieved an innovative disgorgement remedy in the settlement with photo app Everalbum announced last month. In that case, we alleged that the company violated its promises about the circumstances under which it would use facial recognition technology.[6] As part of the settlement, the Commission required the company to delete facial recognition models or algorithms developed with users' photos or videos.

We routinely obtain disgorgement of ill-gotten monetary gains when consumers pay for a product that is marketed deceptively. Everalbum shows how we can apply this principle to privacy cases where companies collect and use consumers' data in unlawful ways: we should require violators to disgorge not only the ill-gotten data, but also the benefits—here, the algorithms—generated from that data.

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[3] *See Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Matter of FTC vs. Facebook*, Fed. Trade Comm'n (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf.

[4] *See Dissenting Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Google LLC and YouTube, LLC*, Fed. Trade Comm'n (Sept. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542971/slaughter_google_youtube_statement.pdf.

[5] *See Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Matter of Zoom Video Communications Inc.*, Fed. Trade Comm'n (Nov. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582918/1923167zoomslaughterstatement.pdf; *Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding Final Approval of the Settlement with Zoom Video Communications Inc.*, Fed. Trade Comm'n (Jan. 19, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586861/dissenting_statement_of_commissioner_slaughter_regarding_final_approval_of_the_settlement_with_zoom_2.pdf.

[6] Complaint ¶¶ 9, 23, 24, *In the Matter of Everalbum, Inc.* (Jan. 11, 2021), https://www.ftc.gov/system/files/documents/cases/everalbum_complaint.pdf.

A good example of effective notice is the Commission's recent fem-tech case involving the Flo menstruation and fertility app. We alleged that Flo violated its promises not to share consumers' sensitive information to third parties by sharing the information with Facebook, Google, and others.[7] An important remedy the Commission achieved in this case was to require the company to notify consumers of its false promises.

Notice lets consumers "vote with their feet" and helps them better decide whether to recommend the service to others. Finally, and crucially, notice accords consumers the dignity of knowing what happened. There's a fundamental equity issue here: many people—including those who most need to know—won't hear about the FTC's action against a company they deal with unless the company tells them. So, I'll be pushing staff to include provisions requiring notice in privacy and data security orders as a matter of course.

The other lesson we can take from Flo is the need to fully plead all law violations. As I mentioned in my joint statement with Commissioner Chopra on that case,[8] I believe we also should have applied the Health Breach Notification Rule to those facts and I'm glad we are conducting a review of this Rule,[9] which requires that vendors of personal health records notify consumers of breaches. In other cases, I have argued that we should have included unfairness counts.[10] In all of our cases, I want to make sure that we are analyzing all of the relevant laws and pleading all the violations that are applicable.

Finally, I think we need to think carefully about the overlap between our work in data privacy and in competition. Many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data. The FTC has a structural advantage over our counterparts in other jurisdictions that focus exclusively on antitrust or on data protection. Our dual missions can and should be complementary, and we need to make sure we are looking with both privacy and competition lenses at problems that arise in digital markets.

So, on all these fronts, I am encouraging staff to be innovative and creative to ensure we are using the full panoply of tools available to the FTC in order to bring about the best results in

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[7] *See* Press Release, Fed. Trade Comm'n, *Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data* (Jan. 13, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc.

[8] *Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter Concurring in Part, Dissenting in Part, In the Matter of Flo Health, Inc.*, Fed. Trade Comm'n (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rcrks_statement_on_flo.pdf.

[9] *See* Press Release, Fed. Trade Comm'n, *FTC Seeks Comment as Part of Review of Health Breach Notification Rule* (May 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/05/ftc-seeks-comment-part-review-health-breach-notification-rule.

[10] *See, e.g.*, *Concurring Statement of Commissioner Rebecca Kelly Slaughter In the Matter of FTC and State of New York v. Vyera Pharmaceuticals, LLC, Phoenixus AG; Martin Shkreli; and Kevin Mulleady*, Fed. Trade Comm'n (Jan. 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564517/2020_01_27_final_rks_daraprim_concurring_statement.pdf.

our cases. We welcome your insights as researchers, including feedback as to which remedies best address particular types of harm and feedback on the effectiveness of our existing orders. To gather this feedback, I've asked the staff to plan a workshop aimed at increasing our understanding of the incentives in the marketplace and how best to ensure market players do a better job of protecting privacy and securing consumer data.

II. Protecting Privacy During the Pandemic

In addition to ensuring we are being as effective and efficient as possible across the board, I want to highlight two substantive areas of priority for me.

The first priority is the pandemic. It's been almost a year since many of us stopped commuting to work, going to restaurants, traveling, or seeing loved ones in person. Some 27 million Americans have been diagnosed with COVID, and more than 450,000 have died, even as the roll-out of effective vaccines gives us new hope for the future.

Responding to COVID requires an all-hands approach nationally, and the FTC has several important roles to play as part of the solution. Obviously, health concerns are paramount, but the pandemic is also fundamentally tied to a host of other challenges Americans are facing, ranging from COVID-related scams to privacy and security issues to an economic crisis. Let me identify a few areas that I am working closely with staff to pursue related to the pandemic.

The first is ed-tech. With the ubiquity of distance learning during the pandemic, the ed-tech industry has exploded. In 2020, U.S. ed-tech startups raised over $2.2 billion in venture and private equity capital—a nearly 30 percent increase from 2019.[11] Speaking from experience—I've got two kids in "Zoom school" downstairs—parents and children are relying on ed-tech more than ever. So, what can the FTC do in this space?

We've put out guidance for parents, schools, and ed-tech providers on protecting privacy. We're conducting an industry-wide study of social media and video streaming platforms in which we've asked recipients questions about ed-tech services they provide. And we're currently in the process of reviewing the COPPA Rule, where we received numerous public comments asking us to clarify how COPPA applies in the ed-tech space. We don't need to complete our rulemaking to say that COPPA absolutely applies to ed-tech, and companies collecting information from children need to abide by it. Finally, we have to remember that there is an important equity angle to ed-tech too, exacerbated by the pandemic, which I will discuss in more detail in a bit.

Second, I'd like staff to take a close look at health apps, including telehealth and contact tracing apps. As in-person doctor visits have become rarer during the pandemic, more consumers

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[11] Tony Wan, "A Record Year Amid a Pandemic: US Edtech Raises $2.2 Billion in 2020," *EdSurge* (Jan. 13, 2021), https://www.edsurge.com/news/2021-01-13-a-record-year-amid-a-pandemic-us-edtech-raises-2-2-billion-in-2020#:~:text=%E2%80%9CEdtech%20investing%20exploded%20in%202020.&text=A%20report%20from%20CB%20Insights,up%2014%20percent%20from%202019.

are turning to telehealth apps and other apps to help them manage their health issues. A recent U.K. survey found that usage of health apps has increased by 37% since the pandemic began.[12] I already mentioned Flo, which happens to be our first health app case, but I'd like to see the FTC pursue more of these types of cases.

Finally, in 2019, we embarked on an industry-wide study of broadband privacy practices. As businesses, schools, governments, and communities have struggled to find new models for staying open, providing critical services, and keeping in touch, the importance of reliable Internet has grown. The largest ISPs added over 1.5 million customers in the third quarter of 2020, the last quarter for which statistics are available.[13] Given the urgent need to provide the public with some transparency regarding the privacy practices of these companies, I'd like the Commission to issue a report on this subject this year.

III. Racial Equity

The second—and related—priority issue I want to emphasize is racial equity; how can we at the FTC engage in the ongoing nationwide work of righting the wrongs of four hundred years of racial injustice. I have been speaking frequently about ways to attack systemic racism through antitrust law, but of course there is a lot we can do on the consumer protection side as well.

There is an overlap between racial equity and the COVID-related privacy issues I mentioned above.[14] Among the things we know about COVID is that the pandemic is exacerbating the equity gaps in this country. One way that is true is in the world of the "digital divide." As many as one in six kids lack the equipment necessary to participate in distance learning,[15] and nearly one quarter of kids lack reliable internet access—conditions that particularly affect rural, urban, and low-income families.[16] We also know that digital services can sometimes target vulnerable communities with unwanted content and that vulnerable communities suffer outsized consequences from data privacy violations.[17] We need to be wary

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[12] "Digital Health Habits in the UK: a Quin nationwide survey," *Quin* (Oct. 2, 2020), https://quintech.io/what-do-the-uk-public-think-about-health-apps/.
[13] Press Release, "About 1,530,000 Added Broadband in 3Q 2020," *Leichtman Research Group* (Nov. 18, 2020), https://www.leichtmanresearch.com/about-1530000-added-broadband-in-3q-2020/.
[14] *See* Remarks of Commissioner Rebecca Kelly Slaughter, *The Near Future of U.S. Privacy Law*, Silicon Flatirons—University of Colorado Law School (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf
[15] Catherine E. Shoichet, "These Kids are Getting Left Behind When Schools Go Online," *CNN* (July 31, 2020), https://www.cnn.com/2020/07/31/us/distance-learning-inequality/index.html.
[16] *See, e.g.*, Emily A. Vogels, Andrew Perrin, Lee Rainie, and Monica Anderson, "53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak," *Pew Research Center* (Apr. 30, 2020) https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/.
[17] *See, e.g.*, Fed. Trade Comm'n, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusionunderstanding-issues/160106big-data-rpt.pdf.

about the ways in which lower-income communities are asked to pay with their data for expensive services they cannot afford.

There are also several other ways we can focus on closing the equity gap. One is algorithmic discrimination. Kate Crawford at Microsoft Research wrote an article a few years back with the memorable title, "Artificial Intelligence's White Guy Problem," in which she wrote: "Histories of discrimination can live on in digital platforms, and if they go unquestioned, they become part of the logic of everyday algorithmic systems."[18] And research published in *Science* in 2019 demonstrated that an algorithm used with good intentions—to target medical interventions to the sickest patients—ended up funneling resources to a healthier, white population, to the detriment of sicker, Black patients.[19] Again, you can imagine that this in an area where the pandemic has made inequity worse; although this research was published pre-COVID, these potential effects will be worse in the pandemic-driven reality, where communities of color have been disproportionately disadvantaged.

As sophisticated algorithms are deployed in ways that impact people's lives, it is vital to make sure that they are not used in discriminatory ways. The Commission has begun to engage in this area—for example, we issued a report a few years ago with guidance for businesses on illegal uses of big data algorithms, including discrimination.[20] Just over a year ago, I gave a speech at UCLA Law discussing the myriad harms of AI and algorithmic decision-making,[21] and a few months later, BCP staff issued excellent new guidance on best practices in using algorithms, including transparency, fairness, and accountability.[22] Going forward, I have asked staff to actively investigate biased and discriminatory algorithms, and I am interested in further exploring the best ways to address AI-generated consumer harms.

Another challenge is the development and deployment of facial recognition technologies, which can exacerbate existing racial disparities. The privacy implications of technologies that allow the identification of previously unknown individuals are obvious, and I know this Forum has done a lot of work on this issue. There's clear and disturbing evidence that these

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[18] Kate Crawford, "Artificial Intelligence's White Guy Problem," *N.Y. Times* (June 25, 2016), https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html.

[19] Ziad Obermeyer, Brian Powers, Christine Vogeli, Sendhil Mullainathan, "Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations," 366 *Science* 447 (Oct. 25, 2019), https://science.sciencemag.org/content/366/6464/447.

[20] Fed. Trade Comm'n, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusionunderstanding-issues/160106big-data-rpt.pdf.

[21] *See* Remarks of Commissioner Rebecca Kelly Slaughter, *Algorithms and Economic Justice*, UCLA School of Law (Jan. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf.

[22] *See* Andrew Smith, Director of the FTC Bureau of Consumer Protection, "Using Artificial Intelligence and Algorithms," Business Blog (Apr. 8, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.

technologies are not as accurate in identifying non-white individuals,[23] and on at least three separate occasions, Black men have been wrongfully arrested based on faulty facial recognition matches.[24] The Commission has challenged illegal practices relating to the use of facial recognition technology in the Facebook and Everalbum cases, and we'll redouble our efforts to identify law violations in this area.

Finally, last summer, several news articles emerged about mobile apps' use of location data to identify characteristics of Black Lives Matter protesters. This raised a firestorm on the Hill, with several members of Congress asking questions about this practice.[25] I'm concerned about misuse of location data generally, but in particular, as it applies to tracking Americans engaged in constitutionally protected speech.

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These are just some of the privacy-related priorities about which I'm passionate.[26] I am deeply honored and grateful to lead the FTC at this critical time, and I'm excited to continue and expand upon the agency's great work. Let me acknowledge, too, that the FTC is by no means working on these issues alone. In particular, I want to thank the researchers whose work will be highlighted in today's program. Your work and that of privacy and security researchers like you is critical to the FTC's mission. For many years now, the FTC has hosted our own annual conference, PrivacyCon, to shine a spotlight on the latest research, and this year's event will take place—virtually—on July 27. Privacy scholarship is tremendously valuable to us in myriad ways, bringing transparency to an all-too-opaque ecosystem and shedding light on policy alternatives or solutions. Thank you for the work that you do, and I look forward to more partnership going forward.

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[23] *See, e.g.*, Brian Fung, "Facial recognition systems show rampant racial bias, government study finds," *CNN Business* (Dec. 19, 2019), https://www.cnn.com/2019/12/19/tech/facial-recognition-study-racial-bias/index.html; Joy Buolamwini and Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification* (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

[24] *See* Kashmir Hill, "Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match," *N.Y. Times* (Jan. 6, 2021), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html.

[25] *See, e.g.*, Press Release, *Reps. Eschoo, Rush, House Colleagues Demand Federal Agencies Cease Surveillance of Protests*, Office of Rep. Anna G. Eshoo (June 9, 2020), https://eshoo.house.gov/media/press-releases/reps-eshoo-rush-house-colleagues-demand-federal-agencies-cease-surveillance; Press Release, *Warren, Maloney, Wyden, DeSaulnier Probe Data Broker's Collection of Data on Black Lives Matter Demonstrators*, H. Comm. on Oversight and Reform (Aug. 4, 2020), https://oversight.house.gov/news/press-releases/warren-maloney-wyden-desaulnier-probe-data-brokers-collection-of-data-on-black.

[26] *See also* Remarks of Commissioner Rebecca Kelly Slaughter, *The Near Future of U.S. Privacy Law*, Silicon Flatirons—University of Colorado Law School (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf; Remarks of Commissioner Rebecca Kelly Slaughter, *FTC Data Privacy Enforcement: A Time of Change*, NYU School of Law (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf.