



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

Bureau of Consumer Protection
Office of Policy Planning

February 26, 2024

The Honorable Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Dear Governor Hochul:

We write this letter as the heads of the Federal Trade Commission's Bureau of Consumer Protection and Office of Policy Planning, the FTC office that provides advocacy and submits filings supporting competition and consumer protection principles to state legislatures, regulatory boards, and officials.

We understand that New York is considering legislation that would add unfairness to New York's existing laws prohibiting deceptive practices.¹ The Federal Trade Commission (FTC or Commission) has enforced an unfairness prohibition for nearly ninety years. This authority has enabled the Commission to bring some of its most important cases protecting consumers. These cases protect the public from a vast range of predatory and exploitative business practices, including unauthorized charges,² lax data security,³ sale of sensitive personal data,⁴ dark patterns

¹ We understand that New York is also considering adopting a prohibition on abusiveness. Although the Federal Trade Commission does not itself enforce such a prohibition, our partners at the Consumer Financial Protection Bureau have done so for more than a decade, to the benefit of consumers and honest businesses. We further note that New York has successfully utilized the provision of the Dodd-Frank Act that empowers state agencies to directly enforce that law's prohibition on unfair, deceptive, or abusive conduct against certain covered persons. *See, e.g.*, Press Release, *NYDFS Reaches Agreement on Final Consent Judgment with Condor Capital, Obtaining Full Restitution for Consumers Under Dodd-Frank Lawsuit* (Dec. 19, 2014), https://dfs.ny.gov/reports_and_publications/press_releases/pr1412191.

² *E.g.*, [FTC v. Amazon.com, Inc.](#), 71 F. Supp. 3d 1158, 1167 (W.D. Wash. 2014) (denying motion to dismiss unfairness claims based on permitting children to make in-app purchases without parental authorization); [FTC v. Inc21 Corp.](#), 745 F. Supp. 2d 975 (N.D. Cal. 2010) (concluding that defendants unfairly "crammed" consumers' phone bills with bogus charges).

³ *E.g.*, [FTC v. Wyndham Worldwide Corp.](#), 799 F.3d 236, 248 (3d Cir. 2015).

⁴ *See* [In re X-Mode Social, Inc.](#), FTC File No. 2123038 (alleging unfair sale of consumer data, without consumers' knowledge or consent, that revealed visits to locations associated with medical care, reproductive health, religious worship, mental health, temporary housing, and addiction recovery); [In re InMarket Media, LLC](#), FTC File No. 2023088 (alleging unfair collection, use, and retention of consumer data, without disclosing intended uses, that revealed people's day-to-day movements).

that frustrate consumer choice and fuel junk fees,⁵ and discriminatory lending practices.⁶ The FTC’s unfairness authority has also been a key tool for stopping upstream actors, like reckless payment processors, from helping fraudsters deceive consumers.⁷

The FTC’s unfairness authority has been particularly important in addressing the challenges consumers face in our digital economy, often posed by technologies that operate behind the scenes. Consider just one emerging trend—artificial intelligence, or AI. The FTC recently brought an unfairness complaint charging Rite-Aid with using error-prone AI facial recognition technology that wrongly identified law-abiding consumers, particularly women and persons of color, as shoplifters. The historic proposed settlement reached with the company bans the use of facial recognition surveillance for five years and requires stringent safeguards to prevent discrimination and other harms—setting an important new benchmark for ensuring that AI is deployed responsibly, or not at all.⁸ This action relied entirely on the FTC’s unfairness authority, demonstrating the importance of unfairness authority as a guardrail against technologies being deployed in harmful ways.

AI is not the only emerging area where unfairness is a vital tool in protecting consumers’ civil rights and civil liberties. For example, the unchecked collection and sale of a staggering amount of consumer data is threatening Americans’ religious liberties, reproductive freedoms, and ability to organize, protest, and otherwise exercise their civil rights.⁹ The FTC recently brought two major enforcement actions against data brokers charging that they unfairly collected or sold consumers’ sensitive geolocation data. Thanks in part to the FTC’s unfairness authority, the Commission was able to secure orders that did not simply require better disclosures around the sale of consumers’ sensitive location data (i.e., stopping deception)—rather, they prohibited the practice altogether.

Finally, we understand that New York is considering creating a private right of action to complement enforcement by the Attorney General. Although the FTC Act does not include its

⁵ E.g., [Epic Games, Inc.](#), FTC File No. 1923203 (alleging that Epic Games used dark patterns to trick users of its Fortnite game into unauthorized charges); Compl., [FTC v. Amazon](#), No. 2:23-cv-0932 (W.D. Wa. June 21, 2023) (alleging unfair use of “dark patterns” to trick consumers into automatically renewing Prime subscriptions).

⁶ See Compl., [FTC v. Passport Auto](#), No. e 8:22-cv-02670-GLS (D. Md. Oct. 18, 2022) (alleging unfair discrimination against Black and Latino customers by imposing higher costs than on similarly situated non-Latino White customers).

⁷ See [FTC v. Wells](#), No. 2:06-cv-01644 (D. Nev. 2009), *aff’d* 385 Fed. Appx. 712 (9th Cir. 2010); Compl., [FTC v. Revenue Wire](#), No. 1:20-cv-01032-RJL (D.D.C. April 21, 2020).

⁸ See [In re Rite Aid Corporation](#), FTC File No. 0723121.

⁹ For a discussion of the challenges related to the data market and the related threats to civil liberties and civil rights, see Sam Levine, *Surveillance in the Shadows – Third-Party Data Aggregation and the Threat to Our Liberties* <https://www.ftc.gov/news-events/news/speeches/remarks-bcp-director-samuel-levine-2023-consumer-data-industry-association-law-industry-conference> (Sept. 21, 2023) (delivered at the 2023 Consumer Data Industry Association Law & Industry Conference).

own private right of action, many state consumer laws do, and private attorneys general have been force multipliers in protecting consumers from unfair practices.¹⁰

We hope this information is valuable to you as you consider legislation in this area. Please do not hesitate to reach out if there is any assistance we can provide as you consider this legislative reform.

Very Truly Yours,

Samuel Levine

Samuel Levine
Director
Bureau of Consumer Protection

Hannah Garden-Monheit

Hannah Garden-Monheit
Director
Office of Policy Planning

Identical letters sent to:

The Honorable Carl E. Hestie, Speaker, New York State Assembly
The Honorable Crystal D. Peoples-Stokes, Majority Leader, New York State Assembly
The Honorable William A. Barclay, Minority Leader, New York State Assembly
The Honorable Nily Rozic, Chair of the Committee on Consumer Affairs and Protection, New York State Assembly
The Honorable Andrea Stewart-Cousins, President Pro Tempe and Majority Leader, New York State Senate
The Honorable Robert G. Ort, Minority Leader, New York State Senate
The Honorable Kevin Thomas, Chair of the Committee on Consumer Protection, New York State Senate

¹⁰ Because of its important role in protecting the public, the vast majority of states have adopted unfairness authority. It bears noting that many states have not adopted the FTC's specific test for unfairness. See David L. Belt, *Should the FTC's Current Criteria for Determining "Unfair Acts or Practices" Be Applied to State 'Little FTC Acts'?* 9 ANTITRUST SOURCE 6 (2010).