

**BEFORE THE
FEDERAL TRADE COMMISSION**

In the Matter of

Competition and Consumer Protection
In the Twenty-First Century Hearings

Project No. P181201

**Comments of the Entertainment Software Association
on
Topic #11 - The Federal Trade Commission's Investigation, Enforcement and Remedial
Processes**

The Entertainment Software Association (“ESA”) is a trade association for companies that publish computer and video games for video game consoles, personal computers, and the internet. Its 33 member companies include many of the world’s largest video game producers.¹ Today, video games are one of the leading forms of entertainment. With over \$36 billion in annual domestic revenues and providing for over 220,000 American jobs across the country, the video game industry is a significant and growing part of the U.S. economy.

ESA supports the Commission’s commitment to protecting America’s consumers and recognizes the vital role that investigations, enforcement, and compliance monitoring play in that context.² However, as part of the Commission’s comprehensive review of its investigation, enforcement, and remedial processes, ESA encourages the Commission to consider whether:

- (1) there are additional ways it can leverage non-enforcement tools to protect consumers;
- (2) there are best practices that might help improve investigations and enforcement actions

¹ ESA offers a range of services to publishers of entertainment software, including a global content protection program, business and consumer research, government relations, and intellectual property protection efforts. ESA also owns and operates E3, an annual event showcasing the video game industry.

² ESA is also filing comments on (1) competition and consumer protection issues in communication, information, and media technology networks, and (2) the intersection between privacy, big data, and competition.

that do take place; (3) the Commission can further improve transparency and communication in its investigative process; and (4) any additional measures might help the Commission best tailor the relief it seeks in enforcement actions.

I. Investigating the role enforcement should play

As the Commission has long recognized, investigations and enforcement actions are important but by no means the only tools for addressing consumer harm. The Commission can promote consumer welfare and compliance with Section 5 by, for example, engaging in consumer and business education initiatives, issuing Staff reports showing perspectives on new and emerging consumer issues, conducting research and development, coordinating with other regulatory agencies, and supporting industry-developed self-regulatory frameworks.³ These methods have benefited consumers, and ESA encourages the FTC to consider whether opportunities exist to further expand the Commission's use of these approaches.

The video game industry exemplifies the role that self-regulatory frameworks, in particular, can play in preventing consumer harm. For example, in 1994, the video game industry established the Entertainment Software Rating Board (ESRB), the non-profit, self-regulatory body that assigns age and content ratings to physical video games, as well as downloadable games and apps on participating digital storefronts, so that parents can make more informed choices. The ESRB's comprehensive enforcement system is designed to ensure that consumers receive complete and reliable rating information, and that there are effective disincentives for noncompliance with the ESRB content disclosure and marketing requirements. ESRB also works with video game retailers in the U.S. to support ratings education and store

³ See Commissioner Maureen K. Ohlhausen, *100 Is the New 30: Recommendations for the FTC's Next 100 Years*, 21 Geo. Mason L. Rev. 1131, 1132 (2014).

policy enforcement programs, including bi-annual mystery shopper audits.⁴ The Commission has supported ESRB’s comprehensive ratings program, including by promoting the program in consumer education materials.⁵

Similarly, the ESRB Privacy Certified program helps participating member companies maintain compliance with the growing complexity of privacy protection laws in the U.S. and beyond.⁶ The Commission has recognized the effectiveness of this program, granting companies complying with the program a safe harbor from liability under the Children’s Online Privacy Protection Act.⁷ In the hearings, the FTC should investigate ways it can further foster the development of self-regulatory frameworks and other mechanisms for preventing harm.

II. Improving investigation and enforcement-related decision-making

ESA appreciates the Commission’s inquiry into whether the agency’s investigative and enforcement processes “can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct.”⁸ In connection with this inquiry, the FTC should examine whether opportunities exist to enhance its procedures for incorporating input from the Bureau of Economics into the enforcement decisions made by the Bureau of Consumer Protection.⁹ For example, practices that the Bureau of Competition or other agencies employ, practices recommended by economic literature, and practices that industry actors employ

⁴ *ESRB History*, ESRB, <http://www.esrb.org/about/chronology.aspx> (last visited Aug. 20, 2018).

⁵ *Kids, Parents, and Video Games*, FTC (June 2012), <https://www.consumer.ftc.gov/articles/0270-kids-parents-and-video-games>.

⁶ *ESRB Privacy Certified*, ESRB, <http://www.esrb.org/privacy/> (last visited Aug. 20, 2018).

⁷ *COPPA Safe Harbor Program*, FTC, <https://www.ftc.gov/safe-harbor-program> (last visited Aug. 20, 2018).

⁸ *Public Comment Topics and Process: Hearings on Competition and Consumer Protection In the Twenty-First Century*, FTC, <https://www.ftc.gov/policy/advocacy/public-comment-topics-process> (last visited Aug. 20, 2018).

⁹ See Jessica Rich and Francine Lafontaine, *The Role of the Bureau of Economics in Consumer Protection: A Conversation with Bureau Directors*, FTC (Nov. 9, 2015 9:39 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/11/role-bureau-economics-consumer-protection-conversation>.

when engaging in economic analysis might serve as useful points of comparison. Relatedly, the Commission should examine whether it might enhance its approach to evaluating the non-economic elements of consumer harm; for example, opportunities may exist to enhance evidence-based assessments of the materiality of allegedly deceptive claims.

Lastly, the Commission should examine its approach to investigating potentially unfair or deceptive conduct that occurred quite some time in the past. For example, in the context of data security, are there best practices the Commission might incorporate to evaluate the reasonableness of conduct by reference to (1) the information the target company knew or should have known at the time the relevant conduct occurred, and (2) community standards in place at the time the relevant conduct occurred? Similarly, should the Commission adopt standards regarding how a target's decision to stop engaging in a certain business practice—before the FTC starts an investigation or indicates concern over the practice—affects investigation and enforcement decisions?

III. Improving communication and transparency in the investigation process

It has been the experience of some recipients of civil investigative demands, both in the larger marketplace and within the video game industry, that the FTC could be more forthcoming and transparent during the investigative process.¹⁰ A lack of transparency may result in companies expending significant resources (a) investigating conduct that in fact is not Staff's actual concern, and (b) compiling documents relating to—what later turns out to be—an overly inclusive set of topics. It also wastes Commission time and resources to review responses

¹⁰ See generally *The State of Antitrust Enforcement*, American Bar Ass'n Section of Antitrust Law, 27 (Jan. 2017), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.auth_checkdam.pdf (“[T]here has been a trend in recent years toward generic and overly-broad CIDs that are not tailored to the nature of the business or the practices at issue. The result in many cases has been that companies have incurred astronomical costs in responding.”).

to inappropriately tailored document demands. Accordingly, the Commission might examine ways to incentivize Staff to issue more narrowly tailored demands, to communicate with recipients about the scope of the FTC’s investigation and the identity of the particular conduct and documents that are of concern to Staff, and to let targets know when the scope of an investigation has changed.

IV. Improving remedies

The FTC should examine whether it can enhance its processes for tailoring the remedies it seeks, including in the consent decree process. In ESA’s experience, companies face strong incentives to resolve FTC complaints through a consent decree, given the length, cost, and public relations harms associated with the FTC administrative enforcement process—even where a company has valid defenses to the allegations. Moreover, in the past decade, the FTC has sought long-lasting injunctive provisions in its consent decrees, which typically require companies to submit a broad range of company activities to ongoing FTC scrutiny.¹¹ The FTC might examine whether this results in unintended consequences, such as rising consumer prices and market distortion.

¹¹ See, e.g., *In re Lenovo (United States), Inc.*, Consent Order, File No. 152-3134 (Sept. 5, 2017), https://www.ftc.gov/system/files/documents/cases/1523134_lenovo_united_states_agreement_and_do.pdf (putting in place a twenty-year program of FTC compliance monitoring).

V. Conclusion

ESA believes that examining these topics will result in positive outcomes for both consumers and the businesses that are subject to the FTC's enforcement jurisdiction.

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Respectfully submitted,

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