



Office of Commissioner  
Rohit Chopra

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

## STATEMENT OF COMMISSIONER ROHIT CHOPRA JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER

*In the Matter of Tapjoy, Inc.*  
*Commission File No. 1723092*

*January 7, 2021*

### Summary

- The explosive growth of mobile gaming has led to mounting concerns about harmful practices, including unlawful surveillance, dark patterns, and facilitation of fraud.
- Tapjoy's failure to properly police its mobile gaming advertising platform cheated developers and gamers out of promised compensation and rewards.
- The Commission must closely scrutinize today's gaming gatekeepers, including app stores and advertising middlemen, to prevent harm to developers and gamers.

The video game business has solidified its place as a fixture of America's entertainment industry. During the pandemic, revenues in the sector have reportedly eclipsed those of the sports and film businesses combined.<sup>1</sup> This period has brought about a massive increase in mobile gaming app installs and spending, cementing gaming as a major magnet for Americans' attention.<sup>2</sup> The latest industry offerings rely on deeper social connectivity features and facilitate content creation by players. Americans are hosting birthday parties through gaming apps, and tens of millions have attended concerts by major artists on Fortnite and Roblox.<sup>3</sup>

Mobile gaming is the fastest growing segment of the market, where revenues are primarily generated through in-app purchases and advertising. Importantly, this segment is characterized by a unique market structure dominated by new gatekeepers, particularly app stores and advertising middlemen. This structure is rightfully under more intense scrutiny, given the challenges facing developers and the downstream practices that can harm gamers.

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<sup>1</sup> Ben Gilbert, *Video-game industry revenues grew so much during the pandemic that they reportedly exceeded sports and film combined*, BUSINESS INSIDER (Dec. 23, 2020), <https://www.businessinsider.com/video-game-industry-revenues-exceed-sports-and-film-combined-1dc-2020-12>.

<sup>2</sup> Robert Williams, *Mobile gaming surges as pandemic drives 45% jump in app installs*, MARKETING DRIVE (Dec. 2, 2020), <https://www.marketingdive.com/news/mobile-gaming-surges-as-pandemic-drives-45-jump-in-app-installs/591417/>. Gaming expert Joost van Dreunen recently offered helpful analysis about emerging trends in this growing industry. The Prof G Show with Scott Galloway, *Pandemic Learnings with Dr. Abdul El-Sayed* (Dec. 15, 2020), <https://westwoodonepodcasts.com/pods/the-prof-g-show-with-scott-galloway/>.

<sup>3</sup> See, e.g., Gil Kaufman, *Here's How Many People Tuned Into Lil Nas X's Roblox Show*, BILLBOARD (Nov. 17, 2020), <https://www.billboard.com/articles/columns/hip-hop/9485495/lil-nas-x-roblox-show-viewers>; see also Joost van Dreunen, *The future is user-generated*, SUPERJOOST PLAYLIST (Nov. 23, 2020), <https://superjoost.substack.com/p/the-future-is-user-generated>.

It is against this backdrop that the Federal Trade Commission evaluates an appropriate remedy to address the conduct of Tapjoy, a mobile advertising platform that connects gamers, game developers, and advertisers. As detailed in the Commission’s complaint, Tapjoy’s practices allowed users to be cheated of promised rewards, and developers to be cheated of promised compensation. The proposed settlement does not remedy these past harms, but will require Tapjoy to better police its platform to prevent abuses going forward.<sup>4</sup>

### **Tapjoy’s Middleman Misconduct**

Tapjoy is a major mobile advertising platform that acts as a middleman between advertisers, gamers, and game developers. The platform woos developers into integrating its technology by promising payments for user activity. In a mobile gaming experience where developers use Tapjoy’s advertising platform, Tapjoy displays “offers.” When gamers complete these “offers,” such as by signing up for subscriptions or making purchases, Tapjoy credits the user’s account with coins or other currency for use in the game, and developers receive a percentage of Tapjoy’s advertising revenue.<sup>5</sup>

However, according to the FTC’s complaint, many players jumped through hoops – and even spent money and turned over sensitive data – to complete Tapjoy’s offers, only to receive nothing in return.<sup>6</sup> It appears that Tapjoy amplified false offers by its business partners, who baited gamers with big rewards only to cheat them when it was time to pay up.<sup>7</sup> Tapjoy did little to clean up the mess, even when hundreds of thousands of gamers filed complaints.<sup>8</sup> This also harmed developers of mobile games, who were cheated of advertising revenue they were entitled to.

In my view, Tapjoy’s conduct violated the FTC Act’s prohibition on unfair practices, as well as the prohibition on deceptive practices.<sup>9</sup> The FTC’s proposed settlement requires the platform to implement screening and testing procedures to weed out advertisers that cheat gamers and developers. This provision will help ensure Tapjoy takes more responsibility for fraud, rather than facilitating it.<sup>10</sup>

### **Gaming Gatekeepers and Trickle-Down Abuse**

Tapjoy is not the only platform squeezing developers. In fact, the firm is a minnow next to the gatekeeping giants of the mobile gaming industry, Apple and Google. By controlling the

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<sup>4</sup> This matter is another example where the lack of clarity regarding the scope of immunities conferred by Section 230 of the Communications Decency Act has given legal ammunition to platforms seeking to shirk responsibility for their commercial activity, including sales and advertising practices. This lack of clarity undermines the ability of the FTC and other regulators to obtain adequate monetary relief for misconduct.

<sup>5</sup> In other instances, users can receive rewards directly through the game.

<sup>6</sup> Compl. In the Matter of Tapjoy, Inc., ¶¶ 21-29.

<sup>7</sup> Compl., *id.* ¶¶ 8, 15-29.

<sup>8</sup> Compl., *id.* ¶¶ 30-40.

<sup>9</sup> The Commission’s proposed complaint charges Tapjoy with deception, but fails to include a charge of unfairness. However, the settlement includes injunctive relief that addresses Tapjoy’s failure to police fraud.

<sup>10</sup> I respectfully disagree with the proposed order provision requiring Tapjoy to disclose that advertisers are responsible for issuing rewards. This disclaimer undermines the goal of ensuring that Tapjoy takes adequate responsibility for its business partners’ practices.

dominant app stores, these firms enjoy vast power to impose taxes and regulations on the mobile gaming industry, which was generating nearly \$70 billion annually even before the pandemic.<sup>11</sup>

We should all be concerned that gatekeepers can harm developers and squelch innovation. The clearest example is rent extraction: Apple and Google charge mobile app developers on their platforms up to 30 percent of sales, and even bar developers from trying to avoid this tax through offering alternative payment systems.<sup>12</sup> While larger gaming companies are pursuing legal action against these practices, developers and small businesses risk severe retaliation for speaking up, including outright suspension from app stores – an effective death sentence.<sup>13</sup>

This market structure also has cascading effects on gamers and consumers. Under heavy taxation by Apple and Google, developers have been forced to adopt alternative monetization models that rely on surveillance, manipulation, and other harmful practices.

For example, many developers are turning to “loot boxes” to squeeze more revenue out of gamers. These loot boxes deploy dark patterns and other deceptions to lure gamers – often children – into purchasing in-app rewards of randomly assigned value, turning videogames into virtual casinos. As detailed in a recent FTC report, this addictive phenomenon emerged as a direct consequence of changing monetization models in the industry, as developers increasingly rely on recurring revenue, such as through in-app purchases, rather than upfront sales.<sup>14</sup>

Mobile gaming’s market structure is also forcing developers to create revenue streams that are not subject to app store taxation, including through intrusive behavioral advertising. Last year, for example, the FTC brought an action against Hyperbeard, a developer of child-directed games charged with allowing major ad networks to surveil users – including children – in order to serve behavioral advertising.<sup>15</sup> This type of conduct violates the Children’s Online Privacy Protection Act, but Hyperbeard’s surveillance practices are not unique. In fact, Google encourages game developers on its platform to adopt this monetization model, claiming “users expect free games.”<sup>16</sup>

Today’s action against Tapjoy reveals another monetization model that developers are turning to in the face of fees and restrictions imposed by app stores. By offering a platform connecting

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<sup>11</sup> See Omer Kaplan, *Mobile gaming is a \$68.5 billion global business, and investors are buying in*, TECHCRUNCH (Aug. 22, 2019), <https://techcrunch.com/2019/08/22/mobile-gaming-mints-money/>.

<sup>12</sup> See STAFF OF H. COMM. ON THE JUDICIARY, 116<sup>TH</sup> CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS at 221 (Google); 339 (Apple). Although Google allows users to “sideload” apps from outside the Play Store, it has been alleged that Google makes this process “technically complex, confusing and threatening[.]” *Id.* at 220 (quoting Epic lawsuit).

<sup>13</sup> Developers have alleged retaliatory practices by both Google and Apple, such as when they have tried to circumvent these gatekeepers’ preferred monetization tools. *Id.* at 222, 348-349.

<sup>14</sup> Press Release, Fed. Trade Comm’n, FTC Staff Issue Perspective Paper on Video Game Loot Boxes Workshop (Aug. 14, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-staff-issue-perspective-paper-video-game-loot-boxes-workshop>.

<sup>15</sup> Press Release, Fed. Trade Comm’n, Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids’ Data without Parental Consent (June 4, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it>.

<sup>16</sup> *Mobile ads: the key to monetizing gaming apps*, GOOGLE ADMOB, <https://admob.google.com/home/resources/monetize-mobile-game-with-ads/> (last visited on Jan. 5, 2021).

advertisers, gamers, and game developers, Tapjoy allows these developers to generate advertising revenue that Apple and Google do not tax. But this monetization model also creates opportunities for fraud, and the Commission's complaint details how Tapjoy allowed this fraud to fester.

### **Monitoring the Middlemen**

Developers of mobile games are delivering creative content that keeps Americans entertained and engaged, but face many middlemen, even beyond the dominant app stores. Game developers relied on Tapjoy to generate revenue for themselves and offer gamers a way to earn currency to enhance their play. However, Tapjoy's failure to screen fraudulent offers left both gamers and developers holding the bag.

The settlement proposed today should help reverse the lax policing practices that led hundreds of thousands of gamers to file complaints. But when it comes to addressing the deeper structural problems in this marketplace that threaten both gamers and developers, the Commission will need to use all of its tools – competition, consumer protection, and data protection – to combat middlemen mischief, including by the largest gaming gatekeepers.