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Bureau of Consumer Protection

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**The Next Era of Ad Law**

*Remarks of Samuel Levine*  
*Director, Bureau of Consumer Protection, Federal Trade Commission*

*September 19, 2022*

Thank you for giving me the opportunity to speak with all of you.<sup>1</sup> NAD plays a key role in the advertising ecosystem, and the FTC has supported its work for decades. The last time a Bureau Director spoke to NAD was in 2018, and it's worth reflecting on how much has changed since then. As you all know, in April 2021, our agency suffered a major setback when the Supreme Court, in the *AMG* decision, stripped us of our ability to recover redress for consumers through Section 13(b) of the FTC Act.<sup>2</sup> It is difficult to overstate the impact this has had. For decades, the Bureau of Consumer Protection had relied on Section 13(b) in the overwhelming majority of its cases. In fact, in the four years before *AMG* was decided, the Commission used the authority to return more than \$11 billion to consumers.<sup>3</sup>

*AMG* dealt a devastating blow to our ability to protect the public, and the decision marked a real inflection point. I'm sure that many expected – and perhaps some hoped – that we would retreat from our mission. That we would stop seeking redress in our cases. That we would settle for injunctions against further lawbreaking, and wait on Congress to restore our authority.

That may have been the easiest option, but it was never an option for Chair Khan, nor for our dedicated staff. In fact, over the last year-and-a-half, our staff has shown extraordinary persistence in ensuring that we can continue to return money to consumers who've been harmed. This has not been easy. Alternative paths to monetary relief can be slower and more challenging, which is one reason it's absolutely urgent that Congress restore our authority. But when we pursue a case, we do not settle for inadequate relief, even if it means needing to invest greater resources – and taking a longer path – than we did when we could seek monetary relief under 13(b).

Importantly, as we inventory our tools to ensure we can continue delivering on our mission,

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<sup>1</sup> I wish to thank Katherine Worthman for her substantial assistance in preparing these remarks. The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

<sup>2</sup> *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>3</sup> See FTC Refunds to Consumers, Refunds by date, Fiscal Years 2017-2020, available at [https://public.tableau.com/app/profile/federal.trade.commission/viz/Refunds\\_157979584020/RefundsbyCase](https://public.tableau.com/app/profile/federal.trade.commission/viz/Refunds_157979584020/RefundsbyCase).

we're not just playing defense. We are undertaking a broader strategic pivot to ensure that we are deterring misconduct market-wide, providing clear rules of the road for industry, and seeking remedies that fix incentives and protect consumers going forward. And we are doing so not only by seeking significant monetary relief but also by securing strong injunctive relief to prevent future unlawful behavior.

Our strategy rests on three pillars. First, we are focusing our enforcement resources on the actors who are causing the most harm to consumers. Second, in pursuing these actors, we are seeking strong relief that not only brings them into compliance with the law but ensures that consumers are protected going forward. And third, when we identify broader problems in the market that are not being remedied through case-by-case enforcement alone, we are deploying additional tools to protect the public.

Today I'll discuss how we're applying this strategy in two key priority areas for the Commission: protecting consumers' pocketbooks in a challenging economy, and curbing unlawful commercial surveillance. I'll then spend a few minutes talking about national advertising in particular, and what you can expect from the Commission under Chair Khan.

### **Protecting Consumers' Pocketbooks in a Challenging Economy**

I'll start by discussing how the FTC is fighting for consumers – including workers and small businesses – in this challenging economic environment. We're in a unique moment. Unemployment is near record lows, job growth is strong, and consumer spending is robust. But at the same time, we are seeing that prices and interest rates are rising, and hiring is slowing.<sup>4</sup> I don't have a crystal ball about where the economy is headed, but what we know at the FTC from decades of experience is that economic uncertainty can create fertile ground for fraud and predation aimed at parting the public from their hard-earned dollars. As a result, we are being aggressive in protecting consumers' pocketbooks in every way we can. Let me describe how.

#### *Targeting Actors that Cause the Most Harm*

First, through our law enforcement actions, we are strategically targeting the actors that do the most harm to consumers' pocketbooks. To do so, we're not only bringing actions against individual fraudsters but also the firms alleged to be enabling these frauds, as we've seen in our cases against

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<sup>4</sup> See Ben Casselman & Stephen Bates, *How Is the Economy Doing*, N.Y. TIMES, (Sept. 13, 2022), <https://www.nytimes.com/interactive/2022/09/13/business/economy/us-economy.html>.

Walmart,<sup>5</sup> Electronic Payment Systems,<sup>6</sup> Automatic Funds Transfer Services,<sup>7</sup> VOIP Terminator,<sup>8</sup> and most recently through our \$100 million settlement with Benefytt Technologies.<sup>9</sup> As the housing market enters an uncertain phase, we just announced a major settlement with OpenDoor – which will return more than \$60 million to consumers who were allegedly underpaid for their homes.<sup>10</sup> And we will not hesitate to take on major frauds in court. Earlier this year, we won at trial against On Point Global, a government impersonation scheme, and as a result we’re making more than \$100 million in refunds available to consumers who were harmed.<sup>11</sup>

We’re paying particular attention to practices that harm underserved communities. For example, we recently obtained the largest fair lending order in FTC history against Napleton Auto.<sup>12</sup> We also joined the state of Florida to sue a fraudulent operation that preyed on minority-owned businesses seeking pandemic relief,<sup>13</sup> and we brought our first action under the Opioid Addiction Recovery Fraud Prevention Act to protect consumers suffering from substance use disorders.<sup>14</sup> We’re also bringing major actions to protect military families, including through our Harris Jewelry action – our first lawsuit alleging violations of the Military Lending Act.<sup>15</sup> And we continue to take aggressive action to protect

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<sup>5</sup> Press Release, *FTC Sues Walmart for Facilitating Money Transfer Fraud That Fleeced Customers out of Hundreds of Millions*, FTC (June 28, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-walmart-facilitating-money-transfer-fraud-fleeced-customers-out-hundreds-millions>.

<sup>6</sup> Press Release, *Federal Trade Commission Finalizes Order Against Electronic Payment Systems for Opening Credit card Merchant Accounts for Fake Companies and Helping a Bogus Business Opportunity*, FTC (May 24, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-finalizes-order-against-electronic-payment-systems-opening-credit-card>.

<sup>7</sup> Press Release, *FTC Takes Action to Ban Payment Processor from Debt Relief Processing*, FTC (Nov. 8, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-takes-action-ban-payment-processor-debt-relief-processing>.

<sup>8</sup> Press Release, *FTC Takes Action to Stop Voice over Internet Provider from Facilitating Illegal Telemarketing Robocalls, Including Scams Relating to the Pandemic*, FTC (Apr. 26, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-takes-action-stop-voice-over-internet-provider-facilitating-illegal-telemarketing-robocalls>.

<sup>9</sup> Press Release, *FTC Action Against Benefytt Results in \$100 Million in Refunds for Consumers Tricked into Sham Health Plans and Charged Exorbitant Junk Fees*, FTC (Aug. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-action-against-benefytt-results-100-million-refunds-consumers-tricked-sham-health-plans-charged>.

<sup>10</sup> Press Release, *FTC Takes Action to Stop Online Home Buying Firm Opendoor Labs, Inc. from Cheating Potential Sellers with Misleading Claims about its Home-Buying Service*, FTC (Aug. 1, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-takes-action-stop-online-home-buying-firm-opendoor-labs-inc-cheating-potential-sellers>.

<sup>11</sup> Press Release, *FTC Win at Trial Against On Point Global Makes \$102 Million in Refunds Available for Consumers Harmed by Fake Government Website Scams*, FTC (Apr. 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-win-at-trial-against-on-point-global-makes-102-million-in-refunds-for-consumers>.

<sup>12</sup> Press Release, *FTC Takes Action Against Multistate Auto Dealer Napleton for Sneaking Illegal Junk Fees onto Bills and Discriminating Against Black Consumers*, FTC (Apr. 1, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-takes-action-against-multistate-auto-dealer-napleton-sneaking-illegal-junk-fees-bills>.

<sup>13</sup> Press Release, *FTC, Florida Act to Shut Down ‘Grant Bae’ Scam Preying on Minority-Owned Businesses Seeking Pandemic-Relief Grants and Funds*, FTC (June 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-florida-act-shut-down-grant-bae-scam-preying-minority-owned-businesses-seeking-pandemic-relief>.

<sup>14</sup> Press Release, *FTC Hits R360 and its Owner with \$3.8 Million Civil Penalty Judgment for Preying on People Seeking Treatment for Addiction*, FTC (May 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-hits-r360-its-owner-38-million-civil-penalty-judgment-preying-people-seeking-treatment-addiction>.

<sup>15</sup> Press Release, *FTC and 18 States Sue to Stop Harris Jewelry from Cheating Military Families with Illegal Financing and Sales Tactics*, FTC (July 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-18-states-sue-stop-harris-jewelry-cheating-military-families-illegal-financing-sales-tactics>.

student borrowers, including by bringing a lawsuit against St. James Medical School,<sup>16</sup> and by working with the Department of Education on their initiative to forgive more than \$70 million in loans to students who were misled by DeVry University.<sup>17</sup>

We know that small businesses are consumers too, and we're focusing our enforcement resources on cases involving significant harm to a significant number of small businesses. Last year, for example, we charged Dun & Bradstreet – a leading provider of business credit reports – with deceiving small businesses, and making it difficult for them to dispute inaccuracies.<sup>18</sup> We also brought an action against First American Payment Systems, our first lawsuit alleging that a payment processor deceived small businesses in violation of ROSCA and Section 5 of the FTC Act.<sup>19</sup> And along with our partners at the Department of Justice, we brought our first Franchise Rule action in more than a decade against BurgerIM and its CEO, whom we charged with deceiving entrepreneurs looking to open a franchise and realize the American Dream.<sup>20</sup>

### *Pursuing Aggressive Remedies Against All Responsible Parties*

It should be apparent by now that when it comes to protecting consumers' pocketbooks, we are not backing down from bringing major actions. The second part of our strategy is to insist on meaningful remedies to help consumers who've been harmed and to prevent further lawbreaking. We are doing so in a number of ways.

First, we are making clear that we are prepared to hold responsible individuals accountable even if they lead large companies. In the Benefytt matter, for example, our settlement permanently banned two top executives from selling or marketing any healthcare-related products.<sup>21</sup> Likewise, in our action against Richmond Capital Group – a small business lender – we obtained industry bans against both the company and its owner.<sup>22</sup> And our action against FleetCor resulted this year in a federal court judgment finding that both the firm and the company's CEO violated the FTC Act by deceiving businesses about fuel savings.<sup>23</sup> The message firms and their executives should take from these actions is clear: we will

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<sup>16</sup> Press Release, *Federal Trade Commission Takes Action Against For-Profit Medical School for Using Deceptive Marketing to Lure Students*, FTC (Apr. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/federal-trade-commission-takes-action-against-profit-medical-school-using-deceptive-marketing-lure>.

<sup>17</sup> Press Release, *FTC Enforcement Action Leads U.S. Dept. of Education to Forgive \$71.7 Million in Loans for Students Deceived by DeVry University*, FTC (Feb. 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-enforcement-action-leads-us-dept-education-forgive-717-million-loans-students-deceived-devry>.

<sup>18</sup> Press Release, *In Response to FTC Charges, Dun & Bradstreet to Clean Up Small Business Credit Reporting Process and Refund Customers*, FTC (Jan. 13, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/response-ftc-charges-dun-bradstreet-clean-small-business-credit-reporting-process-refund-customers>.

<sup>19</sup> Press Release, *FTC Takes Action to Stop Payment Processor First American From Trapping Small Businesses with Surprise Exit Fees and Zombie Charges*, FTC (July 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-takes-action-stop-payment-processor-first-american-trapping-small-businesses-surprise-exit-fees>.

<sup>20</sup> Press Release, *FTC Sues Burger Franchise Company That Targets Veterans and Others With False Promises and Misleading Documents*, FTC (Feb. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-sues-burger-franchise-company-targets-veterans-others-false-promises-misleading-documents>.

<sup>21</sup> See *supra* note 7.

<sup>22</sup> Press Release, *FTC Action Results in Ban for Richmond Capital and Owner From Merchant Cash Advance and Debt Collection Industries and Return of More Than \$2.7M to Consumers*, FTC (June 6, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-action-results-ban-richmond-capital-owner-merchant-cash-advance-debt-collection-industries>.

<sup>23</sup> *FTC v. Fleetcor Techs., Inc.*, No. 1:19-CV-5727-AT, 2022 WL 3350066, at \*1 (N.D. Ga. Aug. 9, 2022).

not hesitate to seek individual accountability when the facts justify it.

Second, we are seeking a new suite of remedies that are tailored to preventing consumer harm. Through our settlement with Dun and Bradstreet, for example, we armed small businesses with new tools to dispute inaccuracies on their credit reports, in addition to providing them with redress.<sup>24</sup> In our action against Raging Bull for deceptive income claims, we obtained an order requiring the settling defendants to provide consumers with an easy method to cancel their subscriptions, and requiring that consumers who call to cancel cannot be placed on hold longer than 10 minutes.<sup>25</sup> Similarly, our action against Frontier Communications alleging deceptive claims about internet speeds resulted in an order that not only returned money to consumers but also made it easier for them to cancel their service.<sup>26</sup> Finally, earlier this month, we reached a settlement with Credit Karma that included two remedies that are worth highlighting.<sup>27</sup> First, the settlement will return money to consumers whose time was wasted by the company's deceptive preapproval claims – a recognition by the Commission that direct monetary loss is not the only way consumers can be harmed. Second, the order will require Credit Karma to preserve A/B testing, clickstream analysis, eye tracking studies, and other techniques that can be used to deploy digital dark patterns.<sup>28</sup> This will help ensure accountability for deceptive design patterns going forward.

These remedies make clear that in spite of *AMG*, the FTC is not backing down from seeking significant relief, including against major firms, to ensure that consumers are protected and that responsible parties are held accountable.

### *Comprehensively Tackling Broader Problems in the Marketplace*

Although we have seen some major successes in our enforcement actions aimed at protecting people's pocketbooks, we are not resting on our laurels. Instead, we are constantly reassessing whether additional tools should be deployed to protect consumers.

For example, we have significant concerns around the deceptive marketing of business opportunities, including through investment training courses, gig work, franchise sales, and multilevel marketing.<sup>29</sup> To address these concerns, we've launched a number of market-wide initiatives to protect

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<sup>24</sup> Decision and Order, *In re Dun & Bradstreet, Inc.* (F.T.C. 2022) (No. C-4761), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/172%203196%20Dunn%20and%20Bradstreet%20combined%20package%20unsigned\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/172%203196%20Dunn%20and%20Bradstreet%20combined%20package%20unsigned_0.pdf).

<sup>25</sup> Press Release, *Online Investment Site to Pay More Than \$2.4 Million for Bogus Stock Earnings Claims and Hard-to-Cancel Subscription Charges*, FTC (Mar. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/online-investment-site-pay-more-24-million-bogus-stock-earnings-claims-hard-cancel-subscription>.

<sup>26</sup> Press Release, *FTC Takes Action Against Frontier for Lying about Internet Speeds and Ripping Off Customers Who Paid High-Speed Prices for Slow Service*, FTC (May 5, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-takes-action-against-frontier-lying-about-internet-speeds-ripping-customers-who-paid-high-speed>.

<sup>27</sup> Press Release, *FTC Takes Action to Stop Credit Karma From Tricking Consumers with Allegedly False "Pre-Approved" Credit Offers*, FTC (Sept. 1, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-takes-action-stop-credit-karma-tricking-consumers-allegedly-false-pre-approved-credit-offers>.

<sup>28</sup> Decision and Order, *In re Credit Karma, LLC* (F.T.C. 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/FINAL%20CK%20Order%209-1-22.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/FINAL%20CK%20Order%209-1-22.pdf).

<sup>29</sup> In 2022 to date, over 40,000 consumers have complained to the FTC about fraudulent business and job opportunities with a total loss of over \$150 million. See *The Big View: All Sentinel Reports*, FTC Consumer Sentinel Network, Top 10 Fraud Categories (data as of June 30, 2022), available at <https://public.tableau.com/app/profile/federal.trade.commission/viz/TheBigViewAllSentinelReports/TopReports>.

consumers in this space. Last year, we served Notices of Penalty Offenses on more than 800 recipients, making clear that they can face civil penalties for false earnings claims.<sup>30</sup> Earlier this year, we launched an Earnings Claims rulemaking, and we've received over a thousand comments from consumers who have suffered as a result of false claims.<sup>31</sup> And just last week, the Commission voted out a Policy Statement on Enforcement Related to Gig Work,<sup>32</sup> which affirmed the Commission's commitment to using its authority to protect gig workers when law violations occur – a commitment reflected in our recent lawsuits against HomeAdvisor<sup>33</sup> and Amazon Flex.<sup>34</sup>

Another area where we're pursuing market-wide initiatives is around hidden fees and charges, which can hit consumers without their consent. Last year, the Commission issued a Policy Statement on Negative Option Marketing, which made clear, among other things, that companies should make it as easy for consumers to cancel services as it is to enroll.<sup>35</sup> Our actions against Raging Bull, Benefytt, First American, and Frontier make clear that we are following up. In addition, leveraging never-before-used authority under Dodd-Frank, we recently proposed a comprehensive rule to protect consumers from junk fees and other abuses when purchasing cars.<sup>36</sup> Across the board, firms that think they can sneak price hikes onto consumers through hidden fees and charges should think again.

Finally, in an economic environment ripe with potential for fraud, we are pursuing market-wide initiatives to deter it in the first instance, especially imposter and telemarketing scams. In the first half of this year alone, the FTC has received more than 360,000 imposter scam fraud reports,<sup>37</sup> and over

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<sup>30</sup> Press Release, *FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties*, FTC (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties>.

<sup>31</sup> Press Release, *FTC Takes Action to Combat Bogus Money-Making Claims Used to Lure People into Dead-end Debt Traps*, FTC (Feb. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-takes-action-combat-bogus-money-making-claims-used-lure-people-dead-end-debt-traps>; <https://www.regulations.gov/docket/FTC-2022-0020>.

<sup>32</sup> FTC Policy Statement on Enforcement Related to Gig Work, Sept. 15, 2022, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf); Press Release, *FTC to Crack Down on Companies Taking Advantage of Gig Workers*, FTC (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers>. We also announced this summer a new partnership with the NLRB. Press Release, *Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices*, FTC (July 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

<sup>33</sup> Press Release, *FTC Charges HomeAdvisor, Inc. with Cheating Businesses, Including Small Businesses, Seeking Leads for Home Improvement Projects*, FTC (Mar. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-charges-homeadvisor-inc-cheating-businesses-including-small-businesses-seeking-leads-home>.

<sup>34</sup> Press Release, *FTC Approves Final Administrative Consent Order Against Amazon for Withholding Customer Tips from Amazon Flex Drivers*, FTC (June 10, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-approves-final-administrative-consent-order-against-amazon-withholding-customer-tips-amazon-flex>.

<sup>35</sup> FTC Enforcement Policy Statement Regarding Negative Option Marketing, Oct. 22, 2021, [https://www.ftc.gov/system/files/documents/public\\_statements/1598063/negative\\_option\\_policy\\_statement-10-22-2021-tobureau.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf); Press Release, *FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions*, FTC (Oct. 28, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions>.

<sup>36</sup> Press Release, *FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers*, FTC (June 23, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers>.

<sup>37</sup> See Fraud Reports, FTC Consumer Sentinel Network (data as of June 30, 2022), available at <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudFacts>.

140,000 Do Not Call complaints received by the FTC in the same time period involve imposter scams.<sup>38</sup> To respond, we proposed just last week a comprehensive rule that would prohibit government, nonprofit, and business impersonation fraud, and which would ensure that we can seek not only redress but also civil penalties from those who engage in it. We also proposed a significant expansion of the Telemarketing Sales Rule, with a particular focus on ensuring that small business consumers are protected from fraudulent telemarketing practices.<sup>39</sup>

Initiatives like our new rulemakings and our revival of the Penalty Offense Authority are, on the one hand, a necessary response to AMG. But they also reflect the Commission’s view that there is more we can do to deter fraud in the first instance, and ensure that consumers across different markets are protected.

## **Curbing Unlawful Commercial Surveillance**

In addition to prioritizing the protection of consumers’ pocketbooks, we have also launched a comprehensive strategy to curb unlawful commercial surveillance. In our increasingly digital economy, nearly every consumer transaction involves the collection, aggregation, and onward disclosure of personal data, and these practices can be fueled by the same dark patterns we see in digital advertising.<sup>40</sup> While some data collected may seem relatively harmless, much of it may reveal highly sensitive information, including about our healthcare decisions and religious practice. As a result, we are laser-focused on curbing unlawful commercial surveillance and our strategy here rests on the same three pillars – bringing impactful cases, seeking meaningful remedies, and pursuing market-wide initiatives when problems persist.

### *Targeting Actors that Cause the Most Harm*

First, we are focusing our enforcement resources on large players who have a significant presence in the marketplace. For example, the Commission recently took action against a prominent data broker, Kochava, for allegedly selling geolocation data from hundreds of millions of mobile devices that can be used to trace the movements of individuals from sensitive locations, including addiction recovery facilities, reproductive health clinics, and places of worship.<sup>41</sup> We also sued advertising platform OpenX, charging the firm with collecting children’s location data without parental consent and then passing on that data to third parties for targeted advertising.<sup>42</sup> In another recent action, we alleged that Kurbo/Weight Watchers collected children’s personal information without parental consent and

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<sup>38</sup> See Do Not Call Complaints, DNC Complaints by Topic, Imposters (data as of June 30, 2022), available at <https://public.tableau.com/app/profile/federal.trade.commission/viz/DoNotCallComplaints/Maps>.

<sup>39</sup> Press Release, *Federal Trade Commission Proposes Small Business Protections Against Telemarketing Tricks and Traps*, FTC (Apr. 28, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/federal-trade-commission-proposes-small-business-protections-against-telemarketing-tricks-traps>.

<sup>40</sup> Press Release, *FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers*, FTC (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers>.

<sup>41</sup> Press Release, *FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations*, FTC (Aug. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other>.

<sup>42</sup> Press Release, *Advertising Platform OpenX Will Pay \$2 Million for Collecting Personal Information from Children in Violation of Children’s Privacy Law*, FTC (Dec. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/advertising-platform-openx-will-pay-2-million-collecting-personal-information-children-violation>.

indefinitely retained their sensitive data in violation of COPPA.<sup>43</sup> And we brought an order enforcement action against Twitter, which we charged with deceptively using consumers' phone numbers collected for security purposes to serve targeted advertising.<sup>44</sup>

As notable as the cases we've brought are the remedies we are seeking – the second pillar of our strategy.

### *Pursuing Aggressive Remedies Against All Responsible Parties*

The remedies we are seeking in our privacy and data security cases go far beyond the notice-and-choice regime that is often the focus of American privacy policy. For example, in our CafePress action – where we charged the company with employing lax security practices – we not only required the firm to strengthen its security program and return money to small businesses, but also required it to minimize the data it collects in the first place.<sup>45</sup> After all, the best way to reduce the potential harm from data breaches is to reduce the amount of data that is collected and stored. That is why we are also seeking retention limits in our cases, as we did in Kurbo Weight Watchers, which has been barred from storing children's data for more than one year after the last time a child uses the service, and has been ordered to destroy any algorithms derived from the illegally collected data.<sup>46</sup> In actions like Twitter, we are seeking cutting-edge remedies like mandatory multifactor authentication options to ensure that consumers don't need to choose between their privacy and their security.<sup>47</sup> And in our recent lawsuit against Kochava, we are seeking a ban on the sale of sensitive geolocation data and a requirement that such data be deleted.<sup>48</sup>

### *Comprehensively Tackling Broader Problems in the Marketplace*

In spite of these major actions, it is clear that commercial surveillance is growing along with the risks to consumers. As a result, we are also launching new initiatives to protect the public and change incentives market-wide. In August, the Commission issued an Advanced Notice of Public Rulemaking, which solicits public comment on potential rules to crack down on harmful commercial surveillance, lax data security, and digital discrimination.<sup>49</sup> A rulemaking in this area would build on the Commission's strengthened Safeguards Rule, which was finalized last year and which will help ensure financial

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<sup>43</sup> Press Release, *FTC Takes Action Against Company Formerly Known as Weight Watchers for Illegally Collecting Kids' Sensitive Health Data*, FTC (Mar. 4, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-company-formerly-known-weight-watchers-illegally-collecting-kids-sensitive>.

<sup>44</sup> Press Release, *FTC Charges Twitter with Deceptively Using Account Security Data to See Targeted Ads*, FTC (May 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads>.

<sup>45</sup> Press Release, *FTC Finalizes Action Against CafePress for Covering Up Data Breach, Lax Security*, FTC (June 24, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-finalizes-action-against-cafepress-covering-data-breach-lax-security-0>.

<sup>46</sup> Stipulated Order, *United States v. Kurbo Inc., et al.*, 22-CV-946 (N.D. Cal. Mar. 3, 2022).

<sup>47</sup> Decision and Order, *In re Twitter, Inc.* (F.T.C. 2022) (No. C-4316), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023062C4316TwitterModifiedOrder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023062C4316TwitterModifiedOrder.pdf).

<sup>48</sup> See *supra* note 40.

<sup>49</sup> Press Release, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, Aug. 11, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>.



institutions better protect our data.<sup>50</sup> Finally, last year, the Commission issued a policy statement reminding firms that health apps and connected devices that collect or use consumers' health information must comply with the FTC's Health Breach Notification Rule.<sup>51</sup>

The Commission has repeatedly urged Congress to pass strong, comprehensive privacy legislation, but in the meantime, we will use every tool we have to protect consumers from surveillance practices that threaten their privacy, security, and civil rights.

## Ensuring Truth in Advertising

Having discussed the Commission's strategy to protect consumers' pocketbooks and rein in harmful surveillance, I want to conclude with a topic of particular interest to this audience – the Commission's work to root out deceptive advertising and ensure a fair marketplace for consumers and honest businesses. Our strategy here mirrors our approach to protecting consumers' pocketbooks and privacy – bringing cases of impact, seeking meaningful remedies, and pursuing market-wide initiatives when harms to consumers persist. But since we're here at the National Advertising Division, I want to focus specifically on how our approach is evolving.

Five years ago, one of my predecessors made clear before this audience and others that the Commission would be moving away from seeking monetary relief in cases against national advertisers, as opposed to fraudsters.<sup>52</sup> He was especially skeptical about seeking monetary relief in substantiation cases.<sup>53</sup> I want to be upfront that I do not share these views. I believe that the remedies we seek should be based on the violations we allege, not the size of the company that committed them. That is why, in spite of the *AMG* decision, the Commission is consistently seeking monetary relief in our cases against national advertisers. Allowing advertisers to reap the rewards of deceptive claims not only leaves consumers in the lurch but also undercuts honest businesses who play by the rules.

Consider our Made in USA program. Falsely labeling a product Made in the USA cheats consumers and harms businesses that create jobs, support communities, and strengthen supply chains by making products here in the United States. Early in Chair Khan's tenure, the Commission finalized the Made in USA Rule, which banned the deceptive use of Made in USA labels and triggered civil penalty liability for violators.<sup>54</sup> And we made use of that rule in short order, bringing our first penalty action

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<sup>50</sup> Press Release, *FTC Strengthens Security Safeguards for Consumer Financial Information Following Widespread Data Breaches*, FTC (Oct. 27, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-strengthens-security-safeguards-consumer-financial-information-following-widespread-data>.

<sup>51</sup> FTC Statement of the Commission on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), <https://www.ftc.gov/legal-library/browse/statement-commission-breaches-health-apps-other-connected-devices>; Press Release, *FTC Warns Health Apps and Connected Device Companies to Comply with Health Breach Notification Rule*, FTC (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-warns-health-apps-connected-device-companies-comply-health-breach-notification-rule>.

<sup>52</sup> Keynote Address of Thomas Pahl at the National Advertising Division Annual Conference 2017, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1262563/pahl\\_-\\_nad\\_keynote\\_10-3-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1262563/pahl_-_nad_keynote_10-3-17.pdf); Remarks of Thomas Pahl, "Reconsidering Advertising Substantiation Forum and Remedy Policies" 2017, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1280233/pahl\\_-\\_ana\\_speech\\_11-14-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1280233/pahl_-_ana_speech_11-14-17.pdf).

<sup>53</sup> Pahl, "Reconsidering Advertising Substantiation Forum and Remedy Policies" 2017, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1280233/pahl\\_-\\_ana\\_speech\\_11-14-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1280233/pahl_-_ana_speech_11-14-17.pdf).

<sup>54</sup> Press Release, *FTC Issues Rule to Deter Rampant Made in USA Fraud*, FTC (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud>.

under it against Lithionics, which we charged with falsely labeling its lithium ion batteries Made in USA.<sup>55</sup> Importantly, we are seeking monetary relief even when violations of the Made in USA rule are not alleged, such as in our recent enforcement actions against Resident Home,<sup>56</sup> Lions Not Sheep,<sup>57</sup> and Electrowarmth.<sup>58</sup> We will continue to be aggressive in making sure “Made in USA” means what it says.

We are taking a similar approach with other forms of deceptive advertising. For example, using our Penalty Offense Authority, the Commission secured \$5.5 million in civil penalties against Kohl’s and Walmart, which were charged with falsely marketing textile products as being made of bamboo through ecofriendly processes, when in fact they were made with toxic chemicals.<sup>59</sup> And we are being aggressive in ensuring that disease claims, especially around COVID-19, are substantiated. In fact, in the first half of 2022 alone, we brought four actions under the COVID-19 Consumer Protection Act,<sup>60</sup> and secured victories in two COVID actions brought in the early days of the pandemic.<sup>61</sup> Notably, we are seeking monetary relief in all of these actions. I hope marketers are getting the message that they will pay a price for making false and unsubstantiated claims, especially around people’s health, and regardless of whether they’re a national advertiser.

Finally, the Commission is aggressively cracking down on deceptive review practices – not only fake reviews but also review manipulation and suppression. Last month, along with six state partners, we brought a major enforcement action against Roomster, charging the platform with posting fake positive reviews and making deceptive claims about its rental listings, and seeking civil penalties and

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<sup>55</sup> Press Release, *FTC Enforces New Made in USA Rule against Lithionics and Owner Steven Tartaglia for Falsely Labeling Foreign-Made Batteries as American*, FTC (Apr. 13, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-enforces-new-made-usa-rule-against-lithionics-owner-steven-tartaglia-falsely-labeling-foreign>.

<sup>56</sup> Press Release, *Federal Trade Commission Finalizes Action Against “Made in USA” Repeat Offender*, FTC (June 22, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/federal-trade-commission-finalizes-action-against-made-usa-repeat-offender>.

<sup>57</sup> Press Release, *FTC Takes Action Against Lions Not Sheep and Owner for Slapping Bogus Made in USA Labels on Clothing Imported From China*, FTC (May 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-takes-action-against-lions-not-sheep-owner-slapping-bogus-made-usa-labels-clothing-imported>.

<sup>58</sup> Press Release, *FTC Sues Heated Mattress Pads Marketer Electrowarmth for Falsely Claiming that Chinese Products were Made in the USA*, FTC (Aug. 30, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-heated-mattress-pads-marketer-electrowarmth-falsely-claiming-chinese-products-were-made-usa>.

<sup>59</sup> Press Release, *FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl’s and Walmart*, FTC (Apr. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls>.

<sup>60</sup> Press Release, *FTC Sues Marketer of Personal Protective Equipment and Light Fixtures for Lying about Products Being Made in the USA and Government-Certified*, FTC (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-marketer-personal-protective-equipment-light-fixtures-lying-about-products-being-made-usa>; Press Release, *FTC, Florida Act to Shut Down ‘Grant Bae’ Scam Preying on Minority-Owned Businesses Seeking Pandemic-Relief Grants and Funds*, FTC (June 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-florida-act-shut-down-grant-bae-scam-preying-minority-owned-businesses-seeking-pandemic-relief>; Press Release, *FTC, DOJ, and FDA Take Action to Stop Marketer of Herbal Tea from Making False COVID-19 Treatment Claims*, FTC (Mar. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-doj-fda-take-action-stop-marketer-herbal-tea-making-false-covid-19-treatment-claims>; Press Release, *FTC Acts to Shut Down “The Credit Game” for Running a Bogus Credit Repair Scheme that Fleeced Consumers*, FTC (May 6, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-acts-shut-down-credit-game-running-bogus-credit-repair-scheme-fleeced-consumers>.

<sup>61</sup> Press Release, *Federal Trade Commission Scores Two Victories in Separate Actions Against Companies Who Failed to Deliver COVID Personal Protection Equipment During Early Days of the Pandemic*, FTC (Aug. 1, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-scores-two-victories-separate-actions-against-companies-who-failed-deliver>. As noted *supra*, we also brought out first action under OARFPA. Complaint, *FTC v. R360 LLC, et al.*, 22-CV-60924 (S.D. Fla. May 16, 2022).

other relief.<sup>62</sup> We also brought an action against retailer Fashion Nova and required the company to pay \$4.2 million to settle our claims that it blocked negative reviews of its products from being posted on its website.<sup>63</sup> In our case against Vision Path, we alleged that this online seller of Hubble contacts used deceptive tactics to generate positive reviews, including posting a BBB review from the company's own Director of Customer Experience.<sup>64</sup> That firm paid \$3.5 million. And we are making sure other marketers know that they, too, will pay a price for these practices. Last year, we sent more than 800 Notices of Penalty Offenses regarding deceptive endorsement practices,<sup>65</sup> and we are following up. Most fake review fraud goes undetected, so to deter it effectively, it is critical that those who are caught pay a price.

One final point on this topic. Reaching settlements is an efficient way to halt wrongdoing and protect consumers, and we're proud of the settlements we are reaching across program areas. But we are not hesitating to take companies – including national advertisers – to court to obtain the relief we believe is necessary to fully protect consumers. Earlier this year, the Commission sued TurboTax for allegedly deceiving consumers by pitching “free” tax filing that really was not free for most people.<sup>66</sup> We sued Gravity Defyer and its owner, charging them with making scientifically unsupported and deceptive pain-relief claims to sell footwear.<sup>67</sup> We sued Stem Cell Institute of America and its co-founders for allegedly targeting older Americans with misleading stem cell therapy claims.<sup>68</sup> And along with the Department of Justice, we sued Legacy Cremation Services, charging the firm and its owner with misleading consumers seeking funeral services.<sup>69</sup> Every enforcement division in BCP is currently in active litigation, and with the benefit of world class litigators across the Bureau, it is something we will not shy away from.

## Conclusion

To conclude, I hope it is apparent from my remarks that the Commission is not stepping back

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<sup>62</sup> Press Release, *FTC, States Sue Rental Listing Platform Roomster and its Owners for Duping Prospective Renters with Fake Reviews and Phony Listings*, FTC (Aug. 30, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-states-sue-rental-listing-platform-roomster-its-owners-duping-prospective-renters-fake-reviews>.

<sup>63</sup> Decision and Order, *In re Fashion Nova, LLC* (F.T.C. 2022) (No. C-4759), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/1923138C4759FashionNovaOrder\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/1923138C4759FashionNovaOrder_0.pdf).

<sup>64</sup> Press Release, *Vision Path, Inc., Online Seller of Hubble Lenses, Settles Charges it Violated the Contact Lens Rule and FTC Act to Boost Sales*, FTC (Jan. 28, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/vision-path-inc-online-seller-hubble-lenses-settles-charges-it-violated-contact-lens-rule-ftc-act>.

<sup>65</sup> Press Release, *FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties*, FTC (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties>.

<sup>66</sup> Complaint, *In re Intuit Inc.*, No. 9408 (F.T.C. Mar. 28, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/D09408IntuitP3Complaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/D09408IntuitP3Complaint.pdf).

<sup>67</sup> Press Release, *Federal Trade Commission Sues Gravity Defyer and its Owner for Violating FTC Order and Making Baseless Pain-Relief Claims to Market Footwear*, FTC (June 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/federal-trade-commission-sues-gravity-defyer-its-owner-violating-ftc-order-making-baseless-pain-relief-claims>.

<sup>68</sup> Press Release, *FTC, Georgia Attorney General Sue Stem Cell Institute of America Co-Founders for Deceptive Joint Pain Cure-All Marketing Scheme*, FTC (Aug. 17, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-georgia-attorney-general-sue-stem-cell-institute-america-co-founders-deceptive-joint-pain-cure>.

<sup>69</sup> Press Release, *Federal Trade Commission Alleges Funeral and Cremation Services Companies and Their Owner Mislead Consumers About Their Location Prices, and Withhold Remains to Extract Payment*, FTC (Apr. 22, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/federal-trade-commission-alleges-funeral-cremation-services-companies-their-owner-mislead-consumers>.

from our critical work, and is in fact redoubling our efforts – bringing cases of consequence, seeking cutting-edge remedies, and pursuing marketwide initiatives to protect the public. I am proud of our successes to date, and want to single out two groups in particular that have made them possible. First, so many of our cases were built and prosecuted in partnership with the Department of Justice and with state enforcers, who are on the front lines of fighting for consumers. And second, and most importantly, none of our victories would be possible without our extraordinary BCP staff. Our attorneys, consumer education specialists, data analysts, investigators, paralegals, and technologists play different roles throughout the Bureau, but they share a deep commitment to our mission that is unrivaled anywhere in the government. It is thanks to them that I am confident that the coming year will bring more victories for consumers, and a more fair market for us all.

Thank you again for having me. I'm happy to take your questions.