FTC 2.0: KEEPING PACE WITH ONLINE PLATFORMS

Terrell McSweeny†

ABSTRACT

As the nation's top consumer protection agency, the Federal Trade Commission (FTC) has played a key role in the regulation of online platforms. This essay, originally delivered as the David Nelson Keynote, reviews how the FTC has adapted its century-old consumer protection and antitrust mandate to the digital world and what it must do to keep pace with increasingly powerful platforms. It examines the benefits and drawbacks of relying solely on the FTC's harm-focused, enforcement-based framework to address increasingly powerful technology and proposes updates to the FTC that will help it continue to be an effective consumer protection enforcement agency for the digital age.

DOI: https://doi.org/10.15779/Z38736M23N

† The views expressed herein are Commissioner McSweeny's own and do not represent those of the Federal Trade Commission or any other Commissioner. Commissioner McSweeny thanks her attorney advisor, Christine DeLorme, for her extensive contribution to this Essay.

TABLE OF CONTENTS

I. INTRODUCTION

Online platforms pose a complex challenge for policymakers. How and when platforms are regulated raises profound questions about how we organize ourselves in a digital economy and, increasingly, how we allocate power within it. The Federal Trade Commission (FTC) has played a key role in the U.S. approach to regulation of platforms. Using its relatively old and analog mandate to protect consumers and competition, the agency has adapted its authority over unfair methods of competition and unfair and deceptive practices to today's digital world, where online platforms play a conspicuous role in the daily lives of consumers and the overall economy. Under the FTC's harm-focused, enforcement-based approach to competition enforcement and issues of data collection and use, online platforms—and the innovation that flows from them—have flourished. In fact, some say certain online platforms have flourished too much and gained too much power because of the historically "light touch" regulatory approach in the United States.[1] Our policy conversation has tended to

1. *See, e.g.*, Howard A. Shelanski, Information, *Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1667 (2013) ("[D]igital platforms raise competitive concerns related to innovation and customer information that may warrant increased antitrust scrutiny of their conduct and merger activity.").

focus on the power of the very large, very successful platforms—sometimes called foundational platforms.[2] These platforms, turbocharged by better technology, improved computing power, and expansive connectivity, are "platforms for platforms" and include, for example, internet service providers, social networks, and operating systems that connect users with app developers. They wield enormous power in the digital economy, thus provoking an important debate about whether our current frameworks for privacy, data use, and competition are sufficient. While remaining mindful of this landscape, it is important to recognize that online platforms come in all shapes and sizes. The multi-sided platform business model is hardly new,[3] and successfully adapting it to the online world is challenging. Failure is common.[4]

If we want policies that both protect consumers and competition and optimize innovation, the FTC must continue to adapt to the changing marketplace. This Essay will begin with some historical background on the FTC; then review the agency's current approach to platforms and some of the benefits and drawbacks of its harm-focused, enforcement-based framework; and finally conclude by examining whether the FTC can keep pace with transformative platforms in the digital economy.

II. HOW THE FTC EMERGED AS A KEY REGULATOR OF ONLINE PLATFORMS

The FTC is, first and foremost, an enforcement agency. Primarily it shapes law and policy by bringing cases against companies that violate the FTC Act or any of the approximately seventy other laws it enforces or administers.[5] But the agency is also charged with shaping policy by studying trends and changes in the marketplace. It does that by issuing reports, holding workshops, and conducting studies to inform its enforcement.[6]

---

2. *See* DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 40 fn. 3 (2016).

3. *See id.* at 199–201.

4. *See id.* at 150–156 (noting common struggles of adapting multi-sided platforms to the online world, and identifying signs of failure).

5. *See Enforcement*, FED. TRADE COMM'N (last visited July 17, 2017), https://www.ftc.gov/enforcement.

6. *Policy*, FED. TRADE COMM'N (last visited July 17, 2017), https://www.ftc.gov/policy. *See also* 15 U.S.C. § 46 (2012) (describing the FTC's ability to conduct wide-ranging studies and publish reports that do not have a specific law enforcement purpose, including the power to issue orders requiring companies to answer questions and provide other information to the agency).

Congress established the FTC in 1914.[7] At that time of rapid economic growth and concern about the limited reach of the existing antitrust laws,[8] people worried about the power of enormous, integrated companies that controlled all major networks and commerce and were owned by a very few, very powerful elite.[9] Accordingly, Section 5 of the FTC Act gave the agency broad latitude to address "unfair methods of competition."[10] This mandate was intended to allow the FTC to keep pace with the American marketplace.[11] The prescient founders of the FTC even appear to have addressed issues alive today in the regulation of online platforms, such as the relationship between the allocation of power in the marketplace and access to data. For example, Louis Brandeis noted, "there is one respect in which the great industry has an important advantage. That is in the

7. *About the FTC*, FED. TRADE COMM'N (last visited July 17, 2017), https://www.ftc.gov/about-ftc.

8. In support of a new Commission, Theodore Roosevelt wrote: "it [is] evident that the Anti-Trust Law is not adequate to meet the situation that has grown up because of modern business conditions . . . ." Theodore Roosevelt, *The Trusts*, *the People*, *and the Square Deal*, 99 OUTLOOK 649, 651 (1914), http://www.unz.org/Pub/Outlook-1911nov18-00649a02. America's first antitrust law, the Sherman Act, was not *forward*-looking and, therefore, not designed to preempt anticompetitive practices in their incipiency. Congress passed the Sherman Act in 1890 to safeguard competition and to prevent the consolidation of economic power. But by the second decade of the 20th century there was a growing recognition that the Sherman Act alone was unequal to the task. As Kintner's treatise on antitrust law puts it, "[i]ndifference and failure characterized early United States antitrust policy." 3 EARL. W. KINTNER, ET AL., FED. ANTITRUST LAW § 18.2 (Matthew Bender 2016). A number of the government's challenges to the trusts that dominated the U.S. economy had failed under the Sherman Act. For example, the government challenged the Knight Company's purchase of four other sugar refineries, which gave Knight control of over 98 percent of domestic sugar refining capacity. But the Supreme Court held that Knight's control over refining would have only an "indirect" effect on trade, "however inevitable, and whatever its extent," and was thus outside the purview of the Sherman Act. *Id.*; *United States v. E. C. Knight Co*., 156 U.S. 1, 16 (1895). By 1914, Senator William Thompson (Kansas) found that more than 9,877 previously independent companies had combined to form 628 trusts—with the greatest period of consolidation occurring *after* the enactment of the Sherman Act. *See* 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 9.03 n. 12 (Matthew Bender 2d ed. 2017); 51 CONG. REC. S14217–18 (1914) (statement of Sen. Thompson).

9. *See* Marc Winerman, *The Origins of the FTC: Concentration*, *Cooperation*, *Control*, *and Competition*, 71 ANTITRUST L.J. 1, 7 (2003) (citing LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1913)) ("[A] so-called 'money trust' had organized consolidations across multiple industries, and its representation on multiple boards of directors was perceived to create cross-industry interconnections short of merger.").

10. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2012).

11. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 237 (1980).

collection, the getting of knowledge, the collection of data in regard to trade, that knowledge for which great concerns extend their bases of inquiry all over the world."[12] Brandeis argued the FTC could serve to help small businesses gain access to the same information to compete in new markets.[13]

The FTC's original enforcement authority was limited to harm to businesses arising from unfair methods of competition.[14] Although the FTC handled a wide range of complaints—including accusations of predatory pricing, induced breaches of contract, misbranding, boycotts, and theft of trade secrets[15]—it was powerless to protect consumers absent a provable harm to competition. The inadequacy of this authority was highlighted in *FTC v. Raladam*,[16] where the Supreme Court refused to uphold an FTC complaint and injunction against a manufacturer of a harmful substance being marketed as an obesity cure because there was no evidence that the advertising of the product as such was harming any business interests or competition.[17] Congress reacted to this development and in 1938 granted the FTC power to take action against "unfair or deceptive acts or practices" under its Section 5 authority.[18] The Wheeler-Lea Amendments gave the FTC the power to stop harms to consumers without the need to show harm to competitors first, enabling the FTC to begin in earnest its mission of consumer protection.[19] In 1973, Congress solidified this power by granting the Commission authority to seek

12. JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 65 (2016).

13. *See id.*

14. *See* Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643, 649 (1931) ("[T]he trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be . . . injured. It is that condition of affairs which the Commission is given power to correct . . . and not some other.").

15. *See* FED. TRADE COMM'N, ANN. REP. FOR THE FISCAL YEAR ENDED JUNE 30, 1916, at 5.

16. *See Raladam*, 283 U.S. at 649 ("[T]he unfair methods must be such as injuriously affect or tend thus to affect the business of these *competitors* . . . .") (emphasis added).

17. *See id.* at 652–53; Milton Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 COLUM. L. REV. 527, 528 (1931) (discussing and excerpting from the Second Circuit's decision in the case, which was upheld by the Supreme Court).

18. *See* Wheeler-Lea Act of 1938, ch. 49, § 3, 52 Stat. 111–12 (codified as amended at 15 U.S.C. §45(a)).

19. *See* Lesley Fair, *FTC Milestones: Weighing in on Weight Loss Cases*, FED. TRADE COMM'N (Dec. 4, 2014, 11:25 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2014/12/ftc-milestones-weighing-weight-loss-cases.

preliminary relief and permanent injunctions in federal court under Section 13(b) of the FTC Act.[20]

The FTC has generally been busy with its mandate, protecting consumers from deceptive marketing, abusive debt collection, illegal telemarketing, frauds, scams, and other harmful financial practices. As consumers have moved consumption from a brick-and-mortar world to a digital one, the FTC has followed along. There, naturally, it encountered online platforms.

A. ANTITRUST ENFORCEMENT AND PLATFORM REGULATION

The FTC has a unique dual mission among federal agencies to protect both consumers and competition. As a competition enforcer, the FTC seeks to contribute to the public understanding of platform markets and the unique consumer benefits and competitive risks associated with platforms.[21] The agency has a long history of advocating against overly restrictive regulatory barriers that prevent new entrants.[22] Frequently this

---

20. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. IV, § 408(a)(1), 87 Stat. 576, 591 (1973) ("The Congress hereby finds that the investigative and law enforcement responsibilities of the Federal Trade Commission have been restricted and hampered because of inadequate legal authority to enforce subpenas [sic] and to seek preliminary injunctive relief to avoid unfair competitive practices."); § 408(f) (codified as amended at 15 U.S.C. § 53(b)) (granting the Commission injunctive authority). The Wheeler-Lea Act previously added Section 13(a) of the FTC Act in 1938, giving the agency the ability to seek preliminary injunctions in federal court, but only in cases involving the false advertising of food, drugs, devices, or cosmetics. Wheeler-Lea Act of 1938, ch. 49, sec. 4, § 13(a), 52 Stat. 114–15 (codified as amended at 15 U.S.C. § 53(a)).

21. *See*, *e.g.*, FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 7 (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf (describing the role of the FTC's "competition advocacy program, which provides advice and input on competition policy issues," including those raised by sharing economy business models).

22. When internet retailers first began making sales to consumers, incumbent brick-and-mortar retailers sought regulatory protection against these new entrants in a number of markets. The FTC advocated against regulatory barriers to online entry in numerous markets from contact lenses to wine shipments. *See*, *e.g.*, FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES 24 (2004), http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf; Letter from Todd J. Zywicki, Director of the Office of Policy Planning, Fed. Trade Comm'n, et al. to Assemblyman William Magee, Chairman, New York Assembly Agriculture Comm., et al. (Mar. 29, 2004), http://www.ftc.gov/be/v040012.pdf (advocating for legislation to remove barriers to wine e-commerce). More recently, FTC officials have criticized as "bad policy" state laws designed to protect the automobile dealership model from competition from Tesla's direct-to-consumer sales strategy. *See* Andy Gavil, Debbie Feinstein, and Marty Gaynor,

takes the form of advocating on behalf of platforms, like ride-sharing platforms, and urging local regulators to tailor regulations to legitimate safety and consumer protection issues without impeding entry and competition from new services.[23]

The FTC is also experienced in understanding the economic concepts that underlie the operation of platforms and the markets they create. For example, certain digital markets are more susceptible to consolidation of market power because of how a competitor's scale interacts with the value of the goods or services transacted. More specifically, an increase in users on one side of a two-sided platform increases the platform's value to users on the other side—a phenomenon known as network effects. To start and maintain this feedback loop, platform operators frequently offer their service to users on one side of the market for free. Because the price is zero, competition often occurs in the form of innovation and quality improvements in products to entice as many users as possible to join. Users on the "free" side of a platform may thus be harmed by consolidation, since remaining firms would not have to compete as vigorously for customer share—although since the price is zero, a traditional price-based approach to competition analysis would not capture that harm.

Per the discussion of innovation in the FTC's *Horizontal Merger Guidelines*, the agency looks at both sides of a market in the merger

Who Decides How Consumers Should Shop?, FED. TRADE COMM'N (Apr. 24, 2014, 11:00 AM), http://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop.

23. In the last few years, the FTC has submitted comments to multiple cities and taxicab authorities urging that regulations be limited to legitimate safety and consumer protection issues, and not impede competition from new ride-hailing platforms (such as those offered by Uber and Lyft). *See* Letter from Andrew I. Gavil, Director of the Office of Policy Planning, Fed. Trade Comm'n, et al. to the Honorable Brendan Reilly, Alderman – 42 Ward, City of Chicago (April 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf; Letter from Andrew I. Gavil, Director of the Office of Policy Planning, Fed. Trade Comm'n, et al. to Mr. Jacques P. Lerner, General Counsel, D.C. Taxicab Comm'n (June 7, 2013), http://ftc.gov/os/2013/06/130612dctaxicab.pdf; Letter from Andrew I. Gavil, Director of the Office of Policy Planning, Fed. Trade Comm'n, et al. to the Honorable Debbie Ossiander, Assembly Member, Seat A, Municipality of Anchorage (Apr. 19, 2013), http://www.ftc.gov/os/2013/04/130426anchoragecomment.pdf; Letter from Andrew I. Gavil, Director of the Office of Policy Planning, Fed. Trade Comm'n, et al. to the State of Colorado Public Utilities Comm'n (Mar. 6, 2013), http://ftc.gov/os/2013/03/130703coloradopublicutilities.pdf.

enforcement context.[24] FTC staff did just that in its recent review of the Zillow-Trulia merger, examining whether the merger between the two largest online real estate listing portals would reduce the combined entity's incentives to innovate—that is, the incentive to develop new features attractive to consumers on the free side of the market.[25] If it is going to police anticompetitive combinations involving online platforms effectively, the FTC must remain vigorous in assessing non-price dimensions of competition, such as competition on privacy, quality, and innovation, in merger review.

Given the presence of network effects, platform operators may organically develop monopoly power. Monopoly power in and of itself is not illegal under U.S. antitrust law. Section 2 of the Sherman Act, however, prohibits anticompetitive behavior by a monopolist that blocks competitive entry.[26] Where there is evidence of anticompetitive exclusionary behavior in digital platform markets, competition enforcers should act. Arguably, the FTC has not used its authority in this regard aggressively enough—perhaps due to worry that antitrust enforcement may blunt the incentives of incumbent firms to innovate or out of concern that antitrust cannot keep pace with rapidly evolving technology markets.[27] For example, antitrust litigation can proceed slowly over the course of many years.[28] By the time a court reaches judgment, the thinking goes, the underlying market may be obsolete, supplanted by something newer and better. But this view simply assumes the existence of the very type of disruptive entry that antitrust law exists to protect. To maximize innovation in digital markets, new entrants must have the opportunity to

24. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

25. *See* Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc. (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

26. Sherman Act of 1890 § 2, 15 U.S.C. § 2 (2015)

27. *See*, *e.g.*, Ronald A. Cass, *Antitrust for High-Tech and Low: Regulation*, *Innovation*, *and Risk*, 9 J.L. ECON. & POL'Y 169, 175–78 (2013); Susan Creighton, *2010 Horizontal Merger Guidelines: The View from the Technology Industry*, THE ANTITRUST SOURCE, Oct. 2010, https://www.wsgr.com/PDFSearch/creighton1010.pdf; Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data*, THE ANTITRUST SOURCE Dec. 2014, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_tucker_12_16f.authcheckdam.pdf.

28. *See, e.g.*, *United States v. Microsoft*, 253 F.3d 34, 48 (D.C. Cir. 2001) ("[I]t is noteworthy that a[n antitrust] case of this magnitude and complexity has proceeded from the filing of complaints through trial to appellate decision in a mere three years.").

test their ideas in the market. The threat of enforcement may deter dominant firms from engaging in harmful conduct. Left unchecked, these dominant firms may have an incentive to engage in anticompetitive exclusionary behavior that would slow or prevent new entrants. Thus, while there are challenges associated with antitrust enforcement in rapidly evolving markets, the consequences of the alternative— the FTC simply walking off the field—would be far worse.

B. CONSUMER PROTECTION AND PLATFORM REGULATION

FTC consumer protection cases involving platforms tend to involve the application of longstanding legal principles forged by the FTC's decades of experience with deceptive or unfair advertising and marketing practices. They have also included policing disclosures and controls around in-app purchases by children,[29] deceptive employment opportunity claims made by ride-sharing platforms,[30] revenge-porn,[31] and deceptive use of crowd-funding platforms.[32]

Of course, platforms tend to be information intensive. So much of the FTC's focus has also been on the information privacy and security practices of platforms. In the last decade, the FTC has taken enforcement

29. *See FTC*, *Amazon to Withdraw Appeals*, *Paving Way for Consumer Refunds Related to Children's Unauthorized In-App Charges*, FED. TRADE COMM'N (Apr. 4, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-amazon-withdraw-appeals-paving-way-consumer-refunds-related; *Google to Refund Consumers at Least $19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges*, FED. TRADE COMM'N (Sept. 4, 2014), https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it; *Apple Inc. Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent*, FED. TRADE COMM'N (Jan. 15, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

30. *See Uber Agrees to Pay $20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims*, FED. TRADE COMM'N (Jan. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited.

31 *Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos*, FED. TRADE COMM'N (Jan. 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges; *FTC and Nevada Seek to Halt Revenge Porn Site*, FED. TRADE COMM'N (Jan. 9, 2018), https://www.ftc.gov/news-events/press-releases/2018/01/ftc-nevada-seek-halt-revenge-porn-site.

32. *See Crowdfunding Project Creator Settles FTC Charges of Deception*, FED. TRADE COMM'N (June 11, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/crowdfunding-project-creator-settles-ftc-charges-deception.

action against many major online platforms, including Twitter,[33] Google,[34] Facebook,[35] Snapchat,[36] and Ashley Madison.[37] Some of these cases, like the Twitter case, involved alleged misrepresentations about security practices.[38] Others alleged misrepresentations about privacy practices[39] or, in the case of Snapchat, misleading statements about the ephemerality of images and videos sent through the messaging app.[40]

The agency's recent case involving Ashley Madison—a dating website for individuals who are married or in committed relationships but interested in having affairs with other adults—primarily focused on the site's data security practices, but also included allegations that the website operator made misleading promises to remove users' "digital trail[s]" and induced users into upgrading to paid memberships by use of fake dating profiles.[41] These so-called "engager profiles" were allegedly created by

33. *Twitter Settles Charges That It Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program*, FED. TRADE COMM'N (June 24, 2010), https://www.ftc.gov/news-events/press-releases/2010/06/twitter-settles-charges-it-failed-protect-consumers-personal.

34. *FTC Charges Deceptive Privacy Practices in Googles* [sic] *Rollout of Its Buzz Social Network*, FED. TRADE COMM'N (Mar. 30, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.

35. *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, FED. TRADE COMM'N (Nov. 29, 2011), https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep.

36. *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False*, FED. TRADE COMM'N (May 8, 2014), https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were.

37. *Operators of AshleyMadison.com Settle FTC*, *State Charges Resulting From 2015 Data Breach that Exposed 36 Million Users' Profile Information*, FED. TRADE COMM'N (Dec. 14, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting.

38. Complaint ¶¶ 13–14, In the Matter of Twitter, Inc., Fed. Trade Comm'n Matter No. 0923093 (Mar. 2, 2011) (Docket No. C-4316), https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110311twittercmpt.pdf.

39. *See*, *e.g.*, Complaint ¶¶ 17–18, In the Matter of Facebook, Inc., Fed. Trade Comm'n Matter No. 0923184 (July 27, 2012) (Docket No. C-4365), https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc.; Complaint ¶ 6, In the Matter of Google Inc., Fed. Trade Comm'n Matter No. 1023136 (Oct. 13, 2011) (Docket No. C-4336), https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzcmpt.pdf.

40. Complaint ¶¶ 6, 16–17, In the Matter of Snapchat, Inc., Fed. Trade Comm'n Matter No. 1323078 (Dec. 23, 2014) (Docket No. C-4501), https://www.ftc.gov/system/files/documents/cases/141231snapchatcmpt.pdf.

41. Complaint ¶¶ 23–29, 17–22, Fed. Trade Comm'n v. Ruby Corp., No. 1:16-cv-02438 (D.D.C Dec. 14, 2016), https://www.ftc.gov/system/files/documents/cases/161214ashleymadisoncmplt1.pdf.

staff acting as female users.[42] In reality, about 16 million of the 19 million dating profiles of users in the United States were created by men, yet the company promised users "thousands of women" in the user's city were on the platform.[43]

These cases stem from the evolution of the FTC over the last two decades into the nation's chief federal privacy and information security enforcer. All told, the FTC has brought more than 500 cases protecting the privacy or security of consumer information.[44] The FTC's efforts have focused on holding companies accountable for the promises they make about the information they use and collect, consistently emphasizing the need for firms to offer consumers transparency and choice.[45]

Over time, the FTC has taken the view that consent for collection, sharing, and use of information may be inferred based on consumers' reasonable expectations consistent with the context of a particular transaction.[46] Under this approach, the FTC has supported frameworks requiring opt-in consent for the collection and sharing of sensitive information—including the content of communications; social security numbers; health, financial, and children's information; and precise geolocation data.[47] Importantly, as technology and techniques used to track and profile people online have grown increasingly powerful, the

---

42. *Id.* at ¶ 18.
43. *Id.* at ¶¶ 12, 17–18.
44. Letter from Edith Ramirez, Chairwoman, Fed. Trade Comm'n, to Věra Jourová, Comm'r for Justice, Consumers, and Gender Equality, European Commission, at 3 (Feb. 23, 2016), https://www.ftc.gov/public-statements/2016/02/letter-chairwoman-edith-ramirez-vera-jourova-commissioner-justice.
45. *See*, *e.g.*, FED. TRADE COMM'N, PRIVACY & DATA SECURITY UPDATE: 2016 at 2–5.
46. FED. TRADE COMM'N REPORT, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 27, 36–40 (2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf [hereinafter PRIVACY REPORT] ("Companies do not need to provide choice before collecting and using consumers' data for commonly accepted practices, such as product fulfillment.").
47. Comment Before the Federal Communications Commission, In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Staff of the Bureau of Consumer Protection of the Fed. Trade Comm'n, WC Dckt. 16-106, FCC 16-39, at 21–22 (May 27, 2016) (https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-federal-trade-commission-federal-communications-commission/160527fcccomment.pdf); PRIVACY REPORT, *supra* note 46, at 47–48, 58–60 ("Companies should obtain affirmative express consent before . . . collecting sensitive data for certain purposes.").

FTC has updated its understanding regarding what data are personally identifiable and warrant privacy protections.[48] In situations where a company makes material changes to its policies for handling consumer information—particularly how such information is made public—the agency has also required notice and choice.[49]

III. LESSONS LEARNED FROM THE FTC'S ENFORCEMENT ORIENTED APPROACH

There are benefits and drawbacks of relying on the FTC to regulate online platforms. The decades of debate and hundreds of thousands of pages of scholarly opinion on the subject of the relative merits of a regulation, enforcement, or free-market approach to economic policy are beyond the scope of this Essay. Nonetheless, the FTC's fact-based, enforcement-oriented approach arguably lowers the cost and burdens on new entrants and maximizes incentives to innovate.[50] The FTC's focus is economically and technologically informed and primarily harm-based. It is technology neutral and sufficiently flexible to keep pace with a rapidly changing marketplace. Issues of industry capture of a regulator are generally lessened at an enforcement agency with broad authority.

There are drawbacks, of course. The most common complaint is that the FTC does not provide sufficiently clear guidance on how and when it uses its generalized authority.[51] Other critics argue the agency does not

48. Jessica Rich, *Keeping Up with the Online Advertising Industry*, FED. TRADE COMM'N (Apr. 21, 2016, 10:30 AM), https://www.ftc.gov/news-events/blogs/business-blog/2016/04/keeping-online-advertising-industry (discussing the FTC's position that information is "personally identifiable" and deserving of privacy protections "when it can be *reasonably linked* to a particular person, computer, or device. In many cases, persistent identifiers such as device identifiers, MAC addresses, static IP addresses, or cookies meet this test.") (emphasis in original).

49. *See*, *e.g.*, Complaint ¶ 29, In the Matter of Facebook, Inc., Fed. Trade Comm'n Matter No. 0923184 (July 27, 2012) (Docket No. C-4365), https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookcmpt.pdf (challenging material retroactive changes to the company's privacy policy); Decision and Order, Part II, In the Matter of Facebook, Inc., Fed. Trade Comm'n Matter No. 0923184 (July 27, 2012) (Docket No. C-4365), https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf (requiring affirmative express consent prior to sharing any nonpublic user information with a third party).

50. *See*, *e.g.*, Shelanski, *supra* note 1, at 1705 (acknowledging the difficulties of "conventional competition enforcement against digital platforms," but arguing for fact-based antitrust enforcement based upon evidence of "effects on innovation incentives").

51. *See*, *e.g.*, Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236, 249–259 (3d. Cir. 2015) (discussing and dismissing the defendant's argument that the FTC failed to provide fair notice of the specific cybersecurity standards the company was supposed to follow).

confine itself enough to purely economic harms, and it cannot keep pace with an innovative and dynamic marketplace.[52] Those who support more aggressive regulation argue the FTC's modern mandate is optimized to stop practices inflicting concrete harms on consumers and competition, so the agency cannot address broader public interest concerns arising from the power of online platforms in our digital economy.[53]

In fact, there are limitations to relying on a purely enforcement-based approach and downsides to relying on an overly regulatory one. For example, some harms to innovation are hard to detect and equally hard to remedy through *ex post* enforcement. In those situations a hybrid system of clear, appropriately tailored *ex ante* rules coupled with *ex post* enforcement may be justified. The FCC's Open Internet order[54] is arguably justified by the relative concentration of broadband markets, the economics of the virtuous cycle (innovation at the edge spurring demand for broadband), protection of non-economic values like speech, and potential harms that are not easily remedied by antitrust or consumer protection laws.[55]

Moreover, as consumers connect more and more devices in their homes and on their bodies, the array of technology that raises privacy and security concerns grows. Accordingly, the FTC must renew efforts to work with other expert industry regulators. Differences between technologies—and the risks associated with them—may justify some differences in how security and privacy are regulated.[56] For example, the

---

52. *See*, *e.g.*, Joshua D. Wright, Prof., George Mason Univ. School of Law, Briefing on Nomi, Spokeo, and Privacy Harms at the George Mason University Law & Econ. Center: The FTC and Privacy Regulation: The Missing Role of Economics, at 5–6 (Nov. 12, 2015), http://masonlec.org/site/rte_uploads/files/Wright_PRIVACYSPEECH_FINALv2_PRINT.pdf.

53. *See*, *e.g.*, *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation?: Hearing Before the Subcomm. on Reg. Reform*, *Commercial*, *and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 72–75 (2014) (statement of Tim Wu, Professor of Law, Columbia Law School), https://judiciary.house.gov/wp-content/uploads/2016/02/113-111-88377.pdf.

54. FED. COMMC'NS COMM'N, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER IN THE MATTER OF PROTECTING AND PROMOTING THE OPEN INTERNET (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf.

55. *See* Comment Before the Federal Communications Commison, In the Matter of Restoring Internet Freedom, Commissioner Terrell McSweeny, WC Docket No. 17-108 (July 17, 2017) (https://www.ftc.gov/system/files/documents/public_statements/1231533/mcsweeny_-_fcc_comment_7-17-17.pdf).

56. *See*, *e.g.*, Deirdre K. Mulligan & Kenneth A. Bamberger, *Public Values*, *Private Infrastructure and the Internet of Things: The Case of Automobiles*, 9 J.L. & ECON. REG. 7, 27 (2016) (discussing cybersecurity as having characteristics of a public good that

regulations for connected cars, medical devices, and drones may vary from those required for connected toasters and hairbrushes. In these situations the FTC should work with expert industry regulators to craft a policy that is both right for the industry and consistent with the FTC's longstanding framework.[57]

Finally, as new issues arise, the FTC does occasionally need new authorities. Sometimes Congress grants the agency rulemaking authority to address certain practices. For instance, with the rise of internet usage by children, the FTC promulgated the Children's Online Privacy Protection Act Rule (COPPA Rule)[58] in late 1999 pursuant to the Children's Online Privacy Protection Act of 1998.[59] Among other things, the FTC's COPPA Rule requires operators of websites and online services directed at children to obtain verifiable parental consent before collecting children's personal information.[60] In other instances, Congress declares specific practices to be unfair or deceptive under the FTC Act, and grants the agency authority to enforce new laws. Most recently, Congress charged the agency with enforcing the Consumer Review Fairness Act of 2016,[61] which protects

---

requires consideration of potential risks and which may give rise to a heightened need to improve cybersecurity).

57. For instance, the Federal Trade Commission and its Director of the Bureau of Consumer Protection have filed comments with the National Highway Traffic Safety Administration (NHTSA) regarding vehicle-to-vehicle communications and the Department of Transportation's Federal Automated Vehicles Policy. *See FTC Provides Comment to NHTSA on Privacy and Vehicle-To-Vehicle Communications*, FED. TRADE COMM'N (Oct. 24, 2014), https://www.ftc.gov/news-events/press-releases/2014/10/ftc-provides-comment-nhtsa-privacy-vehicle-vehicle-communications; *FTC's Bureau of Consumer Protection Director Comments on NHTSA's Federal Automated Vehicle Policy*, FED. TRADE COMM'N (Nov. 22, 2016), https://www.ftc.gov/news-events/press-releases/2016/11/ftcs-bureau-consumer-protection-director-comments-nhtsas-federal. Also, in conjunction with NHTSA, the FTC hosted a workshop on privacy and security issues related to connected vehicles in June 2017. *See Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles*, FED. TRADE COMM'N (last visited Nov. 27, 2017), https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected.

58. 16 C.F.R. § 312 (2016).

59. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–06 (2012).

60. 16 C.F.R. § 312.3(b) (2016).

61. Consumer Review Fairness Act of 2016, Pub. L. No. 114–258, 130 Stat. 1355. Also, prior to passage of this Act, the Commission had challenged contractual "gag clauses" prohibiting consumer reviews as an unfair practice under Section 5 of the FTC Act. *See, e.g.*, *FTC Sues Marketers Who Used "Gag Clauses," Monetary Threats, and Lawsuits to Stop Negative Consumer Reviews for Unproven Weight-Loss Products*, FED. TRADE COMM'N (Sept. 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits.

people's ability to share their honest opinions by prohibiting contract terms that ban or restrict honest product reviews; and the Better Online Ticket Sales (BOTS) Act of 2016,[62] which prohibits the circumvention of a security measure or access control system for online purchase of event tickets, *e.g.*, the use of bots that can buy up large numbers of tickets almost instantaneously.[63]

IV. KEEPING PACE WITH PLATFORMS IN THE DIGITAL ECONOMY

As outlined above, there are benefits to the FTC's enforcement-based approach, and also situations in which the FTC must work with expert regulators to craft appropriate solutions. Much of that is possible within the FTC's existing authority, but sometimes the FTC needs grants of additional authority. To keep pace with the rapid expansion of online platforms in the digital economy the FTC must continue to adapt its analog authorities to the digital world.

In the last year especially, the role and power of platforms in our daily lives have been on vivid display—from the potential for manipulation of social media users to the rise of "fake" news. These concerns are feeding a more generalized fear about the economic and politcal power of platforms. Our rapidly expanding connectivity exacerbates some of these concerns, raising questions for policymakers such as:

- How do we optimize for rapid innovation in order to remain a world leader in the development of new technology while mitigating some of the consequences of all this change? Particularly, how do we address digital divides, ensure data sets are high-quality and representative, increase digital readiness, and protect jobs, privacy, and security?
- How do we respond to changing social norms around data sharing?
- How do we make sure consumers, who want to benefit from innovation, still have choice and transparency?
- What additional protections do consumers need?
- Can notice and choice continue to work as the paradigm to protect privacy, especially when choice is increasingly a take-

62. Better Online Ticket Sales Act of 2016, Pub. L. No. 114–274, 130 Stat. 1401.
63. *See* Lesley Fair, *BOTS Act: That's the ticket!*, FED. TRADE COMM'N (Apr. 7, 2017, 12:40 PM), https://www.ftc.gov/news-events/blogs/business-blog/2017/04/bots-act-thats-ticket.

it-or-leave-it proposition where one must accept certain terms to use a particular service?

- As the technology becomes smarter, how and when do we protect human agency?

Not all of these issues fall within the FTC's jurisdiction, but many do. The lessons that the FTC has learned over two decades of protecting consumers and competition online can help inform the kinds of policies needed to address many of these issues. The good news is that the FTC does not need a radically new toolbox. But it does need to continue to use the tools it has—all of them—and continue to evolve along with the marketplace.

A. PROTECTING THE PRIVACY CHOICES OF CONSUMERS

The FTC plays a vital role in protecting consumer access to truthful information about how their personal data are being collected and used, and ensuring that platforms are honoring consumer choices once they are made. In this regard, the role of consumer expectation should continue to be central to FTC enforcement.

Recent cases demonstrate the types of deceptive and unfair information practices the FTC should target. For example, in the FTC's case against InMobi, the FTC alleged that the mobile advertising network used technology to track geolocation even when consumers had denied permission to access their location information, thereby specifically overriding a clearly expressed consumer choice regarding sensitive personal information.[64] In a case against another mobile advertising network, the FTC alleged that Turn, Inc., which participated in a Verizon Wireless program that uniquely identified each Verizon Wireless user through the use of tracking header identifiers appended to their mobile internet traffic, deceived consumers by leading them to believe they could reduce the extent to which the company tracked them on their mobile phones.[65] Finally, television manufacturer VIZIO, Inc. agreed to pay $2.2 million to settle FTC charges that it collected viewing data on 11 million

64. *Mobile Advertising Network InMobi Settles FTC Charges It Tracked Hundreds of Millions of Consumers' Locations Without Permission*, FED. TRADE COMM'N (June 22, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/mobile-advertising-network-inmobi-settles-ftc-charges-it-tracked.

65. *Digital Advertising Company Settles FTC Charges It Deceptively Tracked Consumers Both Online and Through Their Mobile Devices*, FED. TRADE COMM'N (Dec. 20, 2106), https://www.ftc.gov/news-events/press-releases/2016/12/digital-advertising-company-settles-ftc-charges-it-deceptively.

smart TVs without consumers' knowledge or consent.[66] The company also agreed to a stipulated order requiring it to disclose prominently and obtain affirmative express consent for its data collection and sharing practices.[67]

Increasingly sophisticated technology that passively gathers detailed information—including sensitive data—raises questions of when consumers ought to have choices over the collection and use of such information. In some situations, the FTC has taken proactive steps to warn consumers about the use of this kind of technology that gathers information without proper notice and consent. For example, the FTC has issued warning letters to app developers using Silverpush software designed to monitor consumers' television use through audio beacons,[68] and urged companies engaged in cross-device tracking to obtain affirmative consent before using cross-device tracking on children or tracking users across their device graphs on sensitive information like health, finances, and geolocation.[69] Similarly, the FTC has recommended that Congress enact legislation allowing consumers to opt out of having sensitive information shared with data brokers for marketing purposes.[70]

B. ESTABLISHING BEST PRACTICES AROUND DATA USE

The FTC recognizes consumer data drives valuable innovation to the benefit of consumers—but may simultaneously expose those same customers to risks.[71] Because of these risks, when it comes to consumer data, there are clear legal obligations that go beyond providing clear notice and choice. There is, of course, the obligation to secure consumer

66. *VIZIO to Pay $2.2 Million to FTC*, *State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions Without Users' Consent*, FED. TRADE COMM'N (Feb. 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it.

67. *Id.*

68. *FTC Issues Warning Letters to App Developers Using 'Silverpush' Code*, FED. TRADE COMM'N (Mar. 17, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/ftc-issues-warning-letters-app-developers-using-silverpush-code.

69. FED. TRADE COMM'N, CROSS-DEVICE TRACKING 15–16 (2017), https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf.

70. FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY viii, 50 (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

71. *See* PRIVACY REPORT, *supra* note 46, at 7–9; FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES 5–12 (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf [hereinafter BIG DATA REPORT].

information.[72] Additionally, there may be further obligations associated with the use of consumer data. Specifically, it is now possible for technology to predict things about people that they do not even know themselves.[73] But norms are not well established around when consumers ought to be notified these analytics are being used. For example, the average American consumer may not care very much that a platform can predict that she wants to take a vacation to a sunny beach and show her ads accordingly. But she may deeply care if her employer predicts her potential value based on her interest in beach vacations, or if the price she pays for that vacation is higher because of the kind of computer she used to book the trip.

In some cases, as outlined in the FTC's report on big data, analogous equal opportunity, civil rights, and consumer protection laws already apply in the digital world.[74] For example, the FTC enforces the Fair Credit Reporting Act (FCRA),[75] which applies to consumer reporting agencies (CRAs) that compile and sell reports of consumer information that are used, or expected to be used, to make credit, employment, insurance, or housing decisions about consumers. CRAs have numerous obligations under FCRA. They must implement reasonable procedures to ensure the accuracy of consumer reports,[76] provide consumers with access to their information,[77] and provide the ability to correct errors.[78] Companies that use consumer reports also have obligations—such as providing consumers with adverse action notices if they take an adverse action, like denying or rescinding an offer of employment, based on information in a report.[79] Companies must also provide "risk-based pricing" notices if they deny or charge consumers more for credit based on consumer report information.[80]

---

72. *See* Fed. Trade Comm'n, Commission Statement Marking the FTC's 50th Data Security Settlement (Jan. 31, 2014), http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf; FED. TRADE COMM'N, START WITH SECURITY, A GUIDE FOR BUSINESSES: LESSONS LEARNED FROM FTC CASES 3 (2015), https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf.

73. BIG DATA REPORT, *supra* note 71, at 6–7 (providing examples of big data algorithm applications, such as identifying students for advanced classes and predicting life expectancy and genetic predisposition to disease).

74. BIG DATA REPORT, *supra* note 71, at 17–21.

75. Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (2012).

76. 15 U.S.C. § 1681e(b).

77. 15 U.S.C. § 1681g(a).

78. 15 U.S.C. §§ 1681i, 1681g(d).

79. 15 U.S.C. § 1681b(b)(3).

80. 16 C.F.R. § 640.3 (2016).

The FCRA can also apply beyond traditional CRAs—for example, to data brokers.[81] In a case against Spokeo, the FTC argued the company was subject to the FCRA because it marketed detailed consumer profiles—compiled from hundreds of online and offline data sources—as an employment screening tool, including to human resources professionals.[82] In a case against data broker Instant Checkmate, Inc., the FTC alleged the company failed to comply with the FCRA in marketing to its customers consumer reports containing information about prospective tenants or employees.[83] The FTC has also taken action against Time Warner Cable[84] and Sprint[85] following their alleged failure to provide FCRA-mandated risk-based pricing notices after offering less favorable credit terms to customers based on consumer report information.

The FCRA has some gaps, though. For instance, it does not apply if a company is using its own data to make credit determinations.[86] But if a third-party company sells an algorithm or provides analytics services based on its own data to make eligibility determinations for client firms, then the third-party company would likely be acting as a CRA, and both it and its clients would likely be subject to the FCRA.[87] Accordingly, companies should be cautious when using big-data analytics to make FCRA-covered eligibility determinations. Companies also need to consider federal equal opportunity laws, civil rights laws,[88] the Genetic Information Nondiscrimination Act,[89] fair housing law,[90] and, of course,

81. BIG DATA REPORT, *supra* note 71, at ii.

82. *Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA*, FED. TRADE COMM'N (June 12, 2012), https://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed.

83. *Two Data Brokers Settle FTC Charges That They Sold Consumer Data Without Complying With Protections Required Under the Fair Credit Reporting Act*, FED. TRADE COMM'N (Apr. 9, 2014), https://www.ftc.gov/news-events/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data.

84. *Time Warner Cable to Pay $1.9 Million Penalty for Violating the Risk-Based Pricing Rule*, FED. TRADE COMM'N (Dec. 19, 2013), https://www.ftc.gov/news-events/press-releases/2013/12/time-warner-cable-pay-19-million-penalty-violating-risk-based.

85. *Sprint Will Pay $2.95 Million Penalty to Settle FTC Charges It Violated Fair Credit Reporting Act*, FED. TRADE COMM'N (Oct. 21, 2015), https://www.ftc.gov/news-events/press-releases/2015/10/sprint-will-pay-295-million-penalty-settle-ftc-charges-it.

86. 15 U.S.C. § 1681a(d)(2)(A)(i) (exempting "report[s] containing information solely [gained from] transactions or experiences between the consumer and the person making the report").

87. BIG DATA REPORT, *supra* note 71, at 15.

88. *See*, *e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

89. Pub. L. No. 110-233, 122 Stat. 881 (2008).

Section 5 of the FTC Act, which may apply if data products are sold to third parties that use the products for a discriminatory purpose.[91]

The FTC has already started policing situations in which data products are sold for use in scams or fraudulent conduct. The Commission has challenged the sale of data to customers that a company knows or has reason to know will use the data for fraud. For example, the FTC shut down data broker operation Sequoia One, which allegedly sold the information of financially distressed payday loan applicants to third parties who used that information to withdraw millions of dollars from consumers' accounts without their authorization.[92] In 2006, the FTC took action against data broker Choicepoint, Inc., after the personal financial records of more than 163,000 consumers were compromised—leading to at least 800 cases of identity theft—allegedly due to Choicepoint's failure to screen adequately subscribers to its data products and services, including not implementing reasonable procedures to verify or authenticate the identities and qualifications of prospective subscribers.[93]

Therefore, the FTC and other law enforcers have various legal tools to address some of the risks posed by the amount of information consumers are sharing in the digital economy; however, there are areas where a clear consensus has yet to emerge, especially when it comes to non-economic values like human rights and dignity. Americans love new technology and innovation, but they also have a relatively analog set of expectations about how their data are protected and used. For example, people regard health information as sensitive and expect (after years of signing forms in doctors' offices) it is private. So they are often surprised to learn health information provided to websites or generated on wearables is not subject to the same requirements.[94] Or they may be very surprised to see sensitive

90. *See*, *e.g.*, Fair Housing Act, Pub. L. No. 90-284, tit. viii, 82. Stat. 73, 81 (1968).

91. *See* BIG DATA REPORT, *supra* note 71, at iv, 23, 24.

92. *FTC Puts An End to Data Broker Operation That Helped Scam More Than $7 Million from Consumers' Accounts*, FED. TRADE COMM'N (Nov. 30, 2016), https://www.ftc.gov/news-events/press-releases/2016/11/ftc-puts-end-data-broker-operation-helped-scam-more-7-million.

93. *ChoicePoint Settles Data Security Breach Charges; To Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress*, FED. TRADE COMM'N (Jan. 26, 2006), https://www.ftc.gov/news-events/press-releases/2006/01/choicepoint-settles-data-security-breach-charges-pay-10-million.

94. Latanya Sweeney, Chief Technologist, Fed. Trade Comm'n, Address at the FTC Spring Privacy Series: Consumer Generated and Controlled Health Data (May 7, 2014), https://www.ftc.gov/system/files/documents/videos/spring-privacy-series-consumer-generated-controlled-health-data/ftc_spring_privacy_series_-_consumer_generated_and_controlled_health_data_-_transcript.pdf (discussing health data information flows generally and also stating that students who were surveyed

health information on the public internet, even if they accepted terms that said such data would be made public.[95] Similarly, Americans may regard their television viewing habits as sensitive and not expect their smart televisions to be mining second-by-second viewing information about them without consent.[96] At a more basic level, consumers using a mobile app that allows them to use their Android phones as a flashlight would not have any reason to believe that the app would be tracking their geolocation and sharing that information with advertising networks and other third parties.[97]

Some might say Americans simply do not care about sharing their data in exchange for services. In many cases that may be true. But consumers do continue to expect a choice about who has access to their information and are concerned about loss of control over it. For example, 74% of Americans say it is "very important" to be in control of who can obtain information about them, and 91% believe that they have lost control over how companies collect and use their personal information.[98]

This is not to suggest that companies cannot develop new business models that collect and use consumer data in new or unexpected ways. Of course such innovations can provide great utility or convenience to consumers—and even amaze and delight them. But when data practices depart from established norms and expectations, it is critically important that firms are upfront with consumers in providing a clear and complete explanation of what information they are gathering, how it is being used, and with whom it will be shared. And companies should give consumers a choice about sensitive or unexpected data uses at a relevant time and in

---

expected that most health data outside the data they provide themselves would be covered by HIPAA).

95. This was the case in the FTC's case against Practice Fusion, an electronic health records company that the Commission alleged failed to disclose that consumer reviews of their health care practitioners, which often included sensitive health information, would be publicly available on the internet. *See Electronic Health Records Company Settles FTC Charges It Deceived Consumers About Privacy of Doctor Reviews*, FED. TRADE COMM'N (June 8, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/electronic-health-records-company-settles-ftc-charges-it-deceived.

96. *See Vizio*, *supra* note 66.

97. *Android Flashlight App Developer Settles FTC Charges It Deceived Consumers*, FED. TRADE COMM'N (Dec. 5, 2013), https://www.ftc.gov/news-events/press-releases/2013/12/android-flashlight-app-developer-settles-ftc-charges-it-deceived.

98. Lee Rainie, *The State of Privacy in Post-Snowden America*, PEW RES. CTR. (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/.

proper context to ensure that decisions are well informed and meaningful.[99]

C. ADAPTING EXISTING FRAMEWORKS & UPDATING THE FTC'S TOOLBOX

Consumer choices about how personal data are used are becoming more meaningful, especially since technology is progressively clustering people into like-minded communities and offering consumers increasingly targeted experiences that not only impact how and with whom they communicate but also what opportunities are available to them. In navigating these increasingly difficult waters, the FTC's enforcement experience and policy frameworks can be a helpful guide. The traditional underpinnings of privacy policy—those long terms-of-service agreements that generally go unread—can also be helpful in establishing the data governance requirements for an organization. For years the FTC and privacy advocates have supported the concept of privacy by design, which means including privacy values all along the product development lifecycle to ensure that products consistently reflect the data practice and values of a firm.[100] More recently, the FTC has incorporated this framework into the concept of *data security* by design, which also suggests a process-based approach that includes building with security in mind, implementing training and testing, and avoiding a siloed approach to information security.[101] It is time for the industry and the FTC to engage in a conversation about expanding these frameworks to incorporate governance—and, as technology becomes smarter and more autonomous, ethics by design. Governance and ethics by design would include the following considerations: (1) privacy; (2) security; (3) safety; (4) transparency; (5) choice; (6) explainability; (7) compliance with existing law; (8) testing; (9) data quality; and (10) mitigation and remediation. Many data collection, usage, and analytics practices are entirely opaque to consumers. Absent more aggressive attention to these issues by the FTC

99. *See* PRIVACY REPORT, *supra* note 46, at 49–50 (calling on companies to "offer clear and concise choice mechanisms that are easy to use and are delivered at a time and in a context that is relevant to the consumer's decision about whether to allow the data collection or use. Precisely how companies in different industries achieve these goals may differ depending on such considerations as the nature or context of the consumer's interaction with a company or the type or sensitivity of the data at issue.").

100. *See generally id.*, at 22–32.

101. *See*, *e.g.*, FED. TRADE COMM'N, INTERNET OF THINGS: PRIVACY AND SECURITY IN A CONNECTED WORLD 28–29 (2015), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf.

there may not be sufficient incentives in the marketplace to develop better technology governance practices.

Ultimately, as the technology operating on our data gets smarter—and the machine learning running algorithms become more autonomous—practicing governance and ethics by design can also be used to safeguard human agency. Such precautions and considerations can address the question of when consumers should get a choice and in what situations automated decision-making requires human oversight. Against this backdrop, the FTC has an important job it must continue to do. While the FTC is doing a good job using its 100-year-old authorities to protect consumers in a digital economy, it needs additional tools. Comprehensive privacy and data security legislation at the federal level that includes civil penalty and rule-making authority for the FTC would be helpful.[102] Outdated sector-specific exemptions from FTC authority—like the common carrier exemption[103] and the limitation on enforcement against non-profit entities[104]—should be eliminated to ensure the agency has sufficient jurisdiction. And finally, the FTC needs additional resources, particularly to expand the agency's use of computer scientists and technologists and to enhance the capabilities of the agency's Office of Technology Research and Investigation.[105]

---

102. *See* PRIVACY REPORT, *supra* note 46, at 11–14.

103. 15 U.S.C. § 45(a)(2) (2012).

104. 15 U.S.C. §§ 45, 46, 53 (empowering the Commission to enforce the FTC Act against "persons, partnerships, or corporations"); 15 U.S.C. § 44 (defining "corporation" as an entity "organized to carry on business *for* its own *profit* or that of its members") (emphasis added). *See*, Cmty. Blood Bank of the Kansas City Area, Inc. v. Fed. Trade Comm'n, 405 F.2d 1011, 1022 (8th Cir. 1969) (holding the Act applies to some nonprofit organizations and not others). *But see*, Cal. Dental Ass'n. v. Fed. Trade Comm'n, 526 U.S. 756, 766–8 (1999) (finding the Act does apply to a non-profit entity that carries on business for the profit of its members).

105. *See* Ashkan Soltani, *Booting Up a New Research Office at the FTC*, FED. TRADE COMM'N (Mar. 23, 2015, 11:00 AM), https://www.ftc.gov/news-events/blogs/techftc/2015/03/booting-new-research-office-ftc; *Office of Technology Research and Investigation*, FED. TRADE COMM'N (last visited July 28, 2017), https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/office-technology-research-investigation. The Office of Technology Research and Investigation [OTech] replaced the FTC's Mobile Technology Unit, which previously conducted research on mobile technologies and published reports on topics including mobile apps for kids. *See FTC's Second Kids' App Report Finds Little Progress in Addressing Privacy Concerns Surrounding Mobile Applications for Children*, FED. TRADE COMM'N (Dec. 10, 2012), https://www.ftc.gov/news-events/press-releases/2012/12/ftcs-second-kids-app-report-finds-little-progress-addressing.

V. CONCLUSION

The FTC can and should continue to play a key role in the U.S. approach to regulation of platforms. It is vital that in so doing the FTC remains true to its core mandate to protect consumers and competition by enabling the innovation and evolution of digital markets. As another FTC founder President Woodrow Wilson said: "The treasury of America does not lie in the brains of the small body of men now in control of great enterprises . . . . It depends upon the inventions of unknown men, upon the originations of unknown men, upon the ambitions of unknown men."[106] This sentiment is still a good North Star for the evolving FTC—as long as we are willing to acknowledge that even that guiding principle needs an update. The "treasury of America" depends on the inventions, originations, and ambitions of unknown women, too.

106. RONALD J. PESTRITTO, WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 112 (2005).