

## FEDERAL TRADE COMMISSION (FTC)

### Statement of Regulatory Priorities (2022)

The Federal Trade Commission is an independent agency charged with rooting out unfair methods of competition and unfair or deceptive acts or practices. Its mission is vital to the national interest because, when markets are fair and competitive, honest businesses and the public all benefit. The Commission is committed to deploying all its tools, including issuing new rules and updating old ones, to achieve its mission.

#### **I. The Commission Is Using All Available Tools To Advance Its Missions**

In its 2021 Statement of Regulatory Priorities, the Commission explained that it was considering initiating new rulemakings to advance its missions and respond to several changed circumstances and new developments.<sup>1</sup> First, the Supreme Court's April 2021 *AMG* decision held that the Commission cannot use section 13(b) of the FTC Act to seek consumer redress in federal court.<sup>2</sup> As the Supreme Court noted in *AMG*, however, consumer redress remains available for cases that involve a consumer protection rule violation.<sup>3</sup> Second, the Commission, after careful study, had streamlined its own Rules of Practice, conforming its processes to the requirements set out by Congress in section 18 of the FTC Act, which governs the promulgation, amendment, and repeal of consumer-protection rules.<sup>3</sup> Third, the Commission, noting the limitations of case-by-case competition enforcement, committed to exploring

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<sup>1</sup> See Fed. Trade Comm'n, Statement of Regulatory Priorities (2021),

[https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FTC.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf).

<sup>2</sup> See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021). The Commission has called on Congress to restore its ability to seek disgorgement and restitution. The Consumer Protection and Recovery Act, which would fix the adverse court ruling and restore the Commission's powers, passed the U.S. House of Representatives on July 20, 2021. See Congress.gov, H.R. 2668—Consumer Protection and Recovery Act, <https://www.congress.gov/bill/117thcongress/house-bill/2668/actions>. <sup>3</sup> See *AMG Capital*, 141 S. Ct. at 1352.

<sup>3</sup> See Fed. Trade Comm'n, Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf).

the possibility of promulgating competition rules. These circumstances are all present in equal or greater force in 2022. Accordingly, the Commission and its staff have been hard at work studying the problems

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that rules can address, formulating rulemaking documents, reviewing public comments, and engaging with stakeholders.

As to consumer-protection rules, the Commission in the last year published three advance notices of proposed rulemaking (“ANPRs”) under its section 18 authority. First, in December 2021, the Commission published an ANPR focused on the impersonation of government and businesses, which could result in a rule that codifies the well-established principle that impersonation scams are unlawful.<sup>4</sup> This ANPR noted that the Commission expends significant resources combating impersonation fraud, with impersonation of government and businesses as two of the largest causes of consumer losses. Although some existing rules<sup>5</sup> outlaw impersonation of government and businesses in specific contexts, many impersonation cases are brought only under the Commission’s Section 5 authority, so a potential rule would make redress far more readily obtainable for consumers harmed by impersonation scams. Public comments in response to the ANPR were enthusiastic, including support from companies that scammers frequently impersonate, such as Apple and Microsoft, as well as a bipartisan coalition of 49 state attorneys general. Notably, no public comment opposed proceeding with the rulemaking. Based on this record, the Commission concluded that these forms of impersonation are prevalent and proposed a rule to prohibit the impersonation of government and businesses and the providing of means and instrumentalities for such impersonation.<sup>6</sup>

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<sup>4</sup> See Fed. Trade Comm’n, ANPR – Impersonation of Government and Businesses, 87 Fed. Reg. 72901 (Dec. 23, 2021), <https://www.federalregister.gov/documents/2021/12/23/2021-27731/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

<sup>5</sup> See, e.g., Telemarketing Sales Rule, 16 C.F.R. section 310.3(a)(2)(vii) (prohibiting misrepresentations with respect to a “seller’s or telemarketer’s affiliation with, or endorsement or sponsorship by, any person or government entity”).

<sup>6</sup> See Press Release, Fed. Trade Comm’n, FTC Proposes New Rule to Combat Government and Business Impersonation Scams (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-proposes-new-rule-combat-government-business-impersonation-scams>.

The second new consumer-protection rulemaking focused on unfair or deceptive earnings claims.<sup>7</sup> As with impersonation scams, the Commission expends significant enforcement resources addressing misleading earnings claims, which are a persistent scourge to consumers and tend to flourish in times of economic distress in diverse forms. Enforcement cases have alleged “misleading earnings

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claims were used to tout offers as diverse as coaching or mentoring, education, work-from-home, “gig” work, and other job opportunities, multi-level marketing opportunities, franchise, e-commerce or other business opportunities, chain referral schemes, and other investment opportunities, as well as other types of business or money-making opportunities.”<sup>89</sup> The Commission noted that a potential rule could deter wrongdoing, aid consumers, and provide useful guidance to honest businesses.

The Commission’s 2021 Statement of Regulatory Priorities specifically previewed the third new consumer-protection rulemaking proceeding:

Among the many pressing issues consumers confront in the modern economy, the abuses stemming from surveillance-based business models are particularly alarming. The Commission is considering whether rulemaking in this area would be effective in curbing lax security practices, limiting intrusive surveillance, and ensuring that algorithmic decisionmaking does not result in unlawful discrimination.<sup>10</sup>

After careful consideration, the Commission published an ANPR focused on these issues, describing how Americans must routinely surrender their personal information to participate in basic aspects of modern life.<sup>10</sup> The ANPR canvassed the Commission’s decades-long effort to protect Americans’ privacy through

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<sup>7</sup> See Fed. Trade Comm’n, ANPR – Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13951 (Mar. 11, 2022), <https://www.federalregister.gov/documents/2022/03/11/2022-04679/deceptive-or-unfair-earnings-claims>.

<sup>8</sup> *Id.*, 87 Fed. Reg. at 13953.

<sup>9</sup> Statement of Regulatory Priorities at 2.

<sup>10</sup> See Fed. Trade Comm’n, ANPR – Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022), <https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security>.

case-by-case enforcement, policy work, and implementation of sectoral privacy laws, concluding that rulemaking could be a useful addition to the effort. The Commission asked 95 questions to ascertain whether unfair or deceptive practices relating to commercial surveillance and data security are prevalent and whether proceeding with one or more proposed rules is worthwhile.

A final new rulemaking initiated by the Commission concerns unfair and deceptive practices at auto dealerships.<sup>11</sup> This notice of proposed rulemaking (NPRM) describes how acquiring an automobile is

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among the most expensive and important transactions for consumers and how a variety of unfair or deceptive practices can harm those consumers. After cataloguing the Commission's extensive lawenforcement experience with respect to auto dealerships, the NPRM notes that "many of the problems observed in the motor vehicle marketplace persist in the face of repeated federal and state enforcement actions, suggesting the need for additional measures to deter deceptive and unfair practices."<sup>12</sup> The NPRM contains proposed rule text and a preliminary regulatory analysis of the anticipated costs and benefits of the proposed rule. The Commission sought comment on these general subjects as well as on 49 specific questions to inform the Commission's determination as to whether, and if so how, to finalize a rule.

Updating existing rules to meet new challenges is another important part of the Commission's rulemaking work. A particularly noteworthy effort is potentially updating the Telemarketing Sales Rule ("TSR"). The Commission took two important actions on the TSR in 2022. First, the Commission published an NPRM that would, among other things, expand the TSR to cover misrepresentations made in business-to-business contexts and bolster recordkeeping requirements.<sup>13</sup> Second, the Commission

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<sup>11</sup> See Fed. Trade Comm'n, NPRM – Motor Vehicle Dealers, 87 Fed. Reg. 42012 (July 13, 2022), <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>. Unlike the three other new rulemakings, which each began with an ANPR under section 18, the Commission was authorized by a specific enactment of Congress to begin this rulemaking with an NPRM. See 12 U.S.C. § 5519(d).

<sup>12</sup> NPRM – Motor Vehicle Dealers, 87 Fed. Reg. at 42013.

<sup>13</sup> See Fed. Trade Comm'n, NPRM – Telemarketing Sales Rule, 87 Fed. Reg. 33677 (June 3, 2022), <https://www.federalregister.gov/documents/2022/06/03/2022-09914/telemarketing-sales-rule>.

published a corollary ANPR that seeks “comment on whether to repeal all exemptions regarding telemarketing calls to businesses and inbound telemarketing of computer technical support services, and whether the TSR should provide consumers additional protections for negative option products or services.”<sup>14</sup> These potential updates to the TSR, and proposed updates to other rules such as the Amplifier Rule<sup>15</sup> and the Energy Labeling Rule,<sup>16</sup> demonstrate that the Commission is committed to ensuring that its rules keep pace with changing technological and economic circumstances.

The Commission’s renewed use of its rulemaking authorities comes with a commitment to increase robust public participation at each step of the agency’s rulemaking process. For example, the

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ANPR on commercial surveillance announced a well-attended virtual public forum, which began with a staff explanation of the ways in which the public can participate and concluded with hours of testimony from members of the public who signed up to speak.<sup>17</sup> In a similar vein, the Commission published, in English and in Spanish, new plain-language guides to facilitate public participation in rulemakings, especially from communities and perspectives that have not always been able to participate.<sup>18</sup> The Commission also accepted several petitions under its new process for public rulemaking petitions<sup>20</sup>; each received a notice in the Federal Register<sup>19</sup> and was posted for comment for 30 days on <https://www.regulations.gov>.

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<sup>14</sup> Fed. Trade Comm’n, ANPR – Telemarketing Sales Rule, 87 Fed. Reg. 33662, 33662 (June 3, 2022).

<sup>15</sup> See Fed. Trade Comm’n, NPRM – Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 87 Fed. Reg. 45047 (July 27, 2022), <https://www.federalregister.gov/documents/2022/07/27/2022-16071/traderegulation-rule-relating-to-power-output-claims-for-amplifiers-utilized-in-home-entertainment>.

<sup>16</sup> See Fed. Trade Comm’n, NPRM – Energy Labeling Rule, 87 Fed. Reg. 31754 (May 25, 2022), <https://www.federalregister.gov/documents/2022/05/25/2022-11126/energy-labeling-rule>.

<sup>17</sup> See Fed. Trade Comm’n, Commercial Surveillance and Data Security Public Forum (Sept. 8, 2022), <https://www.ftc.gov/news-events/events/2022/09/commercial-surveillance-data-security-anpr-public-forum>.

<sup>18</sup> See Fed. Trade Comm’n, Public Participation in the Rulemaking Process, <https://www.ftc.gov/enforcement/rulemaking/public-participation-rulemaking-process>; Participación Pública en el Proceso de Reglamentación de la FTC Conforme a la Sección 18, <https://www.ftc.gov/es/participacion-publica-en-el-proceso-de-reglamentacion-de-la-ftc-conforme-la-seccion-18> (printable versions available in both languages).

<sup>20</sup> See 16 C.F.R. section 1.31.

<sup>19</sup> See Fed. Trade Comm’n, Notices of Petitions for Rulemaking from Randall David Marks, 86 Fed. Reg. 70062 (Dec. 9, 2021); Inst. for Pol’y Integrity, 86 Fed. Reg. 73207 (Dec. 27, 2021); Accountable Tech, 86 Fed. Reg. 73206 (Dec. 27, 2021); NetChoice et al., 87 Fed. Reg. 12003 (Mar. 3, 2022).

In the coming year, the Commission’s consumer-protection rulemaking work will have much in common with the past year’s: a continued focus on harmful and intractable practices that are prevalent, a continued commitment to furthering the Commission’s ability to provide redress to harmed consumers and deter bad actors, and continued efforts to enable robust public participation and thoroughly and carefully consider the record evidence. New consumer-protection rulemakings the Commission recently initiated include one to address unfair or deceptive fees, such as mandatory fees added to the advertised price of a good or service during the course of a transaction, and another to address unfair or deceptive reviews and endorsements, such as fake reviews and seemingly independent endorsements that involve undisclosed relationships.

As for its competition mission, the Commission in the past year has been actively exploring whether new rules that specify “unfair methods of competition” prohibited by Section 5 of the FTC Act would help achieve the agency’s mission. In its most recent strategic plan, the Commission observed that “[r]ules . . . inform businesses and their legal advisers about antitrust risks and can deter anticompetitive mergers and business practices” and that promoting competition can benefit all market participants,

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including workers.<sup>20</sup> Accordingly, the Commission is considering proposing a rule addressing noncompete clauses in the labor market.

In sum, the Commission has undertaken important rulemaking initiatives in the last year. In the next year, the Commission will focus on continuing to work on those initiatives. It will also continue seeking public input and learning from its law-enforcement, consumer-education, market-monitoring, and other work to identify additional opportunities for new or improved rules to complement its other tools and the vital work of partner agencies and the states. Rulemakings can deliver important benefits to the public and honest businesses—and they are especially likely to do so with a robust rulemaking record and

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<sup>20</sup> Fed. Trade Comm’n, FTC Strategic Plan for Fiscal Years 2022 to 2026, at 16 (Aug. 26, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf). Other competition problems could also be addressed by new rules. *Cf.* Office of the President of the United States, Executive Order on Promoting Competition in the American Economy, section 5(h)(i)–(vii) (July 9, 2021), <https://www.whitehouse.gov/briefingroom/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>. <sup>23</sup> 58 Fed. Reg. 51735 (Sept. 30, 1993).

meaningful public engagement, so the Commission will continue to seek the views of all affected communities.

## **II. Updates on Ongoing Rulemakings**

### **a. Periodic Regulatory Review Program**

In 1992, the Commission implemented a program to review its rules and guides on a regular basis. The Commission's review program is patterned after provisions in the Regulatory Flexibility Act, 5 U.S.C. sections 601–612, and complies with the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission's review program is also consistent with section 5(a) of Executive Order 12866, which directs executive branch agencies to reevaluate periodically all of their significant regulations.<sup>23</sup> Under the Commission's program, rules and guides are typically reviewed on a 10-year schedule that results in more frequent reviews than are generally required by the Regulatory Flexibility Act. The public can obtain information on rules and guides under review and the Commission's regulatory review program generally at <https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides>.

The program provides an ongoing, systematic approach for obtaining information about the costs and benefits of rules and guides and whether there are changes that could minimize any adverse

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economic effects, not just a "significant economic impact upon a substantial number of small entities."<sup>24</sup>

As part of each review, the Commission requests public comment on, among other things, the economic impact and benefits of the rule; possible conflict between the rule and state, local, or other federal laws or regulations; and the effect on the rule of any technological, economic, or other industry changes. Reviews may lead to the revision or rescission of rules and guides to ensure that the Commission's consumer protection and competition goals are achieved efficiently. Pursuant to this program, the Commission has rescinded 40 rules and guides promulgated under the FTC's general authority and updated dozens of other rules and guides since the program's inception.

### **(1) Newly Initiated and Upcoming Periodic Reviews of Rules and Guides**

On August 5, 2022, the Commission issued an updated ten-year review schedule.<sup>25</sup> Since the publication of the 2021 Regulatory Plan, the Commission has initiated or announced plans to initiate periodic reviews of the following rules and guides:

*Business Opportunity Rule, 16 CFR part 437.* On November 25, 2022, the Commission initiated periodic review of the Business Opportunity Rule as part of the Commission's systematic review of all current Commission rules and guides.<sup>26</sup> The Commission is seeking comments on, among other things, the economic impact, and benefits of this rule; possible conflict between the rule and State, local, or other Federal laws or regulations; and the effect on the rule of any technological, economic, or other industry changes. The comment period will close on January 24, 2023. Effective in 2012, the Rule requires business-opportunity sellers to furnish prospective purchasers a disclosure document that provides information regarding the seller, the seller's business, and the nature of the proposed business opportunity, as well as additional information to substantiate any claims about actual or potential sales, income, or profits for a prospective business-opportunity purchaser. The seller must also preserve information that forms a reasonable basis for such claims.

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<sup>24</sup> 5 U.S.C. section 610.

<sup>25</sup> Fed. Trade Comm'n, Regulatory Review Schedule, 87 Fed. Reg. 47947 (Aug. 5, 2022), <https://www.federalregister.gov/documents/2022/08/05/2022-16863/regulatory-review-schedule>. <sup>26</sup> 87 FR 72428 (Nov. 25, 2022).

*Alternative Fuels Rule, 16 CFR part 309.* During 2023, as part of the systematic review of all Commission rules, the Commission plans to initiate a periodic review of the Alternative Fuels Rule

(formally “Labeling Requirements for Alternative Fuels and Alternative-Fueled Vehicles”) by publishing a notice seeking public comments on the effectiveness and impact of the Rule.

*Cooling-Off Rule, 16 CFR part 429.* During 2023, as part of the systematic review of all Commission rules, the Commission plans to initiate a periodic review of the Cooling-Off Rule (formally “Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations”) by publishing a notice seeking public comments on the effectiveness and impact of the Rule. Most recently, on January 9, 2015, the Commission amended the Cooling-Off Rule by increasing the exclusionary limit for all door-to-door sales at locations other than a buyer’s residence from \$25 up to \$130.<sup>27</sup> Under that final rule, the revised definition of door-to-door sale now distinguishes between sales at a buyer’s residence and those at other locations. The revised definition retained coverage for sales made at a buyer’s residence that have a purchase price of \$25 or more. The final rule amendment was effective on March 13, 2015.

*Guides.* During the calendar year of 2022, the Commission plans to initiate periodic review of the Guides for the Use of Environmental Marketing Claims, 16 CFR part 260. During 2023, the Commission plans to initiate periodic review of the Guides for Private Vocational and Distance Education Schools, 16 CFR part 254.

## **(2) Ongoing Periodic Reviews of Rules and Guides**

The following proceedings for the retrospective review of Commission rules and guides described in the 2021 Regulatory Plan are ongoing:

*Hart-Scott-Rodino Antitrust Improvements Act Coverage, Exemption, and Transmittal Rules, 16 CFR parts 801–803.* On December 1, 2020, the Commission initiated the periodic review of the Hart-Scott-Rodino Antitrust Improvements Act Coverage, Exemption, and Transmittal Rules (“HSR Rules”) as part of the Commission’s systematic review of all current Commission rules and guides.<sup>28</sup> The comment period closed on February 1, 2021, and staff has been reviewing the comments. The HSR Rules and the

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<sup>27</sup> 80 Fed. Reg. 1329 (Jan. 9, 2015).

<sup>28</sup> 85 Fed. Reg. 77042 (Dec. 1, 2020).

Antitrust Improvements Act Notification and Report Form (“HSR Form”) were adopted pursuant to section 7(A) of the Clayton Act, which requires firms of a certain size contemplating mergers, acquisitions, or other transactions of a specified size to file notification with the FTC and the DOJ and to wait a designated period of time before consummating the transaction. By December 2022, staff anticipates sending the Commission a recommendation for a proposed rule on substantive HSR Form changes. By June 2023, staff anticipates that the Commission will issue a final rule to update the HSR Form and Instructions to the new cloud-based, e-filing system, which will eliminate paper filings.

*Children’s Online Privacy Protection Rule, 16 CFR part 312.* On July 25, 2019, the Commission issued a request for public comment on its Children’s Online Privacy Protection Rule (“COPPA Rule”).<sup>29</sup> Although the Commission’s last COPPA Rule review ended in 2013, the Commission initiated this review early in light of changes in the marketplace. Following an extension, the public comment period closed on December 9, 2019.<sup>30</sup> The FTC sought comment on all major provisions of the COPPA Rule, including its definitions, notice and parental-consent requirements, exceptions to verifiable parental consent, and safeharbor provision. The FTC hosted a public workshop to address issues raised during the review of the COPPA Rule on October 7, 2019. Staff is analyzing and reviewing public comments.

*Endorsement Guides, 16 CFR part 255.* On February 21, 2020, the Commission initiated a periodic review of the Endorsement Guides.<sup>31</sup> The comment period, as extended, closed on June 22, 2020.<sup>32</sup> On July 26, 2022, the Commission sought public comments on proposed changes to the Guides.<sup>33</sup> The comment period closed on September 26, 2022. FTC staff is currently reviewing the comments received. The Guides are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of the FTC Act. Among other things, the Endorsement Guides provide that if there is a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed. The advertiser must also possess and rely on adequate substantiation to

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<sup>29</sup> 84 Fed. Reg. 35842 (July 25, 2019). <sup>30</sup> 84 Fed. Reg. 56391 (Oct. 22, 2019).

<sup>31</sup> 85 Fed. Reg. 10104 (Feb. 21, 2020).

<sup>32</sup> 85 Fed. Reg. 19709 (Apr. 8, 2020).

<sup>33</sup> 87 Fed. Reg. 44288 (July 26, 2022).

support claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly.

*Franchise Rule, 16 CFR part 436.* On March 15, 2019, the Commission initiated periodic review of the Franchise Rule (officially “Disclosure Requirements and Prohibitions Concerning Franchising”).<sup>34</sup> The comment period closed on April 21, 2019. The Commission then held a public workshop on November 10, 2020. The closing date for written comments related to the issues discussed at the workshop was December 17, 2020.<sup>35</sup> Staff continues to evaluate the record and anticipates sending a recommendation to the Commission by June 2023. The Rule is intended to give prospective purchasers of franchises the material information they need to weigh the risks and benefits of such an investment. The Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. Required disclosure topics include, for example, the franchise’s litigation history; past and current franchisees and their contact information; any exclusive territory that comes with the franchise; assistance the franchisor provides franchisees; and the cost of purchasing and starting up a franchise.

*Health Breach Notification Rule, 16 CFR part 318.* On May 22, 2020, the Commission initiated a periodic review of the Health Breach Notification Rule.<sup>36</sup> The comment period closed on August 20, 2020. Commission staff has reviewed the comments and intends to submit a recommendation to the Commission by December 2022. The Rule requires vendors of personal health records (PHR) and PHR-related entities to provide: (1) notice to consumers whose unsecured personally identifiable health information has been breached; and (2) notice to the Commission. Under the Rule, vendors must notify both the FTC and affected consumers whose information has been affected by a breach “without

unreasonable delay and in no case later than 60 calendar days” after discovery of a data breach. Among other information, the notices must provide consumers with steps they can take to protect themselves from harm.

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<sup>34</sup> 84 Fed. Reg. 9051 (Mar. 13, 2019).

<sup>35</sup> 85 Fed. Reg. 55850 (Sept. 10, 2020).

<sup>36</sup> 85 Fed. Reg. 31085 (May 22, 2020).

*Identity Theft Rules, 16 CFR part 681.* In December 2018, the Commission initiated a periodic review of the Identity Theft Rules, which include the Red Flags Rule and the Card Issuer Rule.<sup>37</sup> FTC staff is reviewing the comments received and anticipates sending a recommendation to the Commission by December 2023. The Red Flags Rule requires financial institutions and creditors to develop and implement a written identity theft prevention program (a “Red Flags Program”). By identifying red flags for identity theft in advance, businesses can be better equipped to spot suspicious patterns that may arise and take steps to prevent potential problems from escalating into a costly episode of identity theft. The Card Issuer Rule requires credit and debit card issuers to implement reasonable policies and procedures to assess the validity of a change of address if they receive notification of a change of address for a consumer’s debit or credit card account and, within a short period of time afterwards, also receive a request for an additional or replacement card for the same account.

*Leather Guides, 16 CFR part 24.* On March 6, 2019, the Commission initiated periodic review of the Leather Guides, formally known as the Guides for Select Leather and Imitation Leather Products.<sup>38</sup> The comment period closed on April 22, 2019, and staff anticipates submitting a recommendation for further action to the Commission during 2023. The Leather Guides apply to the manufacture, sale, distribution, marketing, or advertising of leather or simulated leather purses, luggage, wallets, footwear, and other similar products. The Guides address misrepresentations regarding the composition and characteristics of specific leather and imitation leather products.

*Negative Option Rule, 16 CFR part 425.* On October 2, 2019, the Commission issued an Advance Notice of Proposed Rulemaking seeking public comment on the effectiveness and impact of the Trade Regulation Rule on Use of Prenotification Negative Option Plans (Negative Option Rule).<sup>39</sup> The Negative Option Rule helps consumers avoid recurring payments for products and services they did not intend to order and to allow them to cancel such payments without unwarranted obstacles. The Commission is studying various options, but the next expected action is undetermined.

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<sup>37</sup> 83 Fed. Reg. 63604 (Dec. 11, 2018).

<sup>38</sup> 84 Fed. Reg. 8045 (Mar. 6, 2019). <sup>39</sup> 84 Fed. Reg. 52393 (Oct. 2, 2019).

*Eyeglass Rule, 16 CFR part 456.* As part of the systematic review process, the Commission issued a **Federal Register** notice seeking public comments about the Trade Regulation Rule on Ophthalmic Practice Rules (“Eyeglass Rule”) on September 3, 2015.<sup>40</sup> The comment period closed on October 26, 2015. Commission staff has completed the review of 831 comments on the Eyeglass Rule and anticipates sending a recommendation for further Commission action by late 2022. The Eyeglass Rule requires that an optometrist or ophthalmologist give the patient, at no extra cost, a copy of the eyeglass prescription immediately after the examination is completed. The Rule also prohibits optometrists and ophthalmologists from conditioning the availability of an eye examination, as defined by the Rule, on a requirement that the patient agree to purchase ophthalmic goods from the optometrist or ophthalmologist.

#### **b. Proposed Rules**

Since the publication of the 2021 Regulatory Plan, the Commission has initiated or plans to take further steps as described below in the following rulemaking proceedings:

*Energy Labeling Rule, 16 CFR part 305.* The Energy Labeling Rule requires energy labeling for major home appliances and other consumer products to help consumers compare the energy usage and

costs of competing models. On October 25, 2022, the Commission issued an Advance Notice of Proposed Rulemaking that seeks public comment on potential amendments to the Rule, including energy labels for several new consumer product categories, other possible amendments to improve the Rule's effectiveness, and reducing unnecessary burdens.<sup>41</sup>

*Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 CFR part 432.*

On December 18, 2020, the Commission initiated periodic review of the Amplifier Rule (officially "Power Output Claims for Amplifiers Utilized in Home Entertainment Products Rule").<sup>42</sup> The Commission sought comments on, among other things, the economic impact, and benefits of this Rule; possible conflict between the Rule and State, local, or other Federal laws or regulations; and the effect on the Rule of any technological, economic, or other industry changes. The Amplifier Rule establishes uniform test standards

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<sup>40</sup> 80 Fed. Reg. 53274 (Sept. 3, 2015).

<sup>41</sup> 87 Fed. Reg. 64399 (Oct. 25, 2022). See also II(c), *Final Actions*, below for information about two separate completed rulemaking proceedings for the Energy Labeling Rule.

<sup>42</sup> 85 Fed. Reg. 82391 (Dec. 18, 2020).

and disclosures so that consumers can make more meaningful comparisons of amplifier-equipment performance attributes. On July 27, 2022, the Commission sought public comment on a proposal to amend the Rule to require sellers making power-related claims to calculate power output using uniform testing methods to allow consumers to easily compare amplifier sound quality.<sup>43</sup> Additionally, for multichannel home theater amplifiers the Commission sought comment about how to set test conditions to reflect typical consumer use. The comment period closed on September 26, 2022, and staff is reviewing the comments.

*Safeguards Rule (Standards for Safeguarding Customer Information), 16 CFR part 314.* On December 9, 2021, the Commission amended the Safeguards Rule issued a final rule that provides additional requirements for financial institutions' information security programs.<sup>44</sup> The final rule also expands the definition of "financial institution" to include entities that are significantly engaged in activities

that are incidental to financial activities, so that the rules would cover “finders” for example, companies that serve as lead generators for payday loan companies or mortgage companies. This rule was effective January 10, 2022, except that the provisions set forth in section 314.5 are applicable beginning June 9, 2023.<sup>45</sup>

*Telemarketing Sales Rule, 16 CFR part 310.* On August 11, 2014, the Commission initiated a periodic review of the Telemarketing Sales Rule (“TSR”).<sup>44</sup> The comment period as extended closed on November 13, 2014.<sup>45</sup> On June 3, 2022, the Commission issued a Notice of Proposed Rulemaking seeking public comment on proposed amendments to the TSR.<sup>46</sup> The proposed amendments would require telemarketers and sellers to maintain additional records of their telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business-to-business telemarketing transactions, and add a new definition for the term “previous donor.” The comment period closed on August 2, 2022, and the Commission has received 25 comments to date. Also on June 3, 2022,

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<sup>43</sup> 87 Fed. Reg. 45047 (July 27, 2022).

<sup>44</sup> 86 Fed. Reg. 70272 (Dec. 9, 2021).

<sup>45</sup> See II(b), *Proposed Rules*, above for information about a separate and ongoing rulemaking under the Safeguards Rule.

<sup>44</sup> 79 Fed. Reg. 46732 (Aug. 11, 2014).

<sup>45</sup> 79 Fed. Reg. 61267 (Oct. 10, 2014).

<sup>46</sup> 87 Fed. Reg. 33677 (June 3, 2022).

the Commission issued an Advance Notice of Proposed Rulemaking seeking public comment on whether the TSR should continue to exempt telemarketing calls to businesses, whether the TSR should require a notice and cancellation mechanism with negative option sales, and whether to extend the TSR to apply to telemarketing calls that consumers initiate to a telemarketer (i.e., inbound telemarketing calls) regarding computer technical support services.<sup>47</sup> The comment period closed on August 2, 2022, and the Commission has received 22 comments to date. Staff is reviewing the comments and will provide a recommendation to the Commission regarding both rulemakings by spring 2023.

*Motor Vehicle Dealers Trade Regulation Rule, 16 CFR part 463.* On July 13, 2022, the Commission issued a Notice of Proposed Rulemaking soliciting public comment on a proposed Rule regarding unfair or deceptive acts or practices under its authority with respect to motor vehicle dealers described in section 1029(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203.<sup>48</sup> The proposed rule would prohibit motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles, require accurate pricing disclosures in dealers' advertising and sales discussions, require dealers to obtain consumers' express, informed consent for charges, prohibit the sale of any add-on product or service that confers no benefit to the consumer, and require dealers to keep records of advertisements and customer transactions. The public comment period closed on September 12, 2022. The staff is reviewing the public comments.

*Trade Regulation Rule on Impersonation of Government and Businesses, 16 CFR part 461.* On October 17, 2022, the Commission issued a Notice of Proposed Rulemaking to address certain deceptive or unfair acts or practices of impersonation of government and business officials.<sup>49</sup> The public comment period will close on December 16, 2022, and staff will review the comments before making a recommendation as to next steps.

*Earnings Claims Trade Regulation Rule, 16 CFR part 462.* On March 11, 2022, the Federal Trade Commission (FTC or Commission) issued an Advance Notice of Proposed Rulemaking seeking public

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<sup>47</sup> 87 Fed. Reg. 33662 (June 3, 2022).

<sup>48</sup> 87 Fed. Reg. 42012 (July 13, 2022).

<sup>49</sup> 87 Fed. Reg. 62741 (Oct. 17, 2022).

comment about a proposed rule to address deceptive or unfair marketing using earnings claims.<sup>50</sup> The comment period closed on May 10, 2022, and staff is reviewing the comments.

*Trade Regulation Rule on Commercial Surveillance, 16 CFR part undetermined.* On August 22, 2022, the Commission initiated an Advance Notice of Proposed Rulemaking (ANPR) under section 18 of the FTC Act to limit privacy abuses, curb lax security practices, and ensure that algorithmic

decisionmaking does not result in unlawful discrimination.<sup>51</sup> The Commission sought public comment on whether new rules are needed to protect people’s privacy and information in the commercial surveillance economy. On September 8, 2022, the Commission hosted a public forum regarding its ANPR on commercial surveillance and data security practices that harm consumers and competition. The public forum included panel discussions and members of the public provided remarks. The ANPR’s extended public comment period closed on November 21, 2022.<sup>52</sup> Staff is reviewing the public comments.

*Funeral Rule, 16 CFR part 453.* On February 14, 2020, the Commission initiated a periodic review of the Funeral Industry Practices Rule (Funeral Rule).<sup>53</sup> The comment period as extended closed on June 15, 2020.<sup>54</sup> Commission staff is reviewing the comments received and anticipates submitting a recommendation for further action to the Commission in fall 2022. The Funeral Rule, which became effective in 1984, requires sellers of funeral goods and services to give price lists to consumers who visit or call a funeral home. On November 2, 2022, the Commission issued an Advance Notice of Proposed Rulemaking seeking comment on potential updates to modernize the Funeral Rule, including improvements to the public accessibility of funeral home price information.<sup>55</sup> The comment period will close on January 3, 2023. The Commission also issued a staff report that summarizes the results of their review of almost 200 funeral provider websites.<sup>56</sup>

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<sup>50</sup> 87 Fed. Reg. 13951 (Mar. 11, 2022).

<sup>51</sup> 87 Fed. Reg. 51273 (Aug. 22, 2022).

<sup>52</sup> 87 Fed. Reg. 63738 (Oct. 20, 2022).

<sup>53</sup> 85 Fed. Reg. 8490 (Feb. 14, 2020).

<sup>54</sup> 85 Fed. Reg. 20453 (Apr. 13, 2020). <sup>55</sup> 87 Fed. Reg. 66096 (Nov. 2, 2022).

<sup>56</sup> See Fed. Trade Comm’n, FTC Seeks to Improve the American Public’s Access to Funeral Service Prices Online (Oct. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-seeks-improve-american-publicsaccess-funeral-service-prices-online>.

*Unfair or Deceptive Fees Trade Regulation Rule, 16 CFR part 464.* On November 8, 2022, the Commission issued an Advance Notice of Proposed Rulemaking to address certain deceptive or unfair acts or practices related to fees.<sup>57</sup> The public comment period will close on January 9, 2023, and staff will review the comments before making a recommendation as to next steps.

*Trade Regulation Rule on the Use of Reviews and Endorsements, 16 CFR part 465.* On November 8, 2022, the Commission issued an Advance Notice of Proposed Rulemaking to address certain deceptive or unfair acts or practices concerning reviews and endorsements.<sup>58</sup> The public comment period will close January 9, 2023, and staff will review the comments before making a recommendation as to next steps.

### **c. Final Actions**

Since the publication of the 2021 Regulatory Plan, the Commission has issued the following final agency actions in rulemaking proceedings:

*Privacy of Consumer Financial Information Rule, 16 CFR part 313.* The Privacy of Consumer Financial Information Rule (Privacy Rule) requires, among other things, that certain motor vehicle dealers provide an annual disclosure of their privacy policies to their customers by hand delivery, mail, electronic delivery, or through a website, but only with the consent of the consumer. Congress enacted the Fixing America's Surface Transportation Act (FAST Act) which included a provision amending the Gramm-Leach-Bliley Act to create a new exception to the annual notice requirement. On April 4, 2019, the Commission issued a Notice of Proposed Rulemaking to revise the Rule's scope, to modify the Rule's definitions of "financial institution" and "federal functional regulator," and to update the Rule's annual customer privacy notice requirement.<sup>59</sup> The proposed update would remove certain examples in the Rule that apply to financial institutions that now fall outside the scope of the Commission's Rule. These changes were intended to conform the Rule to the current requirements of the Gramm-Leach-Bliley Act,

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<sup>57</sup> 87 Fed. Reg. 67413 (Nov. 8, 2022); see also Fed. Trade Comm'n, Federal Trade Commission Explores Rule Cracking Down on Junk Fees (Oct. 20, 2022), <https://www.ftc.gov/news-events/news/pressreleases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees>.

<sup>58</sup> 87 Fed. Reg. 67424 (Nov. 8, 2022); see also Fed. Trade Comm'n, Federal Trade Commission to Explore Rulemaking to Combat Fake Reviews and Other Deceptive Endorsements (Oct. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-explore-rulemaking-combat-fake-reviews-otherdeceptive-endorsements>.

<sup>59</sup> 84 Fed. Reg. 13150 (Apr. 4, 2019).

as amended by the Dodd-Frank Act and the FAST Act. The public comment period closed on June 3, 2019. On December 9, 2021, the Commission issued a final rule to, among other changes, revise the Rule's scope, modify the Rule's definitions of "financial institution" and "federal financial regulator," and update the Rule's annual customer privacy notice requirement.<sup>60</sup> This action was necessary to conform the Rule to the current requirements of the Gramm-Leach-Bliley Act. The amendments were effective on January 10, 2022.

*Safeguards Rule (Standards for Safeguarding Customer Information), 16 CFR part 314.* On December 9, 2021, the Commission issued a final rule amending the Safeguards Rule by providing additional requirements for financial institutions' information security programs.<sup>61</sup> The final rule also expands the definition of "financial institution" to include entities that are significantly engaged in activities that are incidental to financial activities, so that the rules would cover "finders" for example, companies that serve as lead generators for payday loan companies or mortgage companies. This rule was effective January 10, 2022, except that the provisions set forth in section 314.5 are applicable beginning June 9, 2022.<sup>62</sup>

*Energy Labeling Rule, 16 CFR part 305.* On June 2, 2021, the Commission proposed updates to comparability ranges and sample labels for central air conditioners.<sup>63</sup> The comment period closed on August 2, 2021. On October 20, 2021, the Commission issued a final rule updating the comparability ranges and sample labels for central air conditioners.<sup>64</sup> The amendments are effective on January 1,

2023. On May 25, 2022, the Commission sought public comments on proposed updates to the Rule which would allow consumers to compare the estimated annual energy consumption more accurately for appliances before they buy them.<sup>65</sup> The Rule requires the Commission to revise the comparability ranges and associated energy costs every five years for certain EnergyGuide labels. The Commission's Notice of Proposed Rulemaking sought comments on scheduled updates to the comparability ranges that were last

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<sup>60</sup> 86 Fed. Reg. 70020 (Dec. 9, 2021). <sup>61</sup> 86 Fed. Reg. 70272 (Dec. 9, 2021).

<sup>62</sup> 87 Fed. Reg. 71509 (Nov. 23, 2022); also see II(b), *Proposed Rules*, above for information about a separate and ongoing rulemaking under the Safeguards Rule.

<sup>63</sup> 86 Fed. Reg. 29533 (June 2, 2021).

<sup>64</sup> 86 Fed. Reg. 57985 (Oct. 20, 2021).

<sup>65</sup> 87 Fed. Reg. 31754 (May 25, 2022).

revised in 2017. The public comment period<sup>21</sup> closed on July 11, 2022. On October 12, 2022, the Commission issued a final rule updating the comparability ranges.<sup>66</sup> The amendments are effective on January 10, 2023, with the exception of amendatory instructions 9 (appendix E1) and 15 (appendix L), which are effective on October 1, 2023.<sup>22</sup>

#### **d. Significant Regulatory Actions**

The Commission has one proposed rule that would be a "significant regulatory action" under the definition in section 3(f) of Executive Order 12866, which is the Motor Vehicle Dealers Trade Regulation Rule discussed above. In the Notice of Proposed Rulemaking that contains the rule's proposed text, the Commission explored at length its regulatory objectives in initiating the rulemaking, the reasonable

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<sup>21</sup> Fed. Reg. 61465 (Oct. 12, 2022).

<sup>22</sup> See II(b), *Proposed Rules*, above for information about a separate and pending rulemaking proceeding under the Energy Labeling Rule.

alternatives also under consideration, and the anticipated costs and benefits of the proposed rule and its alternatives.<sup>23</sup> The preliminary regulatory analysis concluded that the proposed rule would likely deliver significantly more benefits than it would impose costs, namely that it would produce net economic benefit of more than \$29 billion over ten years. The Commission also requested comments on these issues and will carefully evaluate all evidence in the rulemaking record before determining whether to issue a final rule and if so in what form.

The Commission has no proposed rule that would have significant international impacts, or any international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations, as defined in Executive Order 13609.

### **Summary**

The actions under consideration advance the Commission's mission by informing and protecting consumers while minimizing burdens on honest businesses. The Commission continues to identify and weigh the costs and benefits of proposed regulatory actions and possible alternative actions.

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<sup>23</sup> See 87 Fed. Reg. 42031–44 (July 13, 2022).