



Office of Inspector General

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

September 29, 2023

**MEMORANDUM**

**FROM:** Andrew Katsaros  
Inspector General

A handwritten signature in black ink, appearing to read "Andrew Katsaros".

**TO:** Lina M. Khan, Chair

**SUBJECT:** FY 2023 Report on the FTC's Top Management and Performance Challenges

The *Reports Consolidation Act of 2000* requires that each agency's inspector general provide an annual summary perspective on the most serious management and performance challenges facing the agency, as well as a brief assessment of the agency's progress in addressing those challenges. The challenges summarized in this document are based either on work conducted by the Office of Inspector General (OIG) or separate observations and discussions with senior leaders at the Federal Trade Commission (FTC).

In section I, the OIG has identified the following issues as the top management and performance challenges currently facing the FTC:

- 1. Securing Information Systems and Networks from Destruction, Data Loss, or Compromise**
- 2. Addressing Challenges to FTC Litigation**
- 3. Successfully Managing Merger Transactions**
- 4. Combating Increasingly Sophisticated Imposter Scams and Enhancing the Public's Awareness of Them**

In section II, the OIG has identified **The FTC's Oversight of the Horseracing Integrity and Safety Authority** as a "watch list" item—an issue that does not rise to the level of a serious management and performance challenge but, nonetheless, requires management's continued attention.

Finally, we acknowledge the FTC's progress in addressing a watch list item and two challenges included in our last two *Top Management and Performance Challenges (TMC)* reports: expert witness costs (challenge), managing records and sensitive agency information (challenge), and managing consumer misuse of the Consumer Sentinel Network (CSN) (watch list item). With respect to expert witness costs: despite a significant increase in spending, additional funding has

offered a reprieve that has, at least temporarily, mitigated this challenge in FY 2023. Along with the agency's additional, temporary funding, we note the FTC's continuing commitment to monitoring through regular cost projections and its consideration of internal expertise, when possible. Regarding managing records and sensitive agency information, management has reported the FY 2023 completion of several initiatives aimed at modernizing recordkeeping and making records management progressively more integral to agency operations. In FY 2023, the FTC also made further progress in complying with National Archives and Records Administration records schedule requirements. Lastly, we acknowledge the FTC's continuing efforts to address the public misuse of its consumer-focused data gathering systems, such as IdentityTheft.gov and the Do Not Call Registry, and the effects it has on data accuracy and stakeholders' confidence in them. We view the FTC as having incorporated improvements to the integrity and user experience into its routine management of these systems.

We provided a draft of this report to FTC management, whose comments on the FTC's progress in each challenge area have been summarized and incorporated into the final version.

We appreciate the FTC's ongoing support for the OIG.

# I. The FTC's Top Management and Performance Challenges

## 1. Securing Information Systems and Networks from Destruction, Data Loss, or Compromise

As with any other federal government agency, the FTC must remain vigilant in securing its networks and systems against ever-changing IT security threats. While each agency must confront its own unique combination of legacy IT systems and emerging technology—within its own budgetary constraints—a new era of government-wide shared risks and responsibilities has continued to evolve. In last year's *TMC* report, the OIG first reported on changes to the Federal Information Security Modernization Act of 2014 (FISMA) scoring metrics that introduced supply chain risk management (SCRM) as a new consideration.<sup>1</sup> This year's *TMC* presents the OIG's first opportunity to reflect on the government-wide responsibility to adapt agencies' IT security posture to a broadly common framework of zero trust architecture (ZTA). In light of these evolving information security requirements faced by the federal government, the FTC can mark both early progress from recent fiscal years and unfinished tasks that lie ahead.

The OIG's FY 2022 audit of the FTC's information security program and practices<sup>2</sup> provides the agency its most recent publicly released FISMA scorecard. The audit reported on an overall IT security posture that was effective for the period October 1, 2021, through July 31, 2022. While the overall IT security program reflected a maturity level of 4 (Managed and Measurable),<sup>3</sup> within one of five functions (Function 1: Identify) the FTC's SCRM component rated at a maturity level of 3 (Consistently Implemented).<sup>4</sup> The audit report noted that the agency was in the process of implementing SCRM controls; to elevate its program to the Managed and Measurable level, according to the report's Area of Improvement, the FTC should finish implementing these controls so that it can “demonstrate how to utilize qualitative and quantitative performance metrics to measure, report on, and monitor the information security and SCRM performance of organizationally

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<sup>1</sup> The U.S Department of Commerce National Institute of Standards and Technology (NIST) lists five cybersecurity functional areas: Identify, Protect, Detect, Respond, and Recover. The Council of the Inspectors General on Integrity and Efficiency's (CIGIE's) FISMA guidance uses NIST's five functional areas to create a five-level maturity model for IGs to rate their respective agencies. CIGIE—in coordination with the Office of Management and Budget (OMB) the Department of Homeland Security (DHS), and the Federal Chief Information Officers and Chief Information Security Officers councils—has established level 4 (Managed and Measurable) as the effective level for offices of inspectors general (OIGs) scoring federal program maturity. See [FY 2022 Core IG FISMA Metrics Evaluation Guide](#) (originally published May 12, 2022; re-posted January 2023) for further details.

<sup>2</sup> The OIG contracted with an independent public accounting firm to conduct an audit to meet the FY 2022 FISMA requirements. The objective of the audit was to evaluate the status of the FTC's overall IT security program and practices. For further details, see [Fiscal Year 2022 Audit of the Federal Trade Commission Information Security Program and Practices](#), FTC OIG (Nov. 14, 2022).

<sup>3</sup> The *FY 2022 Core IG FISMA Metrics* describes level 4, “Managed and Measurable,” as follows: “Quantitative and qualitative measures of the effectiveness of policies, procedures, and strategies were collected across the organization to assess and make necessary changes.”

<sup>4</sup> The *FY 2022 Core IG FISMA Metrics* describes level 3, “Consistently Implemented,” as follows: “Policies, procedures, and strategies were consistently implemented, but quantitative and qualitative effectiveness measures were lacking.”

defined products, systems, and services provided by external providers.”<sup>5</sup> Even though the audit made no recommendations on addressing this one needed improvement, the OIG recognizes this new requirement as an ongoing challenge that the FTC (and other federal government agencies) continue to face.

In addition to FISMA, NIST has issued a ZTA scorecard for the federal government to use to measure their IT security program’s maturity. This new metric emerged from a cascading series of federal government responses to an increasing number of high-profile security breaches: (a) an August 2020 NIST Special Publication defining ZTA and providing “general deployment models and use cases” where ZTA could improve agencies enterprise-wide IT security;<sup>6</sup> (b) a May 2021 Executive Order initiating a government-wide migration to ZTA, including but not limited to “the security benefits of cloud-based infrastructure”;<sup>7</sup> and (c) the DHS Cybersecurity and Infrastructure Security Agency’s (CISA’s) June 2021 *Zero Trust Maturity Model*, a pre-decisional draft “stopgap solution” for federal agencies creating ZTA implementation plans.<sup>8</sup>

OMB’s January 26, 2022, memorandum M-22-09, *Moving the U.S. Government Toward Zero Trust Cybersecurity Principles*, required federal agencies to meet specific cybersecurity objectives and goals by the end of FY 2024.<sup>9</sup> The OIG issued an August 2023 ZTA audit report with the objective of assessing the FTC’s progress on the implementation of ZTA and compliance with federal mandates. Based on analysis of the FTC’s Office of the Chief Information Officer (OCIO) documentation—provided to corroborate its self-assessment of the agency’s ZTA implementation status—the OIG concluded that the FTC (a) has made progress on meeting ZTA cybersecurity principles and (b) aims to meet most of the relevant OMB milestones for ZTA implementation by the end of FY 2024. Nonetheless, there will be significant tasks that lie ahead for aligning the agency’s security posture with the federal government’s evolving requirements in a new era of zero trust.

### ***FTC Progress in Addressing the Challenge***

Since the publication of the OIG’s FY 2022 FISMA audit report, which identified the FTC’s need to finish implementing controls that comprise its SCRM, the agency reports having taken steps to do so by (1) revising the relevant policy, incorporating asset management and disposal requirements; (2) developing acquisitions guidance to ensure SCRM requirements are incorporated into procurement actions; and (3) launching efforts to develop a framework for monitoring and measuring risk.

The FTC also reports having made steady progress on its ZTA implementation. One noteworthy milestone the agency reports is the recent award of a security operations center service contract, which is implementing an enterprise security incident and event

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<sup>5</sup> [Fiscal Year 2022 Audit of The Federal Trade Commission's Information Security Program and Practices](#), at 8, FTC OIG (Nov. 14, 2022).

<sup>6</sup> [NIST, SP 800-207, ZERO TRUST ARCHITECTURE \(2020\)](#).

<sup>7</sup> [EO 14028, 86 Fed. Reg. 26633 \(2021\)](#).

<sup>8</sup> In April 2023, CISA issued Version 2.0 of its *Zero Trust Maturity Model*, accessible at [https://www.cisa.gov/sites/default/files/2023-04/zero\\_trust\\_maturity\\_model\\_v2\\_508.pdf](https://www.cisa.gov/sites/default/files/2023-04/zero_trust_maturity_model_v2_508.pdf).

<sup>9</sup> [OMB, OMB Memo No. M-22-09, MOVING THE U.S. GOVERNMENT TOWARD ZERO TRUST CYBERSECURITY PRINCIPLES \(2022\)](#).

management platform that will provide increased network threat visibility in line with ZTA cybersecurity principles. The FTC communicated to the OIG, following the recent audit report, that its ongoing ZTA implementation continues to be a priority for the Commission; however, given potential resource constraints, the agency anticipates that this work may extend beyond FY 2024. As the OIG noted, agencies across government must be particularly vigilant towards the increased threats to accessing sensitive data and privileged accounts. Accordingly, the FTC reports prioritizing several focus areas with the largest impact on reducing threats to agency assets and data.

## 2. Addressing Challenges to FTC Litigation

The FTC continues to grapple with how to litigate its cases most effectively, following the Supreme Court’s decisions in *AMG Capital Management, LLC v. FTC*, 593 U.S. \_\_\_, 141 S. Ct. 1341 (2021), and *Axon Enterprise, Inc. v. FTC*, 598 U.S. \_\_\_, 143 S. Ct. 890 (Apr. 14, 2023).

In 2021, *AMG Capital Management, LLC (AMG)* stripped federal courts of the authority—which they had been exercising for more than 4 decades—to award equitable monetary relief to consumers when the FTC obtains a permanent injunction in federal court pursuant to FTC Act Section 13(b), 15 U.S.C. § 53(b).

Since the decision, the FTC’s primary means of obtaining monetary relief is through FTC Act Section 19.<sup>10</sup> There are two pathways to obtain monetary relief under Section 19. For cases that involve conduct that violates an existing FTC consumer protection rule, the FTC can seek monetary relief directly in federal court under Section 19(a)(1).<sup>11</sup> For cases that involve deceptive or unfair conduct that does not violate an existing FTC rule, the FTC must engage in a two-step process: (1) first, conduct an administrative proceeding (and all appeals); and (2) then initiate a federal court proceeding under Section 19(a)(2) to obtain monetary relief, in which the FTC must establish that a reasonable person would have known that the conduct at issue was “dishonest or fraudulent.” The Section 19(a)(2) process is time-consuming and resource-intensive, because it requires agency staff to litigate the case twice—once through the administrative process, and then in federal court.

Section 19 also has several limitations that Section 13(b) did not. While Section 13(b) had no time limitation on monetary relief, Section 19 limits monetary relief to redress injuries that occurred within 3 years of the filing of the FTC’s complaint.<sup>12</sup> Second, prior to *AMG*, courts ordered disgorgement for unjust gains pursuant to 13(b). However, since Section 19 only authorizes relief “necessary to redress injury,” courts have ruled that Section 19 does not authorize disgorgement beyond a defendant’s gains tied to a consumer injury.<sup>13</sup> Finally, prior to *AMG*, the FTC used Section 13(b) to seek equitable monetary relief in cases involving anti-competitive conduct. Section 19, however, only authorizes the agency to seek

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<sup>10</sup> 15 U.S.C. §57b.

<sup>11</sup> Most, but not all, FTC consumer protection rules are enforceable under Section 19(a)(1).

<sup>12</sup> 15 U.S.C. § 57b(d).

<sup>13</sup> See *FTC v. Credit Bureau Ctr., LLC*, 2023 WL 5604291, at \*6 (7th Cir. Aug. 30, 2023).

monetary relief in consumer protection cases. Accordingly, because of *AMG*, the FTC no longer can obtain any monetary relief for anti-competitive conduct.<sup>14</sup>

The Supreme Court's decision this year in *Axon Enterprise, Inc. (Axon)* has further hampered the FTC's ability to utilize Section 19 to obtain monetary relief for consumers. Following *AMG*, the agency increased its use of the administrative process for consumer protection cases that did not involve rule violations to preserve its ability to seek monetary relief ultimately in federal court under Section 19(a)(2). In *Axon*, however, the Court held that respondents in FTC administrative cases can immediately file actions in federal court challenging the constitutionality of the administrative proceeding—and need not wait for administrative proceedings to conclude before doing so. When such challenges are filed, courts typically stay the administrative proceeding. Thus, as a result of *Axon*, respondents can now easily halt administrative proceedings by filing constitutional challenges in federal court. Not only do these collateral challenges cause significant delays to the FTC's enforcement efforts, but the agency also must expend resources litigating these collateral claims.

In addition to the impact on the FTC's ability to obtain monetary relief, *Axon* has negatively affected other aspects of the agency's litigation. When the FTC files for an injunction in federal court to block a merger before litigating the case through the administrative process, respondents are increasingly raising affirmative defenses and counterclaims regarding the constitutionality of the administrative process. As in the consumer protection cases, these constitutional challenges cause delay and require significant FTC resources to litigate.

Finally, the Supreme Court's recent grant of certiorari in *SEC v. Jarkesy*, 143 S. Ct. 2688 (June 30, 2023) has the potential to limit further the FTC's ability to use its administrative process. In *Jarkesy*, the Court will consider, among other things, whether Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the authority to choose whether to bring its enforcement actions in federal court or administratively—and whether statutory removal restrictions on SEC administrative law judges and Commissioners violate constitutional separation of powers principles. Given the similarities in the structure of the FTC's and SEC's administrative courts, and the removal protections applicable to both agencies' administrative law judges and Commissioners, a Supreme Court ruling adverse to the SEC could have broad implications for the FTC. Already, concerns relating to *Jarkesy* and *Axon* have required the FTC spend more time strategizing the proper forum for its cases.

### ***FTC Progress in Addressing the Challenge***

The FTC reports having taken several steps to maximize its ability to bring successful cases and obtain monetary relief for consumers in this new legal landscape. First, the FTC asserts that its Bureau of Consumer Protection (BCP) continues to focus its enforcement efforts on cases that involve rule violations for which they can obtain monetary relief directly in federal court under Section 19(a)(1) and cases involving order violations for which the FTC can obtain monetary relief in the form of a compensatory

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<sup>14</sup> Another consequence of *AMG* is that several defendants have attempted to reopen old cases and vacate equitable monetary relief judgments previously imposed under Section 13(b). Although no court has agreed to do so, the FTC has had to spend significant resources litigating these cases.

contempt sanction. Using this two-pronged strategy, BCP reports having obtained judgments of approximately \$237 million in FY 2022 and approximately \$193 million to date in FY 2023. Nonetheless, these efforts do not appear to make up for the loss of monetary relief authority under Section 13(b). Prior to *AMG*, BCP obtained monetary relief in enforcement cases of more than \$718 million in FY 2019 and more than \$796 million in FY 2020.<sup>15</sup> Second, the FTC reports that BCP initiated two administrative cases after *AMG*,<sup>16</sup> but those cases have not yet been resolved.

In addition, BCP reports that it has turned to using alternative remedial authorities, such as the Penalty Offense Authority—which allows it to seek civil penalties if an entity engages in conduct that the FTC has previously found unfair or deceptive in an administrative order other than a consent.<sup>17</sup> The agency also reports continued enforcement of its existing federal court and administrative orders against repeat offenders, resulting in significant monetary relief from repeat offenders to compensate for consumer losses attributable to their order violations.<sup>18</sup>

The FTC also asserts that it has initiated several rulemakings to increase the number of cases it could bring directly in federal court pursuant to Section 19(a)(1). In 2023, the agency reported advancing rulemakings in the following areas: consumer reviews and testimonials, junk fees, negative options, and impersonations of governments and businesses.

Finally, the FTC reports its continued support and technical assistance to Congress on proposed legislation that would restore its authority to obtain monetary relief in federal court under 13(b). Since the OIG first raised this challenge in the FY 2021 *TMC* report, several bills have been introduced to restore the FTC's ability to secure equitable monetary relief via Section 13(b).<sup>19</sup> As of this report's publication, Congress has not yet passed such a bill.

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<sup>15</sup> BCP obtained approximately \$178 million in monetary relief judgments in FY 2021, of which \$155 million was obtained prior to the *AMG* decision in April 2021.

<sup>16</sup> See Fleetcor Technologies at <https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3000-fleetcor-technologies-matter> and Intuit, Inc. at <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3119-intuit-inc-matter-turbotax>.

<sup>17</sup> 15 U.S.C. § 45(m)(1)(B). To exercise this authority, the FTC can send a Notice of Penalty Offenses outlining conduct that the agency has determined is unlawful. In 2023, the FTC authorized two new Notices of Penalty Offense covering substantiation of product claims and the misuse of confidential information, which were sent out to approximately 700 businesses. In addition, in FY 2023, the agency also sent previously approved Notices to an additional 14 recipients.

<sup>18</sup> See, e.g., *FTC v. Pukke*, 53 F.3d 80 (4<sup>th</sup> Cir. 2022) (affirming \$120 million compensatory contempt sanction for violation or prior federal court order obtained by the FTC); *FTC v. Noland*, 2023 WL 3372517 (D. Ariz. May 11, 2023) (imposing \$7.3 million compensatory contempt sanction for violation of prior federal court order obtained by the FTC).

<sup>19</sup> See The Consumer Protection and Due Process Act, S. 1076, 118th Cong. (2023); Consumer Protection Remedies Act of 2022, S. 4145, 117th Cong. (2022); The Consumer Protection and Due Process Act, S. 3410, 117th Cong. (2021); Consumer Protection and Recovery Act, H.R. 2668, 117th Cong. (2022).

### 3. Successfully Managing Merger Transactions

How the FTC can most efficiently and effectively manage its workload related to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)<sup>20</sup>—and the difficulties encountered by Bureau of Competition (BC) attorneys reviewing and investigating mergers—has persisted as one of the agency’s top management and performance challenges.

In the FY 2022 *TMC* report, the OIG noted that, “[s]ince FY 2019, the sheer volume of transactions submitted to the FTC has made an already burdensome HSR workload even more challenging for agency leadership” and its BC attorneys. One year later, the volume of transactions has decreased significantly. The OIG noted that, in FY 2022, the volume started to drop, a trend that has continued through FY 2023: for the 12-month period through June 2023, merger transaction volume was down by an average of 45% (316 transactions per month through June 2022 versus 173 through June 2023).<sup>21</sup>

The FTC may also be experiencing a shift in its oversight relationship with entities proposing mergers. The agency works under a 30-day statutory timeline to preliminarily review a proposed merger. If the agency issues a “second request” for information during that time, once the parties comply with the second request, the agency has an additional 30 days before parties may consummate the transaction. Upon issuing a second request, the agency previously had often entered into timing agreements with merging parties where both parties agreed not to close the transaction for a specified number of days following their compliance with the second request.<sup>22</sup> Since a timing agreement to extend the FTC’s review period is solely within the discretion of the parties, the agency reports being at a disadvantage when fewer parties are agreeing to sign such an agreement.

Further complicating the relationship between the FTC and merging parties, in the agency’s estimation, are some approaches that entities are more often deploying in disputes with the FTC.<sup>23</sup> These approaches can include more liberal assertions of privilege—which would force the agency to challenge entities in court to acquire company information—and merging parties’ increased use of ephemeral messaging (i.e., electronic communications that either quickly disappear or are only maintained temporarily). While the FTC is adapting to some of these potentially emerging complexities, it also faces challenges in strategizing on its responses, including its optimal depth of review and position on Requests for Additional Information (i.e., second requests). It is also noteworthy that merger review timelines have not changed since the HSR Act was first enacted in 1976.

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<sup>20</sup> The HSR Act, 15 U.S.C. § 18a—together with Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 15 of the Clayton Act, 15 U.S.C. § 25—enables the FTC and the Antitrust Division of the U.S. Department of Justice (DOJ) to obtain relief against anticompetitive mergers, by requiring that certain proposed mergers be reported to the FTC and the Antitrust Division prior to consummation.

<sup>21</sup> As regularly reported on the FTC’s *Premerger Notification Program* website, at <https://www.ftc.gov/enforcement/premerger-notification-program>.

<sup>22</sup> The FTC’s public Model Timing Agreement identifies this as a 60–90-day time period. See [https://www.ftc.gov/system/files/attachments/merger-review/ftc\\_model\\_timing\\_agreement\\_2-27-19\\_0.pdf](https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf).

<sup>23</sup> The FTC and the Antitrust Division do not take action on the vast majority of transactions, and those transactions are allowed to proceed following the specified HSR period.

In light of an evolving merger landscape, on June 29, 2023, the FTC issued a proposed rulemaking<sup>24</sup> with the stated intent of expanding the information available to the agency, thereby improving the efficiency and effectiveness of premerger reviews—including thorough changes to its Premerger Notification and Report Form. The proposed rulemaking emerged after “a comprehensive review of the premerger notification process and based on the [government’s] experience conducting in-depth investigations of challenged mergers.” Although several of the themes included in the proposed update have been in prior iterations, the draft guidelines represent a departure from the previous lens under which mergers were assessed, which include separate guidelines for horizontal and vertical mergers.

### ***FTC Progress in Addressing the Challenge***

Regarding its June 29, 2023, proposed rulemaking, the FTC reports that receiving additional information up-front will allow the agency to more effectively use the initial 30-day waiting period before issuing a second request. This is especially important, the agency asserts, considering parties’ increasing reluctance to enter into timing agreements.

The FTC has stated its view that the information entities currently report in an HSR filing is insufficient, pointing to a considerable expansion in challenges with premerger reviews in its notice of proposed rulemaking. When communicating its rationale to the OIG, the FTC particularly highlights the unique challenges of reviewing mergers and acquisitions in sectors of the economy that rely on technology and digital platforms to conduct business. In its response to our draft *TMC* report, the FTC further underscored how HSR reportable transactions have become more complex over time. In its view, numerous stakeholders beyond those contemplated in the current guidelines exist in matters beyond an ultimate parent entity, or UPE (i.e., the controlling post-merger entity), and an acquiring entity—including minority partners and loan guarantors—could materially influence a transaction.

According to the FTC, some of the more significant changes to the premerger process proposed by the agency include the required disclosure of foreign subsidiaries; the need to provide draft agreements or detailed term sheets if filing on preliminary agreements; the disclosure of additional companies or individuals that might exert influence over the parties to the transaction; requirements to provide narratives describing product overlaps, supply relationships and information about labor; and generally requesting more detailed information on company activity in almost every section of the HSR filing. The agency asserts that it has proposed these rules to provide clarification on items that previously led to confusion, obtain information critical to the analysis of potential competitive issues by the FTC and U.S. Department of Justice (DOJ) Antitrust staff, and to implement the Merger Filing Fee Modernization Act of 2022.

On the heels of the FTC’s proposed amendments to the premerger notification rules, in a separate July 19, 2023, draft proposal for public comment, the FTC and the DOJ issued joint

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<sup>24</sup> See Notice of Proposed Rulemaking, *Premerger Notification; Reporting and Waiting Period Requirements*, at <https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements>.

merger guidelines<sup>25</sup> with a similar update rationale to “reflect the collected experience of the Agencies over many years of merger review in a changing economy.” The draft proposal identified 13 separate guidelines that explain how the FTC and DOJ intend to evaluate the legality of future mergers. Included in these are guidelines focused on significant increases in market concentrations, attempts to eliminate actual or potential competition, anti-competitive coordination, entrenchments of dominant positions, serial acquisitions, and entities that operate multi-sided platforms (i.e., businesses that facilitate interactions among multiple individuals, groups, or entities).

#### **4. Combating Increasingly Sophisticated Imposter Scams and Enhancing the Public’s Awareness of Them**

Given the FTC’s role as the nation’s primary consumer protection agency, the OIG considers the FTC’s ability to stay on top of increasingly sophisticated scam tactics against consumers and educating them about these tactics to be a top management and performance challenge. In this role, the FTC prioritizes combating fraud scams through enforcement and consumer education, among other efforts. For several reasons, this work has become more challenging for the FTC.

First, imposter scams<sup>26</sup> have become a significant fraud type reported to the FTC. In the second quarter of 2023<sup>27</sup> alone, the FTC received 182,704 reports about imposter scams, more than double that of the next pervasive fraud type reported (i.e., online shopping and negative review fraud).<sup>28</sup> Imposter scams were also the most-reported fraud type in 2022, resulting in reported losses of \$2.6 billion.

Second, the perpetrators of these scams can conduct their schemes from overseas locations, while masking their identities and locations, making it difficult for the agency to locate and pursue fraud perpetrators. Further complicating the challenge is the ready availability of technology such as voice over internet protocol (VoIP), social media, robocalls, text messages, and computer popups. These tools and technological advances enable scammers to scale operations, reduce costs, and increase the number of targets.

The fight against consumer scams remains an uphill battle. Scammers continue to evolve, using increasingly sophisticated methods in their illegal operations. As scammers increase

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<sup>25</sup> See Draft Merger Guidelines for Public Comment, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p859910draftmergerguidelines2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf).

<sup>26</sup> The FTC defines *imposter scams* as those in which someone pretends to be a trusted person to get consumers to send money or give personal information. Examples include the following: scammers posing as a government agency, a friend or relative with an emergency need for money, a romantic interest, a computer technician offering technical support, or a charity or company. The category also includes grant, property tracer, or refund scams, in which the scammer is allegedly a government employee.

<sup>27</sup> See [The Big View: All Sentinel Reports | Tableau Public](#). Data published July 25, 2023, and current as of June 30, 2023.

<sup>28</sup> The top 10 categories of fraud, according to data held in the CSN are (1) imposter scams; (2) online shopping and negative reviews; (3) business and job opportunities; (4) investment-related; (5) telephone and mobile services; (6) internet services; (7) prizes, sweepstakes, and lotteries; (8) health care-related; (9) foreign money offers and fake check scams; and (10) travel, vacations, and timeshares.

the sophistication of their methods and regularly adapt tactics to exploit vulnerabilities and evade detection, the FTC must also continue to innovate to keep pace.

### ***FTC Progress in Addressing the Challenge***

Consistent with its consumer protection mission, the FTC has taken a multi-pronged approach in its attempts to combat increasingly sophisticated scams and enhance public awareness:

*Public awareness and education.* The FTC asserts that it routinely takes measures to protect consumers and educate them about scams and other types of fraud. To inform the public, the agency conducts public education campaigns focused on scam and fraud prevention. Through its consumer website<sup>29</sup> and consumer and business blogs, the FTC regularly shares information about new imposter scams and other fraud schemes with its stakeholders. The agency reports further amplifying its anti-scam messaging by regularly posting information and graphics aimed at educating consumers on its social media accounts,<sup>30</sup> as well as sharing short videos on its public website<sup>31</sup> and YouTube<sup>32</sup> about how to avoid a plethora of imposter scams. In addition, to reach a wider range of people from many communities, the agency has reported conducting in-language media campaigns on a variety of news and advertising platforms, in several in-language mainstream and other media outlets.<sup>33</sup>

*Rulemaking.* Citing sharp increases in impersonation fraud—both during and since the pandemic—the FTC, in December 2021,<sup>34</sup> took a step to combat impersonation fraud by proposing a Rule on Impersonation of Government and Business aimed directly at combating government and business impersonation fraud.<sup>35</sup> If finalized, the proposed rule may help the agency to seek civil penalties against impersonators, more readily obtain monetary redress for their victims, and benefit businesses whose brands are harmed by unscrupulous impersonators. In advance of the new rule hearing, the FTC reported receiving letters and comments of support, pointing out that “existing remedies are currently insufficient to stem the ever-increasing tide of impersonation scams.”<sup>36</sup>

*Disruption.* BCP has reported pursuing strategies to disrupt robocalls, including suing the parties who make robocalls, VoIP service providers, and other third parties that help

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<sup>29</sup> See <https://consumer.ftc.gov/> and <https://consumidor.ftc.gov/>.

<sup>30</sup> See <https://www.facebook.com/federaltradedecommission/>; also, see <https://twitter.com/FTC>.

<sup>31</sup> [Imposter Scams | Consumer Advice \(ftc.gov\)](https://consumer.ftc.gov/consumer-advice/imposter-scams/).

<sup>32</sup> See <https://www.youtube.com/ftcvideos>.

<sup>33</sup> See, for example, [https://consumer.gov/system/files/consumer\\_gov/pdf/FTC%20Top%20Scams%202022%203-10-23%20Invite.pdf](https://consumer.gov/system/files/consumer_gov/pdf/FTC%20Top%20Scams%202022%203-10-23%20Invite.pdf).

<sup>34</sup> See Notice of Proposed Rulemaking, *Trade Regulation Rule on Impersonation of Government and Businesses*, at [Federal Register: Trade Regulation Rule on Impersonation of Government and Businesses](https://www.federalregister.gov/documents/2021/12/23/2021-24747-trade-regulation-rule-on-impersonation-of-government-and-businesses).

<sup>35</sup> On May 4, 2023, the FTC held a virtual, informal hearing on the proposed rule.

<sup>36</sup> See *ABA Letter Requesting Speaking Slot Impersonation Hearing 2023 04 14 final*, at <https://www.regulations.gov/comment/FTC-2023-0030-0025>.

facilitate illegal calls.<sup>37</sup> BCP also reported enacting Project Point of No Entry (PoNE) to combat foreign-based robocall scams, which sometimes serve as a gateway for imposter scam fraudsters to make contact with potential victims. Through PoNE, the FTC asserts that it disrupts scammers by identifying point of entry VoIP service providers routing illegal call traffic. Armed with such data, the agency reports, it can then demand that the ISPs stop assisting and facilitating illegal telemarketing and robocalls. The FTC’s demand letters warn that the conduct may violate U.S. law<sup>38</sup> and that the agency may take legal action.

*Collaboration with other agencies.* The FTC Act, Section 6(f), authorizes the agency to share confidential information with other appropriate enforcement agencies, allowing the FTC and other law enforcers to cooperate and minimize duplication in investigations. Through the Consumer Sentinel Network (CSN)—a free cyber tool that is available to any federal, state, or local law enforcement agency—the agency shares millions of reports about scams. Hundreds of federal, state, local, and foreign agencies maintain access to CSN; however, not all agencies may be regularly accessing this resource.

Additionally, the FTC reports playing a key role in disseminating education and outreach messages across the government, including launching a Scams Against Older Adults Advisory Group<sup>39</sup> and leading discussions on the impact of scams with its component committees.<sup>40</sup>

Through these measures, the FTC has demonstrated that combating and preventing fraud, including imposter scams, remains a priority. Nonetheless, increasingly sophisticated measures to combat scam tactics must be developed to protect consumers.

## II. Agency Watch List

The OIG also maintains a “watch list,” currently with one issue that does not meet the threshold of a serious management or performance challenge—but nevertheless warrants the attention of agency officials.

### **The FTC’s Oversight of the Horseracing Integrity and Safety Authority**

The Horseracing Integrity and Safety Act of 2020 (the Act)<sup>41</sup> requires the FTC to oversee the newly established Horseracing Integrity and Safety Authority (HISA)—whose purpose

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<sup>37</sup> See, e.g., *U.S. v. Hello Hello Miami*, 1:23-cv-22553 (S.D. Fla. July 18, 2003) (VoIP provider); *U.S. v. Xcast Labs*, 2:23-cv-3646 (W.D. Ca. May 12, 2023) (VoIP provider); *FTC v. VoIP Terminator, Inc.*, 6:22-cv-00798 (M.D. Fla. Apr. 26, 2022) (VoIP provider); *U.S. v. Fluent*, 9:23-cv-81045, (S.D. Fla. July 17, 2023) (lead generator for robocalls); *U.S. v. Yodell Technologies, Inc.*, 8:23-cv-1575 (D. Fla. July 14, 2023) (provider of soundboard technology for robocalls); *FTC v. Stratics Networks, Inc.*, 3:23-cv-313 (S.D. Cal. Feb. 16, 2023) (provider of ringless voicemail services); *U.S. v. Bartoli*, 6:19-cv-01160 (M.D. Fla. June 21, 2019) (provider of dialing platform).

<sup>38</sup> 16 CFR 310, Telemarketing Sales Rule.

<sup>39</sup> <https://www.ftc.gov/news-events/events/2022/09/scams-against-older-adults-advisory-group-meeting>.

<sup>40</sup> The committees comprising the advisory group include (1) Consumer Education and Outreach, (2) Industry Training, (3) Technology and New Methods, and (4) Scam Prevention Research.

<sup>41</sup> 15 U.S.C. § 3051 et seq.

is to develop and implement a horseracing anti-doping and medication control program, as well as a racetrack safety program. Per the Act, HISA must appoint individuals to standing committees, which have the purpose of providing advice and guidance to HISA on its programs.<sup>42</sup> With the approval of the FTC, according to the agency, HISA has already promulgated comprehensive sets of rules regarding both anti-doping and medication control and racetrack safety. Moreover, the amended 15 U.S.C. §3053(e) gives the agency broad powers to “abrogate, add to, and modify” HISA rules.

While HISA is required to submit to the FTC any proposed rule, standard, or procedure it develops pursuant to its legislative mandate, the agency does not currently have the expertise in the horseracing industry—or in such narrower fields as racetrack safety and anti-doping and medication control—that is necessary to provide effective oversight. The current FTC organization—with bureaus focused broadly on consumer protection and competition issues—was structured long before it had oversight responsibility over professional sports or veterinary medicine. Undertaking this new oversight responsibility requires expertise in horseracing anti-doping and medication controls, as well as racetrack safety (e.g., training and racing standards, the humane treatment of horses, and establishing related evaluation and accreditation programs), in addition to the resulting program oversight considerations (e.g., funding, conflicts of interest, and jurisdiction; enforcement, rule violations, and civil sanctions; veterinary testing laboratories; and issues pertaining to collaborating with administrative law judges and state racing commissions).

### *Agency Comments*

The FTC reports having taken several measures to exercise its statutory obligation to enforce this Act. Most significantly, the agency asserts that it has focused on transparency in HISA’s operations, rules, and budget. After Congress expanded the FTC’s authority in 2022, the agency adopted a final rule requiring HISA to submit its proposed budget to the agency on an annual basis.<sup>43</sup> The FTC reports exploring other possible ways in which the agency, consistent with the Act, can ensure HISA’s adoption of best practices for effective governance. The agency asserts that it is also considering additional regulation that will further build on the Budget Order’s requirements. In addition, the FTC reports that it has designated a matrixed cross-agency group of staff, led by the Office of the Executive Director, and including the Office of the General Counsel, to work on HISA-related issues. The agency further asserts that it has engaged in benchmarking discussions with multiple federal agencies that oversee independent self-regulatory organizations.

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<sup>42</sup> *Id.* at § 3052.

<sup>43</sup> See HISA’s March 27, 2023, *Procedures for Oversight of the Horseracing Integrity and Safety Authority’s Annual Budget* (Budget Order) at <https://www.ftc.gov/legal-library/browse/federal-register-notices/procedures-oversight-horseracing-integrity-safety-authoritys-annual-budget>.