



October 11, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Comments on Video Game Loot Boxes
Matter No. P194502

On behalf of TechFreedom, we file these comments in the above-referenced proceeding.

I. About TechFreedom

TechFreedom is a non-partisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

II. Introduction

The Federal Trade Commission's sweeping jurisdiction and broad authority over unfair and deceptive acts and practices (UDAP) makes the agency, for better and worse, the *de facto* Federal Technology Commission: the agency is usually the first place anyone worried about some new technological development goes. Sometimes the FTC should indeed intervene in the market by exercising its UDAP authority. But in addressing such requests, we urge the Commission to keep three points in mind.

First, the FTC should generally address emerging consumer protection issues with humility: before rushing to intervene in the marketplace, it should exercise the powerful investigative tools Congress gave it in Section 6(b) of the FTC Act. The intention underlying these

investigative tools was that the FTC would advise lawmakers through the investigative work of its officers, and enable Congress to pass such remedial legislation as might be found necessary.¹

Second, given its uniquely broad authority and de facto rule as the Federal Technology Commission, the FTC is uniquely vulnerable to moral panics over new technologies. As Adam Thierer explains:

Fear-based reasoning and tactics are used by both individuals and institutions to explain or cope with complicated social, economic, or technological change.... [M]ost fears surrounding new information technologies are based on logical fallacies and inflated threats that lead to irrational technopanics and fear cycles. . . . If these fears and the fallacies that support them are not exposed and debunked, it is possible that a precautionary principle mindset will take root. . . [and] prohibition and anticipatory regulation will be increasingly proffered as solutions.²

Third, the FTC must always, before intervening in the marketplace, show that the practice at issue both a) falls within the FTC's jurisdiction under the FTC Act to police consumer protection issues raised by interstate commerce; **and** b) that the requirements of Section 5, as developed through the Commission's Unfairness and Deception Policy Statements, can be satisfied. We question whether either predicate can be demonstrated here.

Nonetheless, we welcome the FTC's review of activities in the computer game industry under its Section 5 authority,³ and are pleased to submit these comments.

¹ *C.f.* H.R. Rep. No. 63-533, at 3 (1914), ("the primary purpose of the act was legislative, to enable Congress by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be found necessary."); *and C.f.* H.R. Rep. No. 63-1142, at 12 (1914) (Conf. Rep.), ("Sec. 11. That when in the course of any investigation made under this act the commission shall obtain information concerning any unfair competition or practice in commerce not necessarily constituting a violation of law by the corporation investigated, it shall make report thereof to the President, to aid him in making recommendations to Congress for legislation in relation to the regulation of commerce, and the information so obtained and the report thereof shall be made public by the commission.").

² Adam Thierer, *Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle*, 14 Minn. J. L. Sci. & Tech. 309, 385 (2013), available at https://www.mercatus.org/system/files/Technopanics-by-Adam-Thierer_MN-Journal-Law-Science-Tech-Issue-14-1.pdf.

³ Fed. Trade Comm'n, *FTC Workshop Looks Into Loot Boxes*, Matter No. P194502 (Apr. 8, 2019, 11:14AM), <https://www.regulations.gov/docket?D=FTC-2019-0021>.

III. The FTC Should Define “Loot Boxes” Narrowly

The economic dynamics of the computer game industry have clearly changed significantly over the past decade. While retail game prices have remained relatively flat, development costs of “AAA” (premium) game products have skyrocketed.⁴ Closing the business case on video game development has required producers to become more creative with their economic models, which has led many to include microtransactions (purchases within games) as a major revenue source. “Buy to Play” (“B2P”) boxed games with a \$39, \$49, or \$59 price-tag that once dominated the market have been largely displaced by Free to Play (“F2P”), “freemium,” and other games where in-game purchases play a significant role. This is especially true in the mobile game space.⁵ At the far end of the spectrum are so-called “Loot Boxes,” which involve offering random valuable in-game items for a price.

In addressing concerns about loot boxes, the FTC should focus on clear consumer protection problems. The term “Loot Box” has been defined in a number of ways, from specific examples of game mechanics that feature virtual boxes available for purchase in a game,⁶ all the way to a very general description of so-called “pay to win” mechanics within a game⁷ that could encompass a wide variety of computer game mechanics that clearly are legal.⁸ Since the very first computer games, “random drops” of items have been a core game mechanic.⁹ Part of the excitement of playing a computer game comes from the exploration aspects of the game: not knowing what’s around the next corner, and not knowing what treasures solving a puzzle or vanquishing a foe might bring. To say that these random aspects of game play are gambling,

⁴ See Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes - Session 1, *Presentation of Sean Kane at the Loot Box Workshop*, FTC (Aug. 8, 2019), available at <https://www.ftc.gov/news-events/audio-video/video/inside-game-unlocking-consumer-issues-surrounding-loot-boxes-session-1> [beginning at 15:00 mark].

⁵ Heier, Craig, *Free to Play: Mobile Gaming and the Precipitous Rise of Freemium*, 16 *The Review: A Journal of Undergraduate Student Research* 5-11 (May 2015), available at <http://fisherpub.sjfc.edu/ur/vol16/iss1/4>.

⁶ See GameSpot Staff, *Star Wars Battlefront 2's Loot Box Controversy Explained*, GameSpot (Nov. 22, 2017), available at <https://www.gamespot.com/articles/star-wars-battlefront-2s-loot-box-controversy-expl/1100-6455155/>.

⁷ See *The Worst and Best Pay to Win Games*, GAMEDESIGNING (accessed Oct. 10, 2019), available at <https://www.gamedesigning.org/gaming/pay-to-win-games/> (explaining “pay to win” game mechanics and calling out the “worst” games employing these tactics.).

⁸ For example, there was reference made at the FTC Loot Box Workshop, that new downloadable content for a game for which customers are charged somehow constitute a “Loot Box” and should be regulated.

⁹ Random treasure drops actually date back to pen and paper games such as “Dungeons and Dragons.” The fundamental game mechanics were incorporated into the first computer games, such as “pedit5” (or “The Dungeon”) in 1975, see Matt Barton, *Breaking News: Author of PEDIT5 Speaks Out!*, *Arcade Armchair* (Aug. 31, 2008), available at <https://bit.ly/2M4bqC2>; and “Rogue” in 1980, see Craddock, David L, *Dungeon Hacks: How NetHack, Angband, and Other Roguelikes Changed the Course of Video Games*, Part I Ch. 2 (Press Start Press 2015); and have been used in virtually all role playing computer games since.

or even harmful, would render virtually all aspects of gameplay subject to government oversight.

As such, before taking any action in this arena, the FTC must narrowly construe what it means by “Loot Box.” We propose the following definition:

A Loot Box is a computer game mechanic where:

1. A user purchases the Loot Box with either;
 - a. Real currency; or
 - b. Game currency that is purchased with real currency; **and**
2. The contents of the Loot Box are items that directly assist the user in progressing through the game, such as:
 - a. An item, ability, or knowledge that helps the user;
 - b. New levels, areas, or content of the game; **and**
3. The contents of the Loot Box are not known to the user at the time of purchase.

If the game mechanic lacks any one of these attributes, it should not be considered a Loot Box and its offering should be presumed lawful (unless the producers of the game have otherwise engaged in deceptive advertising practices, as discussed below).

For example, a game play mechanic that offers a quicker way to succeed in a game through purchasing items directly (without an element of chance), should not be considered a Loot Box.¹⁰ Moreover, the FTC should not interfere with the rights of consumers to spend money, even significant amounts of money, for virtual items within a game that they may lose.¹¹ The FTC must not become the Internet Nanny, deciding what consumers can and can’t spend their money on.

¹⁰ As discussed below, computer game players are quick to point out games that overuse “pay to win” mechanics, and many games have failed in the marketplace when it became widely known that “pay to win” mechanics predominated over gamer skill.

¹¹ For example, in 2014, the online space battle computer game “Eve Online” featured a battle including 2,200 players in which ships were destroyed in a single night on which players had spent over \$200,000 of real world currency. See Rich McCormick, *Spaceships Worth More than \$200,000 Destroyed in Biggest Virtual Space Battle Ever*, The Verge (Jan. 29, 2014: 2:32AM EST), available at <https://www.theverge.com/2014/1/29/5356498/eve-online-battle-sees-200000-dollars-worth-of-spaceships-destroyed>. That is not to say that the FTC could not investigate, for example, a company that pre-sells items in a game that may never exist under its Section 5 authority. See, e.g., Star Citizen’s Developers Met With Nation’s Leading Consumer Protection Group, Polygon (Feb. 12, 2018, 3:30PM EST), available at <https://www.polygon.com/2018/2/12/16997396/star-citizen-better-business-bureau-terms-of-service-changes>, (meeting between the creators of the yet-to-be-released computer game “Star Citizen” and the BBB about refunds and transparency).

In short, the FTC should only be interested in game mechanics that arguably involve: (1) payment (with real money); (2) chance; and (3) a valuable prize — things that look very much like gambling.

IV. The FTC Cannot Regulate Loot Boxes as a Form of Gambling

But therein lies the rub. The vast majority of comments filed to date in this proceeding (113 as of October 10, 2019) argue that the FTC should step in to regulate, or ban outright, Loot Boxes because they constitute “gambling.” But even if Loot Boxes — even defined narrowly as proposed above — would qualify as “gambling” under most state laws (which is by no means certain), it does not follow that the FTC has authority to prohibit gambling as an unfair or deceptive trade practice.

Traditionally, gambling statutes are criminal in nature and creatures of state law. The federal government's jurisdiction over gambling generally is limited to controlling gambling devices used in interstate commerce.¹² The Unlawful Internet Gambling Enforcement Act of 2006 authorizes a narrow role for the FTC in policing online gambling: regulating the banking industry's participation in processing payments for online gambling.¹³ Thus, the FTC has no explicit authority to police gambling.

Instead, the FTC would have to rely on its general UDAP authority under Section 5 of the FTC Act. Starting in 1964, the FTC attempted to use its Unfairness authority to prohibit or restrict practices that it deemed to violate “established public policy.”¹⁴ In the face of intense

¹² See, e.g., *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 307-308 (1934) (finding that “break and take” packages for candy products directed at children constituted a device in interstate commerce that promoted gambling); see also *Chas. A. Brewer & Sons v. Fed. Trade Comm'n*, 158 F.2d 74, 78 (6th Cir. 1946) (“[Though] neither the manufacture no [sic] sale of gambling devices may be specifically prohibited by federal statute, the use of such devices has met with uniform condemnation in the courts of the United States in proceeding where the Federal Trade Commission has sought to prevent their use as violative of the Federal Trade Commission Act.”).

¹³ The Unlawful Internet Gambling Enforcement Act (“UIGEA”), 31 U.S.C.A. § 5364(e)(1) (West) “prohibits any person engaged in the business of betting, as defined, from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts.” FTC, Unlawful Internet Gambling Enforcement Act, available at <https://www.ftc.gov/enforcement/statutes/unlawful-internet-gambling-enforcement-act>. The FTC's enforcement in this area has been scant, and even some in Congress have questioned whether the burdens of the regulations outstrip the benefits. See e.g., *Proposed UIGEA Regulations: Burden Without Benefit?*: Hearing Before the H. Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the Comm. on Fin. Serv., 110th Cong. (2008), available at <https://www.govinfo.gov/content/pkg/CHRG-110hhrg42714/html/CHRG-110hhrg42714.htm>.

¹⁴ See, e.g., J. Beales, Former Director, Bureau of Consumer Protection, “The FTC's Use of Unfairness Authority: Its Rise, Fall and Resurrection,” (May 30, 2003)[hereinafter “Unfairness Policy Statement”], available at

Congressional opposition and after being dubbed the “National Nanny” by *The Washington Post* for attempting to ban the advertising of sugared cereals to children, the FTC responded by narrowing its definition of unfairness in the Unfairness Policy Statement of 1980. In addition to dropping the “unethical or unscrupulous” prong of its unfairness test, the Commission constrained the “established public policy” prong significantly. “This criterion,” explained the Commission, “may be applied in two different ways. It may be used to test the validity and strength of the evidence of consumer injury, or, less often, it may be cited for a dispositive legislative or judicial determination that such injury is present.” In 1994, Congress prohibited the Commission from doing the latter by including these two sentences in Section 5(n): “In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”¹⁵ Thus, the FTC must satisfy the primary requirement of Section 5(n) by showing that the practice “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” In other words, the FTC cannot simply deem Loot Boxes to be unfair simply because they constitute “gambling.”

The Commission would have a difficult time citing state gambling laws as evidence of “established public policy” to “test the validity and strength of the evidence of consumer injury,”¹⁶ given the variation in state gambling laws and the lack of clarity as to how they might apply to Loot Boxes. For example, a number of courts have concluded that game mechanisms that look like Loot Boxes (as defined herein) do not constitute gambling under state gambling laws, because the items obtained through the purchase of Loot Boxes do not rise to the level of “valuable prizes.”¹⁷ Moreover, certain forms of gambling are legal in Louisiana and Nevada, and on sovereign tribal lands.

<https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection> (“the Commission should not be in the business of trying to second guess market outcomes when the benefits and costs of a policy are very closely balanced or when the existence of consumer injury is itself disputed”). See also Jennifer L. West, *A Case of Overcorrection: How the FTC’s Regulation of “Unfair Acts and Practices” Is Unfair to Small Businesses*, 58 Wm. & Mary L. Rev. 2105 (2017), <https://scholarship.law.wm.edu/wmlr/vol58/iss6/7>.

¹⁵ 15 U.S.C. § 45(n) (West).

¹⁶ Unfairness Policy Statement, *supra* note 14.

¹⁷ See, e.g., *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 (4th Cir. 2017) (in an action brought under Maryland state gambling statute, even when construed liberally, plaintiff could not prove that she lost money, because, win or lose, she could not redeem the virtual currency for real money); see also *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (winnings not redeemable for real money); and see *Soto v.*

Simply put, there is no national consensus on gambling that the FTC could apply to loot boxes. Declaring the offering of Loot Boxes (or even just certain Loot Box practices) to be an inherently unfair trade practice is precisely the kind of quasi-legislative policymaking the Unfairness Policy Statement of 1980 and the addition of Section 5(n) in 1994 were intended to guard against.

Thus, most of the comments in this proceeding prove too much: if Loot Boxes do constitute “gambling,” someone other than the FTC will need to step in and regulate — most likely at the state level, enforcing state gaming laws, and again, only for those game mechanics which constitute gambling under state law.

V. How the FTC Could Investigate and Enforce Against Unfair and Deceptive Loot Box Practices

Since 1980, the FTC has been judicious in its use of Unfairness. Instead, the FTC has focused on protecting consumers from deceptive trade practices.¹⁸ Under the Commission’s Policy Statement on Deception,¹⁹ it is a violation of Section 5 for a company to make a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.

In general, the Commission should take the same Deception-focused approach to Loot Boxes. The Commission has, of course, applied its unfairness authority in one context that is somewhat analogous to Loot Boxes: the manner in which app store operators made it possible for children to make unauthorized purchases through the app stores after their parents had logged into a device. In 2017 the FTC and Amazon settled litigation over Amazon’s billing of consumers for unauthorized in-app charges incurred by children totaling some \$70 million in eligible refunds.²⁰ This followed on the heels of FTC settlements in 2014

Sky Union, LLC, 159 F. Supp. 3d 871 (N.D. Ill. 2016). *See generally*, David J. Castillo, *Unpacking the Loot Box: How Gaming’s Latest Monetization System Flirts with Traditional Gambling Methods*, 59 Santa Clara L. Rev. 165 (2019).

¹⁸ 15 U.S.C. § 45(a)(4)(A) (West).

¹⁹ Fed. Trade Comm’n, *FTC Policy Statement on Deception*, (Oct. 14, 1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

²⁰ Fed. Trade Comm’n, *FTC, Amazon to Withdraw Appeals, Paving Way for Consumer Refunds Related to Children’s Unauthorized In-App Charges*, (Apr. 4, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-amazon-withdraw-appeals-paving-way-consumer-refunds-related>.

with both Apple²¹ and Google.²² While this application of Unfairness might be justified by *some* Loot Box practices, it will not apply to all, nor can it justify restricting Loot Boxes across the board. Both Deception and Unfairness require fact-specific inquiries. It is virtually impossible, therefore, for the FTC to make any blanket pronouncements about Loot Boxes that would cover all of the game mechanics that have been raised in this proceeding.

In addition, to the extent that Loot Boxes are used in child-directed games, or in situations where the game operator has actual knowledge that the user is a child, the FTC could use COPPA as an additional hook for policing Loot Boxes: like any other in-app purchase, a Loot Box would involve the collection of a credit card number (or other payment account information) from the user, which triggers COPPA's requirement for verifiable parental consent. Such an application of COPPA would, unlike Section 5, allow the FTC the ability to seek monetary penalties for first-time violations.

Even on a case-by-case enforcement basis, the FTC will need to be specific about the practices it is attempting to regulate. In *LabMD*, the Eleventh Circuit rejected the FTC's claims that failure to meet the vague standard of having "adequate data security" was an unfair trade practice.²³ As the court said there, the FTC may only bar *specific* practices, and cannot require a company "to overhaul and replace its data-security program to meet an indeterminable standard of reasonableness."²⁴ Similarly, generalized conclusions about computer game mechanics, in the abstract, are likely to prove insufficient to put gaming companies on notice that the FTC make take action under Section 5 against them for their Loot Box practices.

VI. The Computer Game Industry has a Long History of Community Oversight and Industry Self- Regulation

The outcry by politicians concerning Loot Boxes is nothing compared to the scorn and ridicule heaped on game developers releasing products with game mechanics such as Loot

²¹ Fed. Trade Comm'n, *FTC Approves Final Order in Case About Apple Inc. Charging for Kids' In-App Purchases Without Parental Consent*, (Mar. 27, 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/03/ftc-approves-final-order-case-about-apple-inc-charging-kids-app>, (settlement opened the door to up to \$32.5 million in refunds from Apple).

²² Fed. Trade Comm'n, *FTC Approves Final Order in Case About Google Billing for Kids' In-App Charges Without Parental Consent*, (Dec. 5, 2014), available at <https://bit.ly/2lk3ybl>, (settlement opened the door to up to \$19 million in refunds from the Google Play Store).

²³ See *LabMD, Inc. v. Fed. Trade Comm'n*, 894 F.3d 1221 (11th Cir. 2018).

²⁴ *Id.* at 1236.

Boxes that require people to pay additional money to advance through the stages of a game.²⁵ Indeed, players have not been shy in suing game developers over such tactics.²⁶ This should come as no surprise, as computer game users are well known for strongly expressing their views about computer games. There are dozens, if not hundreds, of websites dedicated to conducting deep and thorough reviews of games,²⁷ often well in advance of the commercial release of a product. YouTube hosts hundreds of channels and many thousands of reviews of new computer game releases, including covering issues such as Loot Boxes which garner hundreds of thousands of views.²⁸ A player wishing to purchase a new game can easily find out about a game, and its game mechanics, with ease and minimal effort.

²⁵ See Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big Controversy Explained*, Tom's Guide (Aug. 09, 2019), available at <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions.news-26161.html>; see also Erik Kain, *EA's Latest Loot Box Shenanigans Are Absurd, and This Whole Thing is a Circus*, Forbes (Jun 20, 2019, 12:05PM), available at <https://www.forbes.com/sites/erikkain/2019/06/20/eas-latest-loot-box-shenanigans-are-absurd-but-a-government-ban-is-still-a-mistake/#54b8836245eb>; and see Ben Gilbert, *The Video Game Industry is Facing Government Scrutiny Over Loot Boxes, and the Most Powerful Leaders in Gaming Are Divided Over What To Do*, Business Insider (Jun. 23, 2019), available at <https://www.businessinsider.com/video-game-industry-loot-box-legislation-2019-6>.

²⁶ See, e.g., Makena Kelly, *Epic Games Sued Over 'Predatory' Llama Loot Boxes*, The Verge (Feb. 28, 2019, 9:41PM EST), available at <https://www.theverge.com/2019/2/28/18245574/fortnite-epic-games-sued-lawsuit-predatory-llama-loot-boxes>.

²⁷ See, e.g., Kotaku, *Loot Boxes*, (last visited Oct. 10, 2019), <https://kotaku.com/tag/loot-boxes>, (entire section of computer game review site dedicated to reviewing games that include Loot Boxes); see also Charlie Hall, *Now You Can Peek Inside Loot Boxes Before You Open Them In CS:GO, but Only In France*, Polygon (Oct. 1, 2019, 12:40PM EDT), available at <https://www.polygon.com/2019/10/1/20893490/cs-go-loot-box-x-ray-scanner-france>.

²⁸ See, e.g., AngryJoeShow, *NFS: Payback Loot Boxes – Angry R4nt!*, YouTube (last visited Oct. 10, 2019, 5:05PM EST) (1,012,780 views), <https://www.youtube.com/watch?v=wFAG2MLVjAY>; see also Inside Gaming, *Loot Boxes "Caused Huge Damage to Our Family" – Inside Gaming Daily*, YouTube (Jul 15, 2019, last visited Oct. 10, 2019, 5:10PM EST) (289,382 views), available at <https://www.youtube.com/watch?v=jSla0x-NKmo>; and see IGN, *Why Apex Iron Crown Loot Boxes Are Bad*, YouTube (Aug. 14, 2019, last visited Oct. 10, 2019, 5:11pm EST) (199,008 views), available at <https://www.youtube.com/watch?v=6NwTWIND9R0>; and Inside Gaming, *Sony, Microsoft, Nintendo Finally Cave on Loot Boxes - Inside Gaming Roundup*, YouTube (Aug. 10, 2019, last visited Oct. 10, 2019, 5:12PM EST) (185,868 views), available at <https://www.youtube.com/watch?v=52LjEtacBy0>; and Hugbox, *Lootboxes Are Insulting*, YouTube (Nov. 11, 2017, last visited Oct. 10, 2019, 5:14PM EST) (162,120 views), available at <https://www.youtube.com/watch?v=VwVUAzBF7do>; and WatchMojo.com, *Top 5 Dumbest Loot Boxes Systems in Games*, YouTube (Nov. 6, 2017, last visited Oct. 10, 2019, 5:15PM EST) (126,438 views), available at https://www.youtube.com/watch?v=1_CjODCsLI; and Upper Echelon Gamers, *My Rude Awakening With Lootboxes*, YouTube (Jul.15, 2019, last visited Oct. 10, 2019, 5:16PM EST) (113,042 views), available at <https://www.youtube.com/watch?v=eVYMBavYbgY>.

In this respect, computer gamers are in a much better position than regulators to call the industry to task for business practices that may harm consumers.²⁹ Gamers know much more about how computer games work than FTC staffers, and in many ways are better equipped both to critique games, and get the word out to fellow gamers to be wary of certain games that contain Loot Boxes or pay-to-win game mechanics that require players to expend large sums of money in order to complete a game. These Internet influencers have a much better chance of reaching potential purchasers of computer games than does an FTC Advisory that is published on ftc.gov but enjoys little exposure among gamers.

The gaming industry itself has a history of self-regulation. Because of the passion of the user community described above, organizations such as the Entertainment Software Rating Board (“ESRB”) have developed standards that provide industry members both guidance and models for industry norms.³⁰ ESRB first responded to the Loot Box issue in February, 2018, announcing an industry standard of labeling for boxed computer games that contain in-game purchases.³¹ Apple announced at the end of 2017 that developers of mobile games for the App Store would be required to disclose the odds for games that employ Loot Box-type game mechanics.³² Google’s Play Store announced a similar policy in May of this year, although its definition of Loot Boxes appears to be slightly different.³³

²⁹ See, e.g., Paul Tassi, *We Shouldn’t Trust The US Government To Know How To Ban Loot Boxes and Microtransactions*, Forbes (May 10, 2019, 9:33AM), available at <https://www.forbes.com/sites/paultassi/2019/05/10/we-shouldnt-trust-the-us-government-to-know-how-to-ban-loot-boxes-and-microtransactions/#6d00ac2331c7>.

³⁰ In addition to creating a rating system for games, ESRB has developed tools to help parents understand game mechanics and help determine whether a game is appropriate for their children. See Entertainment Software Rating Board, *Tools for Parents*, <https://www.esrb.org/tools-for-parents/>.

³¹ See Kyle Orland, *ESRB Defends “fun” Loot Boxes as It Starts Labeling All “in-game purchases” [Updated]*, (Feb. 27, 2018, 11:01AM), available at <https://arstechnica.com/gaming/2018/02/esrb-defends-fun-loot-boxes-as-it-starts-labeling-all-in-game-purchases/>.

³² Jonathan, *Divulging the Odds — Loot Boxes & The App Store*, AdColony (Jan. 9, 2018), available at <https://www.adcolony.com/blog/2018/01/09/divulging-odds-loot-boxes-app-store/>, (we would note that Apple’s definition of a Loot Box appears to be more expansive than the one that we propose here – “If an app has an IAP item containing other random items, then Apple considers that a loot box. End of story. The App Store rules officially define the term as “mechanisms that provide randomized virtual items for purchase.”)

³³ See Adi Robertson, *Google’s Play Store starts requiring games with loot boxes to disclose their odds*, The Verge (May 29, 2019, 4:49PM EDT), available at <https://www.theverge.com/2019/5/29/18644648/google-play-store-loot-box-disclosure-family-friendly-policy-changes>, (“Apps offering mechanisms to receive randomized virtual items from a purchase (*i.e.*, ‘loot boxes’) must clearly disclose the odds of receiving those items in advance of purchase.”).

At the Loot Box Workshop, ESRB announced that the three major computer game console makers, Nintendo, Microsoft, and Sony will require new and updated games that sell randomized Loot Boxes to reveal the relative odds of receiving individual in-game items with the purchase of the Loot Box.³⁴ In its Press Release, the Entertainment Software Association (“ESA”) also announced that many of the major computer game producers have also agreed to implement more transparency and disclose odds in games that used randomized purchase mechanics such as Loot Boxes.³⁵ The game companies that have agreed to implement this new policy in 2020 include Activision Blizzard, BANDAI NAMCO Entertainment, Bethesda, Bungie, Electronic Arts, Epic, Microsoft, Nexon, Nintendo, Sony Interactive Entertainment, Square Enix, Take-Two Interactive, THQ Nordic, Ubisoft, Warner Bros. Interactive Entertainment, and Wizards of the Coast. And as expected, this new policy was widely reported, and in some instances, widely criticized as not going far enough.³⁶

Taken together, members of the computer game industry that have agreed to odds disclosure, both game producers and purchase platforms, represents a substantial percentage of the major computer games purchased. And although not having the force of law or regulation, the FTC can look to these industry norms and practices to help shape its approach to Loot Boxes.

VII. The FTC Should Propose, at Most, Limited Guidance Under its Section 5 Authority

Given its limited jurisdiction, as well as the current state of industry self-regulation, what can and should the FTC do in this area? We suggest the following:

1. **Prepare a report based on this proceeding.** Following the close of comments in this proceeding and further staff investigation, the FTC could issue a report

³⁴ See Entm’t Software Ass’n, *Video Game Industry Commitments to Further Inform Consumer Purchases*, (last visited Oct. 10, 2019, 5:29PM EST), available at <https://www.theesa.com/perspectives/video-game-industry-commitments-to-further-inform-consumer-purchases/>.

³⁵ *Id.*

³⁶ See, e.g., Kyle Orland, *Never Tell Me the Odds —Sony, Microsoft, Nintendo Team Up to Force Loot Box Odds Disclosures*, *Ars Technica* (Aug. 7, 2019, 11:48AM), available at <https://arstechnica.com/gaming/2019/08/console-makers-will-require-disclosure-of-loot-box-odds/>; Makena Kelley, *Nintendo, Microsoft, and Sony Commit to Disclose Drop Rates for Loot Boxes*, *The Verge* (Aug. 7, 2019, 11:41AM EDT), available at <https://www.theverge.com/2019/8/7/20758626/nintendo-microsoft-sony-loot-box-drop-rate-disclosure-video-games>; Dave Their, *Under Threat of Legislation, Sony, Microsoft And Nintendo Agree To Force Loot Box Odds Disclosure*, *Forbes* (Aug. 7, 2019, 2:31PM), available at <https://www.forbes.com/sites/davidthier/2019/08/07/under-threat-of-legislation-sony-microsoft-and-nintendo-agree-to-force-loot-box-odds-disclosure/#7dc5a7c8449e>.

identifying areas of concern under its Section 5 authority. Further areas of inquiry that should be included in this report:

- a. The extent to which the failure to disclose odds is traceable to actual consumer harm, and whether such disclosure would be an adequate method for reducing or avoiding consumer harm.³⁷ The inquiry should review the extent to which the computer game industry discloses odds of winning in random game purchase mechanics, including Loot Boxes, as discussed herein. This would include a census of popular games to determine which are adhering to the industry practice of disclosing odds;
- b. The manner in which the industry is currently displaying odds. Is the disclosure obvious, clear, and concise? Are the odds displayed at every purchase opportunity, or only generally and in more vague terms? Are these disclosures made available in a “frictionless” way, or in order to obtain the odds, must a player remove herself from the game to make a purchase decision? Case studies from several popular games, including displaying graphics from the game, would help inform the Loot Box debate.
- c. The extent to which the industry utilizes “dynamic odds” in implementing computer game dynamics. One particularly difficult issue is the so-called practice of “harpooning whales”: targeting users who have demonstrated a propensity to spend more in a game.³⁸ As we stated above, users should be free to spend whatever money they wish in a computer game, but they may also reasonably expect to be treated fairly vis-à-vis other players. If a game identifies users who are willing to spend more money than the average user and change the odds to lessen their chance of receiving a useful item (and thereby entice them to buy more Loot Boxes), it is likely that this knowledge of this practice would be material to the users who are being charged more. As such, unless the use of such dynamic odds is clearly and conspicuously disclosed to the user, such “harpooning” would be deceptive practice.³⁹ It is

³⁷ See e.g., Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 Md. L. Rev. 217, 255–56 (2004) (“Although such disclosure is a step in the right direction, it is flawed in that it presents the information in terms of probabilities, which consumers have difficulty understanding, and it does not let the gambler know how much on average she can expect to lose in any effort to win the maximum prize.”).

³⁸ See Jim Lynch, *iOS game developers aim their harpoons at money-bloated whales*, CIO (last visited Oct. 10, 2019), available at <https://www.cio.com/article/3003154/free-to-play-ios-games-aim-their-harpoons-at-money-bloated-whales.html>.

³⁹ We differentiate dynamic odds from price discrimination, the practices of charging different prices for in-game transactions. Price discrimination traditionally has not been found *per se* to be an unfair business practice, and instead is regulated only under specific conditions. See, e.g., 15 U.S.C. § 13. In addition to the pro-

difficult to see how such “harpooning” would continue if it were adequately disclosed. As such, there should be no need for the FTC to restrict harpooning as an unfair trade practice.

- d. The extent to which inconsistent state regulation of non-gambling game mechanics could unduly burden interstate commerce. We are particularly concerned that inconsistent state regulations on disclosure and labeling may be extremely costly to the gaming industry, especially for online games and games that are available only online for download and playing. The Dormant Commerce Clause looms large here; the FTC should not ignore it.⁴⁰

2. **Work with industry to formulate clearer industry standards.** The computer game industry has expressed a willingness to develop clearer standards, especially in the area of labeling and disclosure. The Commission should work with a wide variety of industry players (including “gamers’ rights” advocates) to help them better articulate industry norms in this area. The areas where clearer standards could be developed are:

- a. Defining different types of game mechanics;
- b. Establishing norms for disclosure, including:⁴¹
 - i. “Packaging” of games (including digitally downloadable content), notice types, placement, font sizes, etc.
 - ii. Notice of the average or anticipated “spend” by a consumer to complete the game (or percentage of players who spend money monthly spend if the game is open-ended);

consumer benefits price discrimination (charging consumers with a greater willingness to pay more also means charging consumers with a lesser willingness to pay less, generally maximizing consumer welfare), differential pricing is generally subject to detection by consumers, at least to some degree in that consumers know the prices they have been charged and can compare those prices with other users, allowing consumers to warn others of such practices. The use of dynamic odds, however, is much more difficult to discover or make public, and as such, is more inherently harmful to consumers. By way of example: if Game X charges \$1.00 for an in-game purchase to most players, but \$10.00 to certain players who are known to spend more in the game, this differential is easy to see and make public. In contrast, if the odds of getting a “cloak of invisibility” in a Loot Box drop is 50% for most players, but only 10% for players known to spend more, this dynamic odds mechanic is far more difficult to discover and make public.

⁴⁰ For our work on the issue of preemption and the Dormant Commerce Clause generally, see Graham Owens, *Federal Preemption, the Dormant Commerce Clause & State Regulation of Broadband: Why State Attempts to Impose Net Neutrality Obligations on Internet Service Providers Will Likely Fail*, TechFreedom (Oct. 2018), available at <http://techfreedom.org/wp-content/uploads/2018/10/Federal-Preemption-the-Dormant-Commerce-Clause-State-Regulation-of-Broadband.pdf>.

⁴¹ We are not advocating that the FTC should mandate each of these norms. Rather, these are the subject areas that should be addressed by industry, in collaboration with the FTC.

- iii. Odds of winning a particular item in a microtransaction;
- iv. How to disclose those odds (*e.g.*, every time a purchase can be made versus a more generalized notice of odds and a link to more details that consumers can visit or ignore);
- v. Use of dynamic odds and ways to protect certain individuals from being targeted;
- vi. A framework to establish consistent and uniform parental consent mechanisms for in-game purchases by minors. Parents should be provided an easy way to block in-game purchases or limit the amount a child can spend on a game without having to understand specific game play or mechanics;
- vii. A framework to establish consistent and uniform “opt-in” mechanisms to allow individuals to set spending limits and otherwise control their own tendencies to over-spend. Ideally, all of these norms could be translated into a common set of standards, “seals,” or other graphics that would allow a consumer to quickly understand what they are purchasing.

3. **Educate the public about computer game mechanics.** This proceeding alone has received significant exposure in the media, helping to shine a light on the issue of Loot Boxes.⁴² The public would benefit if the Commission were to issue an FTC Consumer Information guidance document, such as it did with “Kids, Parents, and Video Games,”⁴³ discussing the results of the proceeding. Such an information release, for example, could link directly to the industry efforts mentioned above concerning disclosure on Loot Box odds. No doubt such an information release would trigger substantial reporting in the computer game press.

⁴² See, *e.g.*, Charlie Hall, *FTC Panel Reveals Troubling Relationship Between Streamers and Loot Box Creators*, Polygon (Aug. 7, 2019, 3:19pm EDT), available at <https://www.polygon.com/2019/8/7/20758974/ftc-loot-box-panel-streamer-publisher-sponsorships>; see also Makena Kelley, *FTC To Hold a Public Workshop on Loot Box Concerns This Year*, The Verge (Feb. 22, 2019, 12:31PM EST), available at <https://www.theverge.com/2019/2/22/18236352/loot-box-video-game-ftc-workshop-hassan-congress>; and see Steve Watts, *FTC Loot Box Summit Agenda Outlines Three Key Areas*, GameSpot (Aug. 1, 2019, 1:19PM PDT), available at <https://www.gamespot.com/articles/ftc-loot-box-summit-agenda-outlines-three-key-area/1100-6468828/>.

⁴³ Fed. Trade Comm’n, *Kids, Parents, and Video Games* (June 2012), available at <https://www.consumer.ftc.gov/articles/0270-kids-parents-and-video-games>.

VIII. Conclusion

Both in the context of this proceeding, and more generally, the FTC and the public as a whole must recognize that the FTC's jurisdiction in this area is limited. Rather than expect the FTC to establish a broad regulatory regime over computer game mechanics — the FTC clearly can't just ban Loot Boxes as violating state gambling laws — commenters should focus on what the FTC can do under its Section 5 authority by identifying specific practices that may be deceptive or unfair. Leveraging the power of the gamer community as well as industry self-regulation, the FTC can educate the public about industry practices while continuing to study the field and highlight concerns about practices that may be deceptive and unfair practices under Section 5 of the FTC Act.

Respectfully submitted,

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