

Complaint

IN THE MATTER OF

TAPJOY, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4740; File No. 172 3092
Complaint, March 9, 2021 – Decision, March 9, 2021

This consent order addresses Tapjoy, Inc.’s operation of an advertising platform within mobile gaming applications. The complaint alleges that Tapjoy has violated Section 5 of the Federal Trade Commission Act by representing that consumers will receive a reward of virtual currency upon completion of a specific action when, in many instances, that representation was false, misleading, or not substantiated at the time the representation was made. The consent order requires Tapjoy to disclose that its advertisers determine whether rewards are likely to issue, and when consumers are likely to receive rewards; and prohibits Tapjoy from making the misrepresentations alleged in the complaint.

Participants

For the *Commission*: *Matthew G. Schiltz* and *Matthew H. Wernz*.

For the *Respondents*: *Travis LeBlanc* and *David Mills*, *Cooley LLP*; *Christopher N. Olsen* and *Lydia B. Parnes*, *Wilson Sonsini Goodrich & Rosati*.

COMPLAINT

The Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Tapjoy, Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Tapjoy, Inc. (“Tapjoy” or “Respondent”) is a Delaware corporation with its principal place of business at 353 Sacramento Street, 6th Floor, San Francisco, CA 94111.
2. Tapjoy has advertised, marketed, or distributed virtual currency to consumers throughout the United States.
3. The acts and practices of Tapjoy alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

Tapjoy’s Business Practices

4. Tapjoy operates an advertising platform within mobile gaming applications (“apps”). On the platform, Tapjoy promotes offers of in-app rewards (e.g., virtual currency) to consumers who complete an action, such as taking a survey or otherwise engaging with third-party advertising. Often, these consumers must divulge personal information or spend money.

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In many instances, Tapjoy never issues the promised reward to consumers who complete an action as instructed, or only issues the currency after a substantial delay. Consumers who attempt to contact Tapjoy to complain about missing rewards find it difficult to do so, and many consumers who complete an action as instructed and are able to submit a complaint nevertheless do not receive the promised reward. Tapjoy has received hundreds of thousands of complaints concerning its failure to issue promised rewards to consumers. Tapjoy nevertheless has withheld rewards from consumers who have completed all required actions.

Tapjoy's Rewards Platform

5. Tapjoy's advertising platform appears in certain mobile games, including, for example, games related to war, shopping, sports, and home improvement. Tapjoy receives network fees and commissions from third-party advertisers that engage with consumers through Tapjoy's platform. Advertisers pay Tapjoy for each consumer who Tapjoy induces to, for example:

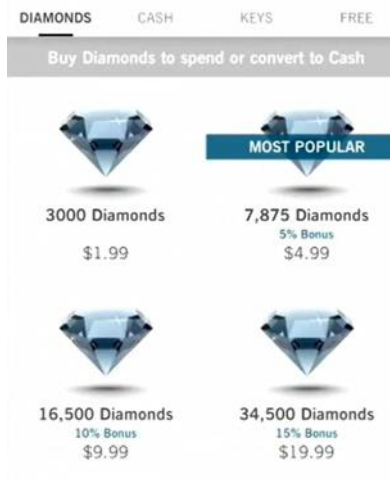
- purchase a product;
- enroll in a free trial of a magazine subscription, video streaming service, or other continuity program;
- disclose personally identifiable information;
- download an additional app;
- complete a survey; or
- watch a short video.

Tapjoy then pays a portion of each commission to the game developer, known as the "publisher," through whose game the consumer engaged with Tapjoy's platform.

6. To induce consumers to engage with the advertisers, Tapjoy offers in-app rewards in the form of a specified amount of virtual currency that can be used in the publishers' games. These games require or allow consumers to obtain and use virtual currency, such as diamonds, gold bars, coins, or cash, to facilitate game play, unlock special features, or reach higher game levels.

7. Consumers typically are able to obtain virtual currency in two ways: (i) through the game in which Tapjoy's platform appears, or (ii) through Tapjoy's platform. When obtained directly through the game, as demonstrated by the offer below, virtual currency is available immediately upon purchase.

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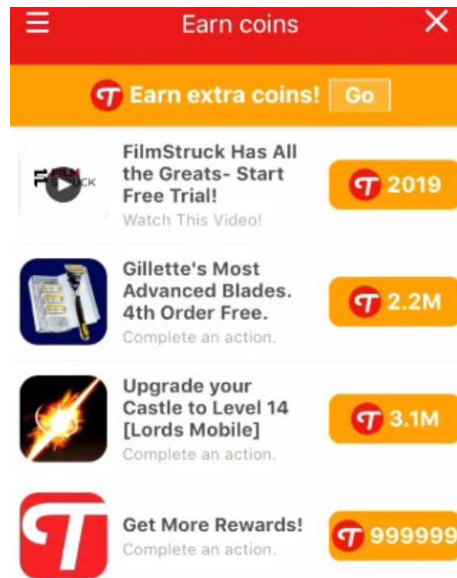


8. Consumers also can attempt to obtain currency by completing actions associated with third-party advertisements that Tapjoy displays to consumers on their in-game platform, known as their “offerwall.” Consumers can access Tapjoy’s offerwall by clicking on buttons within the game. Tapjoy’s offerwall lists a series of third-party advertisements, arranged for each consumer according to an algorithm Tapjoy developed. Next to each ad, Tapjoy represents the amount of virtual currency associated with completing that offer by displaying a number adjacent to or below the image of a diamond, gold bar, coin, or other symbol. For example, in the screenshot below, Tapjoy’s offerwall presents several third-party advertisements and claims that consumers can “earn” tens of thousands of virtual diamonds by completing the corresponding actions:



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9. In some apps, the “T” from Tapjoy’s logo has appeared next to the amount of virtual currency offered for each advertiser-related action, as shown below:

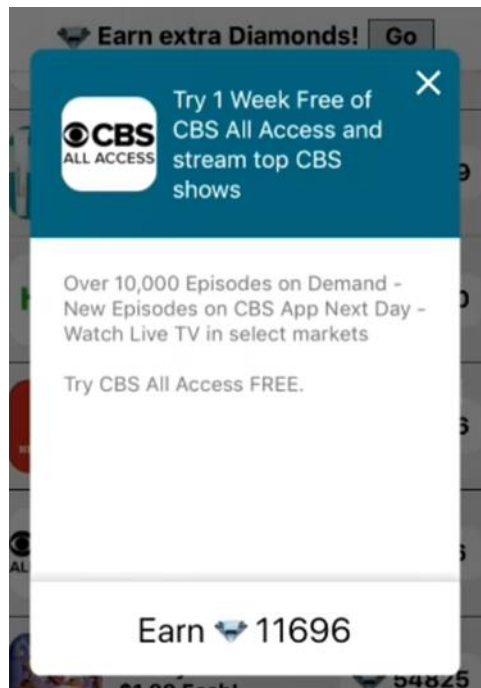


10. Additionally, Tapjoy’s offerwall has contained a link that instructs users to “Get More Rewards!” The icon associated with this link also has been the “T” from Tapjoy’s logo. Clicking on this link has caused a pop-up window to overlay the offerwall. This pop-up window has repeated the instruction to “Get More Rewards!” and further has instructed users, “Earn more rewards for your app! Tap below to see all the amazing ways you can increase your currency.” A link to “Earn [currency]” has appeared below these instructions. Clicking on this link has taken the user to a page on Tapjoy’s website, more.tapjoy.com, where users have been able to review additional virtual currency offers. These offers have appeared identically to the offers on Tapjoy’s in-app offerwall.

11. In addition to incorporating into the offerwall text indicating that consumers will “earn” virtual currency by completing a particular action, Tapjoy also creates and publishes text that appears in conjunction with each advertisement describing what a consumer must do to complete the virtual currency offer. Tapjoy refers to this text as the “Call to Action,” or “CTA summary.” In default Calls to Action, Tapjoy instructs consumers that they must “complete an action,” “watch this video,” or “download and run this app” in order to obtain the associated virtual currency reward.

12. Clicking on an ad on Tapjoy’s offerwall causes a pop-up window to overlay the offerwall. In this pop-up window, Tapjoy again represents that consumers will “earn” the specified amount of virtual currency in exchange for completing the specified action. Additional information also is provided in the pop-up window about the offer’s requirements. As shown in the screenshot below of a pop-up window, for example, Tapjoy prominently claims that consumers would “earn” virtual currency by registering for a free trial of a video streaming service.

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13. In some instances, Tapjoy promises a small reward of virtual currency to consumers who complete a discrete action, such as watching a short video. In many such instances, consumers who click on the image of the virtual currency have been able to complete that action and receive their reward immediately.

14. In many other instances, however, Tapjoy promises a large reward of virtual currency to consumers who complete actions more significant than simply watching a video — for example, purchasing a good or service, registering for a free trial followed by recurring charges, submitting personal information, or downloading and operating another app. In these instances, clicking on the image of the virtual currency within the pop-up window takes consumers outside Tapjoy’s offerwall to the third-party advertiser’s website. When Tapjoy’s virtual currency offer involves downloading or using third-party apps, consumers typically are taken to a mobile app store to complete those offers.

**Tapjoy’s Virtual Currency Offers Often Require Consumers to
Incur Charges or Divulge Personal Information**

15. To obtain the rewards Tapjoy promises, consumers frequently must incur charges or reveal personal information. For example, Tapjoy’s offers often require consumers to pay for products or services sold by the third-party advertisers. Frequently, these products involve recurring payment obligations, such as magazine subscriptions or video streaming services that require the payment of some amount each week or month. Consumers frequently complain that they spent a significant amount — often more than \$100 — in completing various Tapjoy offers. As one consumer put it, “These offers aren’t cheap and . . . the incentive to purchase them primarily is due to the gaming rewards.”

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16. In other instances, to obtain the promised reward, consumers must sign up for a short-term free trial, frequently of one week or less, of a product or service offered by the advertiser. Once these trials expire, consumers are charged on a recurring basis for the product or service.

17. Finally, in many instances, consumers have been required to disclose personal information, including contact information and medical history to third-party advertisers, to complete an offer. Consumers who have pursued these offers have been required to disclose, for example, email addresses, telephone numbers, full names, and addresses. In many instances, however, consumers who have submitted the requested information do not receive the promised rewards.

18. Rather, those consumers have been presented with requests for additional personal information, including personally identifiable information and sensitive health information. For example, in one such offer, Tapjoy represented that it would reward consumers who submitted their email address to an advertiser. However, consumers who submitted their email addresses did not receive a reward. Instead, such consumers were presented with a survey that included questions about “whether you or a loved one” had various health conditions, including cancer, diabetes, or arthritis.

19. In other instances, consumers who have submitted the personal information requested by advertisers are presented with a seemingly endless series of additional advertising offers that require consumers to spend money or sign up for limited-time free trials.

20. Consumers who have completed the actions as instructed do not receive rewards from Tapjoy, but instead have found that the personal information that they submitted was sold by Tapjoy’s advertisers to third-party marketers. One consumer complained that she almost never received rewards from Tapjoy — instead, “All I ever get from completing any TapJoy offers are SPAM emails and Telemarketers calling my cellphone.” Another consumer reported, “Frequently after completing these offers [I] have not received compensation for this. . . . [Y]ou have these people calling and it is doubly annoying to get nothing for this.”

Tapjoy’s Failure to Reward Completed Offers

21. Many consumers complete offers through Tapjoy’s offerwall but do not receive the promised reward.

22. Indeed, Tapjoy recognized as far back as July 2016 that “too many users [were] simply not getting rewarded,” that Tapjoy “clearly [had] a problem,” and that “there are a number of scenarios where we fail to reward people.”

23. An internal presentation over six months later, at the end of February 2017, similarly identified “poor customer experience,” “inconsistent user rewarding,” and “waning reputation” among the “hurdles” the company was facing.

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24. Tapjoy's virtual currency rewarding "problem" has had significant consequences for consumers. Over the past several years, people have filed hundreds of thousands of complaints with Tapjoy, nearly all of which relate to Tapjoy's failure to issue virtual currency to consumers who completed the offers as instructed.

25. Many consumers who spent money in completing the offers through Tapjoy's offerwall never receive the promised reward. Tapjoy has received tens of thousands of complaints from consumers who spent money or signed up for limited-time free trials through Tapjoy's offerwall but have not received promised virtual currency.

26. In many instances in which Tapjoy has represented that it will issue rewards of virtual currency to consumers who disclose specified personal information, consumers have not received their reward.

27. Tapjoy has acknowledged in internal emails that it was "not news" that consumer complaint rates related to offers that purported to request personal information were "out of control."

28. Nevertheless, Tapjoy has continued to prominently and falsely claim that it will always issue rewards to consumers who simply submit personal information or perform other actions.

29. In numerous instances, even when Tapjoy issues promised rewards, it does not issue them for several days or more after consumers complete the offers. However, nowhere on Tapjoy's offerwall does it reveal that rewards will not be fulfilled for multiple days.

Tapjoy Often Withholds Rewards Despite Consumer Complaints about Uncompensated Offers

30. Many consumers who do not receive the promised virtual currency from Tapjoy despite having completed the actions associated with an offer seek to contact Tapjoy to request the reward. In many instances, however, consumers find that they cannot contact Tapjoy, or that Tapjoy does not respond to their communications, wrongfully "closes" their complaint, or delays responding until consumers have incurred additional charges or other obligations related to the third-party advertisement.

31. Despite these failures in responding to consumer complaints, and even though consumers frequently must resort to filing consumer complaints in an effort to obtain the virtual rewards promised by Tapjoy, Tapjoy continues to represent on its offerwall, without qualification, that consumers will earn virtual rewards by performing certain actions.

Tapjoy's Practice of Discouraging Customer Service Inquiries

32. Because of a high volume of consumer complaints, Tapjoy has adopted policies that serve to discourage contacts from consumers who have not received their rewards. Beginning in or around March 2017, Tapjoy prohibited consumers from submitting complaints

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regarding unrewarded virtual currency within 24 hours after completing an offer. Tapjoy has failed to disclose to consumers in making the offer of virtual currency that they must wait any amount of time after completing the required action to receive it, or that they will be unable to contact Tapjoy for 24 hours after completing the action. Indeed, Tapjoy understood that, before March 2017, half of all consumer complaints were filed within 15 minutes after consumers completed Tapjoy's offer but did not receive the promised reward.

33. Additionally, in or around November 2017, Tapjoy removed a link from its offerwall, labeled "Missing [Currency]?", that previously allowed consumers to contact customer support to submit complaints regarding missing rewards.

34. Beginning in or around November 2017, consumers have been able to submit a customer support complaint to Tapjoy only after waiting 24 hours, returning to the offerwall, and finding an obscurely located link.

Tapjoy's Failure to Respond to Customer Service Complaints

35. Consumers who are able to submit a complaint often find that they nevertheless are unable to obtain the reward promised by Tapjoy. Until at least 2018, Tapjoy sent consumers who filed complaints regarding unrewarded virtual currency an automated email that requested proof that the consumer completed the offer, such as a confirmation email or billing invoice. Unbeknownst to consumers, they had to respond to this email within 72 hours to avoid having their complaints closed and marked as "solved."

36. Consumers who did not respond to Tapjoy's automated email within 72 hours received another automated email from Tapjoy stating that it "marked your case . . . as Solved because we haven't heard from you in at least 72 hours." Tapjoy then promised that consumers who would like assistance could "simply reply to this email to reopen the case."

37. However, in many instances, consumers who sent the requested proof to Tapjoy, including within 72 hours, received no response from the company. As one consumer complained, "they requested my screenshots as proof that I have done the offer so I sent it to them and I haven't heard anything from them since. . . . I just want my diamonds"

38. Similarly, many consumers who sent the requested proof nevertheless received an email stating that Tapjoy has "marked your case . . . as Solved because we haven't heard from you in at least 72 hours." As one consumer complained, "I email them and they ignore me and then days later send an email saying 'since they haven't heard from me in 72 hours, they mark the case closed!'"

39. Moreover, many consumers who attempted to respond to Tapjoy's "Solved" email—including consumers who previously submitted proof of completion of an offer—did not receive any reward, or any other response from Tapjoy, despite sending repeated emails to Tapjoy in an attempt to "reopen the case."

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40. In many instances in which Tapjoy delays issuing a reward, or incorrectly closes a complaint as “Solved,” consumers have been required to purchase limited-time free trials or other recurring subscriptions of Tapjoy’s advertisers’ goods and services to earn the promised reward. When consumers attempt to contact Tapjoy to inquire about the status of their rewards, Tapjoy often fails to respond or delay responding until after the free or limited-time free trial offer has expired. As a result, consumers are charged the full cost of advertisers’ goods and services while awaiting the reward of virtual currency from Tapjoy.

Count I
Deceptive Acts and Practices

41. In connection with Tapjoy’s advertising, marketing, promotion, or display of offers of virtual currency, Tapjoy has represented, directly or indirectly, expressly or by implication, that consumers will receive a reward of virtual currency upon completion of a specific action.

42. The representation set forth in Paragraph 41 is false and misleading or was not substantiated at the time the representation was made.

Violations of Section 5 of the FTC Act

43. The acts and practices of Tapjoy as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this ninth day of March, 2021, has issued this Complaint against Tapjoy.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission’s Bureau of Consumer Protection (“BCP”) prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order (“Consent Agreement”). The Consent Agreement includes: 1) statements by Respondent that it

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neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Tapjoy, Inc., a Delaware corporation with its principal office or place of business at 353 Sacramento Street, 6th Floor, San Francisco, CA 94111.
2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

ORDER**Definitions**

For purposes of this Order, the following definitions apply:

- A. "Advertiser" means any third-party person, company, or entity that advertises, markets, promotes, offers for sale, or sells any good or service in connection with the promotion or offer of a Reward.
- B. "Clearly and Conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
 1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

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2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
 4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
 5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- C. “Gameplay Reward” means a Reward issued after and only in exchange for completing a specified level or challenge within the gameplay of a mobile application.
- D. “Respondent” means Tapjoy, Inc., a corporation, and its successors and assigns.
- E. “Reward” means virtual currency usable within a mobile application.
- F. “Video Reward” means a Reward automatically issued immediately after and in exchange only for viewing a promotional video.

Provisions**I. Prohibited Business Practices**

IT IS ORDERED that Respondent, and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the promotion or display of any offer of a Reward, must not:

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- A. misrepresent expressly or by implication:
 - 1. That consumers will receive a Reward;
 - 2. The requirements for consumers to receive a Reward;
 - 3. When consumers will receive a Reward; or
 - 4. Any other fact material to consumers concerning the receipt of a Reward.
- B. fail to disclose, Clearly and Conspicuously, and in close proximity to such promotion or display of any offer of a Reward (other than a Video Reward):
 - 1. that an Advertiser determines whether a Reward shall issue; and
 - 2. when consumers are likely to receive the Reward;
- C. before the initial promotion or offer of any Reward (other than a Video Reward) in conjunction with any Advertiser, fail to obtain the Advertiser's express written agreement that it will prominently disclose all material terms and conditions applicable to any promotion or offer of a Reward, notify Respondent in writing of any material change to those terms and conditions, not misrepresent any material aspect of those terms and conditions, and will comply with all applicable laws in connection with the promotion or offer of a Reward;
- D. before the initial promotion or offer of any Reward (other than a Video Reward), and upon notice of any material change to any of the items listed in Paragraph D(1) of this Provision for such Reward, fail to:
 - 1. obtain (i) all materials to be used in connection with the promotion or offer of the Reward, including text, graphic, video, audio, and photographs; (ii) the URL of any hyperlink contained in the promotion or offer of the Reward; (iii) all terms and conditions applicable to the promotion or offer of the Reward; and (iv) the instructions that state what a consumer must do to obtain the Reward;
 - 2. use the information described in Paragraph D(1) of this Provision to attempt to obtain the Reward; and
 - 3. validate based on successfully obtaining the Reward sought in Paragraph D(2) of this Provision that (i) all material terms and conditions applicable to the promotion or offer of the Reward, and all instructions to obtain the Reward, are Clearly and Conspicuously disclosed and non-misleading; and (ii) the offered Reward is delivered upon completion of the required actions or, if the promotion or offer specifies a time period within which the Reward will likely be delivered, within such specified time;

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- E. fail to provide a prominently disclosed and easy-to-use method by which consumers may submit support requests to Respondent; or
- F. fail to promptly investigate any pattern of consumer support requests, offer-conversion data, or other information indicating that, for a particular promotion or offer of a Reward, the requirements of Paragraph D(3)(i) or (ii) of this Provision are not being satisfied, which investigation shall be documented in writing and at minimum entail:
 - 1. repeating the steps described in Paragraphs D(1)-(3) of this Provision for the promotion or offer of the Reward (other than a Video Reward), *provided, however*, that repeating such steps shall be required for Gameplay Rewards only as necessary to confirm that Paragraphs D(3)(i) and (ii) of this Provision are satisfied;
 - 2. promptly ceasing the promotion or offer of a Reward upon any finding by Respondent that Paragraph D(3)(i) or (ii) of this Provision and the terms of this Order are not satisfied for that particular promotion or offer, until Respondent confirms such promotion or offer of a Reward is corrected to bring it into compliance with Paragraphs D(3)(i) and (ii) of this Provision and the terms of this Order;
 - 3. promptly and permanently ceasing to do business with any Advertiser if the findings of any investigation by Respondent indicate that the Advertiser has committed fraud; and
 - 4. promptly and permanently ceasing to do business related to Rewards with an Advertiser if the findings of any investigation by Respondent indicate a pattern of violations by that Advertiser of the requirements imposed under Paragraph D(3)(i) of this Provision with respect to more than one promotion or offer of a Reward.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

- A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.
- B. For 5 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any

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business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

- C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.
- B. For 10 years after the issuance date of this Order, Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
- C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

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- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re *Tapjoy, Inc.*, FTC File No. 1723092.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

- A. accounting records showing the revenues from all goods or services sold;
- B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. records of all consumer complaints and customer support requests related to a Reward, whether received directly or indirectly, such as through a third party, and any response;
- D. records obtained or created pursuant to Provision I(F) of this Order, including all information obtained to conduct any investigation and the outcome of each such investigation;
- E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and
- F. a copy of each unique advertisement or other marketing material making a representation subject to this Order.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

- A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.
- B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit

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representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

- C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Provision in this Order that terminates in less than 20 years;
- B. This Order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Concurring Statement

**STATEMENT OF COMMISSIONER ROHIT CHOPRA
JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER****Summary**

- The explosive growth of mobile gaming has led to mounting concerns about harmful practices, including unlawful surveillance, dark patterns, and facilitation of fraud.
- Tapjoy's failure to properly police its mobile gaming advertising platform cheated developers and gamers out of promised compensation and rewards.
- The Commission must closely scrutinize today's gaming gatekeepers, including app stores and advertising middlemen, to prevent harm to developers and gamers.

The video game business has solidified its place as a fixture of America's entertainment industry. During the pandemic, revenues in the sector have reportedly eclipsed those of the sports and film businesses combined.¹ This period has brought about a massive increase in mobile gaming app installs and spending, cementing gaming as a major magnet for Americans' attention.² The latest industry offerings rely on deeper social connectivity features and facilitate content creation by players. Americans are hosting birthday parties through gaming apps, and tens of millions have attended concerts by major artists on Fortnite and Roblox.³

Mobile gaming is the fastest growing segment of the market, where revenues are primarily generated through in-app purchases and advertising. Importantly, this segment is characterized by a unique market structure dominated by new gatekeepers, particularly app stores and advertising middlemen. This structure is rightfully under more intense scrutiny, given the challenges facing developers and the downstream practices that can harm gamers.

It is against this backdrop that the Federal Trade Commission evaluates an appropriate remedy to address the conduct of Tapjoy, a mobile advertising platform that connects gamers, game developers, and advertisers. As detailed in the Commission's complaint, Tapjoy's practices allowed users to be cheated of promised rewards, and developers to be cheated of promised

1 Ben Gilbert, *Video-game industry revenues grew so much during the pandemic that they reportedly exceeded sports and film combined*, BUSINESS INSIDER (Dec. 23, 2020), <https://www.businessinsider.com/video-game-industry-revenues-exceed-sports-and-film-combined-idc-2020-12>.

2 Robert Williams, *Mobile gaming surges as pandemic drives 45% jump in app installs*, MARKETING DRIVE (Dec. 2, 2020), <https://www.marketingdive.com/news/mobile-gaming-surges-as-pandemic-drives-45-jump-in-app-installs/591417/>. Gaming expert Joost van Dreunen recently offered helpful analysis about emerging trends in this growing industry. The Prof G Show with Scott Galloway, *Pandemic Learnings with Dr. Abdul El-Sayed* (Dec. 15, 2020), <https://westwoodonepodcasts.com/pods/the-prof-g-show-with-scott-galloway/>.

3 See, e.g., Gil Kaufman, *Here's How Many People Tuned Into Lil Nas X's Roblox Show*, BILLBOARD (Nov. 17, 2020), <https://www.billboard.com/articles/columns/hip-hop/9485495/lil-nas-x-roblox-show-viewers>; see also Joost van Dreunen, *The future is user-generated*, SUPERJOOST PLAYLIST (Nov. 23, 2020), <https://superjoost.substack.com/p/the-future-is-user-generated>.

Concurring Statement

compensation. The proposed settlement does not remedy these past harms, but will require Tapjoy to better police its platform to prevent abuses going forward.⁴

Tapjoy's Middleman Misconduct

Tapjoy is a major mobile advertising platform that acts as a middleman between advertisers, gamers, and game developers. The platform woos developers into integrating its technology by promising payments for user activity. In a mobile gaming experience where developers use Tapjoy's advertising platform, Tapjoy displays "offers." When gamers complete these "offers," such as by signing up for subscriptions or making purchases, Tapjoy credits the user's account with coins or other currency for use in the game, and developers receive a percentage of Tapjoy's advertising revenue.⁵

However, according to the FTC's complaint, many players jumped through hoops – and even spent money and turned over sensitive data – to complete Tapjoy's offers, only to receive nothing in return.⁶ It appears that Tapjoy amplified false offers by its business partners, who baited gamers with big rewards only to cheat them when it was time to pay up.⁷ Tapjoy did little to clean up the mess, even when hundreds of thousands of gamers filed complaints.⁸ This also harmed developers of mobile games, who were cheated of advertising revenue they were entitled to.

In my view, Tapjoy's conduct violated the FTC Act's prohibition on unfair practices, as well as the prohibition on deceptive practices.⁹ The FTC's proposed settlement requires the platform to implement screening and testing procedures to weed out advertisers that cheat gamers and developers. This provision will help ensure Tapjoy takes more responsibility for fraud, rather than facilitating it.¹⁰

4 This matter is another example where the lack of clarity regarding the scope of immunities conferred by Section 230 of the Communications Decency Act has given legal ammunition to platforms seeking to shirk responsibility for their commercial activity, including sales and advertising practices. This lack of clarity undermines the ability of the FTC and other regulators to obtain adequate monetary relief for misconduct.

5 In other instances, users can receive rewards directly through the game.

6 Compl. In the Matter of Tapjoy, Inc., ¶¶ 21-29.

7 Compl., *id.* ¶¶ 8, 15-29.

8 Compl., *id.* ¶¶ 30-40.

9 The Commission's proposed complaint charges Tapjoy with deception, but fails to include a charge of unfairness. However, the settlement includes injunctive relief that addresses Tapjoy's failure to police fraud.

10 I respectfully disagree with the proposed order provision requiring Tapjoy to disclose that advertisers are responsible for issuing rewards. This disclaimer undermines the goal of ensuring that Tapjoy takes adequate responsibility for its business partners' practices.

Concurring Statement

Gaming Gatekeepers and Trickle-Down Abuse

Tapjoy is not the only platform squeezing developers. In fact, the firm is a minnow next to the gatekeeping giants of the mobile gaming industry, Apple and Google. By controlling the dominant app stores, these firms enjoy vast power to impose taxes and regulations on the mobile gaming industry, which was generating nearly \$70 billion annually even before the pandemic.¹¹

We should all be concerned that gatekeepers can harm developers and squelch innovation. The clearest example is rent extraction: Apple and Google charge mobile app developers on their platforms up to 30 percent of sales, and even bar developers from trying to avoid this tax through offering alternative payment systems.¹² While larger gaming companies are pursuing legal action against these practices, developers and small businesses risk severe retaliation for speaking up, including outright suspension from app stores – an effective death sentence.¹³

This market structure also has cascading effects on gamers and consumers. Under heavy taxation by Apple and Google, developers have been forced to adopt alternative monetization models that rely on surveillance, manipulation, and other harmful practices.

For example, many developers are turning to “loot boxes” to squeeze more revenue out of gamers. These loot boxes deploy dark patterns and other deceptions to lure gamers – often children – into purchasing in-app rewards of randomly assigned value, turning videogames into virtual casinos. As detailed in a recent FTC report, this addictive phenomenon emerged as a direct consequence of changing monetization models in the industry, as developers increasingly rely on recurring revenue, such as through in-app purchases, rather than upfront sales.¹⁴

Mobile gaming’s market structure is also forcing developers to create revenue streams that are not subject to app store taxation, including through intrusive behavioral advertising. Last year, for example, the FTC brought an action against Hyperbeard, a developer of child-directed games charged with allowing major ad networks to surveil users – including children – in order

11 See Omer Kaplan, *Mobile gaming is a \$68.5 billion global business, and investors are buying in*, TECHCRUNCH (Aug. 22, 2019), <https://techcrunch.com/2019/08/22/mobile-gaming-mints-money/>.

12 See STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS at 221 (Google); 339 (Apple). Although Google allows users to “sideload” apps from outside the Play Store, it has been alleged that Google makes this process “technically complex, confusing and threatening[.]” *Id.* at 220 (quoting Epic lawsuit).

13 Developers have alleged retaliatory practices by both Google and Apple, such as when they have tried to circumvent these gatekeepers’ preferred monetization tools. *Id.* at 222, 348-349.

14 Press Release, Fed. Trade Comm’n, FTC Staff Issue Perspective Paper on Video Game Loot Boxes Workshop (Aug. 14, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-staff-issue-perspective-paper-video-game-loot-boxes-workshop>.

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to serve behavioral advertising.¹⁵ This type of conduct violates the Children’s Online Privacy Protection Act, but Hyperbeard’s surveillance practices are not unique. In fact, Google encourages game developers on its platform to adopt this monetization model, claiming “users expect free games.”¹⁶

Today’s action against Tapjoy reveals another monetization model that developers are turning to in the face of fees and restrictions imposed by app stores. By offering a platform connecting advertisers, gamers, and game developers, Tapjoy allows these developers to generate advertising revenue that Apple and Google do not tax. But this monetization model also creates opportunities for fraud, and the Commission’s complaint details how Tapjoy allowed this fraud to fester.

Monitoring the Middlemen

Developers of mobile games are delivering creative content that keeps Americans entertained and engaged, but face many middlemen, even beyond the dominant app stores. Game developers relied on Tapjoy to generate revenue for themselves and offer gamers a way to earn currency to enhance their play. However, Tapjoy’s failure to screen fraudulent offers left both gamers and developers holding the bag.

The settlement proposed today should help reverse the lax policing practices that led hundreds of thousands of gamers to file complaints. But when it comes to addressing the deeper structural problems in this marketplace that threaten both gamers and developers, the Commission will need to use all of its tools – competition, consumer protection, and data protection – to combat middlemen mischief, including by the largest gaming gatekeepers.

15 Press Release, Fed. Trade Comm’n, Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids’ Data without Parental Consent (June 4, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it>.

16 *Mobile ads: the key to monetizing gaming apps*, GOOGLE ADMOB, <https://admob.google.com/home/resources/monetize-mobile-game-with-ads/> (last visited on Jan. 5, 2021).

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing a consent order from Tapjoy, Inc. (“Tapjoy”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

Tapjoy operates an advertising platform within mobile gaming applications. On the platform, Tapjoy promotes offers of in-app rewards (e.g., virtual currency) to consumers who complete an action, such as taking a survey or otherwise engaging with third-party advertising. To induce consumers to engage with third-party advertisers, Tapjoy offers in-app rewards in the form of a specified amount of virtual currency that can be used in the in-app games. However, in many instances, Tapjoy never issued the promised reward to consumers who complete an action as instructed, or only issued the currency after a substantial delay. Consumers who attempt to contact Tapjoy to complain about missing rewards have found it difficult to do so, and even consumers who have been able to submit a complaint nevertheless did not receive the promised reward.

The Commission’s proposed complaint alleges that Tapjoy has violated Section 5 of the FTC Act. In particular, the proposed complaint alleges that Tapjoy has represented that consumers will receive a reward of virtual currency upon completion of a specific action when, in many instances, that representation was false, misleading, or not substantiated at the time the representation was made.

The proposed order contains injunctive provisions addressing the alleged deceptive conduct. Part I.A of the proposed order prohibits Tapjoy from making the misrepresentations alleged in the complaint. Part I.B of the proposed order requires Tapjoy to make certain disclosures, specifically that its advertisers determine whether rewards are likely to issue, and when consumers are likely to receive rewards. Part I.C requires Tapjoy to obtain specified agreements from the associated advertiser before a reward is promoted or offered. Part I.D. requires Tapjoy, before a reward is promoted or offered, to obtain the materials used to promote or offer the reward, to use those materials to attempt to obtain the reward, to validate the accuracy of those materials, and to validate that the reward is delivered promptly or that any delay is disclosed. Part I.E requires Tapjoy to provide a prominently disclosed and easy-to-use method by which consumers may submit support requests. Part I.F requires Tapjoy to investigate patterns of customer support requests or other information indicating that a particular promotion or offer of a reward has inaccurate instructions or is failing to deliver the reward.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgments of the order. Part III requires Tapjoy to notify the Commission of changes in corporate status and mandates that the company submit an initial compliance report to the Commission. Part IV requires the company to create certain documents relating to its compliance with the order for 10 years and to retain those documents for a 5-year period. Part V

Analysis to Aid Public Comment

mandates that the company make available to the Commission information or subsequent compliance reports, as requested.

Finally, Part VI states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

**THOMAS JEFFERSON UNIVERSITY
AND
ALBERT EINSTEIN HEALTHCARE NETWORK**

FINAL ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

*Docket No. 9392; File No. 181 0128
Complaint, February 27, 2020 – Decision, [Date]*

This order addresses the \$ [REDACTED] acquisition by Thomas Jefferson University of certain assets of Albert Einstein Healthcare Network. The complaint alleges that the acquisition, if consummated would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the market for inpatient general acute care hospital services and inpatient acute rehabilitation services in Philadelphia and Montgomery counties. The U.S. District Court for the Eastern District of Pennsylvania denied a preliminary injunction barring the Proposed Transaction until completion of the administrative proceeding finding the testimony of the insurance company witnesses not credible and rejecting the proposed geographic markets. The Order returns the matter to adjudication and dismisses the complaint.

Participants

For the *Commission*: Ryan Andrews, Emily Bowne, Gustav Chiarello, Charles Dickinson, Jamie France, Christopher Harris, and Albert Teng.

For the *Respondents*: Ken Vorrasi, Drinker Biddle & Reath LLP; Leigh Oliver and Bob Leibenluft, Hogan Lovells US LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents Thomas Jefferson University (“Jefferson”) and Albert Einstein Healthcare Network (“Einstein”) have executed a system integration agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.**NATURE OF THE CASE**

1. Jefferson and Einstein are two of the leading providers of inpatient general acute care (“GAC”) hospital services and inpatient acute rehabilitation services in Philadelphia and