

November 21st, 2023

Jessica Herron  
Clerk  
Subcommittee on Innovation, Data, and Commerce  
U.S. House Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515-6115

Responses to Questions for the Record by Jon Leibowitz

Dear Ms. Herron,

I want to thank the Subcommittee for inviting me to testify at its October 18, 2023 hearing entitled, "Safeguarding Data and Innovation: Building the Foundation for the Use of Artificial Intelligence."

Pursuant to your request, attached are my responses to follow-up questions for the record.

Please let me know if you need anything else.

Best,

Jon Leibowitz

## **The Honorable Russ Fulcher**

- 1. What would you say to those who argue for a federal solution to digital models using without permission creators' voices and likenesses, especially when it comes to background actors? What would you say to those who argue an AI-generated deepfake with your face and voice – competing for the same clicks and views as your legitimate work – is fair competition?**

As you know, the jurisdiction of the FTC includes the authority to prohibit “unfair methods of competition and unfair or deceptive acts or practices.” Using creators’ voices and likenesses without permission—with or without AI enhancement—strikes me as both an unfair method of competition as well as a deceptive trade practice if done for commercial purposes. Beyond the use of existing laws, Congress should strongly legislate in this area and not waiting for solutions to possibly develop under existing caselaw.

- 2. Where do you “draw the line” when it comes to the liability attached between the developer and the deployer on the use of AI programs? Thoughts on the policy guideposts for us to consider to direct the FTC in this area?**

I do believe Congress should give the FTC (and perhaps other expert agencies) clear authority to develop guideposts and regulations to assure that AI is not misused in ways that harm Americans. To make sure that any new authority is effective, such authority probably needs to include sanctions against both developers and deployers who misuse AI. And that authority needs to be strong—with fining ability and equitable relief for violations. Because determinations of violations will often be fact specific, one provision that may be useful could be a civil prohibition against “aiding or abetting” misuse of AI.

- 3. Some have claimed AI-generated forgeries of voices and likenesses are getting easier to make and are already starting to crowd out legitimate works. Different arguments have focused on everything from reputation to private property theft. What role do you see the federal government playing here or not? What are some of the limits we should consider in this part of generative AI, when it comes to developing rules on data use – given the ADPPA has user data controls on which the AI programs are based?**

Theories of AI liability based on reputational harm and property rights may develop eventually but at this point they remain uncertain. Courts will likely move slowly in the AI space. Congress needs to move carefully, too, but one area where you can make clear and beneficial reforms is by passing some version of the privacy legislation that came out of your Committee last year, which will give all consumers more control over the use of their personal data, including the ability to prevent its collection under most circumstances.

- 4. Generative AI relies on large amounts of data to guide it on the next prompt or logical step it should take. The direction of those prompts leads some to look at areas of potential discrimination. But the type and amount of discrimination is also based on the data from which the AI program is collecting. It's also based on how much decision authority we give the AI program. What is the role for government, given our laws are designed for people who face the harm (and loss) that comes with being discriminated against? What guidelines should we consider with any bill we put forward?**

One of the most important provisions in last year's bipartisan ADPPA was the prohibition on discriminatory algorithms. That is in part because the on-line laws against discrimination are somewhat uncertain, and because it is a fundamental goal of government to prohibit discrimination. I am hopeful that this Committee will move both privacy (and any AI) legislation forward this year that includes a similar provision.

- 5. When it comes to federal preemption, we certainly have heard from a wide array of businesses that having to abide by a patchwork of state privacy rules is a challenge. When it comes to AI programs that not only rely on data that is available for use, but can also execute actions, govern an image, likeness, or voice, do you agree that federal preemption should also be the approach we take?**

Because data moves in interstate commerce, privacy and AI problems require a national solution to protect Americans wherever they live, work or travel. Moreover, a patchwork of inconsistent state laws would be difficult for consumers or businesses to implement or understand. For these reasons alone, some degree of preemption is critical as you attempt to legislate on AI and consumer privacy.

### **The Honorable Tony Cárdenas**

- 1. Mr. Leibowitz, part of the FTC's mission statement is to "prevent business practices that are anticompetitive or deceptive or unfair to consumers and to enhance informed consumer choice." Under this charge, do consumers have a right to know whether products that they're buying were created by a human or artificially generated by an app? What role can the FTC play in ensuring that consumers are informed?**

I agree that consumers generally have the right to know whether products they are buying—or the content they are reading—are created by human or by artificial intelligence. To that end, the FTC can play an important role in ensuring that consumers are informed in several ways: first, by bringing cases against deceptive uses of commercial AI where that deception is material to consumers ("materiality" is a requirement under the FTC Act); second, by using its bully pulpit to educate consumers about AI-related issues; and third, by working with this Committee to help draft

legislation relating to both privacy and AI. It may also have rulemaking authority to require that companies clearly disclose the use of AI in products or services.