



August 18, 2018

United States Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5510
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201

Issue 5: The Commission’s remedial authority to deter unfair and deceptive conduct in privacy and data security matters

I. Introduction

These comments are submitted in response to the U.S. Federal Trade Commission (FTC)’s announcement on the hearings on competition and consumer protection in the 21st Century. The Computer & Communications Industry Association (CCIA)¹ commends the FTC’s study of the legal and policy challenges and opportunities that arise with the digitalization of the economy, and welcomes the opportunity to provide views on the issues identified by the Commission.

The nuance afforded to the FTC by its Section 5 authority to curb unfair and deceptive acts and practices is its strength, and the primary means through which the Commission has historically balanced robust consumer privacy and security protections with the regulatory flexibility necessary to foster innovation online. The Commission should continue to rely on these strengths as it considers how best to protect consumer information going forward.

II. The efficacy of the Commission’s use of its current remedial authority

The FTC should be commended for striving to use its current remedial authority in an appropriately balanced way to protect consumers from “unfair and deceptive acts and practices in commerce” under Section 5 of the Federal Trade Commission Act.² The FTC also has authority to enforce a variety of sector-specific laws as part of its privacy and data security

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

² 15 U.S.C. § 45.



toolkit, including the Truth in Lending Act,³ the CAN-SPAM Act,⁴ the Children’s Online Privacy Protection Act,⁵ the Equal Credit Opportunity Act,⁶ the Fair Credit Reporting Act,⁷ the Fair Debt Collection Practices Act,⁸ and the Telemarketing and Consumer Fraud and Abuse Prevention Act.⁹

The FTC can use a variety of remedial approaches to protect consumers’ privacy and personal information. The FTC’s principal tool is to bring enforcement actions to stop violations of the law and require companies to take affirmative steps to remediate unlawful behavior. Further, if a company violates an FTC order, the FTC can seek civil monetary penalties for the violations.¹⁰

The FTC has brought more than one hundred privacy and data security cases and issued dozens of reports involving privacy and security.¹¹ These publicly available materials are a positive step, but organizations may still not be able to delineate between reasonable and unreasonable data protection practices. The FTC should consider hosting a recurring workshop and producing a report on data security, updating its guidelines on compliance with its children’s privacy rules more frequently, and otherwise providing a clearer set of rules around the privacy requirements facing companies when interacting with consumers—without resorting to an enforce-first approach that prescriptively mandates specific conduct and technical standards on the digital ecosystem.

The FTC’s privacy and data security enforcement actions under Section 5’s deception and unfairness prongs require that the Commission demonstrate an injury to consumers. The Commission is most effective in its efforts to prevent and remedy actual harm to consumers when it links the facts of a particular case and the respective legal requirements of its deception and unfairness analyses to tie concrete injuries to actual harms. By identifying and remedying actual harms, the FTC is able to signal the rules of the road to businesses and consumers while

³ The Truth in Lending Act of 1968, 15 U.S.C. §§ 1601-1667f.

⁴ Controlling the Assault of Non-solicited Pornography and Marketing, 15 U.S.C. §§ 7701-7713.

⁵ Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506.

⁶ Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691(f).

⁷ The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(x).

⁸ The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692(p).

⁹ The Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108.

¹⁰ FTC, *Privacy & Data Security Update: 2017* (2017), available at https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2017-overview-commissions-enforcement-policy-initiatives-consumer/privacy_and_data_security_update_2017.pdf.

¹¹ *Id.*



also affording room for innovative privacy and security practices not previously envisioned or encountered by the Commission.

III. The identification of any additional tools or authorities the Commission may need to adequately deter unfair and deceptive conduct related to privacy and data security

To further solidify the link between consumer injury and enforceable actual harms, the FTC should ensure that it focuses on measurable consumer injuries. More data-driven analysis is the key to balanced and effective consumer protection, and will protect against the risk that the FTC might “erroneously condemn” business practices that provide consumers net benefits.¹²

This analysis should rely on the expertise of the Bureau of Economics, and be informed by the technical experts in the Office of Technology Research and Investigation and the competition experts throughout the Commission, who can together help assess the harms and benefits of practices—along with the harms and benefits of regulation—in a data-driven way. Data-driven reasoning is particularly important in the context of unfairness actions in the digital privacy and security context, where cost-benefit analysis is a key part of determining whether an allegedly unfair business practice has actually led to substantial injury to consumers, or in fact yields overall benefits.¹³

The FTC should consider seeking additional funding to conduct the necessary empirical studies to quantitatively evaluate the net consumer benefits and harms of particular business practices to ensure that its regulatory approach is grounded in facts.

IV. Conclusion

The FTC has generally wielded its authority to deter unfair and deceptive acts and practices in the privacy and data security context in a balanced manner that protects privacy and promotes innovation. In the future, the Commission should work to provide further empirical basis for its efforts to curb activities likely to cause consumer harm.

¹² FTC Commissioner Joshua D. Wright, *The Economics of Digital Consumer Protection: One Commissioner’s View*, July 31, 2014, at 6, available at https://www.ftc.gov/system/files/documents/public_statements/573061/010731techfreedom.pdf.

¹³ See FTC Policy Statement on Unfairness (Dec. 17, 1980) (appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984)), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.