

October 27, 2017

BY ELECTRONIC SUBMISSION

Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street SW, 5th Floor
Suite 5610 (Annex A)
Washington, DC 20024

Re: *Informational Injury Workshop P175413*

The Consumer Technology Association (“CTA”)¹ is pleased to submit these comments in connection with the Federal Trade Commission’s (“FTC’s” or “Commission’s”) workshop on how to best characterize and measure injuries related to the misuse of information.² CTA is a catalyst to the dynamic technology industry, and works to advance public policy that fosters innovation, furthers economic competitiveness, and promotes job and business creation. Our members are engaged in every aspect of technology and innovation, and include traditional consumer technology companies, sharing economy and internet companies, disruptive innovators, and auto manufacturers and suppliers, among many others.

As the Commission is well aware, the collection and use of personal data drives a wide variety of new and innovative services, products, and technologies that benefit consumers.³ At

¹ Consumer Technology Association (CTA)™ is the trade association representing the \$321 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES® – the world’s gathering place for all who thrive on the business of consumer technologies. Profits from CES are reinvested into CTA’s industry services.

² See FTC, *FTC Announces Workshop on Informational Injury*, Sept. 29, 2017, <https://www.ftc.gov/news-events/press-releases/2017/09/ftc-announces-workshop-informational-injury>.

³ See, e.g., FTC, *Protecting Consumer Privacy in an Era of Rapid Change*, at 27 (Mar. 2012) (“FTC Privacy Report”) (“The Commission recognizes the need for flexibility to permit innovative new uses of data that benefit consumers.”); *id.* at 2 (“[T]he collection and use of consumer data has led to significant benefits in the form of new products and services.”); FTC, *Big Data: A Tool for Inclusion or Exclusion?*, at 5-8 (Jan. 2016) (describing expected benefits of big data); see also, e.g., FTC Staff, *Internet of Things: Privacy &*

the same time, the misuse and mishandling of consumer information can create risks for consumers, for example, by leaving them vulnerable to identity theft and fraud. As providers of cutting-edge consumer technologies that rely on consumer information to deliver services that consumers demand, CTA members are acutely aware of the importance of appropriately safeguarding consumer information. Indeed, individual companies and self-regulatory organizations have been at the forefront of identifying privacy and security risks and developing practices and principles to address them. As the Commission moves forward, it should keep in mind not only the benefits of appropriate, and often novel, uses of consumer information and the risks of misuse, but also the constructive role that industry plays in giving consumers choices and providing security across a broad range of devices, applications, and services.

I. The Commission Should Focus Agency Efforts on Identifying and Preventing Concrete Consumer Harm

CTA welcomes the FTC's initiative to better articulate a framework to identify informational injuries. A clearly defined privacy harm framework that guides FTC enforcement will ensure that enforcement actions are both tied to the agency's statutory authority and are more predictable for industry. In particular, as part of this initiative, the Commission should focus on, and seek to identify, informational injuries that cause harm that can be described in terms of concrete, demonstrable effects on an average consumer. In comments last month, Acting Chairman Maureen Ohlhausen identified five types of consumer informational injury based on a review of the FTC's enforcement record:

- Subverting consumer choice;⁴
- Financial injury, such as direct financial loss;⁵
- Health and/or safety injury;⁶
- Unwarranted intrusion;⁷ and

Security in a Connected World, at 7-10 (Jan. 2015) (describing expected benefits of the Internet of Things).

⁴ Prepared Remarks of Acting FTC Chairman Maureen K. Ohlhausen, *Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases*, at 4-5, Sept. 19, 2017, available at https://www.ftc.gov/system/files/documents/public_statements/1255113/privacy_speech_mkohlhausen.pdf.

⁵ *Id.* at 5-6.

⁶ *Id.* at 6-7.

- Reputational injury.⁸

The types of informational injuries identified by Acting Chairman Ohlhausen represent a comprehensive set of injuries. It is questionable whether articulating additional types of informational injury is warranted, particularly if such injuries do not cause clear and demonstrable consumer harm. The Commission’s privacy framework is premised in large part on the fact that certain types of data may deserve special protection because they present an increased “likelihood that data misuse could lead to embarrassment, discrimination, or other harms,”⁹ – *i.e.*, that misuse of such sensitive data can cause actual, concrete, and measurable consumer harm. But the type of data at issue is just the first part of a harm analysis. The FTC’s privacy framework also recognizes that the use of such data is a key factor to evaluating consumer harm.¹⁰ Accordingly, rather than presume harm based solely on the nature of the information at issue, the FTC instead should evaluate particular information practices based on the specific circumstances at hand and whether consumers have been, or are likely to be, harmed in tangible ways.

As a practical matter, companies take precautions to prevent these injuries that far exceed merely providing consumers with choice about the use and sharing of certain information and protecting that information. And just as failing to “reflect the different expectations and concerns that consumers have for sensitive and non-sensitive data” can “hamper beneficial uses of data that consumers may prefer, while failing to protect against practices that are more likely to be unwanted and potentially harmful,”¹¹ an overbroad consideration of informational injury has exactly the same effect. Given these stakes, the Commission should ensure that its assessment of informational injuries is grounded in rigorous, empirical analyses of consumer preferences and consumer decision-making, rather than mere intuition. This kind of research is also helpful in understanding the consumer benefits that data-driven products and services provide, which is essential to the broader framework within which the FTC considers information practices.

⁷ *Id.* at 7.

⁸ *Id.* at 7-8.

⁹ FTC Privacy Report at 47. The Commission has recognized information about children, financial and health information, Social Security numbers, and precise geolocation data as sensitive. *See id.* at 59.

¹⁰ *Id.* at 60 (setting forth final principle that companies should obtain consent before “collecting sensitive data *for certain purposes*”) (emphasis added).

¹¹ Comments of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission to the Federal Communications Commission, *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, at 22 (May 27, 2016).

Accordingly, the Commission should focus its privacy and data security efforts, including its policy initiatives and law enforcement actions, on practices that cause concrete, specific, and demonstrable consumer harm. Doing so will best ensure a predictable regulatory environment that permits continued innovation, while also maximizing the use of FTC resources to protect consumers. When the FTC raises concerns about abstract or hypothetical harms, it risks chilling practices that benefit consumers and distorts debate around these benefits. In contrast, by focusing on concrete harm, the FTC allows the marketplace to adapt to, and serve, the disparate and evolving preferences of consumers.

II. Protecting Consumer Privacy Through Privacy-by-Design, Internal Practices, and Self-Regulatory Standards Is Integral to How Companies Develop Innovative, Beneficial Products and Services for Consumers

Importantly, focusing FTC activities on information practices that cause concrete, demonstrable consumer harm does not mean that consumers suddenly will be susceptible to other practices that some consumers may find objectionable. Instead, businesses take very seriously their responsibility to protect the data consumers entrust to them, and use such data in ways that benefit consumers. For many companies that compete in the data-driven economy, their business depends entirely on building and maintaining the trust of the people they serve, and their data practices form a key dimension of building this trust and succeeding in the marketplace. To build and maintain consumer trust, companies strive to be transparent about their data collection and use practices and keep promises about such practices they make to consumers. They also must be thoughtful about deciding what consumer information to collect and how to use and share such information. Information practices that surprise consumers without providing clear benefits are unlikely to succeed in the marketplace, and companies cannot afford to alienate their customers in industries as competitive and dynamic as the consumer technology industry.

Indeed, many companies operationalize these efforts by implementing privacy-by-design approaches within their organizations, baking meaningful privacy protections into everything they build. Products and services go through rigorous review processes that are designed to identify and address potential privacy issues before they launch. For some organizations, a key feature of their privacy program is to involve experts and perspectives from different departments across the company who are responsible for protecting privacy. This cross-disciplinary approach ensures the companies ultimately make decisions that put consumers first.

In addition to individual companies' efforts, industry as a whole works to address new consumer privacy concerns when they arise. For example, to address growing consumer interest in how data in the emerging digital health and fitness wearable ecosystem is collected,

used, and shared, CTA and its members developed the first-of-their-kind *Guiding Principles on Privacy and Security of Personal Wellness Data*.¹² The *Guiding Principles* set forth voluntary guidelines for private sector organizations that handle personal wellness data, and represent a consensus among CTA members about how companies should address tangible privacy risks and consumer preferences associated with cutting-edge health and fitness devices.¹³

In addition, CTA members in the auto industry helped to create a set of landmark privacy principles for connected vehicles in response to the reality that automobiles increasingly have innovative technologies and services that sometimes rely upon information collected from vehicle systems.¹⁴ The *Consumer Privacy Protection Principles for Vehicle Technologies and Services* set forth a comprehensive framework that automakers and other participants in the automotive industry can adopt when offering innovative vehicle technologies and services. Nineteen automobile manufacturers have made legally enforceable commitments to adhere to the *Consumer Privacy Protection Principles*.

CTA members also have long participated in the online advertising self-regulatory initiatives, which enhance consumer choice and transparency. For example, some CTA members participate in the Digital Advertising Alliance, which has established and enforces Self-Regulatory Principles for Online Behavioral Advertising and Multi-Site Data.¹⁵ These efforts help to ensure that the industry as a whole responds to consumer demands of transparency and choice about the collection and use of their information, even where consumers are unlikely to experience harm from such use.

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¹² Consumer Technology Association, *CTA's Guiding Principles on the Privacy and Security of Personal Wellness Data* (last updated Oct. 20, 2015), available at <https://cta.tech/cta/media/policyImages/policyPDFs/Guiding-Principles-on-the-Privacy-and-Security-of-Personal-Wellness.pdf>.

¹³ CTA and its members developed the *Guiding Principles* in the absence of a regulatory mandate or focused FTC enforcement activity in the digital health and wellness ecosystem.

¹⁴ See Letter from Alliance of Automobile Manufacturers and Association of Global Automakers, Inc. to the FTC, *Consumer Privacy Protection Principles for Vehicle Technologies and Services* (Nov. 12, 2014), available at https://autoalliance.org/wp-content/uploads/2017/01/Auto_Alliance_Global_Automakers_Letter_to_FTCRE_Privacy.pdf.

¹⁵ See Digital Advertising Alliance, *DAA Self-Regulatory Principles*, <http://digitaladvertisingalliance.org/principles> (last visited Oct. 20, 2017). To adapt to new technological developments, the Digital Advertising Alliance has set forth guidance explain how its principles apply to the mobile environment and to cross-device data collection and use. See *id.*

The FTC should continue to rely on the market and self-regulatory efforts in the first instance to address new areas in which consumer expectations concerning personal information are still developing. Given industry's investment in developing self-regulatory practices and incorporating privacy expertise into engineering and business decisions, CTA recommends that the FTC focus its efforts at the workshop (and any further steps) on assessing whether there are additional types of concrete, demonstrable consumer harms arising from consumer data practices. The FTC's December 12 workshop is a welcome initial step toward this assessment. In turn, the FTC will be able to advance its consumer protection mission and provide additional certainty in the marketplace by focusing its efforts on conduct that actually harms consumers.

Respectfully submitted,

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