CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

TIM DAY
SENIOR VICE PRESIDENT
CHAMBER TECHNOLOGY ENGAGEMENT
CENTER (C_TEC)

October 27, 2017

VIA ELECTRONIC FILING

Mr. Donald S. Clark
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 and P175413

Dear Mr. Clark:

The U.S. Chamber of Commerce ("Chamber"), the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, respectfully submits these comments to the Federal Trade Commission ("FCC" or "Commission") in response to its request for comments for its December 12, 2017 Workshop on Informational Injury.[1]

The Chamber applauds the Commission's decision to hold the Workshop and take a serious look at the nature of informational harm in the context of privacy and data security. The Commission should use this Workshop as an opportunity to adopt a regulatory framework that focuses on protecting consumers against concrete consumer harms as opposed to merely conjectural or hypothetical injuries. Such an approach to protecting consumer privacy will provide much needed regulatory certainty, enhance competition in the marketplace, and enable businesses involved in e-commerce to continue providing consumers the benefits they desire.

Generally, with the exception of a few industry specific laws, the Commission regulates privacy practices under its authority to combat unfair and deceptive trade practices under Section 5 of the Federal Trade Commission Act.[2] Section 5 makes clear that the Commission lacks the

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[1] Federal Trade Commission, "FTC to Host Workshop on Informational Injury; Seeking Public Comments, Workshop to be held December 12, 2017) *available at* https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public_notice_injury_workshop.pdf.

[2] Jennifer Woods, "Federal Trade Commission's Privacy and Data Security Enforcement Under Section 5," American Bar Association *available at*

authority to declare unlawful an act or practice on the grounds that it is unfair unless "the act or 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 of competition*."[3] For this reason, the Commission should adopt a regulatory framework for privacy and data security that addresses only concrete consumer harms in light of the benefits provided by the data-driven economy.

I. The Commission should take enforcement actions only in the case of concrete and not hypothetical harms.

At the heart of the American legal system is the concept of Article III standing requirements which must be met by potential litigants to obtain access to federal courts. As explained by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, potential litigants cannot obtain standing unless they can show, among other things, that they suffered a "concrete and particular injury" which is "actual or imminent, *not 'conjectural' or 'hypothetical*.'"[4] These common sense requirements for standing were once again followed by the Supreme Court in 2016 in the case of *Spokeo, Inc. v. Robins*, in which an individual sued an online data aggregator under the Fair Credit Reporting Act for allegedly posting inaccurate information about him.[5] The Court held in *Spokeo* that the plaintiff had to show that his injury was both concrete *and* particularized in order to obtain standing and that allegations of bare procedural violations alone were insufficient to show adequate injury.[6]

The Chamber asserts that the Commission should follow these *Lujan* and *Spokeo* principles when determining whether to take enforcement actions for alleged unfair and deceptive practices with regard to privacy and data security. Unfortunately, the Commission in recent years has expanded and tested the limits with regard to which kinds of privacy practices constitute actionable harms to consumers.

One such example of the Commission too broadly defining consumer injury is the 2015 enforcement action and consent decree entered into between the Commission and Nomi Technologies, a startup data analytics firm. Nomi collected and hashed non-personal identifiers emitted by some mobile devices in order to assess for merchants which store areas received the most traffic in order to more effectively design retail space.[7] Nomi brought online data analytics to the brick-and-mortar retail context and endeavored to do so in a way that protected consumer

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https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/federal_trade_commissions_privacy.html.

[3] *See* 15 U.S.C. § 45(n) (emphasis added).

[4] *See* Lujan v. Defenders of Wildlife, 504 U.S.C. 555, 560 (1992).

[5] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

[6] *Id*. at 1544.

[7] Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Nomi Technologies, Inc., Matter No. 1323251 (Apr. 23, 2015) *available* at https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf; Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nomi Technologies, Inc*. (Apr. 23, 2015) *available at* https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

privacy. The Commission entered into a consent order with Nomi for allegedly violating Section 5's prohibition against deceptive trade practices by not providing an in-store mechanism to opt out of the program for consumers despite claims to the contrary in the company's privacy policy. Nomi also offered and actually provided an easily accessible online opt-out process for consumers. The Commission provided no evidence that any consumers were reasonably likely to have been harmed by the lack of an in-store opt-out mechanism.

Stretching the limits of harm to include hypothetical injuries in reality creates a situation in which companies are effectively under a strict liability system for data practices. When policymakers adopt privacy regulations that establish *de facto* strict liability for the use of data, such as requiring companies obtain consumer consent before using any of their information, studies have shown a negative impact on the economy. For instance, in 2016 when the Federal Communications Commission attempted to impose on broadband providers an opt-in requirement to use nearly all consumer data[8], one credit reporting agency stated that the proposed rule threatened the credit rating of internet service providers.[9] According to another study, the imposition of opt-in style privacy regulation across the entire internet ecosystem could cost American websites $33 billion over five years.[10] The potential negative impacts of opt-in regulation for all consumer data should give the Commission pause when it attempts to take enforcement actions against companies for privacy practices that may only have a hypothetical harmful impact on consumers.

II. The benefits of the data-driven economy outweigh those of overly restrictive privacy and data security enforcement.

Data analytics and digital advertising are the lifeblood of the Internet ecosystem which has spurred economic growth and innovation. A vibrant Internet is critical to emerging technologies such as the Internet of Things, smart cities, artificial intelligence and unmanned aircraft. Data analytics and marketing have become such a force in the U.S economy that it is projected that "digital media in the U.S. will overtake television as the biggest media category [this year]—a year earlier than previously expected—with $66 billion in revenue."[11] Another study found that data-driven marketing led to a $202 billion revenue increase to the national economy and created nearly 1 million jobs in 2014. [12] According to Accenture, the installation of 5G technology to power smart cities which use sensors and data to create efficiencies in

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[8] *See* 81 Fed. Reg. 23360, 23375 (Apr. 20, 2016).
[9] David Shepardson, "Update 1-U.S. FCC Internet privacy proposal could harm broadband providers-Moody's," Reuters (Mar. 15, 2016) *available at* http://www.reuters.com/article/usa-fcc-internet-moodys/update-1-u-s-fcc-internet-privacy-proposal-could-harm-broadband-providers-moodys-idUSL2N16N0UA.
[10] Netchoice Privacy Forecast *available at* https://netchoice.org/privforecast/.
[11] Nathalie Tadena, "Digital Ad Spending in U.S. to Surpass Television Spending in 2016," WALL STREET JOURNAL (Oct. 15, 2015) *available at* http://www.wsj.com/articles/digital-ad-spending-in-u-s-to-surpass-television-spending-in-2016-1444937398.
[12] John Deighton and Peter Johnson, "The Value of Data 2015: Consequences for Insight, Innovation & Efficiency in the U.S. Economy," (2015) *available at* http://thedma.org/advocacy/data-driven-marketing-institute/value-of-data/.

transportation, public safety, and education will contribute $500 billion to GDP growth over seven years.[13]

Policymakers should be wary of imposing privacy regulations not based on concrete harms and which have a chilling effect on how data is used to drive the economy and the benefits consumers demand from the internet. In fact, polling has indicated that the majority of Americans prefer relevant, targeted advertising that supports "free" content.[14] Overly restrictive privacy regulations could impede consumers' use of relatively inexpensive access to web content on which they rely.

In fact, data-driven targeted advertising has the potential to increase competition in the online marketplace as small businesses and startups can more efficiently focus their outreach efforts on selected consumers. Data-driven marketing enables small businesses with limited budgets and resources to find and reach consumers more likely to purchase their products and services.[15] Given the potential that data-informed advertising can have for the nearly 29 million small businesses in the United States[16], the Commission should avoid setting privacy enforcement precedents that regulate hypothetical data-privacy injuries. As the Chamber previously noted in its comments in the Nomi Technologies case, the aggressive use of Section 5 against companies for hypothetical harms also has the potential to have a disproportional negative impact on small businesses.[17]

III. Conclusion.

The data-driven economy is having a transformative effect on the American economy and has contributed significantly to economic growth and innovation. Relevant, targeted advertising has the ability to bring more competition to the market from small businesses and is preferred by most Americans. Unfortunately, the use of hypothetical harms that essentially create *de facto* opt-in privacy requirements has the potential to have a chilling effect on innovation and the services consumers have come to enjoy. The Chamber once again applauds Acting Chairman Maureen Ohlhausen and the Commission for examining this critical issue with regard to the nation's digital economy and requests that the Commission foster economy-growing regulatory certainty by taking enforcement actions for privacy and data security practices which only produce concrete harms.

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[13] AccentureStrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities," (2017) *available at* https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf.

[14] Grant Gross, "Survey: Internet users like targeted ads, free content," PCWORLD (Apr. 19, 2013) *available at* http://www.pcworld.com/article/2035836/survey-internet-users-like-targeted-ads-free-content.html.

[15] Jill Bowers, "Google for Business: A Small Business Guide," Business News Daily (Sept. 17, 2017) *available at* http://www.businessnewsdaily.com/6344-google-business-guide.html; Matthew Tyson, "Why Small Businesses Should Use Facebook Advertising," Huffington Post (May 19, 2016) *available at* https://www.huffingtonpost.com/matthew-tyson/why-small-businesses-shou_b_10046180.html.

[16] U.S. Small Business Administration Office of Advocacy Small Business Profile (2016) *available at* https://www.sba.gov/sites/default/files/advocacy/United_States.pdf.

[17] Comments of U.S. Chamber of Commerce *In Re Nomi Technologies* (May 22, 2015) *available at* https://www.uschamber.com/sites/default/files/5.22.15-_comments_to_ftc_on_nomi_technologies_consent_agreement.pdf.

Thank you for the opportunity to participate in this proceeding. If you have any follow up questions, I may be reached at (202) 463-5457 or by e-mail at wkovacs@uschamber.com.

Sincerely,

William L. Kovacs
Senior Vice President
U.S. Chamber of Commerce

Tim Day
Senior Vice President
C_TEC U.S. Chamber of Commerce