



January 26, 2018

BY ELECTRONIC SUBMISSION

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

Re: Informational Injury Workshop P175413

CTIA¹ appreciates the opportunity to submit comments on the issues raised at the Federal Trade Commission's ("FTC" or "Commission") Informational Injury Workshop ("Workshop") and the agency's evaluation of consumer harms in the privacy and security context.

CTIA's members remain committed to protecting customers' privacy and safeguarding their information and have long done so under applicable federal and state privacy laws and self-regulatory enforceable codes of conduct, all while continuing to experiment and innovate in the vibrant wireless marketplace. CTIA members work hard to earn and maintain consumer trust by employing appropriate and consistent privacy and security protections.

CTIA commends the Commission for initiating this effort to develop a thoughtful policy approach to informational injuries related to privacy and data security. CTIA agrees that this is a timely and worthwhile exercise and that the FTC is off to a

¹ CTIA® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.



promising start to develop sound policy that will enable the Commission to better protect consumers, while continuing to encourage innovation.

That said, as many parties described in their comments, and as was further discussed at the Workshop, the FTC should ensure that its privacy and data security enforcement actions: (1) focus on addressing actual, concrete injuries; and (2) are supported by robust economic analysis and empirical data. Each is discussed in greater detail below.

I. THE FTC'S PRIVACY AND DATA SECURITY ENFORCEMENT EFFORTS SHOULD FOCUS ON ADDRESSING ACTUAL, CONCRETE INJURIES.

CTIA applauds Acting Chairman Ohlhausen for her commitment to ensuring that enforcement efforts address concrete harms that cause, or are likely to cause, consumer injury.² As she stated in her opening remarks for the Workshop, “[g]overnment does the most good with the fewest unintended side effects when it focuses on addressing actual or likely substantial consumer injury instead of expending resources to prevent trivial or purely hypothetical injuries.”³ Moreover, as she has recognized, Section 5 of the FTC Act itself *requires* the Commission to focus on consumer harm for both deception and unfairness claims.⁴ For deception, the

² See, e.g., Maureen K. Ohlhausen, Acting Chairman, FTC, Keynote Address at the ABA 2017 Consumer Protection Conference (Feb. 2, 2017) (“I will make sure our enforcement actions address concrete consumer injury . . . The agency should focus on cases with objective, concrete harms such as monetary injury and unwarranted health and safety risks.”), https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf.

³ Maureen K. Ohlhausen, Acting Chairman, FTC, Opening Remarks at FTC Workshop on Informational Injuries (Dec. 12, 2017), https://www.ftc.gov/system/files/documents/public_statements/1289343/mko_speech_-_info_injury_workshop_1.pdf.

⁴ See, e.g., Maureen K. Ohlhausen, Commissioner, FTC, The Internet of Everything: Data, Networks & Opportunities at the U.S. Chamber of Commerce Foundation and U.S. Chamber’s Center for Advanced Technology & Innovation, Washington, D.C. (Sept. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/804001/150922remarkscommmko.pdf; see also 15 U.S.C. § 45(a)(1).



materiality requirement means that the alleged deceptive acts must “actually harm consumers.”⁵ And a Section 5 unfairness claim involves a balancing of “substantial injury” to consumers that is not reasonably avoidable and that outweighs the benefits to consumers or competition.⁶ CTIA agrees with Acting Chairman Ohlhausen and commenters that any alleged harms cannot be theoretical, and that the Commission should focus on “stopping substantial consumer injury instead of . . . hypothetical injuries.”⁷

Workshop participants highlighted several examples of informational injuries, including actual harms such as identity theft, medical identity theft, stalking, and loss of employment.⁸ As it determines enforcement policy and case selection, the Commission should address these and other actual injuries that have been specifically identified by Congress as warranting special consumer protections – such as those associated with consumers’ health or financial information or children’s

⁵ See, e.g., *id.*; FED. TRADE COMM’N, POLICY STATEMENT ON DECEPTION (1983), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁶ See, e.g., FED. TRADE COMM’N, POLICY STATEMENT ON UNFAIRNESS (1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁷ See Maureen K. Ohlhausen, Acting Chairman, FTC, *Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases* (Sept. 19, 2017), https://www.ftc.gov/system/files/documents/public_statements/1255113/privacy_speech_mkohlhausen.pdf; see also, e.g., *Comment of Advertising Trade Associations #721 Comment # 00022*; *Comment of U.S. Chamber Institute for Legal Reform #721 Comment # 00023*; *Comment of ACT The App Association #721 Comment # 00024*; *Comment of Computer & Communications Industry Association #721 Comment #00025*; *Comment of Data and Marketing Association #721 Comment #00010*; *Comment of the Internet Association #721 Comment # 00028*; *Comment of U.S. Chamber of Commerce #721 Comment #00014*.

⁸ See, e.g., Transcript of the FTC Workshop on Informational Injuries (Dec. 12, 2017), remarks of P. Dixon, World Privacy Forum at 2-4 (discussing the rise of medical identity theft); D. McCoy, New York University, Tandon School of Engineering at 6-7 (discussing stalking and domestic violence); C. Southworth, National Network to End Domestic Violence at 10-11 (discussing stalking and domestic violence and stating that more than 70% of stalkers and abusers “[use] technology to monitor internet and computer use”); and H. Wydra, Whitman-Walker Health’s Legal Services at 12 (discussing loss of employment), https://www.ftc.gov/system/files/documents/videos/informational-injury-panel-1-injuries-101/ftc_informational_injury_transcript_segment_2.pdf.



information.⁹ CTIA also notes, however, that aspects of certain harms discussed at the Workshop (e.g., certain criminal activity, personal healthcare decisions, interference with personal relationships), while worthy of consideration in the appropriate context, may be outside the scope of the FTC's enforcement authority.¹⁰

II. THE FTC'S PRIVACY AND DATA SECURITY ENFORCEMENT EFFORTS SHOULD ALSO BE SUPPORTED BY ROBUST ECONOMIC ANALYSIS AND EMPIRICAL DATA.

CTIA is pleased to see the FTC's focus on economic analysis, which was further evidenced by the prominent role that economists had in the Workshop.

CTIA agrees that, consistent with its statutory mandate, the FTC should ensure that any proposed informational injury enforcement action is supported by rigorous economic analysis.¹¹ Robust economic analysis, based upon empirical data and established theories, will help the agency achieve its job which, as described by Acting Chairman Ohlhausen, is to "address unfair and deceptive practices that harm the market process and harm consumers . . . in a way that avoids hindering market-generated consumer benefits."¹²

Fortunately, as was mentioned at the Workshop and also by commenters, the FTC has substantial internal resources within its Bureau of Economics to support such an

⁹ In determining which data is "sensitive," the Commission has generally looked to categories already identified by Congress as warranting special protection. See, e.g., FED. TRADE COMM'N, *Protecting Consumer Privacy in an Era of Rapid Change*, Report, 58-59 (2012).

¹⁰ See, e.g., Transcript of the FTC Workshop on Informational Injuries (Dec. 12, 2017), https://www.ftc.gov/system/files/documents/videos/informational-injury-panel-1-injuries-101/ftc_informational_injury_transcript_segment_2.pdf.

¹¹ See, e.g., *Comment of Software & Information Industry Association #721 Comment #00018* at 5; *Comment of Computer & Communications Industry Association #721 Comment # 00025* at 3-4; *Comment of the Internet Association #721 Comment # 00028* at 4.

¹² Maureen K. Ohlhausen, Acting Chairman, FTC, Keynote Address at the ABA 2017 Consumer Protection Conference (Feb. 2, 2017) *supra* note 2, at 2.



approach. The FTC should continue to rely upon the Bureau's expertise and ensure that sufficient resources are allocated for these and similar functions.

III. CONCLUSION

CTIA supports the efforts of the Commission to explore informational injuries to consumers. We look forward to continuing to work with the FTC in its effort to develop an appropriate enforcement framework that is focused on actual, concrete injuries and supported by robust economic analysis and empirical data.

Respectfully submitted,

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