

August 16, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

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

To Whom It May Concern:

The American Financial Services Association (AFSA)¹ thanks the Federal Trade Commission (FTC) for holding a series of public hearings on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy. AFSA appreciates the opportunity to submit written comments in advance of the hearings. We hope our comments will be helpful to the FTC as it evaluates its near- and long-term law enforcement and policy agenda.

AFSA's comments focus on several areas: data security, data aggregators, privacy, new technology, use of machine learning and alternative data, debt collection, and mortgages.

(1) Data Security

Financial institutions are subject to privacy and data breach notification requirements under varying federal and state laws. Yet, consumers remain vulnerable to identity theft and fraud because breaches of personal and financial data commonly occur at retailers and other businesses. Meaningful protections will require cooperation by all industries, and a comprehensive approach to securing this sensitive information of consumers is long overdue. AFSA therefore supports a nationwide standard that preempts state law to promote uniformity and coordination among all entities entrusted with private consumer data. Industry and regulators should develop enhanced security standards, practices and communication tools to help the industry mitigate cyber threats and manage breaches, including providing appropriate customer notifications.

However, no matter the budget and level of sophistication, many data security experts recognize that data breaches are inevitable: it is not "whether" a financial institution's data (including non-public personal information of consumers and employees) will be breached; it is "when" will the breach occur. Given this uncomfortable but unfortunately realistic view of data security, it is important that financial institutions be given a safe harbor from liability for meeting or exceeding the national standard.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

(2) Data Aggregators

The growing use of financial data aggregation techniques presents security challenges and potential liability in the event of a breach stemming from inadequate privacy and security standards that can expose customer credentials and financial information to substantial risks of breach or misuse. Once an aggregator has customer information, it may not be subject to security standards comparable to the institution from which it was sourced, and there may be no restriction on its use. A breach of an aggregator's database would not only compromise the customer's financial account data but could allow a bad actor undetected access into a customer's bank account. AFSA suggests that the FTC endorse the principles and approaches adopted by the Bureau of Consumer Financial Protection (BCFP) in October 2017.

(3) Privacy

AFSA commends the FTC's Division of Privacy and Identity Protection for its excellent work in creating authoritative resources on privacy. We would like to see the division enhance its reach by educating and training both businesses and consumers.

(4) New Technology

AFSA supports the administration's goal, as expressed in the recent Treasury report, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation*,² that regulators foster innovation and not regulate in a way that inhibits development. We encourage regulators to enable adaptation of technology to evolving customer interaction and access preferences, focusing regulatory activities on addressing emerging gaps in consumer protection presented by new technologies. There is also a need for a framework for guidance and interpretations, as well as better interagency coordination regarding the novel regulatory issues presented by the deployment of new technologies. It is important that regulators continue observing how technologies mature and adopt regulatory protection frameworks. These frameworks should adapt to emerging technical formats and standards as well as new product features that reflect consumers' evolving choices and preferences.

(5) Use of Machine Learning and Alternative Data

The use of artificial intelligence, including machine learning (ML), is growing in the financial services industry and elsewhere. One of the more exciting uses of machine learning is the use of alternative data to provide access to credit for the estimated 26 million "credit invisibles" (no credit file) and 19 million "unscorables" (credit file is too stale/thin to generate a score) of U.S. adults. However, a lack of regulatory clarity has inhibited financial institutions from using machine learning and alternative data in credit underwriting. We recommend that regulators examine the current application of certain consumer protection regulations to ML scoring methods and alternative data and provide additional guidance to ensure that regulations are appropriately tailored to enable innovative approaches that allow more Americans to gain access to credit and better manage banks' enterprise and systemic risk. Acknowledging that there are many types and sources of alternative data with varying levels of intuitive connection with creditworthiness, regulators should consider providing a determination on certain categories of alternative data that have been established (through extensive analysis and testing) as being more reliable (*i.e.*, accurate, representative and predictive), such as utility and rent payment data. This will enable

² U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation*. July 2018. Available at <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>

financial institutions to innovate in a safe and sound way without the burden of extensive testing that is more appropriate for alternative data that has not yet achieved a sufficient level of reliability. In addition, we would like to see regulators provide greater clarity on how to avoid discrimination when using ML and alternative data, including how to measure disparities, demonstrate business need for particular alternative data inputs or approaches, and assess and choose among potential alternative inputs and approaches. Finally, we recommend that regulators provide transparency on what constitutes an unfair, deceptive or abusive act or practice when collecting and using ML and alternative data.

(6) Debt collection

We commend the FTC on its enforcement actions against phantom debt collectors and debt settlement companies. These operations often hurt both consumers and financial institutions. AFSA members would welcome an opportunity to assist the FTC in combating these activities and would be open to suggestions on how to do so.

(7) Mortgages

The FTC has previously requested comment regarding how the FTC can continue to aid and facilitate competition in the residential real estate brokerage industry. We think the FTC can help to improve competition and foster an industry-wide spirit of cooperation: (1) by teaming up with the BCFP to clarify the application of the Real Estate Settlement Procedures Act in digital real estate transactions; (2) by working with the BCFP to clearly identify digital tools that real estate lenders and brokers may offer to consumers without violating the unfair, deceptive, or abusive acts or practices or fair lending rules and regulations; and (3) by providing additional exceptions to the Gramm-Leach-Bliley Act which would allow real estate brokers and lenders to communicate with their customers more effectively.

* * *

Thank for the opportunity to share our views. Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

/s/ Bill Himpler
Executive Vice President
American Financial Services Association