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OF THE  
UNITED STATES OF AMERICA

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August 20, 2018

**VIA ELECTRONIC FILING**

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 21<sup>st</sup> Century Hearings,  
Project Number P181201***

Dear Commissioners:

The U.S. Chamber of Commerce is pleased to submit these comments to the Federal Trade Commission (“Commission”) in response to the agency’s comment request regarding “Competition and Consumer Protection in the 21<sup>st</sup> Century.” The Chamber looks forward to actively participating in the coming months as the Commission embarks on a series of hearings to explore topics related to the agency’s dual mission of competition enforcement and consumer protection.

The American economy has changed dramatically since the establishment of the Commission over one hundred years ago. Innovations, competition in the market, and consumer demand have driven those changes, and technology and data continued to change the American economy today. The entire business community benefits from the technology digitizing the economy and from the data revolution the digital economy has enabled. The Commission’s enforcement flexibility over an ever-changing economy has been its strength. Such an approach avoids stifling or limiting innovation, competition, or access to in-demand products and services.

**I. The Commission has a dual-mandate, but competition enforcement is different from consumer protection.**

The Commission has authority under Section 5 of its authorizing legislation to take enforcement actions against entities engaged in unfair methods of competition, as well as unfair and deceptive trade practices.<sup>1</sup> While the mandates provide for dual-authority, the enforcement functions should not be intertwined. The Chamber believes that that Commission should use its enforcement authority over unfair methods of competition to enforce the antitrust laws, and avoid any temptation to use competition investigations to address novel theories of harm that attempt to expand the traditional antitrust view of consumer welfare.<sup>2</sup> Consumer welfare is not the same as consumer protection. Both are important, but one addresses economic concerns while the other addresses social concerns.

The Chamber will provide a series of more detailed comments during the forthcoming hearings on the range of competition policy and procedural questions the Commission has identified. In particular, we look forward to sharing our concerns over the questionable and unsubstantiated claim of antitrust harm arising from the digital economy, as well as corporate acquisition-related questions including common, but non-controlling, ownership interests. It is critical that the Commission remain mindful of the pro-competitive benefit that big data, algorithms, artificial intelligence, and predictive analytics provide to consumer welfare.

Similarly, millions of retail investors across the country enjoy access to retirement savings solutions through diversified investment products. In addition, diversified investment funds provide capital to thousands of companies. Changes in enforcement approach over non-controlling ownership interests would limit portfolio diversification and affect millions of retirees and investors who depend on low-cost retirement savings, also potentially curtailing the flow of capital to American corporations.

Critics of U.S. antitrust law believe that antitrust enforcement should address issues as varied as income inequality to concentration of political power within industry. Congress is the best body to address these and other policy questions, not the Commission or the Antitrust Division of the Department of Justice. It is important to hold true to the traditional role of antitrust enforcement, as the Commission's planned policy hearings will undoubtedly draw multiple perspectives.

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<sup>1</sup> See 15 U.S.C. § 45

<sup>2</sup> U.S. Chamber of Commerce antitrust paper on Section 5 authority available at <https://www.uschamber.com/unfair-methods-competition-under-section-5-ftc-act-does-us-need-rules-above-and-beyond-antitrust>

The Commission should question whether it would be best to address some of these views as a matter of antitrust enforcement. This is particularly true given the Department of Justice enforces the same antitrust standards, but does not appear to have a formal role in these Commission policy hearings.

## **II. The Commission should take consumer protection enforcement actions only in the case of clear, demonstrable harms.**

With the exception of a few industry-specific laws, the Commission enforces its consumer protection mandate as it relates to data use under its authority to combat unfair and deceptive trade practices under Section 5 of the Federal Trade Commission Act.<sup>3</sup> Section 5 makes clear that the Commission lacks the 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.*”<sup>4</sup> For this reason, the Commission should adopt an approach to privacy, data security, and cybersecurity that address only concrete consumer harms in light of the benefits the data-driven economy provides.<sup>5</sup>

The concept of Article III standing requirements lies at the heart of the American legal system. Potential litigants must meet these requirements to obtain access to federal courts. As the U.S. Supreme Court explained 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.’*”<sup>6</sup>

The Supreme Court again followed these common sense requirements for standing 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 personal information.<sup>7</sup> The Court held in *Spokeo* that the plaintiff had to show that his injury was both concrete *and* particularized in order to obtain standing

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<sup>3</sup> Jennifer Woods, “Federal Trade Commission’s Privacy and Data Security Enforcement Under Section 5,” American Bar Association *available at* [https://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/federal\\_trade\\_commissions\\_privacy.html](https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/federal_trade_commissions_privacy.html).

<sup>4</sup> *See* 15 U.S.C. § 45(n) (emphasis added).

<sup>5</sup> *See*, for example, the U.S. Chamber of Commerce presentation on Internet of Things (IoT) cybersecurity policy at the National Institute of Standards and Technology *IoT Cybersecurity Colloquium* (October 19, 2017). <https://www.nist.gov/news-events/events/2017/10/iot-cybersecurity-colloquium>

<sup>6</sup> *See* *Lujan v. Defenders of Wildlife*, 504 U.S.C. 555, 560 (1992).

<sup>7</sup> *See* *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

and that allegations of bare procedural violations alone were insufficient to show adequate injury.<sup>8</sup>

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 data protection. Unfortunately, the Commission, in recent years, has expanded and tested the limits of which kinds of privacy practices constitute actionable harms to consumers.

The 2015 enforcement action and consent decree between the Commission and Nomi Technologies, a startup data analytics firm, is one such example of an overly broad definition of consumer injury. Nomi collected and hashed non-personal identifiers emitted by some mobile devices to assess which store areas received the most traffic, to allow merchants to more effectively design retail space.<sup>9</sup> Nomi brought online data analytics to the brick-and-mortar retail context and endeavored to do so in a way that protected consumer privacy.

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

### **III. Proposed additional hearing topic: The Scope of Section 5 Authority and "Informational Injury"**

The Chamber has long advocated for greater clarity surrounding the Commission's Section 5 authority for enforcement against unfair methods of competition and unfair and deceptive practices. Determining what business practices involving consumer data are deceptive, fraudulent, and objectively harmful is a foundational issue underlying the upcoming hearings' consumer protection topics.

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<sup>8</sup> *Id.* at 1544.

<sup>9</sup> 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](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](https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf).

In December 2017, the Commission held a workshop on “information injury” that brought together interested parties from across industries, civil society, and academia. Building on the recent workshop, the Chamber recommends that the Commission add the topic of information injury to the agenda for the Commission’s upcoming hearings as there remains a need for greater guidance in that space.

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

The Commission has long taken a technology-neutral approach to privacy and data security. It is important that this approach continue, as a vibrant Internet is critical to emerging technologies such as the Internet of Things, smart cities, artificial intelligence and unmanned aircraft. Further, data analytics and digital advertising are the lifeblood of the Internet ecosystem, spurring economic growth and innovation.

Data analytics and marketing have become such a force in the U.S economy that digital media is projected to “overtake television as the biggest media category [this year]—a year earlier than previously expected—with \$66 billion in revenue.”<sup>10</sup> 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.<sup>11</sup> According to Accenture, the installation of 5G technology to power smart cities, which use sensors and data to create efficiencies in transportation, public safety, and education, will contribute \$500 billion to GDP growth over seven years.<sup>12</sup>

Policymakers should be wary of imposing data protection regulations not based on concrete harms. Such regulation could have a chilling effect on how data drives the economy and on the ways the Internet benefits consumers. Polling has indicated that the majority of Americans prefer relevant, targeted advertising that supports “free” content.<sup>13</sup> Overly restrictive privacy regulations could impede consumers’ use of inexpensive or free access to web content.

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<sup>10</sup> 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>.

<sup>11</sup> 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/>.

<sup>12</sup> 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>.

<sup>13</sup> 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>.

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 resources to find and reach consumers.<sup>14</sup>

Given the potential that data-informed advertising can have for the nearly 29 million small businesses in the United States<sup>15</sup>, the Commission should avoid setting privacy enforcement precedents based on 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 has a potentially disproportionate negative impact on small businesses.<sup>16</sup>

## V. Conclusion

The Chamber looks forward to providing more detailed input on the competition and consumer protection topics the Commission has identified. The Chamber believes it is vital that the United States maintain its global leadership in the digital economy. To do so, the United States must maintain a policy environment that incentivizes innovation by taking an enforcement approach that is true to the antitrust laws of the United States and weighs in on behalf of consumers against concrete and not speculative harms.

Sincerely,



Neil L. Bradley

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<sup>14</sup> 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](https://www.huffingtonpost.com/matthew-tyson/why-small-businesses-shou_b_10046180.html).

<sup>15</sup> 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](https://www.sba.gov/sites/default/files/advocacy/United_States.pdf).

<sup>16</sup> 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](https://www.uschamber.com/sites/default/files/5.22.15-comments_to_ftc_on_nomi_technologies_consent_agreement.pdf).