



THE ADVOCACY DIVISION OF CONSUMER REPORTS

August 20, 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 P1812201

1. The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings;

Antitrust Law and Enforcement

For Consumers Union’s¹ comments pertaining to antitrust law and enforcement please see: *Comments of Consumers Union—Antitrust and Competition Issues*.

Consumer Protection Law and Enforcement

The Federal Trade Commission (FTC) has served US consumers well by bringing enforcement actions and offering guidance for decades. However, consumers lack critical protections especially in regards to safeguarding their privacy. In order for consumers to be effectively protected, the FTC needs more staff, civil penalty authority, administrative rulemaking authority, and newer consumer protection laws, including a dedicated privacy and security law.

In the meantime, we encourage the FTC to pursue robust enforcement of the Federal Trade Commission Act in order to hold companies accountable for the numerous privacy harms that have proliferated in the marketplace. Although the FTC’s privacy and security work has been affected by cases like *LabMD, Inc. v. FTC* and *D-Link Corp. v. FTC*, we urge the Commission to develop a clear public policy on how it will continue to issue strong, enforceable orders. We also urge the Commission to adopt an expansive view of what constitutes an unwarranted intrusion.

¹ Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, privacy and data security, financial services and marketplace practices, food and product safety, telecommunications and technology, travel, and other consumer issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world’s largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 6 million members and publishes its magazine, website, and other publications.

Limits on the Federal Trade Commission

Consumers Union has always regarded the FTC as a leader in ensuring that consumers are protected in the marketplace, and that they have the accurate information needed to make informed decisions. Every year, the FTC returns millions of dollars to consumers and saves billions more through its law enforcement efforts. Every year, it halts ongoing fraud and deception, and helps legitimate companies that offer consumers valuable products and services compete on a level playing field. Every year, it educates the public through consumer and business education, public workshops, and policy reports. And it does so on a shoestring, compared with the budgets of many other federal agencies, and without many of the tools and remedies that other agencies routinely employ.

In addition, the FTC recently created an Office of Technology Research and Investigation, and has appointed a series of Chief Technologists, to ensure that the Commission thoroughly understands new and emerging technologies as it seeks to address consumer protection issues in our increasingly connected world.

Although the FTC has worked tirelessly to protect consumers, the agency's effectiveness is limited by certain restrictions on its authority. Notably, for historical reasons that no longer make sense, the FTC lacks authority to address unfair or deceptive practices by "common carriers" and nonprofit entities. It has very limited rulemaking authority. And it can only seek penalties for law violations in very specific instances. The FTC needs more authority to protect consumers, not less, including stronger tools to protect consumers from privacy and security threats; broader jurisdiction over common carriers and other entities currently shielded from liability; stronger remedies to hold wrongdoers accountable; and greater resources to address consumer harms across the entire marketplace.²

With the favorable ruling in the Ninth Circuit preserving the traditional understanding of the limits of the common carrier exemption,³ we also urge the FTC to press forward protecting consumers in the area of broadband service, especially with the privacy rollbacks at the FCC. However, in light of the recent decision by the Northern District of California in the *D-Link Corp. v. FTC*⁴ case and the decision in the *LabMD* case,⁵ it is clear that the FTC is hampered by the constraints of its existing authority. For this reason, the Commission should petition Congress for an expansion of the FTC's authority so the Commission can more effectively protect consumers.

In the meantime, we also urge the FTC to adopt an expansive view of what constitutes an "unwarranted intrusion"⁶ sufficient to constitute substantial injury under its Section 5 unfairness

² For further discussion of the FTC's authority, please see Consumer Union's response to Topic 11: *The agency's investigation, enforcement, and remedial processes*.

³ Lesley Fair, *En Banc Court of Appeals Rules in FTC's Favor on Common Carrier Issue*, FED. TRADE COMM'N (Feb. 28, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/02/en-banc-court-appeals-rules-ftcs-favor-common-carrier-issue>.

⁴ *D-Link*, FED. TRADE COMM'N (May 22, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/132-3157/d-link>.

⁵ *LabMD, Inc., In the Matter of*, FED. TRADE COMM'N (Sept. 26, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/102-3099/labmd-inc-matter>.

⁶ In her September 19, 2017 speech announcing the December 2017 Informational Injury Workshop, Acting

authority. For example, in the *Vizio* case, second-by-second information about the video displayed on a consumer's TV was collected and then combined with specific demographic information, such as sex, age, income, marital status, household size, education level, home ownership, and household value.⁷ And in a series of cases involving *Aaron's* rent-to-own computers, the companies enabled spyware on the rentals that monitored computers in consumers' homes.⁸ We encourage the Commission to expand on these cases to challenge similar practices that are harmful and highly invasive as violative of the unfairness prong of Section 5 of the FTC Act.

Consumers' Concern for Their Privacy

Despite the Commission's efforts to protect consumers, consumers face enormous challenges navigating today's marketplace, making it harder than ever to avoid fraud, deception, and other harms. Every day, they face 24-hour data collection and advertising, phishing attempts, imposter scams, massive data breaches, highly sophisticated frauds, and confusion about who they can trust. Although consumers are increasingly interested in protecting their privacy and the security of their data, they are unable to do so, because it is too time-consuming and hard for consumers to effectively manage the amount of data that is collected about them.⁹

Consumer Reports' 2015 survey showed that 88 percent of individuals say it is important that they not have someone watch or listen to them without their permission.¹⁰ A Mozilla study found that a third of people feel like they have no control of their information online;¹¹ and, a study from Pew noted that respondents "regularly expressed anger about the barrage of unsolicited emails, phone calls, customized ads, or other contacts that inevitably arises when they elect to share some information about themselves."¹² The majority of consumers (74 percent) find it is "very important" to be in control over who can get information about them.¹³ In addition, 67

Chairman Maureen Ohlhausen identified five types of consumer informational injury: deception injury or subverting consumer choice, financial injury, health or safety injury, unwarranted intrusion injury, and reputational injury. Maureen K. Ohlhausen, *Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases*, FED. TRADE COMM'N (Sept. 19, 2017), https://www.ftc.gov/system/files/documents/public_statements/1255113/privacy_speech_mkohlhausen.pdf.

⁷ *VIZIO to Pay \$2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions without Users' Consent*, FED. TRADE COMM'N (Feb. 6, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it>.

⁸ See, e.g., *Aaron's*, FTC File No. 122-3264 (2013), <https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter>.

⁹ Unfortunately, consumers typically remain unaware of when their data has been compromised until they are notified or leaked information alerts the general population to data and privacy concerns. This is why data breach notifications are so important and why third parties like Consumer Reports works to keep consumers informed about their data privacy choices and methods to have more control over their privacy and data security. See, e.g., Tericus Bufete, *How to Use Facebook Privacy Settings*, CONSUMER REPORTS (Apr. 4, 2018), <https://www.consumerreports.org/privacy/facebook-privacy-settings/>.

¹⁰ Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security, and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>.

¹¹ *Hackers, Trackers, and Snoops: Our Privacy Survey Results*, MOZILLA (Mar. 9, 2017), <https://medium.com/mozilla-internet-citizen/hackers-trackers-and-snoops-our-privacy-survey-results-1bfa0a728bd5>.

¹² Lee Rainie & Maeve Duggan, *Privacy and Information Sharing*, PEW RESEARCH CTR. (Jan. 14, 2016), <http://www.pewinternet.org/2016/01/14/privacy-and-information-sharing/>.

¹³ See *Americans' Attitudes*, *supra* note 10.

percent of consumers highly value not having “someone watch you or listen to you without your permission” and 65 percent of consumers think it is “very important” to control what information is collected about them.¹⁴ Indeed, this is not a new sentiment for consumers: a Pew research poll in 2014 found that 91 percent of adults “‘agree’ or ‘strongly agree’ that consumers have lost control over how personal information is collected and used by companies.”¹⁵ Consumers desire the ability to limit data collection, detrimental uses, and unnecessary retention and sharing, but lack the ability to easily and efficiently exercise those preferences.

These concerns have a tangible effect on how consumers conduct themselves online. The National Telecommunications & Information Administration’s analysis of recent data shows that Americans are increasingly concerned about online security and privacy, at a time when data breaches, cybersecurity incidents, and controversies over the privacy of online services have become more prominent.¹⁶ These concerns are even prompting some Americans to limit their online activity.¹⁷

Notice and Choice is Insufficient to Protecting Consumer Privacy

Unfortunately, the FTC’s historical notice-and-choice approach to safeguarding personal privacy has proven ineffective.¹⁸ Privacy policies are an ineffective method of providing information directly to consumers. Because the law does not clearly mandate specific disclosures, and because most FTC privacy cases are predicated upon a specific misstatement in a privacy policy or elsewhere, privacy policies tend to be vague and expansive. But even if they were more precise, it would not be efficient for consumers to read them: a study by Aleecia McDonald and Lorrie Cranor estimated that reading every site’s privacy policy would take users over 244 hours per year, at a collective societal cost in wasted opportunity of over \$600 billion.¹⁹

Despite these issues, privacy policies have a role to play. Companies should be required to provide more detailed information about their actual practices within their privacy policies—not so much for consumers, but for regulators, journalists, civil society, and ratings services such as Consumer Reports. As such, privacy policies would function more like financial filings, which are important accountability documents, and which are not necessarily read by ordinary investors, but which are processed by intermediaries to convey meaningful information to the marketplace.

In light of the issues posed by privacy policies—and because consumers strongly desire the ability to control their data and protect their privacy, but lack the means to do so—consumers

¹⁴ *Id.*

¹⁵ Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RESEARCH CTR. (Nov. 12, 2014), <http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/>.

¹⁶ Rafi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, NAT’L TELECOM. & INFO. ADMIN. (May 13, 2016), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

¹⁷ *Id.*

¹⁸ See Terrell McSweeney, *Psychographics, Predictive Analytics, Artificial Intelligence, & Bots: Is the FTC Keeping Pace?*, 2 GEO. L. TECH. REV. 514 (2018), available at <https://www.georgetownlawtechreview.org/wp-content/uploads/2018/07/2.2-McSweeney-pp-514-30.pdf>.

¹⁹ Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, J. OF LAW & POLICY FOR THE INFO. SOCIETY (2008), https://kb.osu.edu/bitstream/handle/1811/72839/ISJLP_V4N3_543.pdf.

need better information and tools to evaluate and compare privacy choices. To that end, Consumer Reports and its partners have developed The Digital Standard,²⁰ an open standard for testing products for privacy and security in order to help consumers make informed decisions in the marketplace. The testing includes assessments of a company's stated privacy practices in both the user interfaces and in their privacy policies. This effort depends on the transparency that privacy policies and user interfaces provide consumers.

Consumers Deserve Stronger Privacy Rights Under the Law

While transparency is important, Consumers Union continues to support broader legislation that would provide increased protections for consumer data security and privacy.²¹ We urge the FTC to renew its support for stronger, clearer authority in this area as well. Such a law should require:

- Clear information about data practices;
- Simple and easy-to-use consumer choices;
- The collection and retention of only the data necessary—and the disposal of old data;
- Explicit mandate to use reasonable security practices;
- Ways for consumers to get easy access to their information; and
- Strong enforcement tools to ensure accountability.²²

Unfortunately, legal protections at the federal level are currently getting weaker.²³ In response, the states are leading the way on advancing legislation to safeguard consumer privacy and security. For example, the recently passed California Consumer Privacy Act²⁴ will give consumers control over the sale of their data, in addition to new access and transparency rights.

Just as states have determined the legal landscape for data breach notification,²⁵ states seem poised to set more comprehensive standards for security and data privacy. While Consumers Union supports many of these state legislative initiatives, a strong federal law ensuring privacy and security protections for all personal data is still needed. Importantly, however, federal legislation should serve as a floor—not a ceiling—for legal protections, and should allow the states to continue to iterate over time to protect their citizens' personal information. Federal legislation must not simply codify weak rules while preventing the states from imposing more

²⁰ The Digital Standard (theDigitalStandard.org) was launched on March 6th, 2017 and is the result of a collaboration with our cybersecurity partners, Disconnect, Ranking Digital Rights, and the Cyber Independent Testing Lab. The Standard is designed to hold companies accountable and equip Consumer Reports and other organizations to test and rate products for how responsibly they handle our private data. This is a collaborative and open source effort. The Standard is designed to empower consumers to make informed choices about the connected products, apps, and services consumers use everyday.

²¹ Jessica Rich, *Beyond Facebook, It's High Time for Stronger Privacy Laws*, WIRED (Apr. 8, 2018), <https://www.wired.com/story/beyond-facebook-its-high-time-for-stronger-privacy-laws/>.

²² Consumers Union, *Where We Stand: Congress Should Pass a Strong Privacy Law, Now*, CONSUMER REPORTS (Apr. 9, 2018), <https://www.consumerreports.org/privacy/its-time-for-congress-to-pass-a-strong-privacy-law/>

²³ Justin Brookman, *Protecting Privacy in an Era of Weakening Regulation*, 9 HARV. L. & POL'Y REV. 356-74 (2015), http://harvardlpr.com/wp-content/uploads/2015/07/9.2_3_Brookman.pdf.

²⁴ Unfortunately, industry groups are working to weaken the bill. Susan Grant, *Consumer and Privacy Groups Urge California Lawmakers Not to Weaken Recently-Enacted Privacy Law*, CONSUMER FED. OF AMERICA (Aug. 13, 2018), <https://consumerfed.org/testimonial/consumer-and-privacy-groups-urge-california-lawmakers-not-to-weaken-recently-enacted-privacy-rules/> AB-375, CALIF. STATE LEGISLATURE, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 (last visited July 30, 2018).

²⁵ *Data Breach Notification Laws: Now in All 50 States*, PRIVACY RIGHTS CLEARINGHOUSE (May 9, 2018), <https://www.privacyrights.org/blog/data-breach-notification-laws-now-all-50-states>.

meaningful protections.

Respectfully submitted,

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