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August 20, 2018

TRANSMITTED ELECTRONICALLY

Donald S. Clark, Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearing
Project Number P181201

Dear Secretary Clark:

The Attorneys General of Arizona, Arkansas, California, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, and Washington ("State Attorneys General") submit the following Comment in response to the announcement of public hearings on Competition and Consumer Protection in the 21st Century and request for public comments ("Announcement") issued by the Federal Trade Commission ("Commission").

The State Attorneys General offer our unique perspective in this Comment on the interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices (Topic 10). The State Attorneys General also offer this Comment in response to the consumer protection issues in privacy and big data (Topic 4); communication, information, and media technology networks (Topic 2); and the use of algorithmic decision tools, artificial intelligence, and predictive analytics (Topic 9).

I. States' Important Role in Consumer Protection and the State Attorneys General Partnership with the Federal Trade Commission (Topic 10)

The State Attorneys General play a distinct and important role in consumer protection, given our broad authority to act in the public interest combined with our responsibility to enforce state laws. We have a long history of protecting consumers from unfair and deceptive practices.

The State Attorneys General frequently use our consumer protection authority—derived from states' traditional police powers—to investigate violations of law, enjoin harmful conduct, redress consumer harm through injunctive relief and restitution, and deter further violations through civil penalties.

As the primary consumer protection enforcers, the State Attorneys General are in a unique position to identify emerging marketplace trends and address unfair or deceptive conduct. States are often the first to hear from consumers regarding problems in the marketplace. The State Attorneys General have particular knowledge of our local economies and we understand how regulation and enforcement affects local businesses.

Early action by the State Attorneys General can prevent a local problem from becoming a national one. However, when national issues do arise, we have a proven record of working together to address unfair and deceptive conduct and provide consumers relief. It is critical that the State Attorneys General continue to enforce state laws to protect our residents.

Similarly, we have a long history of working with the Commission to achieve our shared mandate to protect consumers. Our parallel enforcement authority maximizes government resources, deters potential violators, and redresses consumer harm. Our enforcement authority may differ, yet we have successfully worked as partners, including in *FTC v. EMP Media, Inc.*,[1] *FTC v. Hylan Asset Mgmt., LLC*,[2] *FTC v. VIZIO, Inc.*,[3] *FTC v. Click4Support, LLC, et al.*,[4] and as part of "Operation Main Street: Stopping Small Business Scams Law Enforcement and Education Initiative."[5]

We urge the Commission to continue its partnership with the State Attorneys General to the ultimate benefit of all consumers.

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[1] *FTC, et al., v. EMP Media, Inc., et al.,* 2018 U.S. Dist. LEXIS 107606 (D. Nev. June 15, 2018); Fed. Trade Comm'n, FTC, Nevada Obtain Order Permanently Shutting down Revenge Porn Site MyEx, (June 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-nevada-obtain-order-permanently-shutting-down-revenge-porn (last visited Aug. 13, 2018).

[2] Complaint For Permanent Injunction and Other Equitable Relief, *FTC, et al., v. Hylan Asset Mgmt., LLC, et al.,* No. 1:18-cv-00710-LJV (W.D.N.Y. June 26, 2018); Fed. Trade Comm'n, FTC and New York Attorney General Act Against Phantom Debt Brokers and Collectors, (June 27, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-new-york-attorney-general-act-against-phantom-debt-brokers (last visited Aug. 13, 2018).

[3] Complaint for Permanent Injunction and Other Equitable and Monetary Relief, *FTC, et al. v. VIZIO, Inc., et al.,* No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017); Fed. Trade Comm'n, 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 (Feb. 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it (last visited Aug. 13, 2018).

[4] *FTC, et al., v. Click4Support, LLC, et al.* No. 2:15-cv-05777-SD (E.D. Pa, Jan. 10, 2018), Fed. Trade Comm'n, FTC, Pennsylvania and Connecticut Sue Tech Support Scammers That Took More Than $17 Million From Consumers (Nov. 13, 2015) https://www.ftc.gov/news-events/press-releases/2015/11/ftc-pennsylvania-connecticut-sue-tech-support-scammers-took-more (last visited Aug. 13, 2018).

[5] Participating states include Arizona, Delaware, Florida, Indiana, Missouri, New York, Tennessee, and Texas Fed. Trade Comm'n, FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street: Stopping Small Business Scams Law Enforcement and Education Initiative, (June 18, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main (last visited Aug. 13, 2018).

II. The Intersection Between Privacy and Big Data, and Consumer Protection Implications (Topic 4)

A. The Benefits of Privacy Laws and Regulations on Consumer Protection

In our experience, consumer privacy and data security is an afterthought in product and service development. Industry often does not adequately invest in privacy and security. Consumer data has inherent value and the free market alone does not adequately protect sensitive data. Consumers have voiced concerns to us about what personal information industry collects, how industry informs consumers about data collection, and how industry uses and shares consumers' data. Industry must place privacy and security front and center in its research and development of products and services.

B. The Benefits of State Privacy Laws and Regulations

The State Attorneys General have significant expertise in state and federal privacy laws and regulations. The State Attorneys General began focusing on technology-related privacy issues in the 1990s. Early enforcement actions targeted intrusive telemarketing, spam, spyware, and the absence of privacy policies. Since then, states have been adapting, enacting, and enforcing privacy laws as technology has changed, consumers' use of technology has evolved, and new threats have emerged.

The State Attorneys General use well-established processes to coordinate regional or national investigations and enforcement efforts. This both increases efficiency and minimizes the burden of concurrent investigations. Through privacy and data security enforcement actions, we work together to obtain injunctive relief and impose civil penalties essential to deterring certain conduct in the marketplace.

The State Attorneys General take a similar legal position to that of the Commission regarding privacy and data security. We require persons who collect personal information to be transparent about privacy practices and to act consistently with representations they make. We also require persons to take reasonable steps to protect data that they collect from consumers.

Also important are the independent state actions that the State Attorneys General take under our respective state privacy laws. Many privacy and data security incidents disproportionally affect residents of a particular state. The State Attorneys General are best suited to respond to such incidents involving local businesses and affecting local consumers.

Additionally, states provide benefits to consumers in their development of privacy laws and regulations:

- In 2002, California enacted the first data breach notification law in the nation in response to data breaches that left consumers vulnerable to identity theft. All 50

States and the District of Columbia now require notice to consumers when consumers' personal information is exposed.

- As online credentials became the "keys to the castle" for consumers' data and identities, states introduced legislation. Now account credentials, such as user names and passwords, are a trigger for breach notification—a key state law innovation.[6]

- As healthcare records increasingly became digitized, state laws began to cover patient data as personal information under privacy laws.[7]

- As companies increasingly use fingerprints, voiceprints, and facial recognition to unlock devices and access accounts, states have adopted laws aimed at protecting biometric data.[8]

- A number of states have enacted laws that require entities to take reasonable safeguards to protect data.[9]

- Oregon updated its consumer law to hold companies accountable for their online privacy policies.[10]

- Vermont enacted the first law that establishes a registry and security standards specific to the data broker industry.[11]

- Most recently, California passed the California Consumer Privacy Act of 2018 that affords consumers greater control over their online data.[12]

States continue to innovate and update laws as technology evolves to benefit consumers.

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[6] States include Alabama, Arizona, California, Colorado, Delaware, Florida, Illinois, Maryland, Nebraska, Nevada, Rhode Island, South Dakota, and Wyoming.
[7] States include Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Illinois, Kentucky, Maryland, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Virginia, and Wyoming.
[8] States include Arizona, California, Colorado (effective Sept. 1, 2018), Delaware, Illinois, Iowa, Louisiana, Maryland, Nebraska, New Mexico, North Carolina, Oregon, South Dakota, Wisconsin, and Wyoming.
[9] States include Arkansas, California, Connecticut, Florida, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Utah.
[10] ORS 646.607(12).
[11] 9 V.S.A §§ 2430, 2446, 2447.
[12] Cal. Assem. Bill 375, 2017-2018 Reg. Sess. (Cal. 2018).

III. Consumer Protection Issues in Communication, Information, and Media Technology Networks (Topic 2)

The State Attorneys General often are the first governmental bodies to learn about consumer protection issues associated with internet and online commerce. Every year, we receive numerous consumer complaints regarding internet transactions and we learn about new online scam trends. We also are often the first to hear from consumers about deceptive advertising or billing practices by broadband providers.

The State Attorneys General have worked with the Commission to protect consumers against internet fraud. For example, in *FTC v. Triangle Media Corp.*, the Commission and the Nevada Attorney General halted online marketers responsible for deceptive "free trial" offers.[13] In "Operation Tech Trap," the Commission and many states cooperated in an effort to stave off online tech support scams.[14] In parallel settlements with Lenovo, the Commission and 32 states addressed security vulnerabilities in pre-installed online shopping adware.[15]

The State Attorneys General also enforce consumer protection laws against broadband providers. For example, the New York Attorney General's Office took legal action against a broadband provider that misrepresented the broadband speeds it offered to consumers.[16]

The State Attorneys General would like to continue to collaborate with the Commission to address consumer protection issues in communication, information, and media technology networks.

IV. The Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics (Topic 9)

The State Attorneys General know that industries are deploying algorithmic decision tools, artificial intelligence, and predictive analytics. We understand these technologies are redefining how companies advertise, market, and price their products and services to consumers. The development of these technologies to process and make sense of big data raises significant consumer protection issues.

An example of consumer welfare and privacy implications associated with the use of these technologies is the health insurance industry's use of big data. Data brokers are able to provide health insurers with personal details about consumers, including race, education level, TV habits, marital status, and net worth. The personal information may be collected from

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[13] *FTC v. Triangle Media Corp., et al.,* 2018 U.S. Dist. LEXIS 110465 (S.D. Cal. June 28, 2018).

[14] Participating states include Alabama, California, Colorado, Connecticut, Florida, Hawaii, Massachusetts, Ohio, Pennsylvania, and Texas. Fed. Trade Comm'n, FTC and Federal, State and International Partners Announce Major Crackdown on Tech Support Scams (May 12, 2017), https://www.ftc.gov/news-events/press-releases/2017/05/ftc-federal-state-international-partners-announce-major-crackdown (last visited Aug. 13, 2018).

[15] Fed. Trade Comm'n, Lenovo Settles FTC Charges it Harmed Consumers with Preinstalled Software on its Laptops that Compromised Online Security, (Sept. 5, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/lenovo-settles-ftc-charges-it-harmed-consumers-preinstalled (last visited Aug. 13, 2018).

[16] *State v. Charter Comm'ns Inc., et al.,* 162 A.D.3d 553 (N.Y. App. Div. 2017).

consumers' social media posts, online orders, or bill payment status. This information potentially enables insurers to predict how much consumers' health care could cost.[17] Drawing conclusions about health risks from big data could lead to a bias against some consumers and affect consumers' health insurance prices.

As a second example, the consumer financial services sector might use these technologies as a way to measure creditworthiness, rather than relying on traditional indicia such as FICO scores or income. Although using algorithmic methods and big data may have the potential to expand access to credit, these techniques raise several important consumer protection concerns:

- Creditors may rely on alternative data, such as geolocation or social networking data, which might have the effect of serving as a proxy for race or other impermissible characteristics in violation of federal and state fair lending laws;

- Consumers may lack the protections they have under federal laws such as the Fair Credit Reporting Act to correct inaccuracies and understand how their data is being used; and

- Creditors may use alternative data to engage in predatory practices such as extending credit on terms consumers' cannot repay.

In both of these examples, consumers may not be aware of what personal information industry collects, how industry collects consumers' information, and how industry uses and shares consumers' information.

As the State Attorneys General have historically done with previous technological developments, it is important that we monitor industries' use of these emerging technologies for unfair or deceptive conduct.

V. Conclusion

The United States' framework of federalism allows states to act as laboratories of democracy. Nowhere is this more evident than in the realm of consumer protection. States have a long history of leading the way on protection for consumers from unfair and deceptive acts and practices. We ask that the Commission take into account the important role of the State Attorneys General in consumer protection law. States must be part of the discussion throughout the hearing process.

The State Attorneys General thank the Federal Trade Commission for the opportunity to provide a Comment in preparation of the Commission's hearings to review the state of consumer protection law and policy. We appreciate the consideration of our Comment during the hearings

[17] Similarly, the increasing availability of direct to consumer genetic testing and genealogy products is allowing the increased gathering and pooling of genetic data. The analysis of this data could be used to determine consumers' premiums for life, disability, and long-term care insurance.

process, and look forward to continuing to work collaboratively with the Commission to protect consumers.

Sincerely,

[redacted]

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