



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*

**5. The Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters;**

Consumer Protection

Consumers Union<sup>1</sup> is pleased to be able to submit comments on the issue of the Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters in preparation for the Competition and Consumer Protection in the 21st Century Hearings.

The Federal Trade Commission (FTC) currently lacks sufficient remedial tools to fulfill its consumer protection mandate and to deter illegal conduct, and we strongly support additional powers—most notably civil penalty authority—to augment its current authority. Today, when a company commits an actionable privacy or security violation under Section 5 of the FTC Act, the Commission does not have the ability to obtain penalties from the company. Nor in most cases is restitution an appropriate remedy, as privacy harms or security risks are difficult to quantify and, while possibly substantial in aggregate, may be relatively small in any individual case. The FTC has ordered the disgorgement of ill-gotten gains in some cases,<sup>2</sup> and should expand its use of that

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<sup>1</sup> 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.

<sup>2</sup> *Uber Agrees to Pay \$20 Million to Settle FTC Charges that it Recruited Prospective Drivers with Exaggerated Earnings Claims*, FED. TRADE COMM'N (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited>. Additionally, we reject the assertion of Commissioner Ohlhausen that disgorgement should be tethered to the amount of consumer harm in any particular

authority in lieu of the ability to obtain penalties. However, even in those cases, a company must only cede what it gained directly from its bad behavior, which hardly serves as a sufficient deterrent to others given the relatively small chance of an FTC action. Certainly, the costs of defending an FTC action, the incumbent loss of customer goodwill, and the cost of implementing a compliance program are non-negligible, but in all they are still insufficient to deter rational actors from engaging in unlawful anti-consumer behaviors: the uncertain application of Section 5 in privacy and security matters, along with the relative unlikelihood of enforcement, are hardly outweighed by the weak consequences if they are caught.

The Federal Trade Commission should be granted civil penalty authority for all Section 5 consumer protection matters, and granted comparable authority in any new privacy and security statute. The way that penalties are assessed for violations of trade regulations is, the appropriate model for other FTC penalties. Penalties should be assessed per violation—or per person affected—not based on the number of days on which a violation has occurred, as has been proposed in some legislation. The latter would lead to obviously perverse results—a company could deliberately share or publish to the world all its customer records just for one day, with disastrous results. Nor should the FTC’s penalty authority be subject to a hard, monetary cap, as has also been proposed in some legislation. The appropriate penalty for a small business is obviously very different than it should be for a giant company such as Google or Facebook; a cap would only favor the largest companies and most harmful violations, and thus weaken a law’s deterrent and retributive effect as to them. Instead, the penalty amount should be reasonably tied to factors such as the nature of the violation, the types of data compromised, the willfulness of the behavior, and the size of a company, as well as its ability to pay.

As we explain in response to Topics 1-4, Section 5 is not sufficient to ensure the privacy for American consumers deserve and expect.<sup>3</sup> While the Commission’s interpretation of Section 5 to mandate reasonable security practices sets an appropriate baseline standard, dedicated security legislation would be beneficial for consumers and industry. As companies have challenged

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case. Rather, the purpose of disgorgement is to deprive a wrongdoer of the fruits of his illegal behavior, not to reward such behavior unless harm can be meaningfully assessed and measured in any particular instance.

<sup>3</sup> Recent research from Forrester shows that consumers are increasingly concerned about how their data is being used online. Greg Sterling, *Survey: Chasm Exists Between Brands and Consumers on Data Privacy*, MARTECH (Apr. 6, 2018), <https://martechtoday.com/survey-chasm-exists-between-brands-and-consumers-on-data-privacy-213646>. This concern has resulted in individuals trusting fewer brands. *Id.* Additionally, 61 percent of US adults expressed concern about the sharing of their data or online behaviors between companies. *Id.* And an increasing number of consumers (33 percent) block ads when online and use browser do-not-track settings (25 percent). *Id.* Despite these tools, the majority of consumers (61 percent) would like to do more to protect their privacy. Lee Raine, *Americans’ Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RESEARCH CTR. (Mar. 27, 2018), <http://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/>.

Consumers’ privacy concerns have translated into a desire for stronger laws to help them protect their privacy while online: two-thirds of Americans say that current laws are not good enough in protecting their privacy and the majority of consumers (64 percent) support more regulation of advertisers. *Id.*

(unfortunately, with some success) the FTC's interpretation of Section 5 and enforcement remedies in court, it would be beneficial to articulate a reasonable security mandate in a dedicated statute. Moreover, as some have criticized the FTC reasonableness standard as not offering sufficient notice to businesses about appropriate security practices and procedures,<sup>4</sup> the FTC should propose a dedicated statute to give the Commission rulemaking authority to offer greater clarity and certainty over time as to what reasonable security entails.

Finally, we reiterate our comments in response to Topic 11 that the Federal Trade Commission needs dramatically more resources to achieve its consumer protection mission and should include these resources in its next budget request. The Commission currently has too few people to bring sufficient cases to effectively deter illegal conduct, and as noted in response to Topic 3, modern internet platforms that host more and more online commerce and advertising do not themselves have sufficient incentives to police their platforms for bad conduct. In addition to Congress dedicating substantially greater funds to augment the FTC's capacity, any new privacy and security statute should also empower state attorneys general to bring enforcement actions in order to supplement the Commission's own work on behalf of consumers.

Respectfully submitted,

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<sup>4</sup> Gerard Stegmaier & Wendell Bartnick, *Psychics, Russian Roulette, and Data Security: The FTC's Hidden Data Security Requirements*, 20 GEO. MASON L. REV. 673-720 (May 9, 2013), available at <https://ssrn.com/abstract=2263037>.