

August 20, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
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Washington, District of Columbia 20580

Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 10: “The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices”)

I. Introduction and Statement of Interest

ACT | The App Association (App Association) appreciates the opportunity to provide its views to the Federal Trade Commission’s (FTC) to inform its 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,¹ specifically regarding “the interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices.”

The App Association represents thousands of small business software application development companies and technology firms that create the software apps used on mobile devices and in enterprise systems around the globe. Today, the ecosystem the App Association represents – which we call the app economy – is valued at approximately \$950 billion and is responsible for 4.7 million American jobs. Alongside the world’s rapid embrace of mobile technology, our members have been creating innovative solutions that power the internet of things (IoT) across modalities and segments of the economy. The FTC’s approach to competition and consumer protection enforcement law, enforcement priorities, and policy directly impacts each of the App Association’s members.

¹ Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century*, Notice of Hearings and Request for Comments, 83 FR 38307 (August 6, 2018).

II. Whether the Commission can, and to what extent it should, take steps to promote harmonization between the FTC Act and similar statutes

The potentially problematic variation that is observed between consumer protection laws at the state level—and between state laws and their federal analog in the FTC Act—is especially apparent in the private enforcement of those state laws.² The Commission could help states adopt a uniform approach by suggesting or endorsing model state legislation that minimizes the incentives of trial lawyers to take an overly zealous approach with private enforcement of consumer protection laws. We also support the Commission’s use of its authority to weigh in on the competitive effects of adopting certain state policies through its Office of Policy Planning (OPP).³ These filings could help guide states toward a harmonized approach with federal policies led by the FTC.

Due to the issue of unpredictable and potentially harmful private enforcement of state consumer protection laws, the App Association also supports federal legislation to preempt state laws with respect to data security and breach notification. State laws requiring notification in case of a breach of sensitive personal information vary substantially. In this area, instead of the FTC urging harmonization among the state laws, Congress should preempt them and authorize the FTC to carry out enforcement. Such legislation should require notice in case of a breach, but it should not place separate requirements on cloud services to provide notice to consumers on other covered entities’ behalf. Such an approach does not appear at all in state laws and would create confusion among consumers as to why an unknown entity is notifying them of a breach of information they provided to a consumer-facing party. Moreover, separate notice requirements on cloud services would also create confusion among businesses as they forge cloud service agreements against an already-complex liability backdrop.

² See <https://www.alec.org/model-policy/private-enforcement-of-consumer-protection-statutes-act/>.

³ See, e.g., <https://www.ftc.gov/policy/advocacy/advocacy-filings/2018/01/federal-trade-commission-staff-comment-pennsylvania-state>.

III. Conclusion

We encourage the FTC to use the many tools at its disposal--from workshops to OPP filings--to bring more uniformity between state competition and consumer protection legal regimes and the federal regime, led by the FTC. In certain areas, such as data security and breach notification, Congress should step in to provide more definition and clarity to the FTC's authority and preempt state laws dealing with the same policy matters. Today's internet-driven economy, fueled by cloud computing and mobile connectivity, is inherently interstate. Data security and notification in case of a breach are both policy areas that would benefit immensely from a single, national set of requirements. We appreciate the Commission's attention to streamlining state and federal approaches to consumer protection and competition and look forward to working together to develop approaches that work best for consumers and innovation.

Sincerely,



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