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## WLF Urges FTC to Refocus Consumer-Protection Enforcement on Concrete Consumer Harm

*(In Re: FTC Informational Injury Workshop)*

**“As the FTC engages in a long-overdue study of privacy and data-security injuries, it must set aside its recent tendency to pursue indefinite and speculative harm, while also integrating First Amendment analysis into its enforcement and regulatory activities.”**

**—Glenn Lammi, WLF Chief Counsel, Legal Studies Division**

WASHINGTON, DC—Washington Legal Foundation filed comments on Friday, October 27, 2017 with the Federal Trade Commission (FTC) to inform its examination of consumer injury in the context of privacy and data security. The agency is seeking comments ahead of a December 12, 2017 public workshop.

For the past two decades, the FTC has utilized its broad authority under Section 5 of the Federal Trade Commission Act to prosecute what it perceives as unfair or deceptive data practices, with a vast majority of such actions resulting in settlements. WLF’s comments applaud the FTC’s willingness to look for input on how it should evaluate harm, while also warning the agency not to create a new, amorphous new category of “informational injuries.”

Rather than developing a knowledge-base to justify and support so-called informational injuries, WLF urges the agency to refocus its data-related unfairness and deception enforcement on remedying concrete harms. The FTC’s recent § 5 activities have instead labeled data breaches as *per se* “unfair,” regardless of the speculative nature of the alleged harm. The agency has also brought deception charges against businesses for failing to follow privacy and security statements without determining whether those errors were material to consumers. Limiting principles such as substantial injury and materiality, WLF explains, are critical checks on the FTC’s authority and ensure that government action does more good than harm.

WLF’s comments also ask the FTC to inject First Amendment analysis into its regulatory and enforcement decisions. Courts have concluded that the First Amendment applies when the government restricts the collection, use, and disclosure of information. FTC unfairness and deception actions, and settlements of those actions, have imposed long-term, oppressive controls on business’s collection and use of data. The agency fails its public-interest mission, WLF argues, if it continues to be consciously oblivious to the impact its decisions have on speech rights.

*Celebrating its 40<sup>th</sup> year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.*

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