ADVOCACY
TALENT
IMPACT
What you need to compete.

November 21, 2022

Submitted via Regulations.gov

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

RE: Comment Request for Commercial Surveillance ANPR, R111004

The Federal Trade Commission's (FTC) Advance Notice of Proposed Rulemaking (ANPR) on privacy comes at a time when the privacy landscape in the United States is highly active and in substantial flux. There is active debate on federal privacy legislation in Congress that passed out of committee for the first time in more than two decades, while several states are simultaneously poised for their own omnibus privacy laws to take effect in 2023.

It is critical for the Federal Trade Commission to seriously weigh the costs to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states and federal agencies. The Commission should taper its focus and approach to privacy rulemaking to best reflect its professional expertise, jurisdiction, and Congressionally delegated authority. Most importantly, however, such a rulemaking should clearly encompass a defined set of prevalent, unfair and deceptive data practices based upon past FTC enforcement actions.

The American Association of Advertising Agencies ("the 4A's") strongly supports the written comments submitted by the Privacy for America Coalition concerning the Commercial Surveillance and Data Security ANPR, R111004. The 4A's is a founding member of the Privacy for America Coalition.

Outlined below are some specific concerns with the Commercial Surveillance and Data Security ANPR.

I. Suggesting All Forms Of Commercial Data Use Are Now Commercial Surveillance Is Misleading

The FTC's repeated use of the term "commercial surveillance" as the preferred nomenclature for what appears to be a broad spectrum of data practices, many of which represent essential and beneficial practices, is problematic. This terminology has and will continue to have a significant negative impact on public perception of behavioral, data-driving advertising — a routine

25 W. 45th Street, 16th Floor, New York, NY 10036
Tel 212.682.2500 / Fax 212.682.8391
www.4As.org

advertising practice that has allowed American businesses to effectively reach new customers, promote healthy competition, advance new market entrants, and ensure global consumers have the ability to discover new products and services at little to no cost.

The FTC's use of the blanket term "commercial surveillance" lacks a clear definition in the ANPR and appears to be an overly broad characterization of a set of business practices that are often used by entities in the advertising industry that already practice responsible uses of data and provide consumers with effective tools to exercise choices regarding the use of data collected.

The use of the term “commercial surveillance” itself seems designed to influence public and regulatory thinking that many of the routine data practices utilized by American companies are somehow inherently harmful because they exist.

The 4A’s asks the FTC to narrow and clarify this definition of “commercial surveillance,” and not duplicate existing consumer protection efforts already codified in U.S. law or effectively addressed using existing advertising industry self-regulatory paradigms such as through the Digital Advertising Alliance (DAA), the Better Business Bureau National Program’s Global Privacy Division, and the Association of National Advertisers’ (ANA) Independent Center for Ethical Marketing.

II. The Commission Must Assess the Costs of New Regulation for Businesses and Consumers

Compliance costs associated with divergent privacy laws with differing requirements and frameworks are significant and only growing for American businesses. A regulatory impact assessment of California’s Consumer Privacy Act of 2018 concluded that the initial compliance costs to California firms would be $55 billion[1]. Another recent study found that a consumer data privacy proposal in a different state considering privacy legislation would have generated a direct initial compliance cost of $6.2 billion to $21 billion and an ongoing annual compliance costs of $4.6 billion to $12.7 billion for the state.[2] Prior to GDPR going into effect, PwC surveyed 200 U.S. companies with more than 500 employees and found that 77% planned on spending between $1 and $10 million to meet the regulation’s requirements. Another 9% planned to spend more than $10 million.

[1] See State of California Department of Justice Office of the Attorney General, Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations, 11 (Aug. 2019), located at https://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf.

[2] See Florida Tax Watch, Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida, 2 (Oct. 2021), located at https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986.

As a means to promote consumer welfare and prevent overly burdensome business compliance costs that will prevent new entrants and harm competition, any future FTC data privacy rule should consider including adherence to industry standard self-regulatory transparency and choice management tools already in the marketplace. Over the past decade, 4A's members and responsible actors in the advertising industry have made significant investments in complex notice and consent tools and privacy compliance paradigms in order to provide consumers with choices over their data use.

III. The FTC Should Balance Any New Privacy Regulations Against The Consumer Benefits Of Free Data Flows

The FTC should carefully consider and balance the consumer benefits of the free flow of data against any new privacy restrictions. Given the beneficial uses and responsible practices that the use of data supports for American consumers and businesses, any new FTC data privacy rule that constricts the responsible use and transfer of consumer data should be narrowly tailored to specific cases where consumer harm is present and outweighs these significant data benefits to U.S. consumers and the economy.

Data continues to support American consumers across different geographies and the socioeconomic spectrum with the benefits that the ad-supported Internet provides. Consumers are generally not reluctant to participate online due to industry's use of targeted advertising. A recent survey found more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.[3]

Digital advertising is also a critical linchpin in promoting market growth for small businesses. Third-party data helps small and medium-sized firms to generate new business opportunities at reasonable costs, affording them much needed tools to help them compete with larger companies, who routinely have more first party customer data and financial resources for marketing. Small businesses rely heavily on personalized advertising to build a customer base and reach diverse audiences outside their own geographies.

A recent study of U.S. small businesses suggests that approximately 70 percent of small firms yield a higher return on advertising spend through the utilization of personalized ads, which are powered by third-party data. A 2020 study found that businesses who collectively spent ~$325.6 billion to advertise their products and services (spend included utilizing targeted advertising), generated approximately $2.8 trillion dollars in sales, representing ~$8.6 in incremental sales per advertising dollar spent.

[3] See Mark Sableman, Heather Shoenberger & Esther Thorson, Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates (2013), located at https://www.thompsoncoburn.com/docs/default-source/Blog-documents/consumer-attitudes-toward-relevant-onlinebehavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0.

ADVOCACY
TALENT
IMPACT
What you need to compete.

Overly restrictive new rules on the use of targeted advertising will harm innovation in digital advertising and limit helpful tools that small and medium-sized businesses use to connect with customers. Small and medium-sized businesses, who engage agencies to help them build brand recognition and drive product sales, rely on targeted advertising to emerge in a market full of established players. A switch to purely contextual advertising models could further inadvertently entrench existing industry players and further negatively impact the affordability of advertising for the small businesses that rely on those tools the most.[4]

Conclusion

Heavy-handed regulation on top of the already complex, ununified patchwork of comprehensive state privacy laws is likely to cause unnecessary consumer confusion, user consent fatigue, and costly, unworkable compliance confusion for America's businesses. The FTC rulemaking should tread carefully. Any new data privacy rule that curtails the responsible use of consumer data should ensure the negative impacts do not outweigh the significant consumer, economic, and competition benefits provided by data-driven digital advertising to U.S. consumers and the economy.

We thank the FTC for its consideration of the above comments and reaffirm our ongoing affiliation with the comments filed to the same docket by the Privacy for America coalition.

Sincerely,

Alison Pepper
Executive Vice President, Government Relations and Sustainability, 4A's
apepper@4as.org

[4] See Beales, J. Howard, and Andrew Stivers. NERA Economic Consulting, 2022, An Information Economy Without Data, located at https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf. Accessed 17 Nov. 2022.