February 18, 2011

Via electronic filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments on the Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change

Dear Secretary Clark:

The undersigned represent a wide array of industries and companies that have come together to evaluate and respond to the Federal Trade Commission's ("FTC" or "Commission") *Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* ("Staff Report").[1] Included are leading trade associations from the advertising, marketing, media, financial services, retail, and Internet industries. The undersigned appreciate this opportunity to provide their comments.

Self-regulation and a competitive market that stimulates best business practices constitute the most effective framework to protect consumers, further innovation in the area of commercial privacy, and ensure the Internet economy continues to flourish. Absent the existence of a concrete, discernable harm to consumers, the Commission should not propose or impose new regulations or obligations on businesses. Through self-regulatory efforts, industry will continue to quickly respond and address the evolving preferences and concerns of consumers. Particularly in areas of rapidly developing technological change, we believe that such self-regulation should be developed by the businesses to which the standards would apply and supported by accountability programs with authority to refer cases to the appropriate regulatory agency in cases of non-compliance, rather than imposed by the government.

As the Commission refines its proposed privacy framework, we ask that the Commission consider the following points:

- Online advertising and marketing provide significant benefits to consumers and businesses by generating enormous economic activity, competition, and

[1] FTC, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, Preliminary FTC Staff Report (Dec. 1, 2010) (*hereinafter* "Staff Report").

jobs and supporting the maintenance and growth of free media and information on the Internet.

- Businesses continue to develop and implement privacy protections and are responsive to consumer concerns.
- The proposed framework is useful to identify issues, but not as a regulatory mandate.
- Data collection and retention limits are additional areas that are useful to evaluate through the Commission's framework, but should not be obligations.
- The "Commonly Accepted" practices framework for determining what practices require choice is inappropriate as the basis for legislation or regulation.
- Opt-Out choice is the appropriate means to obtain consent for non-sensitive advertising and marketing contexts.
- Industry self-regulation provides the type of choice that the Commission calls for under its Do-Not-Track proposal.
- Legislated Do-Not-Track proposals would be duplicative at best, but more likely would harm the functioning of the Internet by generating unnecessary consumer concerns about Online Behavioral Advertising and thereby hurt consumers by creating a less competitive and more cluttered Internet marketplace.
- There is no identified need for new data access, correction or accuracy standards.

These key points are discussed in more detail below.

Online Advertising and Marketing Provide Significant Benefits to Consumers and Businesses

Online advertising and marketing provides significant benefits to the economy, consumers, and businesses. It supports valuable Internet content, services, and products that shape today's popular Internet experience. It also provides consumers with information regarding products and services most likely to be of interest to them. As the Commission has noted, consumers find value in this form of "personalized advertising."[2] Moreover, online advertising creates cost efficiencies that directly result in new entrants to the marketplace that otherwise would not be economically viable.

Online retail sales in 2009 accounted for over $140 billion in retail sales for U.S. companies, and three million Americans were employed directly or indirectly by advertising-supported Internet services, 1.2 million of whom hold jobs that did not exist two years ago.[3] Between 1998 and 2008, the number of domestic information technology ("IT") jobs grew by 26 percent – four times faster than U.S. employment as a whole – and by 2018, IT employment is expected to grow by another 22 percent.[4] These are

[2] Staff Report at 34.
[3] Department of Commerce Internet Policy Task Force, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, at 13-14 (December 2010).
[4] *Id.*

extraordinary results given the current economic woes, underscoring the fact that the Internet is increasing in its importance as a vital sector of the United States' economy.

Online advertising and marketing significantly subsidize the cost of providing products to consumers online, allowing companies to fund the content and services that consumers have come to expect and enjoy. For example, Internet advertising supports online versions of newspapers and magazines, blog platforms, and online forums, such as resume services, job banks, and social and professional network communities, which are available to consumers at little or no cost. It also subsidizes online offerings such as e-mail, chat, video conferencing, telephone service, and online safety tools.

In addition, online advertising and marketing has enhanced consumers' online experience by improving the relevance of particular advertisements. Through behavioral and contextual advertising, consumers receive advertisements for products and services likely to be of interest to them, enabling them to make more informed buying decisions.

Online advertising and marketing also improve a company's ability to communicate with consumers. When a business can efficiently market its goods to consumers through targeted interactive advertising – connecting with audiences more likely to be interested in its particular products or services – its marketing and advertising costs are dramatically reduced, thereby lowering prices for consumers. In addition, online advertising and marketing has increased competition in the marketplace and has opened markets to new entrants that offer a diverse variety of new products and services. The Internet and online advertising have opened larger markets to small business by lowering the barriers to entry, and have created national markets for previously local, regional, or niche business models. This increased competition encourages innovation and leads to lower prices, all to the direct benefit of consumers.

There is already strong evidence that privacy regulations in the European Union have resulted in an average 65 percent reduction in the effectiveness of online ads.[5] Regulatory intervention in the U.S. could similarly hinder innovation in the advertising and marketing industry, undermining economic support for valuable content and services and possibly encouraging higher fees to consumers. A general contraction in the e-commerce market could result, stifling a powerful engine of the American economy.

Businesses Continue to Develop and Implement Privacy Protections and Are Responsive to Consumer Concerns

As the Commission highlighted in the Staff Report, the increasing flow of information provides important benefits to consumers and businesses.[6] Robust self-regulation, which the Commission has consistently supported, continues to be the best

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[5] According to a study conducted by Avi Goldfarb and Catherine E. Tucker, "Privacy Regulation and Online Advertising," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600259.
[6] Staff Report at 33-35.

policy approach for preserving those benefits while protecting consumer privacy.[7] The Department of Commerce in its report released in December 2010 also expressed support for the development of voluntary codes of conduct to address consumer privacy concerns.[8] Rigid regulations, which are quickly out-paced by evolving technologies and consumer preferences, could stifle innovation. In contrast, self-regulation provides a framework by which new challenges can quickly be addressed while ensuring flexibility for development of new channels, services, and products. For instance, self-regulatory efforts have resulted in the ubiquitous adoption of online privacy policies. Industry has also developed robust self-regulatory codes for mobile marketing that foster innovation in this emerging channel while providing consumer protections.[9] Thus, it is clear that industry developed voluntary codes of conduct have promoted consumer safeguards and fostered trust in online communication channels.

The business community has proactively developed and enforced voluntary codes of conduct regulating the collection and use of consumer data for marketing and advertising purposes for over forty years. The Direct Marketing Association ("DMA"), the Interactive Advertising Bureau ("IAB"), the Network Advertising Initiative ("NAI"), TRUSTe, the AICPA's WebTrust, and BBB*OnLine* have issued robust guidelines and best business practices designed to ensure that their members and the industry-at-large employ responsible, professional, and ethical marketing and advertising practices. These industry groups also have a proven track record for enforcing these codes of conduct. The DMA and Council of Better Business Bureau ("CBBB") through the National Advertising Review Council ("NARC"), for example, have standing committees responsible for examining the practices of businesses and determining whether such practices violate industry codes of conduct. These committees successfully work with individuals and companies to gain voluntary cooperation in adhering to codes and to adopt good business practices for companies.

These voluntary programs successfully handle and resolve an impressive array and volume of complaints. For example, the National Advertising Division (NAD) accepts complaints from consumers, competing advertisers and local Better Business Bureaus about the truthfulness of advertising claims made for goods and services as diverse and critical as telecommunications, infant nutrition, over-the-counter medications and dietary supplements and "green" products. NAD's decisions represent the single largest body of legal decisions related to truth and accuracy in the U.S. Similarly, the DMA's Corporate Responsibility team and Ethics Operating Committee promotes compliance with a broad range of business standards by all members of the direct marketing community. In the rare cases where voluntary cooperation is not forthcoming,

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[7] FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising,* at 11(Feb. 2009), available at http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf. Report states, "Staff supported self-regulation because it provides the necessary flexibility to address evolving online business models."
[8] Department of Commerce, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, at 42 (Dec. 16, 2010), available at http://www.ntia.doc.gov/reports/2010/IPTF_Privacy_GreenPaper_12162010.pdf.
[9] *See* DMA *Guidelines for Ethical Business Practices*, available at http://www.dmaresponsibility.org/Guidelines/ and Mobile Marketing Association Guidelines and Best Practices, available at http://mmaglobal.com/policies/education.

both the DMA and the NARC /CBBB programs can and do refer cases to the government.

Building on this strong foundation, the industry has developed, launched, and continues to implement a robust self-regulatory program to provide greater transparency and consumer control over online behavioral advertising. In July 2009, a coalition of industry organizations released the *Self-Regulatory Principles for Online Behavioral Advertising* ("Principles").[10] The Principles were designed to apply broadly to the diverse set of actors that work interdependently to deliver relevant advertising intended to enrich the consumer online experience. In all, the Principles foster consumer friendly standards that are to be applied throughout the ecosystem. The Principles call for: (1) consumer education, (2) enhanced notice outside of the privacy policy, (3) the provision of new choice mechanisms, (4) data security, (5) heightened protection for certain sensitive data, (6) consent for certain material changes to online behavioral advertising data collection and use policies, and (7) strong enforcement mechanisms. The Principles mirror and in some areas exceed those set forth by the Commission in its call for the business community to increase its efforts in this area. As discussed in detail below, the coalition has implemented the Principles through the Self-Regulatory Program for Online Behavioral Advertising ("Program"), which was launched in October 2010.[11]

In addition to these programs, companies rapidly are advancing technologies that provide more choices to consumers. For example, companies are developing preference management tools to allow customers to express their preferences with respect to advertised products and services they receive. It is vital that the Commission's framework allow for continued innovation and not disadvantage one technology or business model to another.

These self-regulatory guidelines, combined with existing sectoral law and the Commission's effective and capable enforcement of existing law, address concerns about transparency and choice and constitute a comprehensive system of consumer protection in the marketing context.

The Proposed Framework is Useful to Identify Issues, But Not as a Regulatory Mandate

Under the Staff Report proposal, the new framework would apply to all commercial entities that collect or use consumer data that can be reasonably linked to a specific consumer, computer, or other device.[12] While we believe that a broad approach

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[10] American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, and Council of Better Business Bureaus, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009)*, available at* http://www.iab.net/media/file/ven-principles-07-01-09.pdf.

[11] American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, and Council of Better Business Bureaus, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009)*, available at* http://www.iab.net/media/file/ven-principles-07-01-09.pdf.

[12] Staff Report at 42.

that captures all data, including data that may not be personally identifiable, would be useful to companies in their efforts to identify and address potential privacy issues, such a standard is unsuitable for a legislative, regulatory, or self-regulatory framework.

Applying the proposed framework to non-personally identifiable data would raise the regulatory burden associated with using anonymized or de-identified data, which could in turn discourage the use of such data and, ultimately, the development of new technology that improves such efforts. The collection and use of non-identifiable data is not susceptible to the same level of risk or concern associated with identifiable information and thus should not be treated the same. In fact, the Commission should encourage companies to use anonymized and de-identified data. Processes used under the Health Insurance Portability and Accountability Act ("HIPAA"), the Fair Credit Reporting Act ("FCRA"), and by the Census Bureau, for example, demonstrate the tremendous potential that advancements in de-identification technology hold. We have seen that as such technology advances, companies increase the use of de-identified data. Subjecting non-personally identifiable data to the same requirements as personally identifiable information, as suggested in the Staff Report, eliminates the incentive to use anonymized data and to invest in de-identifying technologies and business models. As such, data that is not personally identifiable, such as IP addresses, should not be covered by any regulatory or legislative framework unless the data becomes identifiable by combining it with personally-identifiable information.

Moreover, non-identifiable data in the behavioral advertising context is already effectively governed by the Program. Under the Principles, consumers may opt-out of the collection and use of *any* data used for behavioral advertising purposes. Providing consumers with this type of opt-out protects consumers without imposing costly regulatory requirements on the collection and use of non-identifiable data from those consumers that choose not to opt-out.

The Commission should clarify that its proposed framework is meant to supplement existing sectoral laws rather than supplant or build on top of current robust regulatory regimes. Certain types of data already are subject to substantial regulatory requirements for notice, choice, access and correction, and security. For instance, financial data is covered under the Gramm-Leach-Bliley Act, health information is regulated under HIPAA, children's data is covered by the Children's Online Privacy Protection Act, and data used for eligibility decisions is governed by FCRA. The Commission should be clear that its proposed framework would not apply to data currently regulated by sectoral laws.

Data Collection and Retention Limits Are Additional Areas That Are Useful to Evaluate Through the Commission's Framework, But Should Not Be Obligations

The concept of "privacy by design" serves as a useful tool for evaluating corporate privacy and data security practices to identify potential vulnerabilities.[13] Indeed, many companies and industry groups already require the incorporation of data

[13] Staff Report at 44-52.

security, reasonable data collection limits, sound retention practices, and data accuracy into a company's everyday business practices. The DMA's *Guidelines for Ethical Business Practices,* for instance, directs its members to (1) only collect, exchange, and use marketing data, (2) limit the use of marketing data for only marketing purposes, (3) keep sensitive data confidential, (4) establish information security policies and practices, (5) create and implement staff policies, procedures, and training measures to protect personally identifiable information, and (6) employ and reassess protective physical safeguards and technological measures, including data retention, destruction, and deletion practices.[14] While "privacy by design" can be useful as a framework for evaluating current and future business practices, we believe that the promulgation of rigid standards or the imposition of onerous obligations based on these substantive principles does not advance consumer privacy, undercuts practices that benefit consumers, and stifles innovation.

In particular, applying across-the-board restrictions on data collection would significantly curtail important current and future uses of information. In the online world, wholesale restriction on data collection would interfere with the functionality and operation of the Internet. The Commission has not identified a public policy basis for such a shift in current practices. Likewise, the Commission has not provided analysis for this recommendation, nor has it suggested the potential impact of such restrictions. We believe the impact on offerings that consumers cherish will be significantly undercut by such a framework. The proposed data collection standard, which would require companies to limit the collection of data to "information needed to fulfill a specific, legitimate business need," does not reflect the operational realties of data collection.[15] When companies collect data, a single piece of data can be used for multiple purposes instead of a single, specific purpose. For instance, the same data point could be collected and used for fraud protection, authentication, and marketing purposes. Thus, any data protection standards are more appropriately focused on uses of data, and not the collection of data.

We support the guiding principle that data should be retained only for as long as there is a legitimate business purpose. However, such a standard should be a guideline and not a regulatory requirement. In some instances, there may be needs to preserve data for future uses that were not yet determined at the time of collection. New uses of data drive much of the innovation seen in recent years that provides significant benefits to consumers. For example, new uses of data in the social media context and in the data analytics context fuel innovation in the next generation of consumer applications. Similarly, data retention time limitations vary across uses, businesses, and industries. Further, no evidence has been provided to demonstrate the need for specific time durations for data retention. Of the more than 40 states that have enacted data security and maintenance laws, where such limitations have been considered, no state law imposes specific time limits. In addition, any guidance on data retention must be clear to reflect the differences between types of data and data uses.

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[14] The Direct Marketing Association, *Guidelines for Ethical Business Practice* (revised January 2010) 16-21, *available at*, http://www.dmaresponsibility.org/Guidelines/.
[15] Staff Report at 45-46.

The "Commonly Accepted" Practices Framework for Determining What Practices Require Choice is Inappropriate as the Basis for Legislation or Regulation

The Staff Report identifies a limited set of practices it characterizes as "commonly accepted" for which companies would not be required to seek consent. The Staff Report does not explain its justification for determining what constitutes a "commonly accepted practice," nor does it define the criteria to be applied in determining how to classify practices in the future as consumer preferences and expectations evolve.

Although we agree that not all practices require choice, promulgating a list of "commonly accepted practices" is an inherently problematic endeavor. Beyond being a misnomer, the use of a list is, by nature, static and thus unable to appropriately address rapidly evolving technologies and consumer expectations. While we believe that it is important to recognize that choice is not necessary for many uses of data, the appropriate, pro-innovation approach is to define where choice **is** appropriate, rather than where it **is not** appropriate.

We support the Commission's recognition that one-size-fits-all choice for certain data practices – including the collection and use of consumer data for first-party marketing purposes – should not be required by legislation or regulation.[16] Consumers already enjoy choice in first-party marketing – affected through industry or company opt-out mechanisms – in numerous situations deemed necessary under existing regulations or industry self-regulatory practice. These tailored choice mechanisms, which exist in every direct marketing channel, reflect the studied review of policy-makers and industry regarding consumer preferences and expectations for first-party marketing. Mandatory collection of additional consent in areas where consumers are aware of, and benefit from, the use of such information by first parties is not necessary.

We nevertheless have concerns with the Staff Report's approach to simplified choice. As described in the Staff Report, the concept of "commonly accepted practices" would not be appropriate even as a framework for evaluating business practices because the definition of the term is too narrow. The list of specific "commonly accepted practices" enumerated in the Staff Report does not adequately represent the breadth of legitimate and commonly acceptable practices currently occurring in the marketplace and thus should be broadened.[17] For example, third-party marketing is both commonly used and widely accepted, and not including the practice in a category named "commonly accepted practices" implies otherwise. Third-party marketing is the basis for prospect marketing and the identification of new customers – the lifeblood of business and the underpinning of our consumer economy. For example, for decades, small businesses entering new communities would routinely develop mailing lists from the local telephone company's white pages in order to send out notices of grand-opening specials to local residents. These practices and their digital analogs continue today because business growth typically requires expansion of a company's customer base. Without the use of third-party data, new businesses that do not have an established customer base would not

[16] Staff Report at 53-57.
[17] Staff Report at 53-54.

be able to market to anyone. The Commission's proposed limitations on these kinds of benign uses of third-party data to develop new customers would severely hamper entrepreneurialism and economic growth.

Further, the scope of the exclusion from choice for first-party marketing is too narrow. It should apply to all marketing by first parties to their customers regardless of the channel through which the marketing occurs because the same considerations about consumer awareness and informed consent apply. Additionally, the definition of first-party marketing practices included as "commonly accepted practice" should extend to the corporate affiliates and subsidiaries of a first party under common control. By including affiliates, corporate parents, and subsidiaries in the proposed exclusion, companies could continue to leverage the efficiencies derived from sharing information across related entities, and consumers would continue to receive the benefits of sharing information among commonly owned or affiliated entities including customized sites, content, and relevant information online. This approach would be consistent with the treatment of affiliate sharing practices under existing law such as the Gramm-Leach-Bliley Act, which regulates sharing of sensitive financial data among affiliates. Moreover, data enhancement is a legitimate and commonly accepted practice that is essential to effective first-party marketing practices. Because choice already is provided to consumers for the transfer of third-party marketing data, data enhancement should not be subject to an additional layer of choice. In addition, data enhancement plays a critical role in data accuracy. Companies use data enhancement products and services to help ensure the accuracy of data.

Opt-Out Choice Is the Appropriate Means to Obtain Consent for Non-Sensitive Advertising and Marketing Contexts

The FTC has appropriately recognized that a meaningful opt-out mechanism may be more privacy protective than an opt-in approach.[18] The Staff Report also recognizes that a method of consent is contextual (for example, whether it is delivered offline or online; whether the choice is given by first parties, third parties, service providers; or whether the channel used is direct mail or email).[19] However, attempting to prescribe a one-size-fits-all choice mechanism that requires clear and conspicuous choice at the time of collection of information is not workable in the online or offline environment. The Commission's proposed framework – which attempts to mandate new requirements based on the timing of choice – will create barriers to the collection and use of information that is the lifeblood of the information economy. The Commission has not demonstrated a need for this approach, nor any evaluation of its impact to critical business functionality. Companies need flexibility to meet consumer expectations and technological advancements, both of which are constantly evolving.

The provision of choice should be made easily available to consumers, but not interfere with the consumer experience. In the online, social media, and mobile environments, a consumer's ability to exercise choice should be available via the website

[18] Staff Report at 60.
[19] Staff Report at 58-59.

where the information is collected, but does not always need to be presented on the particular page or at the point where the consumer enters his personal information. In fact, putting it a click away will allow consumers that are interested in understanding choices with respect to uses of data to access more information to inform their choices. The example provided by the Commission in the retail context highlights the impracticality and disruptiveness of the Commission's approach.[20] In the "brick and mortar" retail context, requiring the cashier to ask customers whether they would like to receive marketing offers from other companies would drastically interfere with the consumer experience. Consumers at checkout are interested in making their purchases efficiently, not in being distracted or engaged in discussion regarding data practices. The training required, and interruption of the consumer experience that the proposed approach would cause, are not acceptable in practice. The framework proposed by the Commission would result in both uninformed choices regarding data practices and consumer frustration – outcomes that are counter to the Commission's goals.

The Commission's proposal to require affirmative express consent for secondary uses of any data that were not specifically disclosed at the time the data was first collected is similarly overly broad and would stifle investment in future innovative uses of data that benefit consumers.[21] For example, had such a limitation been in place a decade ago, it would have prevented the use of data about customers' purchases to help provide recommendations to online shoppers (e.g., suggestions that other customers viewing a particular product also viewed similar products, or a greater percentage of other customers favored one product over another). These recommendation services exist on many retail websites today and are strongly favored by online shoppers. The use of one customer's data to make online recommendations to other customers may not have been disclosed to consumers in the early stages of the development of these practices. Yet, online consumers have benefitted from such innovations despite not having expressly opted in to these data uses in advance. The appropriate choice standard for uses of marketing data and other non-identifiable or non-sensitive data is meaningful notice and the ability to opt-out, as industry best practices already recommend and many businesses currently provide.

Industry Self-Regulation Provides the Type of Choice That the Commission Calls for Under Its Do-Not-Track Proposal

Industry currently provides the type of uniform consumer choice for online behavioral advertising that the Commission endorses in the Staff Report. The Self-Regulatory Program for Online Behavioral Advertising, which fully launched in October 2010, gives consumers enhanced control over the collection and use of data regarding their Web viewing for online behavioral advertising purposes.

The Program promotes the use of a single "Advertising Option Icon" across the Internet that lets consumers know when the advertisements they see are interest-based, and links to information about online behavioral advertising and choices about the

[20] Staff Report at 58.
[21] Staff Report at 77.

interest-based ads they receive. The Advertising Option Icon is already being served on the Internet in billions of ads, and in the coming weeks, use of the icon will increase exponentially, making its use readily noticeable to consumers. Additionally, the Program Website includes an AboutAds Consumer Opt-Out Page linked to from the Advertising Option Icon. Since November 2010, consumers have been able to visit the AboutAds.info Consumer Opt-Out Page to easily opt-out of some or all of the interest-based ads they receive, if they choose.[22] The AboutAds Consumer Opt-Out Page also provides consumers dynamic information about the companies that have enabled customized ads on their browsers.[23] More than 60 companies are already listed on the AboutAds Consumer Opt-Out Page and dozens more will be added to the tool in the coming weeks. Both the DMA and the CBBB ensure accountability for the program, with the former already monitoring compliance and undertaking enforcement activities, and the latter scheduled to begin enforcement by March 31, 2011.

In this most recent Staff Report, the Commission appears to want to extend the requirements of a uniform consumer choice mechanism beyond that which it specifically called for in its online behavioral advertising report of February 2009.[24] The Commission also appears to want such a mechanism to apply to a wider scope of information than was specifically set forth in its definition of "online behavioral advertising," which served as the basis for the uniform consumer choice mechanism developed by industry.[25] It is unclear, however, what specific uses or data the Commission is concerned about, nor has there been any analysis of the impact such a change could have on critical operational practices of the Internet.

The federal government should not undercut the industry's commitment to the Program by creating a duplicative Do-Not-Track mechanism through legislation or regulation, especially when appropriate mechanisms already exist in the marketplace and were themselves designed to meet the high standards and principles proposed by the Commission in its final report on online behavioral advertising two years ago.[26] Such efforts by the government would reverse the substantial progress made in the last 15 months and could signal to consumers that they should not trust the business community or online behavioral advertising as a whole. Consumer mistrust in online behavioral advertising threatens the Internet as it exists today – an area of American innovation and dominance, and a primary area of job growth and investment. With an average return of 457 percent, behavioral advertising is 50 percent more effective in generating incremental revenue than other types of online advertising, providing much greater revenue to support free contents and services on the Internet.[27] Government mandated Do-Not-Track threatens to quash these results, undermining growth in the market and in the overall economy. It could also undermine consumers' online experience. As noted by the

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[22] *See* www.aboutads.info/choices.
[23] *See Id.*
[24] FTC, *Self-Regulatory Principles for Online Behavioral Advertising* (February 2009).
[25] Staff Report at 66-69.
[26] FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising,* at 11(Feb. 2009), available at http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf.
[27] According to study performed by the Ponemon Institute on behalf of Evidon, available at http://www.evidon.com/documents/OBA_paper.pdf.

Commission, consumers value "personalized advertising."[28] Breaking the link between advertising and relevancy could result in consumers being inundated with irrelevant ads in the hope that some displayed ad will be of an interest to a viewer causing a cluttered online experience for consumers.

There is No Identified Need for New Data Access, Correction or Accuracy Standards

We support the Commission's call for increased transparency of corporate data practices by making privacy notices more consumer friendly. Enhanced disclosures coupled with effective education efforts would help improve consumers' understanding of data collection and use, allowing them to make informed decisions. We believe the Commission's role in consumer education initiatives is critical and we look forward to working with the Commission to educate consumers about data practices.

On the other hand, the record does not justify any legislative, regulatory, or self-regulatory requirement imposing mandatory data access and correction standards beyond those that already exist. We agree with the Staff Report that a sliding scale approach for providing consumer access and correction to personal data is appropriate, and that current standards as set forth in the FCRA and other laws have defined the appropriate balance.[29] While certain data uses command a robust access and correction regime such as exists in the FCRA, other data uses, such as for marketing purposes, do not. A "one-size-fits-all" approach to data access and correction is neither workable nor desirable.

In fact, new access requirements that allow consumers the ability to obtain data that currently does not exist could result in "pretexting," a practice that policy makers and the Commission have worked to combat over recent years. Criminals could use the proposed access and correction rights to gain access to and even alter confidential or proprietary information under false pretenses for the purpose of misappropriating the data or for other criminal purposes including identity theft. The proposed requirement would undermine the Commission's goal of protecting consumers.

Moreover, the nature of marketing databases renders the implementation of access and correction procedures unnecessary. While marketing databases maintain information about individuals, marketers only seek to understand the general characteristics of the individuals to whom they are marketing. In many cases, marketing databases are compiled at the geographic or household level, rather than at the personal level, and marketing data are estimated or presented in ranges. Moreover, marketing information is not used to assess eligibility for credit, insurance, or employment. Additionally, the use of third-party information in such cases is already governed by fair information practices in statutes including the FCRA, the Fair Billing Act, the Fair Debt Collection Practices Act, and the HIPAA. If a consumer's information is inaccurate in a marketing database, there is no harm to the consumer aside from the possible inconvenience of receiving an irrelevant offer. As the Staff Report acknowledged, the costs of implementing access and

[28] Staff Report at 34.
[29] Staff Report at 73-74.

correction for marketing databases are prohibitive.[30] Providing access to marketing databases would be expensive to implement and would require the integration of multiple, separate consumer databases and would require companies to make data linkable to an identifiable person. This requirement would force companies to collect and maintain more data than they currently do in a manner that may create risk to consumers.

Finally, the Staff Report has not identified – nor is there – a need for new data access and correction and accuracy standards for authentication services. Authentication services are vital to stemming fraudulent activity and incidence of identity theft. Providing such rights as proposed could undermine the effectiveness of these services and put consumers at risk. Specifically, providing access and correction rights with respect to consumer files could undermine the efficacy of the data files and reduce the effectiveness of authentication services. At worst, failure to pass a consumer authentication process results only in consumers being asked for additional documentation to verify that they are the person they say they are.

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We thank you for the opportunity to submit these comments, and look forward to working closely with the Commission on these important issues. Please do not hesitate to contact Stu Ingis of Venable LLP at 202-344-4613 with questions.

American Advertising Federation
American Association of Advertising Agencies
ASAE
Association of National Advertisers
Coalition for Healthcare Communication
Consumer Data Industry Association
Direct Marketing Association
Electronic Retailing Association
Interactive Advertising Bureau
National Business Coalition on E-Commerce and Privacy
NetChoice
Performance Marketing Association
U.S. Chamber of Commerce

[30] Staff Report at 74.