



**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

COMMENTS

of the

ASSOCIATION OF NATIONAL ADVERTISERS

on the

Competition and Consumer Protection in the 21st Century Hearings, Project No. P181201

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On behalf of the Association of National Advertisers (“ANA”), we provide the following submission in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for final comments for the hearings on Competition and Consumer Protection in the 21st Century, published on May 10, 2019.¹

ANA makes a difference for individuals, brands, and the advertising industry by driving growth, advancing the interests of marketers, and promoting and protecting the well-being of the marketing community. Founded in 1910, the ANA provides leadership that advances marketing excellence and shapes the future of the industry. The ANA’s membership includes more than 1,850 companies and organizations with 20,000 brands that engage almost 50,000 industry professionals and collectively spend or support more than \$400 billion in marketing and advertising annually. The membership is comprised of more than 1,100 client-side marketers and more than 750 marketing solutions provider members, which include leading marketing data science and technology suppliers, ad agencies, law firms, consultants, and vendors. Further enriching the ecosystem is the work of the nonprofit ANA Educational Foundation (AEF), which has the mission of enhancing the understanding of advertising and marketing within the academic and marketing communities.

Our industry recognizes that the data and advertising ecosystem is at a crossroads. While self-regulatory programs centered on transparency, notice, and choice have been successful, recent events and legislative action in the states have created an environment that is ripe for federal action. Efforts to craft privacy legislation at the state level are often well-meaning, and certain policies developed in particular states may have some positive consumer effects. However, even beneficial state consumer privacy protection legislation can be problematic if it is overly burdensome, hinders effective business operations, and is inconsistent with other legal requirements.

A number of states such as California, Nevada, and New Jersey already have introduced or passed privacy legislation. These laws threaten to burden both consumers and industry with a cornucopia of inconsistent rules that could detract from consumer privacy, harm small businesses, and cripple new market entrants. Ultimately, the ANA believes that the benefits afforded to consumers through privacy legislation should be uniform, and the consumer protection environment should not change as individuals cross state lines. Our country is in need of a consistent federal policy on consumer privacy that sets forth clear rules of the road that are not dependent on geography, and do not burden legitimate consumer and business interests. Privacy regulation should encourage a competitive business marketplace. This type of marketplace competition will yield higher quality products, lower costs, and more numerous commercial options for consumers. The FTC’s request for comments on competition and consumer protection is therefore timely. This is a pivotal moment for our country to strive to identify and develop an intelligible, comprehensive privacy standard.

ANA supports such a nation-wide standard that will provide enhanced privacy protections to consumers, preserve the benefits of the ad-supported economy and maintain

¹ Federal Trade Commission, FTC Announces 14th and Final Session of its Hearings on Competition and Consumer Protection in the 21st Century (May 10, 2019), <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-announces-agenda-14th-final-session-its-hearings-competition>.

healthy business competition. To that end, we along with other leading advocates have formed the Privacy for America coalition, which is dedicated to championing a new strong, positive paradigm for consumer privacy in the United States. Our efforts are leveraging the strong foundation of industry self-regulation and the broad range of sectoral laws that already have had significant success in the United States to serve as an effective launching pad for this new paradigm.

ANA believes that this new paradigm for consumer privacy must preserve and harness the varied benefits of the ad-supported economy so consumers can continue to enjoy unencumbered access to the products, services, and the vast array of data and content they continually rely on and have come to expect. A federal approach to privacy should also take cognizance of the so far minimally tested privacy models, such as Europe's General Data Protection Regulation ("GDPR") and the California Consumer Privacy Act ("CCPA"). This type of analysis will help us both learn from and avoid any pitfalls that would stand in the way of the development of a privacy framework that sufficiently protects consumers and encourages a healthy competitive business environment.

This approach should avoid unnecessary over-regulation that would burden consumers with excessive notifications while also having strong enforcement mechanisms to assure a forceful consumer protection environment. ANA envisions this new paradigm will come in the form of preemptive federal legislation, as conflicting state laws across the nation would seriously burden both consumers and industry alike. ANA supports the FTC's efforts to enhance consumer privacy and preserve business competition. We look forward to continuing to work with the Commission and Congress to develop a workable, comprehensive privacy model for the United States. ANA believes it is important that the FTC be the preeminent privacy regulator in the U.S.

I. Americans Need Strong, Effective, and Consistent Privacy Protections and Access to Valuable Content, Products, and Services

The new privacy regime that ANA recommends for the United States must allow the data-driven advertising ecosystem to continue to provide significant economic benefits to our country and its consumers. Data-driven advertising has played a substantial role in making our economy as vibrant as it is today. In fact, a 2015 study by IHS Economics and Country Risk found that 16% of the total \$36.7 trillion in sales generated by the U.S. economy in 2014 were attributable to advertising expenditures.² That same study found that advertising activity represented \$3.4 trillion in U.S. gross domestic product—a number that translates to approximately one-fifth of the total value of goods produced and services provided in the United States in 2014.³ As a result, any laws that threaten the data-driven advertising industry will also threaten our country's economy. It is therefore incumbent upon leaders in government and industry to work together to develop a privacy model that will allow advertising to continue to

² IHS Economics and Country Risk, *Economic Impact of Advertising in the United States* 3 (Mar. 2015), available at <https://www.ana.net/content/show/id/ADTAX>.

³ *Id.* at 11.

contribute significantly to the economy while ensuring that consumers' personal information is rigorously protected.

Not only has data-driven advertising contributed greatly to U.S. gross domestic product, it has also created numerous jobs and employment opportunities for consumers across the country. In 2014, the data-driven marketing economy helped businesses employ approximately 996,000 professionals, a 49% increase from the number of individuals employed in data-driven marketing positions in 2012.⁴ Moreover, from 2012 to 2014, employment added by services that depend directly on third-party data increased by 56% and employment added by services that indirectly depend on third-party data increased 60%.⁵ These numbers illustrate the escalating positive effects data and advertising have had for consumers in terms of employment in the United States. Legislative and regulatory efforts that stifle advertising could therefore cause significant consumer and economic harm by reducing employment opportunities and slowing or limiting economic growth.

In addition to the macroeconomic benefits and employment opportunities data-driven advertising provides to consumers, studies have shown that consumers actually prefer the ad-supported Internet instead of other potential frameworks. A survey conducted by the Digital Advertising Alliance ("DAA") in 2016 revealed that 85% of consumers favor the ad-supported Internet over a paid subscription-based model.⁶ Furthermore, over 92% of participants indicated that free content like news, weather, email, blogs, and videos are important to the overall value of the Internet.⁷ Those same consumers assigned an annual value of almost \$1,200 per consumer to the free, ad-supported online content and services they are able to access thanks to digital advertising.⁸ Consequently, consumers support the data-driven advertising model that has subsidized and enabled the vast and varied content, products, and services they are able to access at little or no cost to them. ANA, therefore, urges that a new federal privacy paradigm in America should balance the existing benefits of the data-driven economy with the need for enhanced consumer protection and privacy.

II. Certain Existing Privacy Regimes Have Not Been Adequately Evaluated

Although ANA supports a federal privacy solution to preempt the patchwork of laws that are being considered and passed at the state level, we believe the Commission should avoid

⁴ John Deighton and Peter A. Johnson, *Executive Summary of The Value of Data 2015: Consequences for Insight, Innovation & Efficiency in the U.S. Economy* 19, available at <http://thedma.org/wp-content/uploads/Value-of-Data-Summary.pdf>.

⁵ *Id.*

⁶ Zogby Analytics, *Public Opinion Survey on Value of the Ad-Supported Internet* (May 2016), available at http://www.aboutads.info/resource/image/Poll/Zogby_DAA_Poll.pdf; PR Newswire, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth \$1,200/Year; 85% Prefer Ad-Supported Internet to Paid* (May 11, 2016), available at <http://www.prnewswire.com/news-releases/zogby-poll--americans-say-free-ad-supported-online-services-worth-1200year-85-prefer-ad-supported-internet-to-paid-300266602.html>.

⁷ *Id.*

⁸ *Id.*

supporting legislative models that suffer from the defects of the GDPR and CCPA. While the privacy-related and economic impacts of the CCPA have not yet been fully revealed or evaluated there are growing concerns about its likely impacts. The preliminary effects of the GDPR, however, already suggest the law has taken a toll on the European economy. We believe a systematic analysis of both of these approaches is now appropriate and highly warranted.

Notably, the GDPR has had a disproportionate effect on small businesses and start-up companies as opposed to their larger market participant counterparts.⁹ The GDPR demonstrates how government can engage in regulatory activities in a way that unintentionally could lessen healthy competition. We therefore urge the FTC and its Bureaus of Economics and Competition to conduct economic impact assessments of both the GDPR and the CCPA to determine their likely effects on consumers and competition before considering any privacy regime that might approximate those laws' provisions.

The GDPR, for example, places heavy responsibilities on consumers to closely read privacy policies and make choices about data uses that they may not fully understand. The GDPR's reliance on an opt-in model has inundated consumers with privacy notices, obligating them to take action to protect themselves. Some reports note that placing the onus on consumers to read about and approve privacy practices has caused substantial notice fatigue in Europe, as consumers are bombarded with lengthy privacy policies and a barrage of pop-up and banner notices to approve.¹⁰ Even the Article 29 Working Party, the European institution tasked with providing expert advice on data protection to European member states, has said "information fatigue" exists in its guidelines on the GDPR requirement of transparency.¹¹ The effects of the GDPR show that inundating consumers with information, while well-intentioned, may cause consumers to tune out rather than become more privacy responsive and protective.

In a statement before the House of Representatives Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, Roslyn Layton of the American Enterprise Institute outlined a laundry list of companies that cut ties with Europe in an effort to survive the GDPR.¹² For some, the loss of European revenue may have been "the straw that broke the camel's back," as a number of those companies went out of business or are no longer in operation. In the GDPR era, this story may not be an idiosyncratic one. However, without a robust, comprehensive assessment of the GDPR and its impacts, both government and industry will fail to have a full picture of how rare or common these impacts presently are. As a result, an economic impact study of the effects of the GDPR on consumers and competition is necessary in order to better help all interested parties to understand the outcomes of the law and learn from them. Also, it is important to note, that for many U.S. based companies, they will soon have to comply simultaneously with the inconsistent burdens of the GDPR and the CCPA.

⁹ Hannah Kuchler, Financial Times, *US small businesses drop EU customers over new data rule* (May 24, 2018) <https://www.ft.com/content/3f079b6c-5ec8-11e8-9334-2218e7146b04>.

¹⁰ Dan Jaffe, ANA, *The FTC Should Analyze the GDPR and the CCPA*, REGULATORY RUMBLINGS BLOG (Aug. 21, 2018), available at <https://www.ana.net/blogs/show/id/rr-blog-2018-08-ftc-should-analyze-GDPR-CCPA>.

¹¹ Article 29 Data Protection Working Party, *Guidelines on transparency under Regulation 2016/679* 7, 19, 36 (2018), available at https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227.

¹² *See id.*

The CCPA, like the GDPR, has created a growing level of uncertainty. The law severely limits the ability of third-partys to collect and utilize data, giving a major advantage to both first parties and incumbents. Furthermore, the CCPA is extraordinarily broad in its application, impacting a wide swath of both large and small businesses if they meet certain minimal thresholds for processing consumer data. Because the CCPA creates significant compliance costs for businesses, its broad coverage may create a highly uneven playing field by sweeping in small and medium-sized companies who may have severe difficulty meeting the law’s requirements. While some may believe that this is a justifiable price to pay for consumer privacy, it cannot be ignored that these increased costs may detrimentally impact many smaller market participants, and in turn lead to fewer options for consumers. To help avoid a situation like the current status quo in Europe where small businesses are acutely impacted by GDPR’s compliance costs, government must critically examine the CCPA to understand whether its provisions will truly further consumer privacy or whether they will disproportionately impact small businesses and competition. Currently, no one adequately understands the likely impacts of the CCPA or GDPR on the economy, so careful studies surrounding those effects are sorely needed.

III. The Time Is Ripe for A New Privacy Paradigm that Uniquely Suits American Consumers and Businesses

Instead of defaulting to experimental legislative models like the GDPR and CCPA, ANA believes that America would be best served by a preemptive federal privacy solution that learns from those models to create a framework particularly fit for American consumers and businesses. This framework should take into account our country’s experience in the privacy space by leveraging the successes of self-regulatory programs and sector-specific laws but strongly further modifying, developing, and enhancing this approach.¹³ The framework should also leave room for growth by making purposeful accommodations for advancements in technology and supporting a healthy, competitive economic environment for businesses of all sizes.

ANA is working to support, through Privacy for America and other efforts, such a framework that will set forth a fundamentally new standard for data use and advertising in the United States.¹⁴ This approach should include a preemptive federal privacy solution that harnesses the benefits of data-driven advertising while providing robust protections for consumers, thereby learning from the past while planning responsibly for the future.

To date, privacy in this country has been regulated through a patchwork of state and federal laws as well as industry self-regulatory programs. ANA now supports a preemptive, federal solution that, for the first time, would set forth clear, enforceable, and nationwide

¹³ In particular, the DAA’s work has garnered praise from former Acting FTC Chairman Ohlhausen who stated that the DAA “is one of the great success stories in the [privacy] space.” Katy Bachman, *FTC’s Ohlhausen Favors Privacy Self-Regulation* (June 3, 2013), available at <https://www.adweek.com/digital/ftcs-ohlhausen-favors-privacy-self-regulation-150036/>.

¹⁴ Privacy for America, *New “Privacy for America” Coalition Calls for Strong Data Privacy Protections for All Americans* (April 8, 2019), available at <https://www.privacyforamerica.com/new-privacy-for-america-coalition/>.

consumer privacy protections in the United States.¹⁵ We believe that without this approach, it is almost inevitable that the U.S. will be burdened by a Balkanized patchwork of inconsistent state laws that will be destructive, both for consumers and businesses. As its key aims, this paradigm seeks to: (1) prohibit a variety of specific data practices, including using a person’s data for eligibility, discriminatory, or fraudulent purposes; (2) grant new resources to the Commission for increased oversight and enforcement; (3) place restrictions on data used for advertising in a way that furthers consumers’ expectations and preferences; and (4) streamline data security protections. This paradigm seeks to achieve these goals and ensure a healthy and competitive business ecosystem that can nimbly and seamlessly respond to and take advantage of new technologies in the market.

Notably, ANA and Privacy for America envision a federal structure that would solidify the FTC’s role as the preeminent privacy regulator in the United States. To do so, the coalition supports creating a new Data Protection Bureau within the FTC and equipping it with enhanced enforcement capacities and adequate staffing. The new framework we endorse would also give the FTC specified rulemaking authority. We support a standard that would delineate proper and improper business behaviors, so consumers are relieved from the need to constantly read and understand privacy policies and opt-in or out of data practices. Under Privacy for America’s new paradigm, businesses would be responsible for adhering to particular data standards and would incur penalties for violating those rules. By setting forth clear guidelines for businesses to identify appropriate and inappropriate data-related activities, Privacy for America’s new paradigm would give businesses a better understanding of the kinds of practices that warrant enforcement actions by the Commission, creating a clear and understandable regulatory environment. ANA supports Privacy for America’s goal of enhancing the Commission’s ability to protect consumers from harmful privacy practices.

Privacy for America’s new paradigm will protect consumers and maintains vigorous competition in the marketplace for companies both large and small by imposing strict rules of the road on businesses while simultaneously sustaining the benefits of the data-driven economy. The framework preserves positive aspects of data-driven advertising, learns from existing privacy models such as the GDPR and CCPA, and takes an approach that allows small and medium-sized businesses to thrive in the economy. ANA supports the new paradigm as the best way forward for protecting consumer privacy and preserving business competition in the United States and we look forward to working on these and other privacy issues with the Commission.

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¹⁵ Privacy for America, *Creating a Strong New Paradigm for Privacy and Responsible Data Use*, available at <https://www.privacyforamerica.com/wp-content/uploads/2019/04/New-Paradigm-Overview-4-8-19.pdf>.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dan Jaffe". The signature is fluid and cursive, with the first name "Dan" written in a large, rounded script and the last name "Jaffe" in a more compact, cursive style.

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