



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

COMMENTS

of the

ANA – ASSOCIATION OF NATIONAL ADVERTISERS

on the

**“Petition for Rulemaking to Prohibit Surveillance Advertising”
Docket No. FTC-2021-0070
File No. R207005**

Christopher Oswald
EVP, Head of Government Relations
Association of National Advertisers
2020 K Street, NW
Suite 660
Washington, DC 20006
202.296.2066

Counsel:
Stu Ingis
Tara Potashnik
Allaire Monticollo
Venable LLP
600 Massachusetts Ave., NW
Washington, DC 20001
202.344.4613

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On behalf of ANA – Association of National Advertisers (“ANA”), we provide comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) December 27, 2021 request for public comment on the “Petition for Rulemaking to Prohibit Surveillance Advertising” (“Petition”) submitted by Accountable Tech (“Petitioner”).¹ The Petition asks the FTC to ban “surveillance advertising,” because, in the Petitioner’s view, the vaguely defined practice always leads to unfair competition. This assertion is baseless, and it ignores the significant and irrefutable benefits, including enhanced competitive opportunities for many Internet participants, that data-driven advertising brings to consumers and businesses alike. The FTC should deny this petition and should not engage in a rulemaking to ban “surveillance advertising” as an unfair method of competition (“UMC”).

The mission of the ANA is to drive growth for marketing professionals, brands and businesses, the industry, and humanity. The ANA serves the marketing needs of 20,000 brands by leveraging the 12-point ANA Growth Agenda, which has been endorsed by the Global CMO Growth Council. The ANA’s membership consists of U.S. and international companies, including client-side marketers, nonprofits, fundraisers, and marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). The ANA creates Marketing Growth Champions by serving, educating, and advocating for more than 50,000 industry members that collectively invest more than \$400 billion in marketing and advertising annually. Our members include small, mid-size, and large firms, and virtually all of them engage in or benefit from data-driven advertising, including interest-based advertising (“IBA”) practices that give consumers access to relevant information, messaging, and advertisements at the right time and in the right place.

Although the Petition asks the FTC to issue a blanket ban on “surveillance advertising,” it provides no clear definition of the practice. The Petition states “surveillance advertising” includes “1) an information or communication platform collecting personal data and 2) targeting advertisements at users, based on that personal data, as they traverse the Internet, including other digital platforms.”² These elements suggest the Petitioner is asking the FTC to outlaw any use of personal data to target messaging, including IBA and all other forms of data-driven advertising, whether online or offline. It also implies that the proposed ban may extend to information “based on” personal data, and potentially deidentified data sets that power statistical analyses and research that benefit consumers. Such a ban would result in a swift decrease in the availability of accessible information for consumers, cripple the economy, and disproportionately impact small and mid-size businesses. The Petition purposefully capitalizes on negative connotations implied by the term “surveillance” to hyperbolize the alleged harms it discusses; “surveillance” is used in the Petition as a pejorative term and not as an analytical construct.

Reaching audiences with the assistance of data-driven advertising existed long before the emergence of the commercial Internet, reinforcing the reality that data-driven advertising is not anticompetitive by nature. For example, targeted billboard and print advertisements have existed for over a century, and like IBA, they are structured to be relevant to the interests and needs of the individuals who will likely encounter them. Data-driven advertising is the reason it would be

¹ Accountable Tech, *Petition for Rulemaking to Prohibit Surveillance Advertising* (Dec. 27, 2021), located [here](#) (hereinafter, “Petition”).

² *Id.* at 60.

just as unlikely to come across a billboard in Florida advertising snow tires as it would be to read a local newsletter in a town in Ohio promoting a garage sale taking place in Arizona. In the online environment, it is what helps make sure that an auto dealership in California is not advertising to a consumer in Georgia or that someone who is not in the market to purchase a car is sent new car offerings. All of this, of course, benefits consumers in that they are not receiving irrelevant advertising and instead receive advertising regarding products and services that they are likely to be interested at the time they are interested. Given the longstanding existence of data-driven advertising in both online and offline contexts that predate the formation of the companies and platforms named in the Petition, it is unclear why the Petition concludes that “surveillance advertising” itself is harmful to consumers or anticompetitive in nature. The vibrant ecosystem of companies participating in the advertising industry, the enhanced ability of ease of market entry through the use of IBA by many start-up and other companies, the consumer benefits data-driven advertising provides, the ability for individuals to exercise control over IBA, and the undeniable purchase-stimulating impact data-driven advertising has contributed to the economy demonstrate that this conclusion is unfounded.

Advertising generates immense benefits for consumers, businesses, and society at-large, and it serves as a foundational pillar supporting the modern American way of life. Consumers receive virtually free access to massive amounts of information online in large part due to the ad-subsidized Internet. Additionally, thanks to data-driven advertising, consumers are presented with advertisements and messaging that is tailored to them, thereby benefitting consumers by giving them information that is useful and maximizing efficiency in businesses’ interactions with their existing and prospective customers. Marketplace competition is clearly enhanced by consumers receiving relevant, timely, truthful information. The Petition inaccurately alleges that “surveillance advertising” intrinsically is the source of certain harms, such as discrimination, exploitation of kids and teens, extremism, and misinformation.³ Despite these bold allegations, the Petition fails to establish any causal connection between the practice of generating relevant advertisements for consumers related to products and services they may wish to buy and the harms discussed in the Petition. Moreover, the FTC has demonstrated its ability to step in and penalize such activity through enforcement actions and adjudication.⁴

A ban on “surveillance advertising” would be the most extreme and aggressive form of regulation the FTC could choose to take in the name of limiting UMC and, as a result, the Commission should deny the Petitioner’s request for rulemaking. Other steps, short of a ban on “surveillance advertising” via a UMC regulation, can help deter anticompetitive conduct to the extent it may exist and help ensure consumer protection while preserving the economic and societal benefits of data-driven advertising.

The following comments first discuss the value of advertising to clarify that there exists a well-established connection between data-driven advertising and benefits to consumers and the economy, while there is no clear link between the practice and the harms alleged by the Petition. Our comments next discuss the FTC’s alleged authority to issue a UMC rule; it is unclear that the Commission may issue a sweeping regulation regarding “surveillance advertising.” Finally,

³ *Id.* at 31-34.

⁴ *See, e.g.*, Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *U.S. v. Kuuhub, Inc. et al.* (Case No.: 21-cv-01758) (Jul. 21, 2021); Consent Order, *U.S. v. Quickwork LLC, et al.* (Case No.: 4:21-cv-00437-RLW) (May 5, 2021).

we raise the all-too-real possibility that anticompetitive aims could, in fact, be the impetus behind the Petitioner’s request for rulemaking.

I. Advertising in General and IBA in Particular Yield Significant Value to Society and the Economy

For more than a century, companies have used advertising to reach the “right” audiences for their products and services in offline environments. In the past thirty years, such techniques have expanded to the online environment, helping businesses provide customized, relevant offerings to an even broader consumer audience and helping them to identify interested audience members more quickly, thereby fueling unprecedented economic growth. This growth has occurred in an environment that continues to focus on expanding transparency and limiting harms to consumers. Within this current framework, the responsible use of data for marketing purposes has helped drive innovation and fuel the U.S. economy.

The Petition’s claims that “surveillance advertising” harms consumers and the economy are not supported by research, and the Petition paints an inaccurate picture of the data-driven advertising ecosystem. The Petition alleges four harms that it attributes to “surveillance advertising,” but it draws no causal connection between the stated harms and data-driven advertising practices. The Petition also does not address the vast benefits consumers and the economy receive from data-driven advertising. The Petition thus presents a skewed view of advertising practices by failing to acknowledge the ways data-driven advertising has enriched the lives of consumers and strengthened the economy.

Courts have invalidated legal attempts to prohibit advertising and have affirmed that advertising is entitled to First Amendment protections under commercial free speech doctrine, as discussed in more detail below. Businesses have long used information about existing and would-be customers to tailor messaging to them so it is relevant and actionable, and consumers have a First Amendment free speech right to receive truthful information from advertisements. The benefits advertising provides to consumers, businesses, and society at-large cannot be understated; advertising drives a healthy, vibrant economy; generates immense value for individuals by giving them access to critical messaging and content; and contributes to a robust marketplace where businesses of all sizes can reach consumers and compete.

In particular, in the past three decades IBA has generated massive gains in United States (“U.S.”) gross domestic product (“GDP”) and has created employment opportunities for individuals living throughout the country. IBA has also supported the existence of an open web, where information, news, content, and online products and services can be accessed by consumers at little or no cost to them. Additionally, despite the Petition’s focus on alleged consumer harms generated by “surveillance advertising,” consumers have actually indicated that they value the ad-based model of the Internet, and they are aware of their ability to opt out of IBA at any time. Finally, IBA supports a variety of companies in the marketplace. From small to midsize to large firms, IBA enhances businesses’ ability to compete and reach consumers at scale. For these reasons, as explained in more depth below, the Commission should demur from undertaking to ban the practice outright via regulation.

A. *Advertising Is Protected Under the First Amendment and A Ban Would Not Pass Constitutional Muster*

If the FTC were to issue a UMC regulation banning IBA or other forms of data-driven advertising, such regulations would likely run afoul of the First Amendment. The First Amendment protects speech that is not misleading or in furtherance of an illegal activity. Courts have long affirmed First Amendment protections for advertising under commercial free speech doctrine by making clear that individuals, businesses, and society in general have strong interests in the free flow of commercial information. Advertising brings immense value to consumers and society, and the overwhelming majority of it is not false, deceptive, or illegal. As such, advertising is entitled to strong commercial free speech protections.

Commercial free speech includes the right of businesses to communicate with consumers without undue hindrance, and courts have struck down previous laws that have banned advertising. For example, the Supreme Court in 1999 unanimously held that a federal ban on advertisements for lawful private casinos was an illegal regulation on commercial free speech.⁵ The Court found that the government’s ban would not curtail harmful practices, and as a result the ban unreasonably prohibited a specific type of speech. Furthermore, in similar cases, the Court has noted the importance of commercial free speech to consumers by stating:

“Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.... We acknowledge[] that this Court has referred to a First Amendment right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive.’... If there is a right to advertise, there is a reciprocal right to receive the advertising... .”⁶

First Amendment commercial free speech protections for advertising therefore serve to advance the interests of consumers and businesses alike. The dissemination of data collected by a business is constitutionally protected free speech.⁷ In order for a regulation restricting commercial speech to pass constitutional muster, (1) the state must assert a substantial interest in restricting the speech, (2) the regulation must directly and materially advance that interest, and (3) the regulation must be narrowly tailored to serve that interest.⁸

The Petition articulates no clear government interest in a wholesale ban of “surveillance advertising,” and it is unclear that the government would be able to establish a clear substantial interest in such a ban if it were to promulgate UMC rules to prohibit the activity. Even assuming *arguendo* that the government could articulate a substantial interest in prohibiting anticompetitive activity, it is not at all clear from the Petition that a ban on advertising would

⁵ *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999) .

⁶ *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 756-57 (1976); *Sorrell et. al. v. IMS Health Inc.*, 564 U.S. 552, 570-71 (2011).

⁷ See *Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001); *Boetler v. Advance Magazine Publishers Inc.*, 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016); *Sorrell et. al. v. IMS Health Inc.*, 564 U.S. 552, 571-72 (2011).

⁸ *Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001); see also *Central Hudson Gas and Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980).

directly advance that interest. In fact, as set forth in more detail in Section I.E below, banning the practice would hinder—rather than advance—a vibrant, competitive marketplace for data-driven advertising. A ban on data-driven advertising is also far from narrowly tailored. Prohibiting the practice would be the most extreme form of regulation the Commission could choose to pursue in the name of advancing its alleged substantial interest. As a result, if the FTC were to issue a blanket rule banning “surveillance advertising,” such a ban would likely be struck down in the courts as an illegal abridgement of bedrock First Amendment protections.

B. Data-Driven Advertising Contributes to U.S. GDP and Fuels Economic Growth

Data-driven advertising has created significant growth in U.S. GDP and has generated jobs and employment opportunities that power the economy. The growth in advertising-related economic benefits continues to compound. According to one study, the Internet economy’s contribution to US GDP via IBA has grown 22 percent per year since 2016.⁹ Moreover, data-driven advertising is responsible for a significant overall portion of US GDP. In 2020, the Internet economy contributed \$2.45 trillion to the U.S.’s \$21.18 trillion GDP.¹⁰ Those figures suggest that data-driven advertising is responsible for more than 10% of the total monetary value of all the goods and services produced within the United States’ borders.¹¹

The contributions of advertising, including data-driven advertising, to U.S. GDP are mirrored by its contributions to U.S. employment. For every million dollars spent on advertising in 2020, 83 American jobs were supported across a wide swath of industries throughout the economy.¹² This figure shows that advertising, including data-driven advertising, not only serves consumers receiving relevant and useful messaging, but in a broader sense, the advertising industry serves individuals who are employed in industries that depend on the practice. In 2020, advertising contributed \$2.1 trillion in salaries and wages to such individuals, representing 18.2% of total labor income in the United States during that year.¹³ The average salary for jobs ultimately supported by advertising was over \$73K or 12% above the national average.¹⁴

Presently, more than 17 million Americans are employed in jobs generated by the commercial Internet.¹⁵ Additionally, many of these jobs have been created by small to mid-size firms rather than by large companies. In fact, in 2020 more Internet jobs were created by small firms and self-employed individuals (38 percent) than by the largest Internet companies (34 percent).¹⁶ Moreover, consistent with the general movement of brand spending towards online media, more than half of the employment in the advertising and media fields is related to the commercial Internet, which is powered by IBA.¹⁷

⁹ See John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5 (Oct. 18, 2021), located at https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf (hereinafter, “Deighton & Kornfeld 2021”).

¹⁰ *Id.*

¹¹ *See id.*

¹² *See* IHS Markit, *The economic impact of advertising on the US economy 2018 – 2026* at 5 (Nov. 2021).

¹³ *See id.* at 13.

¹⁴ *See id.* at 5.

¹⁵ Deighton & Kornfeld 2021, at 5.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 8.

Additionally, IBA serves as a more effective kind of advertising than other digital advertising techniques such as contextual advertising. IBA is the main driver of economic value for small and mid-sized publishers that do not have access to direct advertising sales.¹⁸ IBA allows businesses to reach consumers with advertisements and messages that are relevant to them, while contextual advertising is more limited because it focuses solely on the content of websites. Many studies support the benefits of increased granularity in targeting. “[A] number of empirical studies have confirmed the benefits of targeted advertising for both sides of the market. Even accounting for the selection bias (due to a higher baseline probability that a targeted group is more likely to buy the product with or without advertising), multiple empirical studies find that targeted advertising is more effective than non-targeted advertising.”¹⁹ Moreover, scholars are quick to point out more invasive forms of contextual advertising that could raise concerns, particularly in a world where businesses cannot access or use IBA.²⁰

Legal requirements that threaten the very existence of data-driven advertising also jeopardize our country’s economy and individuals’ employment. Overly restrictive requirements that hinder or place an outright ban on reasonable advertising practices such as IBA could yield tens of billions of dollars in losses for the U.S. economy.²¹ These limits or bans would also create barriers to entry of new market entrants and smaller and mid-sized companies that do not have wide access to first party data. 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 drive the economy while ensuring consumers are well protected and understand their rights with respect to advertising technologies. A ban on data-driven advertising would detrimentally impact U.S. GDP, American businesses, consumers, and more than 17 million individuals who are employed in the industry.

C. Data-Driven Advertising Subsidizes Consumers’ Access to Online Content and Helps Provide Messaging to Consumers for Their Benefit

Data-driven advertising provides significant benefits to consumers that would not exist if the practice were to be outlawed entirely. One clear example of the consumer benefit from data-driven advertising is its support and enablement of free and low-cost content and services that publishers offer consumers online (including news, research, video, music, games, and more). Without data-driven advertising, many online content and service providers may elect to adopt a subscription-based model, where content would be accessible to a consumer only upon payment of a fee. An increase in subscription-based services would change the egalitarian nature of the Internet, with consumers of means able to access cutting edge content and services while consumers with less expendable income would not be able to access such information. Data-driven advertising practices such as IBA allow the Internet to remain open and accessible to all by helping to make crucial content widely available for free or at a low cost.

¹⁸ *Id.* at 6.

¹⁹ Jura Liaukonyte, *Personalized and Social Commerce* at 14 (May 2021).

²⁰ See generally Alexander Bleier, *On the Viability of Contextual Advertising as a Privacy-Preserving Alternative to Behavioral Advertising on the Web* (Dec. 7, 2021).

²¹ See John Deighton, *The Socioeconomic Impact of Internet Tracking*, 4 (Feb. 2020), located at <https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf>.

While the Petition’s request that the FTC ban “surveillance advertising” implicates all forms of data-driven advertising, both in online and offline contexts, at the heart of the Petition is an attack on IBA. The Petition claims that every use of consumer data is “a price hike” without offering an adequate explanation of what that increase is or how it is derived.²² The Petition does not discuss the immense benefits consumers receive from IBA. The Petitioner claims: “Consumers also suffer directly from surveillance advertising. For users of nominally ‘free’ products, paid for in the form of personal data and attention, each new invasion of privacy and degradation of services is an effective price hike.”²³ What the Petitioner cavalierly dismisses as “free” is an unprecedented amount of data and information access by consumers online. The Petitioner ignores the value in IBA; in the Petitioner’s view, there is only a loss to consumers. However, numerous studies show this assertion to be patently untrue. Consumers derive extraordinary benefits from IBA, and surveys show they attribute significant value to the practice. In fact, one survey shows that consumers assign a monetary value of over \$1,400 per year to the ad-supported Internet.²⁴

IBA technology is used to send targeted messaging to benefit consumers. For instance, the ability to process data enables consumers to receive targeted messaging relating to COVID-19 and vaccinations. Specifically, advertising technology helps entities identify at-risk groups and reach out to these communities with crucial information about the coronavirus as well as information regarding who can receive vaccines at particular locations and particular times. Targeted messaging has worked to encourage members of hard-to-reach communities to receive COVID-19 vaccinations.²⁵ The value of this type of messaging is shown in the Department of Health and Human Services’ use of targeted advertising to reach individual communities with information about the vaccines in a way that is relevant and meaningful to them.²⁶

Advertising technology has helped consumers and society in myriad other ways as well. For example, one adtech provider assisted New York’s largest healthcare provider in using marketing data such as overall views to the system’s website, wait times at the emergency department, and directions to the hospital to help the health system “develop a predictive model to anticipate the next wave of [COVID-19]” and “proactively allocate resources and staff to serve [its] patients.”²⁷ Advertising technology has also allowed nonprofits to successfully reactivate past donors and enhance fundraising efforts for refugees.²⁸ Advertising technology, including IBA, has shown its value to consumers and society by helping to disseminate crucial and relevant information to individuals at scale.

²² Petition at 6, 27.

²³ *Id.* at 6.

²⁴ DAA, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), located [here](#)

²⁵ See Jeremy B. Merrill and Drew Harwell, *Telling conservatives it’s a shot to ‘restore our freedoms’: How online ads are promoting coronavirus vaccination*, WASHINGTON POST (Aug. 24, 2021), located [here](#).

²⁶ *Id.*

²⁷ ANA, *MightyHive Helps Northwell Health Address Pandemic Crisis with Marketing Data* (Jun. 16, 2021), located [here](#).

²⁸ ANA, *Primed and Poised* (Oct. 4, 2019), located [here](#); ANA, *How to Keep Lapsed Donors from Staying Socially Distant* (Feb. 3, 2021), located [here](#).

D. Consumers Appreciate the Ad-Supported Internet and Are Empowered to Opt Out of IBA

Consumers of all income levels throughout the United States embrace the ad-supported Internet and use it to create value in their lives. Consumers are not harmed by IBA; in fact, research shows consumers are supportive of the practice. One study found that more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.²⁹ Additionally, in a recent survey conducted by the Digital Advertising Alliance (“DAA”), 90 percent of surveyed consumers stated that free content was important to the overall value of the Internet, and 85 percent surveyed expressed a preference for the existing ad-supported model where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.³⁰ As the Commission has acknowledged in past comments concerning IBA practices, if a subscription-based model replaced the ad-based model, many consumers likely would not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.³¹

Additionally, the Petition repeatedly makes the false claim that consumers are “trapped” and cannot avoid “surveillance advertising.”³² To the contrary, consumers can control IBA by opting-out of the practice. In states such as California, Virginia, and Colorado, laws will soon come into effect that allow residents to opt out of IBA.³³ In addition, self-regulatory frameworks such as the DAA Principles allow all consumers, regardless of their state of residency, to opt out of IBA, and these tools are recognized by the FTC as providing important consumer protections.³⁴ The DAA Principles also require companies to be transparent with consumers regarding uses of data by providing relevant notices outside a privacy policy. Such notice is often provided through the well-recognized DAA Icon that offers easy access to consumer controls for IBA.³⁵ As a result, consumers are made well aware of IBA via the DAA Icon and can readily opt out of the practice through the DAA’s tools. The DAA Principles have been widely implemented across the online advertising industry and are enforceable through longstanding and effective industry self-regulatory enforcement programs.

²⁹ 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-online-behavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0.

³⁰ DAA, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), located [here](#).

³¹ Federal Trade Commission, *In re Developing the Administration’s Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

³² *Id.* at 20.

³³ California Privacy Rights Act of 2020, Cal. Civ. Code § 1798.120; Virginia Consumer Data Protection Act, Va. Code Ann. § 59.1-573(A)(5); Colorado Privacy Act, Colo. Rev. Stat. § 6-1-1306(1)(a).

³⁴ DAA, *Self-Regulatory Principles for Online Behavioral Advertising* (Jul. 2009), located [here](#); FTC, *Cross-Device Tracking, An FTC Staff Report* (Jan. 2017) at 11, located [here](#) (“FTC staff commends these self-regulatory efforts to improve transparency and choice in the cross device tracking space...DAA [has] taken steps to keep up with evolving technologies and provide important guidance to their members and the public. [Its] work has improved the level of consumer protection in the marketplace.”)

³⁵ DAA, *New DAA-Commissioned Survey Shows ‘AdChoices’ Icon Recognition Has Grown to 82 Percent in 2021* (Jun. 3, 2021), located [here](#).

Because U.S. consumers can opt out of IBA, a flat ban on the activity is not necessary. Consumers are empowered to take action to stop the practice if they do not want to allow companies to use data associated with them to present them with relevant content and advertisements, and it is clear that consumers value IBA and prefer it to less relevant advertising. Consumers understand, value, and can control IBA practices. No concrete harms have been presented by the Petition that counterweigh the benefits consumers receive. A ban is also not necessary to further competition. For example, more than 100 companies participate in the DAA's choice tools across different advertising channels.³⁶ All of these companies compete in the IBA marketplace. There is no lack of competition that supports this proposed ban.

E. Data-Driven Advertising Is Pro-Competition and Supports a Vibrant Ecosystem of Companies of All Sizes

Although the Petition acutely focuses on three companies in the marketplace, a flourishing ecosystem of companies competing in the data-driven advertising industry in fact exists. Data-driven advertising helps the new companies of today develop into the sophisticated, larger enterprises of the future that lend value to everyday Americans' lives. Many different kinds of companies of various sizes, from publishers of popular websites and small bloggers to third party ad tech companies and marketing services providers, engage in IBA and other data-driven advertising techniques to reach individuals with relevant messaging. Third-party companies assist first-party companies looking to activate their data to reach consumers more efficiently; first-party companies rely on data-driven advertising to maximize their advertising spend; and consumers benefit from the overall practice, as they receive more relevant advertisements and broad access to information online as a result of the activity. All of this fosters a competitive environment.

The Petition claims that the use of "surveillance advertising" creates insurmountable barriers of entry and degradation of competition. However, the overwhelming majority of the companies that leverage data-driven advertising are not large platforms or market behemoths; to the contrary, they are new, small, and mid-size businesses that use, facilitate, and depend on data-driven advertising to reach their target markets and generate value. One of the Petition's greatest failings is its lack of recognition that an inability to use data-driven advertising might have significant anti-competitive effects. For new entrants or companies with weaker market share, and therefore less first-party data, the ability to compete would be substantially reduced if they cannot use data-driven advertisements to find an audience.

The existence of a wide variety of companies that engage in and benefit from data-driven advertising shows the practice can serve to promote competition rather than hinder it in the way the Petition suggests. Large market players are not the only companies that engage in or benefit from data-driven advertising. IBA in particular creates lower barriers to entry for new market entrants, reduces small business costs, and facilitates start ups' ability to access markets. As a result, modern digital advertising is actually a fundamental driver of competition. It particularly empowers small businesses by enabling them to compete where costs would otherwise hinder their market entry. This leads to a greater diversity of online companies, products, and services, from which consumers gain value.

³⁶ DAA, *DAA Participating Companies & Organizations*, located [here](#).

Although online publishers of all sizes rely on data-driven advertising, smaller websites depend on IBA for a significantly greater portion of their advertising revenue.³⁷ IBA specifically helps small and mid-size businesses personalize their marketing, connect with the right customer segment, and therefore increase sales. One survey found that 74% of small and mid-size businesses using IBA reported that personalized advertising was “important to the success of their business.”³⁸ In addition, the same study showed that, by engaging with their customers through personalized ads, small and mid-sized businesses can increase overseas sales by diversifying their customer base beyond their own home location, thereby making them more resilient to local demand shocks.³⁹

A regulation that flatly bans data-driven advertising, including IBA, would not only impact the companies explicitly named in the Petition, but more ominously also would impact myriad other small, medium, and large companies as well as individuals employed by those companies. One report that analyzed the potential impacts of a ban on IBA in the European Union found that such a ban “would reduce the €16 billion of spending on data-driven ads in the EU, threatening about €6 billion of advertising income for app developers. As a result, European consumers would face the prospect of a radically different Internet: more ads that are less relevant, lower quality online content and services, and more paywalls.”⁴⁰ The FTC should therefore not take steps to ban the practice, as doing so would actually hinder competition and harm businesses, the economy, and consumers.

F. The Petitioner’s Proposed Regulations Would Deprive Consumers of a Variety of Options for Products and Services and Would Give Established Businesses a Competitive Advantage

The regulations the Petitioner proposes, including a ban on “using personal data for the purpose of delivering advertisements” and the “more restrained” version of prohibiting “the sharing or use of personal data to target advertisements at users as they traverse the internet” are exceedingly broad and would impede rather than advance a healthy competitive marketplace.⁴¹ As discussed above, many companies that use data-driven advertising to reach audiences and compete would lose a crucial method of making contact with existing and new customers. In turn, consumers’ access to products and services would be constrained; consumers would lose the benefit of receiving advertisements and messages from a wide variety of companies in the business community. Only the companies that can afford to reach customers through other means would be able to survive and thrive in the economy if data-driven advertising is subject to restrictions akin to the proposed regulations articulated in the Petition. The Petition specifically points to a small handful of entities as the culprits for the bad practices that it says should be outlawed under UMC rulemaking, but the proposed ban would impact *all entities* that engage in data-driven advertising. The result of such a ban would, contrary to the Petition’s stated aims,

³⁷ Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), located [here](#).

³⁸ Deloitte, *Dynamic Markets: Unlocking small business innovation and growth through the rise of the personalized economy* at 2 (May 2021).

³⁹ *Id.* at 23.

⁴⁰ Center for Data Innovation, *The Value of Personalized Advertising In Europe* (Nov. 22, 2021), located [here](#).

⁴¹ Petition at 60, 62.

leave larger companies that engage in data-driven advertising with an inherent advantage over their smaller business counterparts, thereby impeding competition rather than fostering it.

II. The Commission Does Not Have Clear Authority to Promulgate a Rule Banning “Surveillance Advertising” Under Its UMC Authority

The Petition raises significant issues regarding the proposed use of FTC UMC rulemaking authority to achieve the goal of preventing anticompetitive conduct. The Petition does not analyze or consider how antitrust enforcement presently works to address competition issues. Instead, it summarily dismisses antitrust solutions and enforcement as “too slow and too narrowly focused,” and it uses that broad assertion to arrive at the conclusion that a UMC rulemaking is required.⁴² In doing so, the Petition proves too much, because it rests on the premise that antitrust adjudication and enforcement efforts can never serve as an effective form of deterrence for the anticompetitive conduct alleged in the Petition. However, the FTC is currently pursuing actions against some of the companies named in the Petition, and FTC consent orders can be used to prevent or deter undesired conduct. The Commission therefore already has effective, more targeted tools at its disposal to address the Petition’s alleged competition concerns without issuing a sweeping and economy-shattering UMC rule banning data-driven advertising—a UMC rule that the FTC has questionable authority to promulgate, as discussed below.

The Petition asserts that the FTC may issue a regulation to ban “surveillance advertising” as a UMC pursuant to its authority under Section 6 of the FTC Act.⁴³ However, it is not a matter of settled law that a UMC rule would withstand judicial review. While there is a single court ruling from nearly half a century ago that states the FTC can issue rules under the Administrative Procedure Act (“APA”) under its FTC Act Section 6 authority,⁴⁴ the FTC has used such authority only once in its more than 100-year history, and Congress’s subsequent express grants of authority to the FTC to issue rules suggest that a modern-day court may not uphold the Commission’s ability to promulgate broad UMC rules pursuant to Section 6 of the FTC Act.

The 1973 decision affirming the FTC’s Section 6 authority to promulgate broad UMC rules rests on an uncertain foundation.⁴⁵ Since the 1973 decision, Congress has repeatedly and explicitly given the FTC APA notice and comment rulemaking authority through specific statutory directives, such as those in the Children’s Online Privacy Protection Act and the Telemarketing and Consumer Fraud and Abuse Prevention Act.⁴⁶ Congress has not, however, granted the FTC rulemaking powers relating to its broad Section 5 authority to prohibit unfair or deceptive acts or practices, nor has it clarified the Commission’s alleged rulemaking authority under Section 6 of the FTC Act. Instead, Congress provided the FTC explicit rulemaking authority for unfair and deceptive acts and practices under the Magnuson-Moss Warranty Act, which set forth detailed procedures and guardrails for rulemaking under the FTC’s Section 18

⁴² Petition at 59.

⁴³ Petition at 8-10.

⁴⁴ *National Petroleum Refiners Association v. FTC*, 482 F. 2d 672 (D.C. Cir, 1973).

⁴⁵ See generally Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. CHAMBER OF COMMERCE (Aug. 12, 2021) (hereinafter, Chamber 2021).

⁴⁶ Children’s Online Privacy Protection Act, 15 U.S.C. § 6502; Telemarketing and Consumer Fraud and Abuse Prevention Act 15 U.S.C. § 6102.

authority. Congress has made no similar grant of UMC rulemaking authority, instead choosing to empower the FTC to undertake only case-by-case administrative adjudication of competition cases to shape the law.

Moreover, the FTC has asserted its supposed authority to issue regulations under its Section 6 authority just once (in 1968) by issuing rules related to discriminatory practices in the clothing industry.⁴⁷ Notably, the FTC did not issue additional UMC rules after the 1973 case upholding such rulemaking authority. The lack of FTC UMC rules post-1968 and the approximately 50-year history of Congressional delegations of specific rulemaking power to the Commission reveals the shaking foundation upon which the alleged authority to promulgate broad UMC rules to ban data-driven advertising subject to Section 6 of the FTC Act rests. Also, as noted earlier, there are strong reasons to believe that the proposed rule suggested by the Petitioner would require the FTC to take actions that would violate the First Amendment protection of commercial free speech. In short, a UMC rule banning “surveillance advertising” would inevitably be courting various legal challenges.

III. The Petition Lacks Transparency, and While Purportedly Made in an Effort to Prevent UMC, the Petition May in Actuality Further the Petitioner’s Own Competition Interests

The FTC’s own rules regarding petitions require petitioners to explain “how the petitioner’s interests would be affected by the requested action.”⁴⁸ The Petition sets forth a section to this effect that amounts to just one single sentence noting that the Petitioner is a nonprofit organization.⁴⁹ This disclosure does not shed any light on the interests of Accountable Tech, the entity behind the Petition for rulemaking, or how its interests would be impacted by the requested rulemaking. The lack of a clear designation of the Petitioner’s interests could result in the Commission initiating a rulemaking proceeding based on a request from entities or individuals who may in fact have anticompetitive motives for drafting and submitting the Petition.

When the FTC updated its Rules of Practice to add more requirements surrounding the petition process, it did so in the name of increasing “public participation and accountability around the work of the FTC.”⁵⁰ After those updates to the Rules of Practice were made effective, then-Commissioner Rohit Chopra applauded the FTC for revising the rules specifically because the revisions were intended to provide better clarity on who is backing rulemaking requests made through the petition process.⁵¹ However, the Petition’s cursory and uninformative statements provide neither clarity nor accountability in the proposed rulemaking.

In similar contexts, federal government bodies impose disclosure requirements on petitioners to foster transparency and accountability. For example, the Supreme Court requires

⁴⁷ Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry, 16 C.F.R. Part 412 (1968).

⁴⁸ 16 C.F.R. § 1.31(b)(1).

⁴⁹ Petition at 3.

⁵⁰ FTC, Press Release, *FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability* (Sept. 15, 2021), located [here](#).

⁵¹ See FTC, *Prepared Remarks of Commissioner Rohit Chopra Regarding New Procedures to Ensure the Right to Petition the FTC* (Sept. 15, 2021), located [here](#).

certain disclosures about petitioners, their counsel, and their interests in certain submissions before the Court.⁵² The Supreme Court's approach, unlike the FTC's current approach, results in allowing the applicable government body to more fully understand the party(ies) before it. To ensure fairness and transparency in the FTC's petition process, the Petitioner should similarly disclose key information about its interests in the rulemaking. Shedding light on such interests behind the Petition will help to illuminate whether the purpose of the Petition is to advance consumer protection or for anticompetitive business interests.

Data-driven advertising, including IBA, provides immense benefits to consumers, businesses, and the economy. A ban on data-driven advertising technologies would walk back decades of advancements and efficiencies achieved through the ability to reach consumers with important and relevant messaging and would likely run afoul of the U.S. Constitution. A ban would also severely hinder consumers' ability to readily access important content and services on the Internet. It is not a settled matter that the FTC has the authority to prohibit data-driven advertising by deeming it to be a UMC. Moreover, the Petitioner's interests are not adequately disclosed to enable the FTC to rule out the possibility that the initiative behind the rulemaking request is, in fact, to hinder (rather than advance) competition and consumer protection. For the foregoing reasons, the FTC should deny the Petition.

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Thank you for the opportunity to submit comments on the Petition. Please do not hesitate to contact us with any questions you may have regarding this submission.

⁵² U.S. Sup. Ct. R. 37.