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

COMMENTS
of the
ANA – ASSOCIATION OF NATIONAL ADVERTISERS
on the
Advance Notice of Proposed Rulemaking for a
Trade Regulation Rule on Commercial Surveillance and Data Security
“Commercial Surveillance ANPR, R111004”

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 Sugiyama Potashnik
Allaire Monticollo
Venable LLP
600 Massachusetts Ave., NW
Washington, DC 20001
202.344.4613

November 21, 2022
I. Introduction and Executive Summary.

On behalf of the ANA – the Association of National Advertisers (“ANA”) – we provide comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Advance Notice of Proposed Rulemaking (“ANPR”) on “the prevalence of commercial surveillance and data security practices that harm consumers.”

As America’s oldest and largest advertising trade association, the ANA has long supported brands, advertisers, marketing service providers, and countless other entities that engage in and facilitate advertising while protecting consumer privacy and maintaining the security of data processed through their systems. We strive to assist our member companies in their efforts to comply with law, including mandates to avoid unfair or deceptive acts or practices. The ANA and its members support federal data standards, such as those set forth in Privacy for America’s Principles for Privacy Legislation (“Privacy for America Framework”) that would preserve the benefits of responsible uses of data while clearly defining prohibited practices that make personal data vulnerable to breach or misuse.

The ANA’s mission 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 “personalized” or “targeted” advertising practices that give consumers access to relevant information, messaging, and advertisements at the right time and in the right place.

While the ANA takes this opportunity to respond to the FTC’s ANPR, we nonetheless maintain significant concerns about the manner in which the Commission has begun building the administrative record that will serve as the foundation for any subsequent proposed rules stemming from this ANPR. The ANPR uses the pejorative term “commercial surveillance” broadly to encompass virtually any advertising practice that uses data, including targeted advertising. Such a negative framing of advertising and data practices shows that the Commission is already keenly fixated on limiting data use for advertising when academics, elected representatives, and even past and present FTC officials have acclaimed the benefits of advertising and the self-regulatory data efforts in the space.

In the ANPR, the FTC states it is proposing to regulate “commercial surveillance” and “data security” under its authority to issue trade regulation rules pursuant to Section 18 of the FTC Act, an authority vested by the Magnuson-Moss Warranty Federal Trade Commission Act (“Mag-Moss”) in 1975 and amendments to that Act in 1980. Through Mag-Moss, Congress included specific and incremental requirements for rulemaking, which involve more substantive and procedural measures than what is required under traditional Administrative Procedure Act.


\[2\] Privacy for America, Principles for Privacy Legislation, located here.
notice-and-comment processes. Congress enacted these more specific requirements in response to a period of FTC overreach, when the Commission’s efforts to conduct rulemaking on a wide range of subjects, including a proposal to ban children’s advertising, led many to accuse it of acting as the “great national nanny.”\(^3\) Congress thus sought to rein in such FTC overreach by requiring the Mag-Moss rulemaking procedures in Section 18 of the FTC Act.

In addition to several additional rulemaking procedures required under Mag-Moss, a threshold substantive requirement for such rulemaking is an FTC determination that a particular act or practice to be regulated is unfair or deceptive. Mag-Moss also requires the regulated practice to be prevalent and described with specificity, and the FTC must present and describe reasonable alternatives to the proposed rule that it may be considering. The development and recording of this substantive information are necessary to create an administrative record supported by “substantial evidence” that provides a holistic review of the costs and benefits of the FTC’s proposed regulatory action. To develop such a record, the Commission must consider the benefits and costs of practices it seeks to regulate. This ANPR should be no different when it comes to examining the value of data-informed advertising. The FTC must give due weight to the immense value that all advertising, including data-driven methods such as targeted advertising, provides consumers and the U.S. economy so as to develop an accurate, comprehensive administrative record, and this should occur before deciding whether issuing regulations that limit or abolish the practice entirely is the appropriate outcome. Indeed, a fulsome cost-benefit analysis of such broad restrictions would show that regulations severely limiting responsible use of data for advertising would hurt consumers and the economy much more than such regulations would protect or help them.

Advertising is the lifeblood of the American economy. Advertising contributes significantly to U.S. gross domestic product (“GDP”), fosters a competitive economic environment where businesses of all sizes can thrive, generates employment opportunities, and allows consumers to access vast and varied content online for free or at a very low cost. The ANPR itself acknowledges the vital role that advertising plays in the modern economy. As detailed in Commissioner Noah Phillips’ dissent to the ANPR, advertising facilitates the provision of free services to consumers, and reducing the ability of companies to responsibly use data to perform advertising could drive higher prices at a time when inflation is at its highest point in decades.\(^4\) And yet, the ANPR—which purports to be neutral about gathering information to help the FTC determine whether a basis exists for moving forward with issuing regulations—makes clear through its use of language from the outset that the Commission holds a clear bias against and is dismissive of advertising in general, and the use of data in advertising specifically. The FTC should not presuppose that any kind of data-informed advertising is harmful without the administrative record necessary to support such a bold assertion.

The ANPR fails to set forth a clear description of the specific, prevalent activity the Commission proposes to regulate. The ANPR thus initiates an economy-wide rulemaking process without giving the public any notice of what practices are under consideration or how FTC trade regulations could impact them. Because the breadth of topics the ANPR addresses offer little to no insight into the Commission’s proposed plans, the ANPR is materially flawed.

---

\(^3\) See J. Howard Beales III and Timothy J. Muris, Return of the National Nanny (May 26, 2022), located [here.](#)

\(^4\) ANPR at 51293.
and cannot serve as the basis for developing a comprehensive administrative record to support a Mag-Moss rulemaking. However, assuming *arguendo* that the ANPR is not deficient, and the Commission decides to proceed with issuing a Notice of Proposed Rulemaking (“NPRM”) to regulate the amorphous and broadly construed concept of “commercial surveillance,” we provide the following comments to assist the agency in honing its areas of inquiry and examining the costs and benefits of regulation. We note that our comments are based on what we surmise the Commission *may* decide to regulate, as the topic for regulatory action is not clear in the ANPR. Our comments proceed by addressing the following specific points:

1) The ANPR is deficiently constructed such that it is impossible for the public to know how to respond to the FTC to help inform the development of a comprehensive and balanced administrative record;

2) Advertising—and in particular, targeted advertising—provides immense benefits to consumers and the American economy that would not be outweighed by regulations limiting the ability responsibly to use data;

3) The Constitution, other federal laws, and jurisdictional limits cabin the FTC’s authority to issue a broad rule severely limiting or banning truthful advertising;

4) Data security requirements should permit flexibility in technical, administrative, and organizational measures and should not add another layer of complexity to already existing breach notification standards;

5) The FTC should only promulgate regulations that are within the Commission’s authority and allow responsible data use for advertising to persist; and

6) The FTC should allow Congress to set nationwide data standards or, at the very least, work to develop a balanced and clear record that provides the basis for a permissible trade regulation rule under Mag Moss.

The ANPR’s rhetoric and its questions for consideration reveal a predetermined goal of severely limiting or even potentially banning bedrock advertising practices that are a hallmark of the American economy and that, to date, have not been shown to be unfair or deceptive. Rather, the Commission should engage in a holistic, unbiased assessment of data advertising practices through the Mag-Moss rulemaking process to create a record that fairly reflects the benefits such advertising contributes to modern society. Such a record is necessary to support any rulemaking with substantial evidence lest it be susceptible to invalidation upon judicial review. Once the FTC openly considers and understands the benefits provided by data-driven advertising, it will be apparent that such benefits far outweigh any purported harms the agency or others articulate. We therefore urge the FTC to support Congress in its effort to pass comprehensive federal legislation that recognizes the value of data in advertising for fueling the economy, providing consumers with useful information and largely free and open access to data-supported goods and services, and supporting a healthy, vibrant marketplace where businesses of all sizes can thrive, like the approach to federal data privacy legislation set forth in the Privacy for America Framework.
II. The ANPR is deficiently constructed such that it is impossible for the public to know how to respond to the FTC to help inform the development of a comprehensive and balanced administrative record.

In the ANPR, the FTC has proposed to regulate “commercial surveillance” through its Mag-Moss rulemaking authority. The ANPR itself provides an extremely broad definition of the term “commercial surveillance”—i.e. “the collection, aggregation, analysis, retention, transfer, or monetization of consumer data and the direct derivatives of that information”—that offers no clarity as to which specific practices constitute such “commercial surveillance.” In fact, the FTC asks the public to define the term for the agency by asking a broad blanket question: “Which practices do companies use to surveil consumers?” The ANPR thus establishes no clarity regarding what specific acts or practices the Commission considers to be “commercial surveillance,” and the agency sets in motion a regulatory process that cannot develop a well-considered administrative record to support any future regulatory action. Further, the ANPR manifests through its use of the pejorative term “commercial surveillance” itself that the Commission is biased against and dismissive of advertising in general, and the use of data in advertising specifically.

The ANPR itself is deficient, as it does not meet the requirements of the FTC Act regarding the content it must contain. According to the FTC Act, the ANPR must “contain a brief description of the area of inquiry under consideration, the objective which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission.” The ANPR fails to describe clearly the “area of inquiry under consideration.” The ANPR instead proposes a vast array of topics that could be the subject of regulation. The ANPR also provides no FTC “objective” and is patently devoid of discussion of “possible regulatory alternatives” the Commission may be considering. The ANPR thus fails the FTC Act’s basic statutory threshold for completeness. Federal agencies enjoy only the powers granted to them by Congress. Through Mag-Moss, the FTC Act includes specific requirements and limits on the Commission’s Section 18 rulemaking authority that must be honored; the FTC Act is not an unchecked ticket permitting any rules that do not satisfy Mag-Moss requirements.

Mag-Moss sets forth a detailed process by which the Commission must present to the public the topic to be regulated, engage with stakeholders, develop an administrative record, make specific findings regarding the subject to be regulated, and support those findings with past orders or other information demonstrating a prevalent and specific issue the Commission seeks to address. A number of procedural and substantive requirements must be met through the Mag-Moss rulemaking process, including the following: (1) an ANPR and related comment period, (2) notice to Congress prior to issuance of any formal Notice of Proposed Rulemaking (“NPRM”), (3) an NPRM and related comment period, (4) Commission findings, supported by evidence, that the specific acts or practices to be regulated are unfair or deceptive and prevalent, based on past cease-and-desist orders or other materials, (5) an opportunity for a formal hearing.

---

5 ANPR at 51277.
6 ANPR, Question 1 at 51281.
and (6) promulgation of a final rule bolstered by supporting documentation and “substantial evidence,” which must include a cost-benefit analysis explaining the need for the rule.10

Mag-Moss permits the Commission to prescribe only those rules “which define with specificity acts or practices which are unfair or deceptive” and are prevalent.11 The ANPR’s imprecise description of “commercial surveillance” fails to describe “with specificity” a “prevalent” practice the FTC proposes to regulate. The broad and unclear definition of “commercial surveillance” offers the public no notice regarding the rule the FTC is contemplating advancing through the rulemaking process. A fulsome, accurate, and useful administrative record for a rulemaking compliant with Mag-Moss requirements cannot be developed from such an amorphous regulatory proposal.

Additionally, the FTC may determine an activity proposed to be regulated is “prevalent” only if “(A) it has issued cease and desist orders regarding such acts or practices, or (B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.”12 The Commission’s privacy enforcement cases have never mentioned “commercial surveillance” or determined targeted advertising practices to be unfair or deceptive. The cases cited in the ANPR center on a hodgepodge of varied business models and activities. The cease-and-desist orders issued by the Commission offer no hint at a prevalent, specific practice against which the Commission has consistently enforced. The Commission has also failed to cite any information indicating a “widespread pattern” of unfair or deceptive acts or practices.

For a rule to be supported by “substantial evidence,” and therefore not susceptible to invalidation due to a lack of such necessary support, the FTC must engage in a cost-benefit analysis of the proposed regulatory action and any alternatives to that potential action.13 The ANPR is so broadly constructed that it fails to initiate a process that can develop an administrative record supported by substantial evidence. The ANPR clearly proposes to regulate advertising—and even threatens to abolish data-driven methods of advertising—but it provides little to no discussion of the significant and pervasive benefits derived from such advertising practices. Instead, the ANPR provides a laundry list of harms that it attributes broadly to “commercial surveillance” without keying in on any specific practices it alleges to be unfair or deceptive.14 In this way, the ANPR fails to commence a regulatory process supported by a

---

10 Id.
11 Id. at § 57a(a)(1)(B).
12 Id. at § 57a(b)(3).
13 See id. at § 57a(e)(3).
14 ANPR at 51274 (“[R]eports note that [advertising personalization practices] have facilitated consumer harms that can be difficult if not impossible for any one person to avoid.” “Most consumers, for example, know little about the data brokers and third parties who collect and trade consumer data or build consumer profiles that can expose intimate details about their lives and, in the wrong hands, could expose unsuspecting people to future harm.”); ANPR at 51275 (“Companies’ collection and use of data have significant consequence for consumers’ wallets, and safety, and mental health. Sophisticated digital advertising systems reportedly automate the targeting of fraudulent products and services to the most vulnerable consumers.”); see also ANPR, Question 12 at 51281 (“Lax data security measures and harmful commercial surveillance injure different kinds of consumers (e.g., young people, workers, franchisees, small businesses, women, victims of stalking or domestic violence, racial minorities, the elderly) in different sectors (e.g., health, finance, employment) or in different segments or “stacks” of the internet economy. For example, harms arising from data security breaches in finance or healthcare may be different from those concerning discriminatory advertising on social media which may be different from those involving education...
sufficient cost-benefit analysis. The Commission must openly discuss the costs and benefits of its proposed regulatory action to develop a record supported by “substantial evidence” to accompany any potential future rule under Mag-Moss that may regulate data use in advertising.

III. Advertising—and in particular, targeted advertising—provides immense benefits to consumers and the American economy that would not be outweighed by regulations limiting the ability responsibly to use data.

Advertising is essential to today’s modern economy. It provides consumers with useful information, connects consumers with products and services they desire, and empowers businesses of all sizes to reach new markets and grow. Data use allows the market to function more efficiently by enabling companies to reach consumers with the right advertising messages at the right time. Advertising thus drives growth and innovation. A recent study found that advertising supported $7.1 trillion in sales activity in 2020, a figure that represented 19.4% of total U.S. economic output for that year. Advertising is therefore a key driver of the economy that helps to inform consumers and connect them with products and services they desire.

Despite advertising’s demonstrable contributions to society, the plain text of the ANPR suggests the FTC is intent on severely limiting or even potentially banning fundamental technology. How, if at all, should potential new trade regulation rules address harms to different consumers across different sectors? Which commercial surveillance practices, if any, are unlawful such that new trade regulation rules should set out clear limitations or prohibitions on them? To what extent, if any, is a comprehensive regulatory approach better than a sectoral one for any given harm?); ANPR, Question 21 at 51282 (“Should companies limit their uses of the information that they collect to the specific services for which children and teenagers or their parents sign up? Should new rules set out clear limits on personalized advertising to children and teenagers irrespective of parental consent? If so, on what basis? What harms stem from personalized advertising to children? What, if any, are the prevalent unfair or deceptive practices that result from personalized advertising to children and teenagers?”); ANPR, Questions 39, 40, 41, and 42 at 51283 (“To what extent, if at all, should the Commission limit companies that provide any specifically enumerated services (e.g., finance, healthcare, search, or social media) from owning or operating a business that engages in any specific commercial surveillance practices like personalized or targeted advertising? If so, how? What would the relative costs and benefits of such a rule be, given that consumers generally pay zero dollars for services that are financed through advertising?” and “How accurate are the metrics on which internet companies rely to justify the rates that they charge to third-party advertisers? To what extent, if at all, should new rules limit targeted advertising and other commercial surveillance practices beyond the limitations already imposed by civil rights laws? If so, how? To what extent would such rules harm consumers, burden companies, stifle innovation or competition, or chill the distribution of lawful content?” and “To what alternative advertising practices, if any, would companies turn in the event new rules somehow limit first or third-party targeting?” and “How cost-effective is contextual advertising as compared to targeted advertising?”); ANPR, Questions 63 and 81 at 51284 (“To what extent, if at all, does the First Amendment bar or not bar the Commission from promulgating or enforcing rules concerning the ways in which companies personalize services or deliver targeted advertisements?” and “Should new trade regulation rules require companies to give consumers the choice of opting out of all or certain limited commercial surveillance practices? If so, for which practices or purposes should the provision of an optout choice be required? For example, to what extent should new rules require that consumers have the choice of opting out of all personalized or targeted advertising?”); ANPR, Question 95 at 51285 (“The Commission is alert to the potential obsolescence of any rulemaking. As important as targeted advertising is to today’s internet economy, for example, it is possible that its role may wane. Companies and other stakeholders are exploring new business models. Such changes would have notable collateral consequences for companies that have come to rely on the third-party advertising model, including and especially news publishing. These developments in online advertising marketplace are just one example. How should the Commission account for changes in business models in advertising as well as other commercial surveillance practices?”).

15 IHS Markit, *The economic impact of advertising on the US economy* at 4 (Nov. 2021), located [here](#).
advertising practices that have benefitted consumers and the business community alike. For example, the Commission states:

An elaborate and lucrative market for the collection, retention, aggregation, analysis, and onward disclosure of consumer data incentivizes many of the services and products on which people have come to rely. Businesses reportedly use this information to target services—namely... to serve advertisements... among other things. While, in theory, these personalization practices have the potential to benefit consumers, reports note that they have facilitated consumer harms that can be difficult if not impossible for any one person to avoid.16

Through the ANPR, the FTC articulates an animus towards data use in advertising.17 Along with this apparent bias, the ANPR fails to articulate any specific, prevalent, unfair or deceptive advertising practice the Commission proposes to regulate. The Commission makes only cursory nods to the benefits provided by data-driven advertising,18 hinting the FTC is aware that such benefits exist. But the ANPR provides no information about the value advertising provides to consumers, competition, or the economy-at-large. The FTC thus puts the cart before the horse by deciding that advertising causes harm without meaningfully contemplating the benefits from constitutionally protected advertising practices.

The FTC’s apparent aim to limit data use for advertising completely disregards the value that advertising contributes to society. Data-driven advertising single-handedly subsidizes individuals’ ability to access a wealth of information online for free or at a very low cost and creates myriad opportunities for employment. It also empowers small and mid-size companies to enter markets, reach prospective customers, and compete. Advertising serves as a key driver of economic growth and vitality. Data-driven advertising, including targeted advertising, powers innovation and advancement, supports a vibrant marketplace of businesses, and facilitates companies’ ability to develop numerous and diverse offerings for consumers. The ANA therefore disputes any assertion that data-driven advertising causes more harm than benefits to consumers and society. The FTC must consider the benefits that data-driven advertising provides to consumers, the competitive marketplace, and the modern U.S. economy to develop a sufficient, balanced administrative record to inform and support any future regulatory action.

a. Data-driven advertising benefits consumers by providing free and open access to resources and employment opportunities.

Consumers benefit significantly from today’s data-driven advertising practices. Any regulation regarding data-driven advertising—including targeted advertising—should be narrowly tailored to ensure those benefits can persist. The ANPR asks: “What are the benefits or costs of refraining from promulgating new rules on commercial surveillance or data security?”19 A major benefit that would result from not issuing new rules would be that data-driven

16 ANPR at 51273-74.
17 See supra at FN 14.
18 See, e.g., ANPR at 51274 (“[I]n theory… personalization practices have the potential to benefit consumers…”); ANPR at 51285 (“As important as targeted advertising is to today’s internet economy, for example…”).
19 ANPR, Question 29 at 51282.
advertising could continue to support a largely free and open Internet that consumers from all geographies and backgrounds can use without undue barriers to access.

Targeted advertising allows consumers to reach resources and content online for free or at a very low cost, including news, research, video, music, games, and more. Consumers have come to expect this free and open access to the vast majority of online content. Largely free and open Internet usage allows individuals to progress and thrive in all domains of life. Onerous or broad limits on targeted advertising would cause many online content and service providers to turn to a subscription-based model, where content would be accessible to consumers only upon payment of a fee. An increase in subscription-based services would impact consumers unevenly. Consumers who can afford to pay subscription fees would be able to access content and services online, while consumers with less expendable income would be deprived of access to such information. Targeted advertising supports the egalitarian nature of the Internet. We note that promoting equity is one of the Biden-Harris Administration’s “immediate priorities” for government; the FTC should ensure it considers how targeted advertising facilitates widespread access to information that otherwise may not be available. Advertising allows the Internet to remain open and accessible to all by helping to make crucial content widely available for free or at a low cost.

Moreover, consumers understand data-driven advertising practices and can opt out of targeted advertising if they do not wish to receive it. The ANPR asks: “To what extent are existing legal authorities and extralegal measures, including self-regulation, sufficient? To what extent, if at all, are self-regulatory principles effective?” Through the ANA Center for Ethical Marketing, the ANA offers effective and affordable data management and hygiene tools in offline and online contexts which empower consumers to exercise choice to opt out of relevant advertising. The ANA serves as a leader in self-regulation by ensuring that the choice mechanisms it provides and supports are bolstered by strong accountability programs, which help its members build consumer trust. Through the ANA’s Center for Ethical Marketing, the ANA offers education, guidelines and guidance, and accountability tools to advance opportunities for consumers to exercise choice as well as oversee companies’ compliance with those tools to ensure they are respecting consumers’ stated preferences.

In the offline sphere, the ANA offers a postal mail prospecting opt-out mechanism called DMAchoice, a mail suppression service that removes consumers who have signed up for the service from mailing lists to reduce the overall volume of marketing or donor mail those consumers may receive. Specifically, this choice feature applies to prospecting arrangements, such as mail from businesses and organizations with whom consumers may not have an existing

20 Center for Data Innovation, The Value of Personalized Advertising In Europe (Nov. 22, 2021), located here (finding that a ban on targeted advertising in the EU “would reduce the €16 billion of spending on data-driven ads…. 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.”)
22 ANPR, Question 30 at 51282.
23 See ANA, Center for Ethical Marketing, located here.
24 See DMAchoice.org, located here.
business relationship. Consumers thus already enjoy a broad and well-established ability to opt out of receiving prospecting ads via postal mail through DMAchoice.

Additionally, in the online space, the ANA is a founder and board member of the Digital Advertising Alliance (“DAA’), an independent, non-profit self-regulatory organization led by major advertising and marketing trade associations. The primary functions of the DAA are (1) establishment of responsible privacy practices applicable across industry, which are memorialized in the DAA’s Self-Regulatory Principles for Online Behavioral Advertising (the “DAA Principles”) and related codes of conduct that have adapted to changes in technology to extend privacy-forward requirements into new spheres, and (2) its centralized AdChoices opt-out tool, which permits all consumers, regardless of their state of residency, to opt out of “online-behavioral advertising,” as defined in the DAA Principles. The DAA Principles also require companies to provide “enhanced transparency” regarding uses of data for targeted advertising by offering relevant notices directly next to ads, outside of a privacy policy. This notice is often provided through the DAA YourAdChoices icon that offers easy and well-recognized access to consumer controls for targeted advertising.25

Self-regulation in the targeted advertising space has been lauded by government staff as well as past FTC Commissioners.26 The DAA Principles have been widely implemented across the online advertising industry and are enforceable through the Better Business Bureau’s longstanding and effective industry self-regulatory enforcement program.27 Consumers across the United States are empowered because they can opt out of targeted advertising, taking action to stop the practice if they do not wish to allow companies to use data associated with them to present relevant content and advertisements. Self-regulation has thus served consumers and industry for decades by helping to ensure individuals are notified about online behavioral advertising practices and can opt out of targeted advertising through a centralized tool.

Research shows that consumers support targeted advertising and related marketing practices.28 One study found that more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desires tailored discounts for online products and services.29 Additionally, in a recent survey conducted by the DAA, 90 percent of surveyed consumers stated that free content was “important” to the overall value of the Internet, and 85 percent surveyed stated they prefer 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 Recent

---

26 See 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.”); see also Katy Bachman, FTC’s Ohlhausen Favors Privacy Self-Regulation, Adweek (June 3, 2013), located here (quoting then-FTC Chair Maureen Ohlhausen, who said the DAA is “is one of the great success stories in the [privacy] space.”).
27 See DAA, Accountability, located here.
28 J. Howard Beales & Andrew Stivers, An Information Economy Without Data, 31 (2022), located here.
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.
research has quantified the annual dollar value consumers receive from access to free and low-cost Internet resources. According to one study, the free and low-cost goods and services consumers receive via the ad-supported Internet amount to approximately $30,000 of value per year, measured in 2017 dollars.\textsuperscript{31} If the Commission were to severely limit targeted advertising, consumers would be forced to absorb the lost value or forego the ability to use crucial products and services and access information online. As the Commission has acknowledged in past comments regarding targeted advertising 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 the information, products, and services they rely on today and that will become available in the future.\textsuperscript{32}

In addition, targeted advertising contributes significantly to U.S. employment. More than 17 million individuals in the U.S. are employed in jobs generated by the commercial Internet.\textsuperscript{33} In 2020, more Internet jobs were created by small firms and self-employed individuals (38 percent) than by the largest Internet companies (34 percent).\textsuperscript{34} Following the trend of brand spending on online media, more than half of the employment in the advertising and media fields is related to the Internet.\textsuperscript{35} Consumers thus benefit from targeted advertising both in terms of access to online resources and access to job opportunities.

b. Data-driven advertising enables a healthy, vibrant marketplace where businesses of all sizes can compete.

Data-driven advertising supports the ability of companies of all sizes to compete and contribute value to the marketplace. The ANPR asks: “Would any given new trade regulation rule on data security or commercial surveillance impede or enhance competition? Would any given rule entrench the potential dominance of one company or set of companies in ways that impede competition? If so, how and to what extent?”\textsuperscript{36} Targeted advertising fosters a competitive environment where businesses of all sizes can thrive. Overly broad or onerous regulations on the practice would disproportionately impact small, start-up, and mid-size businesses, threatening to force them out of the market, and leaving only the larger, extremely well-resourced firms to continue to function. Consumers thus would have fewer outlets from which to choose for obtaining products and services, and large companies would be able to entrench even more their dominant market positions.

Access to data permits a healthy ecosystem of businesses to compete to spur innovation and create products and services for consumers. While many companies of all sizes engage in targeted advertising to reach individuals with messaging that is relevant to them, small, start-up, and mid-size businesses derive particularly significant value from the practice. According to one study, “[b]y the numbers, small advertisers dominate digital advertising, precisely because online

\textsuperscript{31} J. Howard Beales & Andrew Stivers, \textit{An Information Economy Without Data}, 2 (2022), located \url{here}
\textsuperscript{32} Fed. Trade Comm’n, \textit{In re Developing the Administration’s Approach to Consumer Privacy}, 15 (Nov. 13, 2018), located \url{here}.
\textsuperscript{33} \textit{See} John Deighton and Leon Kornfeld, \textit{The Economic Impact of the Market-Making Internet}, \textit{Interactive Advertising Bureau}, 5 (Oct. 18, 2021), located \url{here}.
\textsuperscript{34} \textit{Id.} at 6.
\textsuperscript{35} \textit{Id.} at 8.
\textsuperscript{36} ANPR, Question 27 at 51282.
advertising offers the opportunity for low cost outreach to potential customers.”37 Because some small and mid-size businesses pursue a strategy focused on digital or online-only activities, data-driven advertising is a significant and critical part of their business models.38 Targeted advertising allows small, mid-size, and new businesses to compete by lowering barriers to entry and enabling them to flourish where costs would otherwise impede them from entering markets. Access to targeted advertising for such small, start-up, and mid-size businesses equates to access to customers those businesses otherwise would not have been able to reach, and targeted advertising allows them to reach prospective customers at scale. Targeted advertising thus allows small, start-up, and mid-size firms to enter the economy and sustain their businesses, thereby directly creating more competitive and diverse online companies, products, services, and content, from which consumers derive significant value. Smaller websites and publishers depend on targeted advertising for a significantly greater portion of their revenue when compared to their larger business counterparts.39

Additionally, the ANPR suggests that the Commission is not only considering a broad rule limiting data-driven advertising, which would hinder small, start-up, and mid-sized companies’ ability to compete, but also could issue regulations constraining companies from engaging in other business models if they engage in targeted or data-driven advertising at all. For instance, the ANPR asks: “To what extent, if at all, should the Commission limit companies that provide any specifically enumerated services (e.g., finance, healthcare, search, or social media) from owning or operating a business that engages in any specific commercial surveillance practices like personalized or targeted advertising? If so, how?”40 This question suggests the Commission purports to use Mag-Moss rulemaking, which enables the FTC to issue regulations only regarding specific and prevalent unfair or deceptive practices, to impose draconian limits on competition that would have catastrophically detrimental ripple effects throughout the economy. As Commissioner Noah Phillips stated in his dissent to the ANPR, “[h]ow any of these naked restraints on competition fall within our ken of policing ‘unfair or deceptive acts or practices’ is completely unclear.”41 The Commission must consider that an overly broad data rule limiting companies’ ability to compete solely because they engage in data-informed advertising is almost certainly outside the scope of a permissible Mag-Moss rule, and, even more ominously, such a rule could have lasting and damaging consequences for the vibrancy of the American economy.

Finally, the Commission must carefully consider how overly restrictive data rules could entrench or favor certain companies in the marketplace that act as intermediaries between consumers and other businesses. Large companies that control the ways consumers access products and services through the Internet, for example, stand to gain market share and an even greater competitive advantage if regulations give such entities power to decide which companies can and cannot reach consumers with their messaging and offerings. The impact of rules that further engrain market behemoths into the fabric of the economy would disproportionately harm

37 J. Howard Beales & Andrew Stivers, An Information Economy Without Data, 9 (2022), located here.
38 Id. at 8; David S. Evans, The Online Advertising Industry: Economics, Evolution, and Privacy 3 (April 2009) (working paper, subsequently published in 23 J. ECON. PERSP. 37 (2009)), located here.
39 DAA, Study: Online Ad Value Spikes When Data Is Used to Boost Relevance (Feb. 10, 2014), located here.
40 ANPR, Question 39 at 51283.
41 ANPR at 51297.
small and mid-sized businesses.42 Additionally, overly complex or burdensome rules would impose untenable compliance costs on small businesses, thereby driving them out of the market, and leaving the largest entities to capture the remaining market share. The ability to openly access and responsibly use data has created an environment where the smallest and newest of businesses can compete with the economy’s largest and most well-established players. Rules that limit or prohibit targeted advertising would hinder this competitive environment, create increased market consolidation, and deprive consumers of access to a variety of businesses from which they can purchase products or services.

c. **Data-driven advertising bestows significant benefits on the entire economy.**

To help ensure any regulation the FTC promulgates is supported by “substantial evidence” and therefore not susceptible to invalidation upon judicial review, the FTC must consider as part of its cost-benefit analysis how data-driven advertising has supported and powered innovation in the economy. Innovation powered by advertising has made the United States a world leader in terms of economic, social, and cultural impact. Some of the world’s best and most useful products and services have been developed in the United States, and the ability to engage in that innovation and development can be traced to revenue generated from data-driven advertising. The ANPR asks: “To what extent would any given new trade regulation rule on data security or commercial surveillance impede or enhance innovation? To what extent would such rules enhance or impede the development of certain kinds of products, services, and applications over others?”43 Data-driven advertising, in both online and offline contexts, has created significant growth in the economy and has driven innovation in the U.S. marketplace for decades. Severely limiting it in the guise of regulating “commercial surveillance” would harm consumers and the economy alike.

Reaching audiences via data-driven advertising existed long before the emergence of the commercial Internet. For example, offline targeted advertising, such as billboard and print advertisements, have existed for over a century. Those advertisements 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 just as unlikely to come across a billboard in Juneau, Alaska advertising beach chairs as it would be to read a newspaper bulletin in Montgomery, Alabama promoting a garage sale taking place in Albany, New York. In this way, offline advertising is often personalized because it is presented to individuals in the right time and in the right place. As referenced above, consumers also have the ability to opt out of various forms of offline personalized advertising through existing self-regulatory tools such as DMAchoice.

Personalized advertising benefits consumers because it helps ensure they receive less irrelevant messaging and instead receive promotions and information regarding products and services in which they are likely to be interested, and at the right time and in the right place. Modern data-driven advertising also permits other forms of offline advertising, such as direct mail, to be more relevant and useful for consumers. For example, data-driven advertising allows consumers to receive mailers about local businesses they may want to frequent and tailored offers they may want to accept. Without the ability to use data for targeted or personalized

---

42 J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 24-26 (2022), located [here](#).

43 ANPR, Question 26 at 51282.
advertising, even offline methods of advertising would suffer. Direct mail, for example, would be far less pertinent to consumers’ interests.

In the online sphere, targeted advertising has developed and matured over the past three decades to a point where it now creates significant growth in the economy year-over-year. In 2020, the Internet economy contributed $2.45 trillion to the U.S.’s $21.18 trillion GDP.44 The Internet economy’s contribution to U.S. GDP has grown 22 percent per year since 2016.45 One study estimates that, if targeted advertising were to be severely limited or banned without mitigation, “the U.S. open web’s independent publishers and companies reliant on open web tech would lose between $32 and $39 billion in annual revenue by 2025.”46 Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated content would lose more than an estimated $15.5 billion in revenue.47 Overly restrictive regulations that hinder targeted advertising—both online and offline—could result in billions of dollars in losses for the U.S. economy.48

Other methods of data-driven advertising, while important to the overall advertising ecosystem, cannot generate the same value that targeting advertising provides to the economy today. The ANPR asks: “How cost-effective is contextual advertising as compared to targeted advertising?”49 Studies show that targeted advertising is more effective than non-targeted advertising, such as contextual advertising.50 Contextual advertising cannot serve as a viable substitute for targeted advertising practices. Contextual advertising techniques are inherently limited, because they require advertisements to mirror the specific content of an online property; thus, any advertisement promoting products or services that do not directly relate to information presented on a page viewed by the consumer would be prevented from reaching consumers. Targeted advertising—not contextual advertising—has been the key to the explosive economic growth generated by the commercial Internet. Limiting targeted advertising in favor of contextual advertising practices would not yield the same economic activity as the marketplace witnesses today.51

Contextual advertising based on the content of an online property is an important tool for advertising in businesses’ toolkits, but it does not have the same efficiency and it is not as egalitarian as targeted advertising. By its nature, contextual advertising provides less space for digital advertisements, because ads must be relevant to the information presented to the consumer on the website or application. By contrast, targeted advertising allows companies to reach consumers with messages regardless of the subject matter presented by the digital property containing the ad space. In a world where only contextual advertising is permissible, much less space for relevant digital ads would exist alongside fewer opportunities to reach consumers for companies without significant resources or an existing customer base. As a result, small

44 See John Deighton and Leon Kornfeld, The Economic Impact of the Market-Making Internet, INTERACTIVE ADVERTISING BUREAU at 5 (Oct. 18, 2021), located here.
45 Id.
46 See id. at 34.
47 See id. at 28.
49 ANPR Question 42, at 51283.
50 See generally Jura Liaukonyte, Personalized and Social Commerce (May 13, 2021), located here.
businesses would be forced to compete with larger, more well-resourced businesses to claim the fraction of ad space that is available, thereby reducing their opportunities to reach potential customers for their products and services.

The ability of an advertiser to choose the best ad space for a product to reach the right customer is a central driver of businesses’ (especially small businesses’) profitability. Targeted advertising thus is the main advertising technique that drives economic and consumer value, and it cannot be replaced by defaulting to other methods such as contextual advertising. Contextual advertising is not a practical substitute for targeted advertising. Regulations banning targeted advertising but permitting contextual advertising would still create significant losses in terms of healthy economic competition, consumer access to online content and a variety of products and services, and overall economic growth.

IV. The Constitution, other federal laws, and jurisdictional limits cabin the FTC’s authority to issue a broad rule severely limiting or banning truthful advertising.

Truthful advertising is constitutionally protected, and limits on advertising practices already exist in sector-specific federal laws. The FTC must ensure any rules it promulgates regarding data use in advertising do not run afoul of constitutional protections or encroach on areas that are already settled under federal law. Moreover, the FTC must carefully consider jurisdictional limits that constrain the Commission’s authority to issue regulations on subjects that are left to Congress to legislate pursuant to separation of powers principles that are the foundation of American government. The FTC is not a legislative body, and as such, it should not “kickstart… the circumvention of the legislative process and the imposition upon the populace of the policy preferences of a majority of unelected… commissioners.”

- The First Amendment of the United States Constitution protects advertising under the commercial speech doctrine.

The First Amendment of the United States Constitution guarantees free expression. Businesses, in addition to individuals, enjoy this right to free expression under the commercial free speech doctrine, which has been recognized by the Supreme Court for over forty-five years. Truthful advertising is within the ambit of protected expression under the commercial free speech doctrine. In fact, one of the first cases affirming commercial speech, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, considered a law that made it illegal for pharmacies to advertise the price of medications. The Supreme Court struck down that law, asserting that the First Amendment’s protections include both the right of the speaker to speak and the right of the listener to receive information. The Supreme Court ultimately found that businesses had a right to speak, and consumers had a right to receive truthful information—through advertising—about prescription medication prices.

Commercial free speech protects both businesses in their right to free expression and consumers in their right to receive accurate information through advertising. The Commission must honor these important rights if it proceeds to issue an NPRM on “commercial surveillance” that proposes to severely limit data-driven advertising. Overly broad advertising regulations

---

52 ANPR at 51295.
would not just harm the business community, which has a bona fide interest in disseminating information about products and services to the public, but would also harm consumers themselves by infringing on their protected First Amendment right to receive truthful information. As the Supreme Court stated in *Virginia State Board of Pharmacy*, “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising.”

In several decisions following *Virginia State Board of Pharmacy*, the Supreme Court reaffirmed the commercial speech doctrine. In *Central Hudson Gas & Electric v. Public Service Commission*, the Supreme Court articulated the modern test for considering a regulation on advertising, which is constitutionally protected commercial speech. According to that test, as a threshold matter to be entitled to Constitutional protection, the speech must concern lawful activity and must not be misleading. If the speech passes this threshold test, the state must assert a substantial interest to be achieved by the restriction on commercial speech. The regulation must also directly advance the state’s asserted interest, and it must be narrowly tailored to serve that interest. As a result, broad federal regulations that limit advertising, which is constitutionally protected commercial speech, may be invalidated for running afoul of the First Amendment.

The ANPR asks: “To what extent, if at all, does the First Amendment bar or not bar the Commission from promulgating or enforcing rules concerning the ways in which companies personalize services or deliver targeted advertisements?” As described above, advertising enjoys commercial free speech protection and consumers enjoy a free speech right to receive truthful advertising. The FTC may not issue a rule limiting truthful advertising without asserting a substantial interest and showing that its regulation directly and materially advances that interest. Finally, and perhaps most importantly, any regulation must be narrowly tailored to serve the state’s asserted interest. This requirement would prohibit a broad FTC rule limiting advertising activity. The FTC may not contravene consumers’ and businesses’ fundamental First Amendment protections by issuing broad regulations limiting advertising communications.

b. The Commission should not attempt to preempt already-existing data rules set by Congress via sectoral laws.

The ANPR’s questions and verbiage suggest that Commission may, through its rulemaking, encroach on or even conflict with requirements in areas already clearly regulated and defined by federal laws. For example, the ANPR suggests the FTC is considering regulations that directly contradict the Children’s Online Privacy Protection Act (“COPPA”), the controlling statute when it comes to requirements for data collected from children online. The ANPR asks: “Given the lack of clarity about the workings of commercial surveillance behind the screen or display, is parental consent an efficacious way of ensuring child online privacy? Which other protections or mechanisms, if any, should the Commission consider?”

---

54 *Id.* at 757.
56 *447 U.S. 557, 564-66 (1980).*
57 *Id.*; see also *State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).
58 ANPR, Question 63 at 51284.
59 *Id.*, Question 19 at 51282.
plainly permits parents to consent to uses of data collected from children online, without limitations on the scope of that ability to consent.60 The FTC may not, by rule, contravene or contradict COPPA’s mandates, which were created by Congress. The FTC should take care to consider how federal laws that already impose requirements related to the collection and use of data bar the Commission from issuing rules that conflict with those statutory requirements.

In addition to COPPA, the ANPR suggests the Commission’s regulatory agenda may encroach on areas already clearly regulated by federal anti-discrimination laws. The ANPR asks several questions on the topic of algorithmic discrimination and discrimination based on protected categories.61 Existing federal laws such as the Civil Rights Act of 1964, the Americans with Disabilities Act, the Fair Housing Act, and the Equal Credit Opportunity Act already protect consumers and prohibit illegal discrimination in many contexts. These laws may be the basis for claims alleging illegal discrimination in algorithmic functions or other impermissible uses of data to further discriminatory ends. The ANPR itself also acknowledges that several federal agencies are already examining artificial intelligence practices, such as the National Telecommunications and Information Administration, the Department of Labor, and the Equal Employment Opportunity Commission.62 Additionally, several self-regulatory codes published by the DAA restrict the use of data for determining purposes of eligibility for employment, credit, health care, insurance, and a variety of other areas protected by existing federal law.63 Sufficient resources thus already exist to prohibit the type of illegal discrimination discussed in the ANPR. The FTC should not upend the structure or mandates of cornerstone federal anti-discrimination laws by issuing confusing or potentially conflicting protections related to data or algorithmic decision-making. Such rules would have the potential to contravene or obscure clear and well-established protections already set forth in law. The FTC does not have the authority to preempt Congressionally enacted policies. Any regulations the Commission issues must respect the preeminence of federal anti-discrimination statutes already in existence.

c. The non-delegation and major questions doctrines limit the Commission’s authority to issue rules on issues of vast economic or political significance, like data-driven advertising.

The Commission’s ANPR suggests it intends to engage in a broad, economy-wide rulemaking to regulate the cryptic and ill-defined concept of “commercial surveillance.” The sheer scope of the FTC’s potential regulatory action could abridge core separation of powers principles, such as the non-delegation and major questions doctrines. Recent broad federal agency regulatory actions have been invalidated by the Supreme Court for overstepping the bounds of authority delegated to the executive branch and usurping authority specifically

61 ANPR, Questions 65-72 at 51284.
62 Id. at 51289, FN 19.
63 See, e.g., DAA, Self-Regulatory Principles for Multi-Site Data (Nov. 2011), located here and DAA, Self-Regulatory Principles for the Mobile Environment (July 2013), located here; see also Privacy for America, Principles for Privacy Legislation at Part 1, Section 3.A & B, located here (setting forth a model for antidiscrimination provisions related to data use that the FTC should consider as it proceeds with this Mag-Moss rulemaking).
designated for Congress. The ANPR’s extremely broad scope, in proposing to regulate all collection, aggregation, analysis, retention, transfer, or monetization of consumer data, including data-driven advertising, runs the risk of encroaching on Congress’s realm and authority. Indeed, as Commissioner Phillips stated in his dissent, “[w]hat the ANPR does accomplish is to recast the Commission as a legislature, with virtually limitless rulemaking authority where personal data are concerned.”

Any Congressional delegation of rulemaking authority to an agency must satisfy the non-delegation doctrine, which requires Congress to provide an “intelligible principle” to guide agency actions, including rulemaking. In passing Mag-Moss, the Commission permitted the Commission to issue regulations only on unfair or deceptive activities that are “prevalent” and defined “with specificity.” A broad rule banning or severely limiting data-driven advertising could consequently be susceptible to legal challenges for exceeding the authority Congress delegated to the FTC via Mag-Moss.

The major questions doctrine, which is related to non-delegation, also constrains the FTC’s authority to engage in quasi-legislative activities. The major questions doctrine holds that courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” As a result, under that doctrine, courts will not grant permissive Chevron deference to agencies’ regulations or statutory interpretations that involve questions of vast economic or political significance. The FTC should consider how a broadly cast “commercial surveillance” rule that prescribes or limits data-driven advertising conduct across the entire Internet may involve a major question of economic and political significance.

The Supreme Court examined the major questions doctrine and invalidated agency regulations in 2022 in West Virginia v. EPA. In that case, the Supreme Court noted that the major questions doctrine “refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” An overly broad trade regulation rule limiting advertising or “commercial surveillance” could run afoul of the major questions doctrine.

Past FTC Commissioners have observed that “[t]he FTC has a troubling history of rulemaking overreach, one that the courts and Congress have both stepped in to limit.” Through Section 18 of the FTC Act and Mag-Moss, Congress provided the FTC circumscribed rulemaking authority to regulate unfair and deceptive acts and practices that are prevalent and specific, not just any practice a particular Commission decides it must control. Congress has not given the FTC authority to issue rules outside the clear bounds set forth in the FTC Act, and separation of powers principles mandate that democratically elected members of Congress are

---

64 West Virginia v. EPA, 597 U.S. ___ (2022), 2022 WL 2347278, at 17.
65 ANPR at 51294.
68 Id. at 17.
the appropriate stakeholders to create obligations and requirements surrounding issues of significant economic or political significance.

V. **Data security requirements should permit flexibility in technical, administrative, and organizational measures and should not add another layer of complexity to already existing breach notification standards.**

In addition to addressing the amorphous topic of “commercial surveillance,” the Commission proposes to use its Mag-Moss authority to impose data security regulations on the entire economy. If the FTC decides to issue data security rules, it should not mandate specific security measures required of each and every business regardless of the type of personal data they process or their size. Instead, the Commission should consider adopting a set of guiding principles for data security that allows businesses to stand up reasonable security procedures and processes that are tailored to the level of risk, and the given business’s size and capabilities; this is the approach taken in the Privacy for America Framework.

The Privacy for America Framework would require companies to implement a risk-based data security program that would vary in requirements based on the risks faced by a particular company. The program would mandate certain essential elements, such as risk assessments, risk management and control processes, employee training, vendor and third-party oversight, incident response procedures, and periodic assessments. The Privacy for America Framework would also require companies to maintain a written data security program, including technical and administrative safeguards appropriate to the nature and scope of business operations, the sensitivity of personal information processed, and the privacy risks and threats presented to such personal information. Any data security rules promulgated by the Commission should mirror this principles and governance-based approach.

Additionally, any data security rules the FTC advances should not reopen areas that have already been debated and settled under existing law, such as data breach notification. The ANPR defines “data security” as “breach risk mitigation, data management and retention, data minimization, and breach notification and disclosure procedures.” The use of this definition appears to bring breach notification requirements into the ambit of the Commission’s regulatory consideration. The Commission should not intrude into an area that has already been addressed by the several states and ensures consumers are appropriately notified of qualifying data breaches.

Every state in the country has a data breach notification law that serves the purpose of informing consumers about unauthorized access to or acquisition of personal information. In addition, several state agencies have promulgated regulations imposing incremental, more specific breach notification requirements when breaches affect certain kinds of personal information or certain entities that process personal information, such as financial institutions. The Commission should not add to this already robust breach notification landscape by issuing new or conflicting breach notification requirements when the topic is already sufficiently and comprehensively covered by the several states. A single, national breach notification standard

---

70 ANPR at 51277.
71 N.Y. Comp. Codes R. & Regs., tit. 23, §§ 500 et seq (creating “Cybersecurity Requirements for Financial Services Companies.”)
appears to be the policy goal the FTC has set out to achieve, but Congress is best suited to further such a goal. In fact, Congress has attempted several times to create such a preemptive breach notification law, but each time has declined to move forward and has instead looked to existing laws and rules in the states to set the requirements for breach notification.

VI. The FTC should only promulgate regulations that are within the Commission’s authority and allow responsible data use for advertising to persist.

The ANPR’s massive scope indicates the FTC proposes to regulate countless activities, parties, industries, data types, and every-day business and consumer interactions. The FTC should ensure that any regulations it promulgates remain within the scope of its authority under Mag-Moss and allow for bedrock and fundamental advertising practices to continue. We provide input on several topics the Commission raised in the ANPR below.

a. Dark Patterns

In the ANPR, the Commission proposes to regulate “dark patterns,” another pejorative term the FTC has widely leveraged to describe any and all “conduct that seeks to manipulate users.” The Commission also issued a report that details purported ills associated with this broadly construed concept of “dark patterns.” However, neither the ANPR nor the Commission’s reports clearly describe how a “dark pattern” differs from an unfair or deceptive act or practice generally. The use of the term “dark pattern” appears to be an attempt by the Commission to assert authority to regulate any act or practice that “manipulates users,” when Mag-Moss requires any regulated practice to be prevalent and defined with specificity. Indeed, the ANPR itself notes that its concept of dark patterns is so broad that it is “overlapping” with the Commission’s concept of negative options marketing. As a result, the broad nature of what the FTC considers a “dark pattern,” and the Commission’s failure to distinguish dark patterns from deceptive or unfair acts or practices generally, cast doubt on whether the Commission may regulate “dark patterns” through this Mag-Moss rulemaking.

The ANPR attempts to support the Commission’s authority to regulate the broad and ill-defined concept of “dark patterns” through its assertion that “[t]he Commission’s enforcement actions have targeted several pernicious dark pattern practices, including burying privacy settings behind multiple layers of the user interface and making misleading representations to ‘trick or trap’ consumers into providing personal information.” However, the Commission cites just three enforcement actions to support its claims. These enforcement actions address basic deception issues, where companies abjured their public statements about how they would use consumer data or made false, public claims about their affiliations. None of these cases shows a pattern of any practice alleged to be a “dark pattern” outside the general practice of deceiving consumers.

72 ANPR at 51287.
73 See Fed. Trade Comm’n, Bringing Dark Patterns to Light: An FTC Staff Report (Sept. 2022), located here; see also
74 ANPR at 51280.
by openly and publicly warranting something that is not true. Moreover, one of the three cases
cited by the Commission is a negative options case, adding further support to the idea that the
concept of “dark patterns” is so broadly defined that it cannot be boiled down to a specific,
prevalent practice that may be regulated under Mag-Moss. The FTC should not use its Mag-
Moss rulemaking authority to regulate the vague concept of “dark patterns.”

b. Third-Party Data Use

The ANPR asserts that “[m]ost consumers… know little about the data brokers and third
parties who collect and trade consumer data or build consumer profiles that can expose intimate
details about their lives and, in the wrong hands, could expose unsuspecting people to future
harm.” 76 This broad claim gives no consideration to the benefits third-party data contributes to
consumers and the economy. Third-party data, when used legally and responsibly for
advertising purposes, presents a minimally low risk of consumer harm. The use of third-party
data for everyday and indispensable data practices, such as facilitating the delivery of more
relevant and useful products and services to consumers, should not be subject to overly onerous
limitations or extreme bans.

Third-party data, i.e., information from marketing services providers and other entities in
the marketplace, plays an incredibly important role in the modern economy. Third-party data
remains a major catalyst of efficient marketing campaigns for companies of all sizes. Large and
established companies use it to identify new customers, continue to grow, and contribute value to
society by creating new and useful products and services to offer consumers. In particular, third-
party data helps small and mid-size businesses compete in the economy. Third-party data
decreases barriers to entry for small and mid-sized companies that have not launched their
businesses. The ability to leverage and purchase third-party data in the marketplace enables
small businesses that do not yet have an economic presence to create marketing strategies that
are more likely to drive customers to encounter their offerings. As a result, small businesses can
more efficiently use their limited resources to capture value. Third-party data sets also permit
consumers to receive advertising and messaging that is relevant to them and their interests.
Without third-party data, consumers would be presented with advertisements that may have no
relation to their preferences, something consumers consistently have indicated they do not desire.
The FTC should not issue data rules that unreasonably constrain uses of third-party data.

c. Derived Data

The ANPR’s definition of “commercial surveillance” includes “direct derivatives” of any
consumer data collected or analyzed. 77 By its nature, derived data is created by businesses
themselves, and is not data collected directly from or about consumers. As such, the information
is rightly the property of the business that created such data, as the business’s own computing
processes and trade secrets permitted it to derive such information. Additionally, in many
contexts, derived data used for modeling and generating advertising segments masks the
individual identities of consumers. By its nature, this data is more privacy protective than other
data that directly identifies a consumer or individual. The FTC should therefore not include

76 ANPR at 51274.
77 Id. at 51277.
information derived from consumer data within the scope of any “commercial surveillance”
rulemaking.

Derived data is of key importance to data-driven advertising and allows businesses to
understand how to connect with existing and potential customers. Derived data permits
messaging to be personalized to better suit consumers’ needs and wants. For example,
advertisements for cross-state moving services are likely to be useful to a consumer planning to
move from one apartment to another in a different state. Businesses may be able to derive
insights about the consumer’s move from the data they lawfully collect and maintain. This
derived data would allow the relocating consumer to receive advertisements that are aligned with
their interests and needs—such as an advertisement for a moving truck—at the right time (prior
to the move) and in the right place (at the consumer’s current place of residence). If consumers
are going to receive ads, they would prefer to receive relevant advertising instead of advertising
that is not at all tailored to their interests. The Commission should carefully consider how any
regulation targeting derived data use in advertising would harm competition, the economy, and
consumers’ ability to access desired products and services.

d. Workers and Business-to-Business Data

The ANPR defines “consumer” to include both “businesses and workers, not just
individuals who buy or exchange data for retail goods and services.”78 However, the
Commission makes no mention of federal labor agencies and existing commercial practices that
already provide protections for employee and business-to-business data. For example, several
federal labor laws and labor-focused agencies, such as the United States Department of Labor,
the National Labor Relations Board, and the Equal Employment Opportunity Commission, have
a dedicated mandate to protect workers and employee data. In fact, several of these agencies
have already initiated processes to examine protections related to employee data.79 For business-
to-business data, companies are able freely to contract with one another to define workable terms
for protecting business contact information. The Commission thus should not include worker or
business-to-business data in the scope of the ANPR, as existing processes and structures exist to
define rules and protections for those data sets.

The Commission cites a handful of cases to ground its assertion that it has a
“longstanding practice of bringing enforcement actions against firms that harm… workers of all
kinds.”80 Such cases, however, involve enforcement related to disparate security breaches
associated with worker data and pure deception claims when companies failed to live up to their
public disclosures.81 The cases the Commission cites as support for its authority to issue broad

78 Id. at 51277.
79 See Dep’t of Lab., Off. of Fed. Contract Compliance Programs, Internet Applicant Recordkeeping Rule, FAQ
located here; Press Release, Equal Emp. Opportunity Comm’n, EEOC Launches Initiative on Artificial
Intelligence and Algorithmic Fairness (Oct. 28, 2021), located here.
80 Id.
81 See, e.g., Press Release, Fed. Trade Comm’n, FTC Settles Charges Against Two Companies That Allegedly Failed
to Protect Sensitive Employee Data (May 3, 2011), located here; Press Release, Fed. Trade Comm’n, Rite Aid
Settles FTC Charges That It Failed to Protect Medical and Financial Privacy of Customers and Employees (July 27,
2010), located here; Press Release, Fed. Trade Comm’n, CVS Caremark Settles FTC Charges: Failed to Protect
Medical and Financial Privacy of Customers and Employees; CVS Pharmacy Also Pays $2.25 Million to Settle
Allegations of HIPAA Violations (Feb. 18, 2009), located here. See also Press Release, Fed. Trade Comm’n, Amazon
regulations surrounding worker and business-to-business data consequently offer no basis for the FTC to assert a prevalent, specific activity to be regulated in the employee or business-to-business data spheres. Indeed, as Commissioner Phillips stated in his dissent to the ANPR, the FTC Act does not clearly confer jurisdiction on the Commission to regulate the employer-employee relationship. The Commission may not infer such jurisdiction merely based on the fact that an aspect of the employer-employee relationship “happens to involve data.” The Commission should therefore reconsider its inclusion of “businesses and workers” in the ANPR’s definition of “consumer.”

e. Equal Playing Field for Advertising

The ANPR asks, “[t]o what extent, if at all, do firms that now, by default, enable consumers to block other firms’ use of cookies and other persistent identifiers impede competition? Should new trade regulation rules forbid the practice by, for example, requiring a form of interoperability or access to consumer data? Or should they permit or incentivize companies to limit other firms’ access to their consumers’ data?” The FTC should ensure any rules it promulgates do not declare winners and losers in the marketplace based on companies’ ability to serve as gatekeepers that can block other entities’ ability to communicate with consumers. For example, companies that manufacture devices, browsers, and platforms that consumers use to access the Internet or online “stores” that stand between those intermediary companies and other businesses should not be permitted to set the rules of the road for the economy. The FTC’s rules should ensure that companies can access online identifiers on an equal basis. If certain companies are permitted to access online identifiers for advertising while others are not, large market players’ positions will become more dominant, and small and mid-size businesses will not be able to drive revenue from data-driven advertising.

The ANA helped found the Partnership for Responsible Addressable Media (“PRAM”), an entity now housed within the DAA and that works to ensure that all browsers, devices, and platforms—intermediary companies that stand between consumers and their access to other businesses in the marketplace—allow equal access to all companies’ products and services, free from unreasonable interference. Part of PRAM’s efforts involve establishing a responsible addressable media identifier be used solely for advertising use cases and that is open to all entities in the marketplace. Such a protected identifier, used for responsible and legal advertising only, would ensure that companies can compete, advertise, and reach prospective and existing customers on equal terms. No one company should be able to control another company’s ability to reach consumers regarding its products and services. Any regulations promulgated by the Commission should ensure an even playing field for businesses in the economy and should not allow or motivate just a few, large companies to limit other businesses’ access to consumer data.

To Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), located here.

82 ANPR at 51296-97.
83 Id.
84 ANPR at 51283.
85 See Partnership for Responsible Addressable Media, Developing Addressability Solutions that Safeguard Privacy, Improve the Consumer Experience, and Protect Ad-Supported Digital Content and Services, located here; see also Partnership for Responsible Addressable Media, Policy Framework for Addressable Media Identifiers, located here.
VII. The FTC should allow Congress to set nationwide data standards or, at the very least, work to develop a balanced and clear record that provides the basis for a permissible trade regulation rule under Mag-Moss.

The FTC’s ANPR addresses such a broad range of activities that it is difficult if not impossible for the public to respond appropriately so as to facilitate the development of an administrative record that could justify a Mag-Moss rulemaking. The Commission must support any Mag-Moss rulemaking with substantial evidence, which must involve a consideration of the costs and benefits of the proposed regulatory action and any alternatives to such action. The ANPR does not provide any discussion of the benefits of data-driven advertising. Without documented consideration of the benefits of data-driven advertising to consumers, competition, and the economy overall, the Commission will not have the necessary inputs to decide whether a rule regulating the use of data in advertising is necessary or even permissible. The ANPR is too ambiguous to elicit the meaningful response from the public that will build the administrative record containing substantial evidence to support a trade regulation rule limiting responsible data use for advertising. The ANPR is thus deficient and will not develop a satisfactory record for any proposed rule limiting or outlawing data-driven advertising practices.

Congress is the entity that should set economy-wide standards on issues as pervasive and economically consequential as data use. The Commission should lend its expertise and support to Congress as it works to craft a comprehensive federal privacy law that recognizes the benefits of responsible data use for advertising, thereby emulating the approach set forth in the Privacy for America Framework. The Privacy for America Framework strikes the right balance of protecting consumers while allowing reasonable uses of data for advertising. The Framework takes lessons from past FTC enforcement actions to define a list of per se unreasonable data practices that should be prohibited, and provides an explicit list of routine and essential practices that should be permitted. For practices that fall in between those two clear categories, the FTC would be permitted to issue regulations to define the contours of permissible activity. The Privacy for America Framework thus envisions that the Commission has a key role in the development of data standards for the country. However, at the outset, Congress is the entity that should adopt legislation setting clear rules for businesses, protecting consumers, and allowing beneficial advertising to continue.

Congress is currently considering several legislative vehicles that would set rules around a variety of data practices. Elected representatives of the people are best suited to determine an appropriate national and economy-wide approach to data regulation. The FTC should support Congress in setting a national standard that permits certain reasonable and responsible uses of data, prohibits others, and allows space for the FTC to issue reasonable regulations to govern practices that fall in between. Data-driven advertising is, at its core, a practice that benefits consumers and the economy. The Commission should not issue broad rules limiting or prohibiting data-driven advertising and should instead support Congressional efforts to set the foundational structure for data use requirements in the United States.

* * *

86 See Privacy for America, Principles for Privacy Legislation, located here.