BEFORE THE FEDERAL TRADE COMMISSION
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, D.C. 20580

COMMENTS

of

INTERACTIVE ADVERTISING BUREAU

on the

Advance Notice of Proposed Rulemaking for a
Trade Regulation Rule on Commercial Surveillance and Data Security

"Commercial Surveillance ANPR, R111004"

Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau

CC: **Stu Ingis, Venable LLP**
Mike Signorelli, Venable LLP
Katie Marshall, Venable LLP

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Introduction and Executive Summary

The Interactive Advertising Bureau ("IAB") welcomes this opportunity to 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."[1]

Founded in 1996 and headquartered in New York City, IAB (www.iab.com) represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, IAB develops both technical standards and best practices. In addition, IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing. IAB is committed to professional development and elevating the knowledge, skills, expertise, and diversity of the workforce across the digital advertising and marketing industry. Through the work of our public policy office in Washington, D.C., IAB advocates for our members and promotes the value of the interactive advertising industry to legislators and policymakers.

While IAB welcomes the opportunity to engage with the Commission, we believe the ANPR falls markedly short of the procedural requirements outlined in the Federal Trade Commission Act ("FTC Act"), as well as indicates that the Commission intends to engage in rulemaking substantively outside the scope of its limited Section 18 authority. As a result, it would be misguided for the FTC to proceed with a rulemaking based on this ANPR.

With respect to procedural requirements, the ANPR fails to comply with the Commission's obligations under Section 18 of the FTC Act. Section 18 of the FTC Act imposes heightened procedural requirements for all stages of the Commission's rulemaking effort—including the advance notice of proposed rulemaking stage.[2] As explained in our comments, history shows that these requirements were specifically put in place to prevent sweeping rulemakings similar to the rulemaking the Commission has now commenced. However, the ANPR does not abide by these requirements. Specifically, the ANPR neither identifies "possible regulatory alternatives" nor adequately describes the "area of inquiry under consideration" as required by Section 18 of the FTC Act.[3] The result is both a failure to comply with the FTC Act and the creation of confusion for stakeholders. Based on procedural deficiencies alone, it would be unreasonable for the Commission to proceed in this rulemaking effort.

The substance of the ANPR also concerningly indicates that the Commission intends to engage in rulemaking outside of its Section 18 authority. First, the Commission's authority under

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[1] Fed. Trade Comm'n, *Trade Regulation Rule on Commercial Surveillance and Data Security*, 87 Fed. Reg. 51273, Advanced Notice of Proposed Rulemaking (Aug. 22, 2022) [hereinafter ANPR].

[2] *See* 15 U.S.C. § 57a(b).

[3] *See id.* § 57a(b)(2)(A)(i).

Section 18 is strictly limited to prescribing rules with respect to acts or practices that are "unfair or "deceptive" as those terms are understood within Section 5 of the FTC Act.[4] However, the ANPR shows that the Commission may not issue rules that address acts or practices that are neither "unfair" nor "deceptive" under Section 5 of the FTC Act. In particular, the ANPR suggests that the Commission may view essentially *all* practices involving use of "consumer data" to be unfair or deceptive, even though there is no evidence to suggest that such practices would meet the requirements to be either an unfair or deceptive practice. Second, the topics addressed in the ANPR, including potentially all uses of "consumer data," are of "vast economic and political significance."[5] Under the "major questions doctrine," the FTC is prohibited from regulating such topics unless it has a clear grant of authority from Congress[6]—which the FTC does not have here. Finally, various subject areas addressed in the ANPR, such as children's privacy and civil rights, are expressly regulated through non-Section 18 authorities. Given that Congress clearly provided *other* regulatory authorities for such areas, Congress did not intend for the Commission's Section 18 rulemaking to extend to these areas.

While it is unreasonable for the Commission to proceed with its rulemaking based on both procedural and substantive concerns, to the extent the Commission proceeds with this rulemaking, IAB's comments additionally provide evidence for the significant benefits data-driven advertising provides to both consumers and competition. We focus our comments on data-driven advertising as the ANPR singles out types of data-driven advertising, namely "personalized advertising" and "targeted advertising," as examples of potentially unfair or deceptive practices,[7] even though there is no evidence to indicate that these practices are unfair or deceptive. In particular, under Section 5 of the FTC Act, an unfair practice necessarily must be one that *substantially injures* consumers.[8] As our comments demonstrate, rather than injure consumers, data-driven advertising substantially benefits both consumers and competition, such as by (1) supporting the United States economy and creating and maintaining jobs; (2) enabling consumers to access free and low-cost products and services; and (3) supporting small businesses and reducing barriers to entry for businesses. The Commission has recognized benefits of data-driven advertising in the past,[9] so such an apparent reversal in the Commission's view on "personalized" or "targeted" advertising is a perplexing and unfounded change of position.

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[4] *See id.* § 57a(a)(1).
[5] *See West Virginia v. EPA*, 142 S.Ct. 2587, 2605 (2022) (quoting *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014)).
[6] *See id.*
[7] *See* ANPR at 51283.
[8] *See* 15 U.S.C. § 45(n) ("The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair ***unless the act or practice causes or is likely to cause substantial injury to consumers*** which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.") (emphasis added).
[9] *See, e.g.*, Fed. Trade Comm'n, *FTC Staff Comment to the NTIA: Developing the Administration's Approach to Consumer Privacy*, 11, 15-18 (Nov. 9, 2018) available 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?utm_source=govdelivery (last visited Oct. 10, 2022).

I. The ANPR Fails to Comply with Congressionally Mandated Procedures.

IAB is dedicated to consumer privacy, and as a founding member of Privacy for America, IAB has long supported federal legislation that strengthens consumer protections. However, if privacy will be federally regulated, such efforts should start with Congress—not the FTC—particularly as Congress is actively considering privacy legislation. We encourage the Commission to reconsider the ANPR based on this fact alone. Even so, as the ANPR is also markedly procedurally deficient, we believe it would be unreasonable for the Commission to proceed in a rulemaking effort based on this ANPR.

The FTC has relied on its limited rulemaking authority under Section 18 of the FTC Act to issue the ANPR. As the Commission knows, Section 18 imposes heightened procedural requirements for all stages of the Commission's rulemaking effort—including the advance notice of proposed rulemaking stage.[10] Beyond these procedural requirements not being optional, the requirements were specifically put in place to prevent the type of sweeping ANPR the Commission has now published. When the Commission was first granted the Section 18 rulemaking authority, Congress imposed procedural requirements on this rulemaking process that exceeded the usual requirements of the Administrative Procedures Act ("APA").[11] In spite of the enhanced procedural requirements imposed by Congress, the FTC used its Section 18 authority to pursue a series of far-reaching rulemaking proceedings.[12] One such rulemaking was a heavily criticized attempted ban on children's advertising, which led to many referring to the Commission as the "National Nanny."[13] Shortly thereafter, finding that "in many instances, the FTC had taken actions beyond the intent of Congress," the Democratic-led Congress added additional requirements to Section 18 rulemaking procedures.[14] As explained below, not only have these requirements not been adhered to by the Commission in the ANPR, but also the ANPR suggests the Commission is considering a rulemaking even broader than the very activities that led to Congress limiting the Commission's authority.

A. The ANPR Violates 15 U.S.C. § 57a By Failing to Include Possible Regulatory Alternatives.

The ANPR falls notably sort of meeting the FTC's obligation in Section 18 of the FTC Act to include "possible regulatory alternatives under consideration by the Commission[.]"[15] Even though this is a clear legal obligation on the FTC, nowhere in the ANPR does the FTC

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[10] *See* 15 U.S.C. § 57a(b).
[11] 15 U.S.C. § 57a(b)(1). A House of Representative committee report at the time noted that "[b]ecause of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words 'unfair or deceptive acts or practices', the committee believes greater procedural safeguards are necessary." H.R. Rep. No. 93-1107 93rd Cong. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7727.
[12] *E.g.*, S. Rep. No. 96-500 96th Cong. (1980) at 1-2.
[13] *E.g.*, WASHINGTON POST, *The FTC as National Nanny* (Mar. 1, 1978) available at https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/ (last visited Oct. 6, 2022).
[14] *Id.* at 2.
[15] *Id.* § 57a(b)(2)(A)(i).

meaningfully identify any such regulatory alternatives. Rather than fulfill this requirement, the Commission explains, in a footnote, that it is "wary" of committing to "any regulatory approach" at this time.[16] While the Commission may be wary to do so, it nevertheless is obligated to identify possible regulatory alternatives.

Unfortunately, the ANPR does not meet even this standard. Through a mere footnote, the Commission states that it identifies possible regulatory alternatives in Item IV of the ANPR.[17] Item IV does no such thing. Instead, Item IV poses ninety-five (95) questions—with numerous subparts—to the public. Through these questions, the Commission asks the public to identify regulatory alternatives. This is not what Section 18 requires. In enacting Section 18, Congress specifically required the FTC, not the public, to identify possible regulatory alternatives being considered by the Commission in such a rulemaking. As the Commission knows, Congress added the requirement to identify regulatory alternatives in an effort to ensure that the FTC's actions are consistent with the public's interests following the FTC's attempt to promulgate the aforementioned-widely criticized rules banning children's advertising in the late 1970s.[18] By identifying regulatory alternatives at the ANPR stage, Congress intended for the public to have the opportunity to meaningfully assess the Commission's effort and be in a position to better determine if the effort aligns with its interests. However, Item IV of this ANPR demonstrates that the FTC is attempting to push its own legal responsibility onto the public by making the public do the FTC's work of identifying regulatory alternatives.

B. The ANPR Does Not Adequately Describe the Area of Inquiry—Resulting in a Violation 15 U.S.C. § 57a and Creation of Confusion for Stakeholders.

The breadth of the ANPR likewise results in a failure to describe the "area of inquiry under consideration," as required by Section 18 of the FTC Act.[19] Like the requirement to identify regulatory alternatives, Congress added the requirement to describe the area of inquiry in an ANPR in response to several attempts by the Commission to issue sweeping, criticized rules under Section 18 of the FTC Act. Before this requirement was added, Congress noted "there [had] been excessive ambiguity, confusion and uncertainty" in Section 18 rulemakings.[20] The requirement to describe the area of inquiry in an ANPR was intended by Congress to alleviate such ambiguity, confusion, and uncertainty by requiring the FTC to provide additional notice to stakeholders before undertaking trade regulation proceedings.

Unfortunately, by failing to satisfactorily describe the areas of inquiry, this ANPR does not provide meaningful notice to interested stakeholders and instead creates substantial uncertainty as to what rules the Commission might be considering. While the ANPR attempts to focus on two

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[16] ANPR at 51281 (see footnote 127).
[17] *Id.*
[18] S. Rep. No. 96-500 96th Cong. at 1-2 (noting that "the FTC ha[d] come under attack for embarking upon rulemaking proceedings which have aroused considerable criticism."); *e.g.*, WASHINGTON POST, *The FTC as National Nanny* (Mar. 1, 1978) available at https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/ (last visited Oct. 6, 2022).
[19] 15 U.S.C. § 57a(b)(2)(A)(i).
[20] S. Rep. No. 96-500 96th Cong. at 3.

key practices, "commercial surveillance" and "lax data security," these practices are defined so broadly that it is nearly impossible to understand the areas that are under the Commission's consideration. In particular, in defining "commercial surveillance" as "the collection, aggregation, analysis, retention, transfer, or monetization of consumer data and the direct derivatives of that information,"[21] the ANPR could reasonably implicate *any* activity leveraging "consumer data." As nearly every sector of the economy employs some use of "consumer data"—a term the ANPR does not even define—the ANPR provides no meaningful description of the areas the FTC is considering for a rulemaking. Further, the wide range of questions the Commission seeks comment on in Item IV likewise do not indicate any defined area of inquiry. Asking so many questions about such broad topics indicates only that the Commission might pursue any number or type of regulations.[22] As a result, the ANPR fails to "contain a brief description of the area of inquiry under consideration" as required by Section 18 of the FTC Act.[23] The unfortunate result for the public is that there is no way to assess the range of practices or possible harms being considered by the Commission.

Relatedly, we understand that the FTC has issued this ANPR to generate a public record about "prevalent commercial surveillance practices."[24] However, it impossible to prepare a record for what "prevalent commercial surveillance practices" exist given that the definition of ANPR's definition of commercial surveillance is so broad it essentially covers any commercial data use. It simply cannot be the case that all commercial data uses are unfair or deceptive. It is also unreasonable for the FTC to require the public to do the Commission's own work of identifying what practices could potentially be unfair or deceptive amongst the myriad commercial uses of data. Through the ANPR, the FTC provided the public with a haystack and essentially told them to find the needle.

II. The ANPR Indicates Rulemaking Outside of the Commission's Section 18 Authority.

In addition to violating procedural safeguards specifically established by Congress, the ANPR indicates that the Commission intends to engage in a rulemaking that exceeds its authority under Section 18 of the FTC Act. As explained below, specifically, the ANPR shows that the Commission may not issue rules that address acts or practices that neither meet the standards of "unfair" nor "deceptive" acts or practices under Section 5 of the FTC Act. Additionally, the significance of the topics addressed in the ANPR is such that the Commission cannot reasonably regulate these topics without a clear grant of authority from Congress—and that a decision to act absent such authority would violate the "major questions doctrine." Finally, the FTC addresses various subject areas in the ANPR that Congress has expressly provided other regulatory authority regarding, which demonstrates that the Commission may not reasonably rely on its Section 18

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[21] ANPR at 51277.

[22] *See* Fed. Trade Comm'r Noah Joshua Phillips, *Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking* 2-4 (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf; *see, e.g.*, ANPR at 51281.

[23] 15 U.S.C. § 57a(b)(2)(A)(i).

[24] ANPR at 51277.

authority in these areas.

A. The ANPR Indicates an Intent to Exceed the Limited Authority in 15 U.S.C. § 57a.

Based on the scope of the ANPR, it further appears that the Commission intends to exceed its statutory authorization, as the encompassing nature of the term "commercial surveillance"[25] demonstrates that the FTC may regulate acts or practices that are neither unfair nor deceptive within the meaning of Section 5 of the FTC Act. As an agency, the FTC's authority is necessarily constrained. Unlike Congress, which maintains broad legislative authority,[26] the FTC has only the limited authority that Congress specifically delegates to it.[27] With respect to Section 18 of the FTC Act, Congress specifically provided the FTC with the ability to issue rules that define with specificity acts or practices that are unfair or deceptive within the meaning of Section 5 of the FTC Act.[28] The requirements for an act or practice to be unfair or deceptive under Section 5 of the FTC Act are significant—indeed, as the D.C. Circuit has stated with respect to the FTC's Section 18 authority, "[t]he Commission is hardly free to write its own law of consumer protection[.]"[29] First, the Commission may determine that an act or practice is "unfair" only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[30] Second, the Commission has consistently taken the position that a three-part test must be met for an act or practice to be "deceptive."[31]

However, the definition of "commercial surveillance" is so broad that it indicates that the FTC's rulemaking may involve acts or practices that do not meet the requisite standards to be either "unfair" or "deceptive." As noted earlier, the ANPR defines the term in a way that theoretically would encompass any activity involving "consumer data."[32] Use of "consumer data" is pervasive across the U.S. economy and it is simply not reasonably possible that all—or even most—uses of consumer data could be unfair or deceptive within the meaning of Section 5 of the FTC Act. Even so, the ANPR does not indicate any sort of limiting principle with respect to what specific types of "commercial surveillance" the Commission might regulate as unfair or deceptive acts or practices. The ANPR therefore implies that the Commission's rulemaking effort seeks to

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[25] IAB's comments primarily address the "commercial surveillance" aspects of the ANPR based on our membership interests. However, we note that IAB's focus in these comments on "commercial surveillance" mirrors the FTC's focus. While the ANPR ostensibly addresses both "commercial surveillance" and "lax data security," only six of the ninety-five (95) questions are for data security. We find this the lack of emphasis on data security to be perplexing given the Commission's significant enforcement in this area.

[26] *See* U.S. CONST. art. I.

[27] *Id.* art. I, § 8, cl. 18; *see, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 516 (1911).

[28] 15 U.S.C. § 57a(a)(1)(B), b(3).

[29] *Am. Financial Serv. Ass'n v. Fed. Trade Comm'n*, 767 F.2d 957, 968 (D.C. Cir. 1985).

[30] 15 U.S.C. § 45(n).

[31] *E.g.*, FTC Deception Policy Statement, Letter from the FTC to Hon. John D. Dingell, House Comm. on Energy & Commerce (Oct. 14, 1983). Specifically, the Commission deems an act or practice to be deceptive only when (1) there is a representation, omission, or practice that is likely to mislead consumers; (2) the act or practice is considered from the perspective of a reasonable consumer; and (3) the representation, omission, or practice is material to consumers.

[32] ANPR at 51277.

define acts or practices within its definition of "commercial surveillance" as "unfair" or "deceptive" even though such acts or practices would not meet the legal standard that the FTC Act requires of the Commission for such findings. Regulating acts or practices that are neither unfair nor deceptive would violate the FTC's limited rulemaking authority and far exceed Congresses intent in granting the Commission that limited authority.

B. The FTC Lacks Clear Authority from Congress to Regulate "Commercial Surveillance."

Given the significance of and debate surrounding data use, privacy, and data security, the Commission cannot reasonably issue regulations on these topics absent clear authorization from Congress without violating the "major questions doctrine." When delegating a topic of "vast economic and political significance" to an agency, the "major questions doctrine" maintains that courts "expect Congress to speak clearly."[33] As Justice Gorsuch recently explained, it is critical for that "when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not 'exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond' those the people's representatives actually conferred on them."[34] Unfortunately, the ANPR reflects that the FTC seeks to assume responsibilities far beyond what Congress conferred to it. It is evident that the topics in the ANPR are of "vast economic and political significance" and it is equally evident that Congress has not provided the FTC with a clear grant of rulemaking authority for these topics.

As explained throughout these comments, the ANPR's scope encompasses all uses of "consumer data" based on the broad definition of "commercial surveillance." Given the widespread uses of data across our modern society, we cannot imagine many topics that are more economically or politically significant than data use. Further, like the role of emissions caps in the recent *West Virginia v. EPA* decision—in which the Supreme Court found specific decisions related to emissions to be "major questions"— questions of consumer data use, privacy, and data security has "been the subject of an earnest and profound debate across the country."[35] For example, as the ANPR notes, five states have enacted privacy laws that provides certain rights to consumers and a number of other states have considered similar legislation.[36] However, the ANPR disregards the significant debate regarding privacy legislation by failing to recognize the fact that many states have considered but declined to enact similar legislation—with over a dozen states declining to do so in 2022 alone.[37] The profound debate regarding data use, privacy, and security that is currently taking place in this country confirms that these topics are "major questions" and that the FTC may only address these topics with a clear grant of Congressional authorization.

However, no such grant of Congressional authorization is present. Neither Section 5 itself nor Section 18 clearly authorize the FTC to issue rules regarding data use, privacy, or data security.

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[33] *West Virginia v. EPA*, 142 S.Ct. 2587, 2605 (2022) (quoting *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014)).
[34] *Id.* at 2620 (Gorsuch, J. concurring).
[35] *Id.* at 2614.
[36] ANPR at 51277.
[37] *E.g.*, Fla. S.B. 1864.

In *West Virginia v. EPA*, the authority the EPA relied on to devise emissions caps mentioned both "emission" and "reduction"—and this was still deemed insufficient by the Supreme Court.[38] The authority the FTC seeks to rely on is far less apt than that of the EPA's. Here, nowhere in Section 5 or Section 18 of the FTC Act are the terms "consumer data," "privacy," or "data security" mentioned. Additionally, the fact that Congress is evaluating legislation that would grant the FTC authority related to consumer data, privacy, and data security demonstrates that Congress believes that the Commission currently lacks the authority needed to substantively regulate these areas.[39] As a result, it would be unreasonable for the FTC to issue regulations related to consumer data, privacy, or data security under its Section 18 authority.

C. The ANPR Tackles Topics Not Reasonably Intended to be Addressed in a Section 18 Rulemaking.

The range of topics addressed in the ANPR also demonstrates potential regulatory overreach by the Commission. For instance, the ANPR requests comment on children's privacy, which is enforced through the Children's Online Privacy Protection Act ("COPPA"). Although Congress granted the Commission regulatory authority for children's privacy, this authority and related rulemaking powers are specific to COPPA. Congress did not intend for the Commission to regulate children's privacy through Section 18 of the FTC Act. Relatedly, the ANPR requests comment on teen privacy. However, Congress is currently actively considering legislation related to teen privacy,[40] which demonstrates that Congress views itself as the appropriate body to address teen privacy, rather than the Commission. In addition, if Congress wished for the Commission to issue rules regarding teen privacy, Congress could act at any time, such as by passing one of the many pieces of legislation it has considered to extend COPPA to apply to teens. Nevertheless, while Congress has considered many such proposals related to teen privacy and numerous updates to COPPA, to date, it has consistently declined to provide rulemaking authority to the FTC in this area.[41] Likewise, the ANPR requests comment on topics addressed by civil rights and anti-discrimination laws. Not only has Congress not delegated the FTC authority related to these topics, but also it has expressly delegated such authority to other agencies. If Congress wished for the FTC to address such topics through its Section 18 rulemaking authority, it would have acted accordingly by expressly providing the FTC with such authority through specific legislation.

III. Data-Driven Advertising Significantly Benefits Consumers and Competitions.

Assuming the Commission takes further action on this rulemaking, we understand that the Commission is considering rules that may regulate "commercial surveillance" as unfair or deceptive acts or practices. However, as explained above, the FTC is restrained by Section 18 to issuing trade regulations defining with specificity acts or practices which are unfair or deceptive,[42] as these terms are defined under the FTC Act. To establish that an act or practice is "unfair," the

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[38] *E.g.*, *West Virginia v. EPA*, 142 S.Ct. 2587, 2614 (2022).
[39] H.R. 8152, 117th Cong. (2022).
[40] S.1628, 117th Cong. (2021).
[41] *See, e.g.*, S. 748 116th Cong. (2019).
[42] *See* 15 U.S.C. § 45(a)(4)(A)(i).

FTC must demonstrate that the practice: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition.[43] For an act or practice to be "deceptive," the FTC must show that (1) there is a representation, omission, or practice that is likely to mislead consumers; (2) the act or practice is considered from the perspective of a reasonable consumer; and (3) the representation, omission, or practice is material to consumers.[44] As such, "commercial surveillance" practices that the FTC regulates under its Section 18 authority must meet one or both of these standards.[45]

While "commercial surveillance" is defined exceedingly broadly under the ANPR, the ANPR identifies "personalized advertising" and "targeted advertising" as examples of types of "commercial surveillance" and potentially unfair or deceptive practices.[46] However, there is not evidence to suggest that data-driven advertising, like "personalized" or "targeted" advertising, could reasonably meet the definition of either an unfair or deceptive act or practice under Section 5 of the FTC Act. With respect to "deceptive" acts or practices, there is no indication that the act of data-driven advertising is at all likely to mislead consumers. As explained throughout our comments, consumers are well aware of the fact that data is collected for advertising purposes and they are not reasonably deceived by such data collection and use.

Our below comments focus more significantly on the possibility of data-driven advertising being considered an "unfair" act or practice as a result. With respect to "unfair" acts or practices, as our comments show, rather than injure consumers, data-driven advertising provides significant benefits to both consumers and competition—benefits that could be eliminated if the Commission issued regulations unreasonably restricting data-driven advertising. Understanding that any such regulation issued by the Commission must consider whether possible injuries are "outweighed by benefits to consumers or competition"[47] the below comments highlight the significant body of evidence demonstrating that consumers and competition alike benefit from data-driven advertising. Similarly, in response to Question 40 in the ANPR, asking to what extent rules that limit "targeted advertising and other commercial surveillance practices" would "harm consumers, burden companies, [and] stifle innovation or competition,"[48] the below comments likewise illustrate that consumers, companies, and competition would be significantly harmed by efforts to limit data-driven advertising.

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[43] *Id.* § 45(n).
[44] FTC Deception Policy Statement, Letter from the FTC to Hon. John D. Dingell, House Comm. on Energy & Commerce (Oct. 14, 1983).
[45] *Am. Financial Serv. Ass'n v. Fed. Trade Comm'n*, 767 F.2d 957, 972 (D.C. Cir. 1985) ("Thus we determine the validity of the Commission's actions by reviewing the reasonableness of the Commission's application of the consumer injury test to the facts of this case, and the consistency of that application with congressional policy and prior Commission precedent.").
[46] *See* ANPR at 51283.
[47] 15 U.S.C. §§ 45(n); 57a(a)(1)(B).
[48] ANPR at 51283.

A. Data-Driven Advertising Benefits Consumers in Monumental Ways, But Regulatory Disruptions to the Current Data-Driven Advertising Model Could Result in Lost Jobs, Higher Prices, and Reduced Personalization.

While the ANPR expresses that practices relying on personalization—such as serving advertisements—have only the theoretical "potential" to benefit consumers,[49] there is substantial evidence that data-driven advertising actually benefits consumers in immense ways. As explained below, not only does data-driven advertising support a significant portion of the competitive U.S. economy and millions of American jobs, but data-driven advertising is also the linchpin that enables consumers to enjoy free and low-cost content, products, and services online. The Commission should not take any action that puts these benefits at risk.

1. Data-Driven Advertising Benefits Consumers by Supporting the Economy and Creating and Maintaining Jobs.

Data-driven advertising greatly benefits consumers by supporting the U.S. economy and creating and maintaining American jobs. Data-driven advertising, and the Internet economy it supports and drives, contributed $2.45 trillion to the United States' gross domestic product ("GDP") in 2020, accounting for 12 percent of GDP.[50] That is a growth rate of 22 percent between 2016 and 2020, in a total economy that grew only 2-3 percent per year during that same period.[51] Additionally, 2.1 million e-commerce companies were operating in the United States in 2020, generating $715 billion in revenue.[52] Many of those millions of companies are small businesses and sole-proprietorships that are able to achieve success and grow their customer base thanks to data-driven advertising technologies that lower barriers to entry and broaden geographic reach.[53] Given the massive benefits data-driven advertising provides to the U.S. economy, regulations restricting data-driven advertising stand to significantly harm the economy, businesses, and consumers.

Regulations restricting data-driven advertising could likewise have devastating consequences on the over 17 million American jobs that are supported by data-driven advertising.[54] Most of those jobs were created by small firms and self-employed individuals in all 50 states and across many sectors.[55] In fact, self-employed individuals and people working in small teams of five or fewer people made up 19% of the Internet job total.[56] For instance, there are 200,000 full-time equivalent jobs in the online creator economy.[57] This number is close to the

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[49] *Id.* at 51274.
[50] John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5 (Oct. 18, 2021), https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf [hereinafter *Market-Making*].
[51] *Id.* at 7.
[52] *See id*. at 6.
[53] *See* Deloitte Dynamic Markets, *Small Business Through the Rise of the Personalized Economy*, 11 (May 2021).
[54] See *Market-Making* at 5.
[55] *Id*. at 5-6.
[56] *Id.*
[57] *Id.* at 7.

combined memberships of the following craft and labor unions: SAG-AFTRA (160,000), the American Federation of Musicians (80,000), the Writer's Guild (24,000), and the Authors Guild (9,000).[58] There are also at least 5.5 million full-time and part-time jobs which otherwise would not have existed if it were not for smaller data-driven advertising supported platforms, such as eBay, Instacart, and Etsy.[59] Further, with support from data-driven advertising, the total employment in the online news market has risen threefold since 2008, to 142,000 jobs—73% more than were employed in 2016.[60] Additionally, more than half of all U.S. advertising and media employment now derives from the data-driven advertising supported Internet.[61] If the Commission limited companies that provide certain services from owning or operating a business that engages in "any specific commercial surveillance practices like personalized or targeted advertising," as the Commission contemplates in Question 39 of the ANPR,[62] many of these jobs may well vanish.

2. *Data-driven Advertising Enables Consumers to Benefit from Free and Low-Cost Products and Services.*

To put it plainly, data-driven advertising is fundamental to consumers having access to easily accessible, free, and low-cost products and services online. For decades, data-driven advertising has supported and subsidized businesses that provide the free and low-cost services that allow consumers to communicate, learn, connect, and access entertainment online. To ensure that these businesses can continue to provide benefits to consumers for years to come, in response to Question 95 of the ANPR,[63] it is paramount that any actions taken by the Commission support both existing advertising business models while also enabling continued innovation. As explained below, the benefits businesses supported by data-driven advertising provide to consumers are critical to consumers' lives and are meaningfully valued by consumers.

The Internet is built on the continuous exchanges of data between devices and servers—without these data exchanges, the Internet and its social, cultural, economic, and personal benefits would not exist. For instance, out of the top ten websites in the United States, eight are free to consumers in no small part because of data-driven advertising.[64] Additionally, the number of options available to consumers has exponentially increased due to the ad-supported Internet. For instance, there were over 2.1 million e-commerce retail businesses operating in the U.S. in 2020—generating $715 billion in revenues in 2020.[65] By subsidizing businesses, data-driven advertising has provided a means for businesses both new and old to offer increased content, products, and services to consumers. Before the ad-supported Internet, for example, consumers had access to a limited set of newspapers, radio stations, television stations, educational opportunities, and shopping experiences based on where they happened to live. Now, consumers have access to tens

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[58] *Id.*
[59] *Id*. at 6, 8.
[60] *Id.* at 7.
[61] *Id.* at 8.
[62] ANPR at 51283.
[63] *Id.* at 51285.
[64] As of the date of these comments, the top ten websites in the U.S. were Google, YouTube, Facebook, Amazon, Yahoo, Twitter, Instagram, Wikipedia, Reddit, and Pornhub.
[65] *Market-Making* at 80.

of thousands of content publishers, e-commerce options, and online services across multiple channels—unlimited by geographic constraints.

If data-driven advertising was limited, however, many of the benefits the ad-supported Internet provides to consumers today would be dramatically reduced, if not eliminated. As the Commission has acknowledged, if today's data-driven advertising model was displaced, this would likely result in the loss of ad-supported online content.[66] In response to the Commission's inquiry in Question 41 of the ANPR,[67] even if businesses were able to survive the loss of this ad revenue, many businesses likely would be forced to turn to subscription-based models to survive, resulting in higher costs for consumers and consumer fatigue. This would be particularly challenging for today's consumers, as one third of consumers report being overwhelmed by the number of subscriptions they already have.[68] Further, e-commerce sites could struggle to identify and connect with consumers interested in their products, which may result in products offered by these businesses disappearing altogether and consumers having fewer choices. According to a survey, 42% of online shoppers purchased from a specialty marketplace that focused on a unique category in 2020.[69] Without data-driven advertising, these specialty marketplaces may struggle to connect to consumers, disrupting a significant stream of commerce. For instance, last year, Etsy had over 7.5 million active sellers on its marketplace and over 96 million active buyers.[70]

Regulations that would adversely impact the ad-supported Internet would also be inconsistent with consumer's interests. Consumers desire free or low-cost access to the online services that data-driven advertising provides and understand the value data-driven advertising offers them. According to a 2020 survey, an incredible 90 percent of consumers stated that free content was important to the overall value of the Internet, and 85 percent 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.[71] Likewise, when given the option between paying more for non-ad supported content in the streaming context, consumers prefer the lower cost, ad-supported service.[72]

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[66] *See* Fed, Trade Comm'n*, In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), 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.
[67] ANPR at 51283 ("To what alternative advertising practices, if any, would companies turn in the event new rules somehow limit first- or third-party targeting?").
[68] Brooke Auxier and Paul H. Silverglate, *About One-Third of Consumers Report Feeling Overwhelmed By Tech Management During COVID-19*, DELOITTE (Aug. 19, 2021), https://www2.deloitte.com/xe/en/insights/industry/technology/digital-fatigue.html.
[69] Stephanie Crets, *Etsy continues to grow sales and find new buyers*, DIGITAL COMMERCE 360 (Aug. 6, 2021), https://www.digitalcommerce360.com/2021/08/06/etsy-continues-to-grow-sales-and-find-new-buyers/ (citing a Digital Commerce 360 and Bizrate Insights April 2021 survey).
[70] Etsy*, Etsy, Inc. Reports Fourth Quarter and Full Year 2021 Results* (2021), https://s22.q4cdn.com/941741262/files/doc_financials/2021/q4/Exhibit-99.1-12.31.2021.pdf.
[71] Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at $1,400/Year; Annual Value Jumps More Than $200 Since 2016* (Sept. 28, 2020), https://digitaladvertisingalliance.org/press-release/americans-value-free-ad-supported-online-services-1400year-annual-value-jumps-more-200.
[72] Hub Research Insights, https://hubresearchllc.com/reports/?category=2021&title=2021-tv-advertising-facts-vs-

Moreover, surveys show that the use of data for advertising is the least important issue to consumers when they consider digital privacy protections, and that consumers want any privacy regulation to protect the ad-supported Internet they enjoy today.[73] Additionally, surveyed consumers placed a value on the ad-supported digital services they use for free at more than $1,400 per consumer in 2020, an increase of more than $200 from 2016.[74] Another economic analysis published by the Massachusetts Institute of Technology ("MIT") found that consumers, collectively, place a value of trillions of dollars per year on the free, ad-supported digital services they receive, including search engines, email, maps, video, e-commerce, social media, messaging, and music.[75] Restricting the use of data for advertising purposes would significantly reduce, if not eliminate, many of these free services.

3. *Consumers Understand Choices Available to Them Today Regarding Data-Driven Advertising, But Consumers Like Data-Driven Advertising.*

Contrary to the Commission's assertions,[76] surveys show that consumers understand the choices they have regarding data-driven advertising. As such, any potential injuries caused by data-driven advertising would be reasonably avoidable by consumers. However, even understanding their choices, few consumers choose to exercise such choices. For instance, self-regulatory frameworks, such as the Digital Advertising Alliance Self-Regulatory Principles ("DAA Principles"), have long allowed all U.S. consumers to opt out of interest-based advertising. Such self-regulatory frameworks not only have been recognized by the FTC as providing important consumer protections,[77] but surveys show that consumers are also aware of the choices these frameworks provide to them. For example, according to a 2021 survey, over 80% of surveyed consumers reported that they recognize the DAA AdChoices Icon and understand that it provides information about privacy or controls over advertisements.[78] Given consumer awareness of controls over advertising and the ability to opt out of such advertising through these controls,

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[73] *See* Digital Advertising Alliance, *U.S. Consumer Attitudes on Privacy Legislation* (2018), https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/Nov2018-privacy-legislation-consumer-survey.pdf.

[74] Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at $1,400/Year; Annual Value Jumps More Than $200 Since 2016* (Sept. 28, 2020), https://digitaladvertisingalliance.org/press-release/americans-value-free-ad-supported-online-services-1400year-annual-value-jumps-more-200.

[75] Erik Brynjolfsson *et. al.*, Proceedings of the National Academy of Sciences, *Using massive online choice experiments to measure changes in well-being* (Apr. 9, 2019), https://www.pnas.org/content/116/15/7250.

[76] *See* ANPR at 51274.

[77] Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (Jul. 2009), https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/seven-principles-07-01-09.pdf; FTC, *Cross-Device Tracking, An FTC Staff Report*, 11 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf ("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.").

[78] Digital Advertising Alliance, *New US Survey Data Highlights Opportunities for Companies to Use the AdChoices Icon for Consumer-Friendly Privacy Disclosures*, 1 (2021), https://digitaladvertisingalliance.org/icon_assets/DAA_2021_AdChoices_Icon_Awareness_Survey.pdf.

potential injuries caused by data-driven advertising are reasonably avoidable to consumers.

However, even with strong consumer awareness of the choices available to them regarding data-driven advertising, studies show that few consumers opt out of the practice.[79] As numerous studies and surveys show that consumers desire relevant content and advertising, this is unsurprising. One study found that more than half of surveyed consumers desire relevant advertising, and a significant majority desire tailored discounts.[80] In a separate survey, 70% of surveyed consumers reported that they prefer advertisements that are tailored to their personalized interests and shopping habits.[81] The bottom line? Consumers like the data-driven advertising and understand the benefits it brings them.

B. Data-Driven Advertising Considerably Benefits Competition, and Evidence Shows that Competition is Harmed When Data-Driven Advertising is Unreasonably Limited.

In addition to providing consumers with numerous benefits, data-driven advertising also benefits competition by supporting the growth of small businesses and by reducing barriers to entry through lower cost advertisements. However, these benefits would be limited, if not lost entirely, were the Commission to unreasonably regulate data-driven advertising.[82] Further, evidence related to Apple's restrictions on its Identifier for Advertising and the implementation of the European Union's General Data Protection Regulation demonstrates that competition is harmed by unfair and unreasonable efforts to restrict data-driven advertising. Therefore, the Commission should not take action that would likewise unreasonably restrict data-driven advertising and harm competition.

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[79] See Garret Johnson *et al.*, *Consumer Privacy Choice in Online Advertising: Who Opts Out and at What Cost to Industry?* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020503 (finding that 0.23% of consumers choose to opt-out of IBA).

[80] Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), 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.

[81] Adlucent, *71% of Consumers Prefer Personalized Ads* (2016), https://www.adlucent.com/resources/blog/71-of-consumers-prefer-personalized-ads/#:~:text=Our%20research%20makes%20it%20clear%20that%20consumers%20want%20to%20see%20relevant%20advertising.&text=The%20advantages%20of%20personalized%20advertising,46%25%20reduces%20irrelevant%20advertising.

[82] Limiting behavioral advertising in favor of contextual advertising would significantly impair the value of data-driven advertising to consumers and businesses, particularly small businesses. A few academics have posited that limiting behavioral advertising in favor of alternatives, like contextual advertising, would have limited impact on publishers' revenues. See Veronica Marotta, Vibhanshu Abhishek, and Alessandro, *Online Tracking and Publishers' Revenues: An Empirical Analysis* (2019), https://www.semanticscholar.org/paper/Online-Tracking-and-Publishers-Revenues%3A-An-Marotta/bee63f4551c7b6a5a1f07357734a81eab2fec919. However, the paper's conclusions are misleading for a number of reasons, including *inter alia*: (1) the paper only analyzes data from 60 websites owned by a single media company, a company particularly well positioned to targeting in the absence of cookies; and (2) the paper fails to recognize the overall welfare effects of eliminating behavioral advertising (beyond just the impact on publishers).

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1. *Data-driven Advertising Benefits Competition by Supporting Small Businesses and Reducing Barriers to Entry.*

Regulations issued by the Commission regarding data-driven advertising must consider the impact such regulations would have on competition.[83] Data-driven advertising substantially benefits competition by lowering barriers to entry; therefore, the Commission should not issue regulations that impede data-driven advertising. As background, one study found that across approximately forty different sectors of the economy, the Internet's data-driven advertising drove market entry, employment, and revenue growth.[84] This is in part due to the fact that data-driven digital advertising is exceptionally cost effective, which enables small businesses to thrive and reduces barriers to entry for new market entrants. As background, the average cost-per-thousand impressions ("CPM") in direct mail in the United States is around $300 and about $35 for prime-time television advertising—but only $2.80 for data-driven advertising.[85]

In particular, small businesses are able to leverage the lower cost of data-driven advertising to enter new markets, build their businesses, and deliver goods and services to consumers. One study found that 64% of surveyed small businesses in the U.S. used data-driven advertising to lower their overall advertising costs, with 76% of those surveyed small businesses reporting that digital ads specifically helped them find new customers.[86] Data-driven advertising also delivers results, with sales growth at small companies using data-driven advertising being 16% greater than at small businesses that did not leverage data-driven marketing during the period of study.[87]

However, if the Commission's forthcoming rulemaking limits data-driven advertising, this could result in 12x to 100x increases in advertising costs, as businesses would be forced to increase their reliance on much more expensive direct mail and television advertising to reach consumers. Such an act would disproportionally adversely impact small businesses who have more limited budgets. Although online businesses of all sizes rely on data-driven advertising, smaller publishers depend on the practice for a significantly greater portion of their advertising revenue.[88] Further, businesses would be forced to pass on increased advertising costs to consumers through higher prices in order to survive. Small businesses would be less equipped to withstand such a change, and the higher costs of reaching potential customers would increase barriers to entry for new businesses.

2. *Competition Would Be Harmed by Regulations That Unreasonably Regulate Data-Driven*

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[83] *See* 15 U.S.C. § 45(n).
[84] *See generally, Market-Making*.
[85] *See* Stephanie Faris, Chron, *What Is a Typical CPM?* (Apr. 15, 2019), https://smallbusiness.chron.com/typical-cpm-74763.html.
[86] *See* Deloitte Dynamic Markets, *Small Business Through the Rise of the Personalized Economy*, 27 (May 2021).
[87] *Id*. at 16.
[88] Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), https://digitaladvertisingalliance.org/press-release/study-online-ad-value-spikes-when-data-used-boost-relevance. *See also* Digital Advertising Alliance, *New Study Shows Ad Revenue Benefit through Cookies – Reinforcing Previous 2014 DAA Research: We Can Have Both Personalization & Ubiquitous Privacy Protections* (2019), https://digitaladvertisingalliance.org/blog/new-study-shows-ad-revenue-benefit-through-cookies-%E2%80%93-reinforcing-previous-2014-daa-research-we.

Advertising.

The concerns outlined above regarding the impact on competition that the Commission's efforts to restrict data-driven advertising would have are not theoretical. Evidence exists that competitiveness is harmed by unfair and unreasonable efforts to restrict data-driven advertising—not data-driven advertising itself. For example, since Apple restricted access to its Identifier for Advertising ("IDFA"), the cost of acquiring new customers for a business has increased tenfold.[89] Further, if the Commission's regulations resulted in a ban of personalized or targeted advertising, it is likely that between "$32 billion and $39 billion of advertising and ecosystem revenue would move away from the open web by 2025."[90] This type of result was observed in a study of the European mobile app marketplace. The European Union has considered a ban on data-driven advertising, and the study found that a ban would threaten "about €6 billion of advertising income for app developers. As a result [of a ban], 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."[91] In fact, implementation of the General Data Protection Regulation ("GDPR") in Europe has foreshadowed what is likely to occur in the U.S. should unnecessary and unfair data constraints be implemented: It helps large firms increase their reach and revenues at the expense of smaller firms.[92] Indeed, small businesses in Europe have not flourished in the ways their U.S. counterparts have.

Lessons from Apple's changes to the IDFA and the implementation of the GDPR are also consistent with multiple studies by leading economists showing that unreasonable regulation of "tracking" and "interest-based advertising" would lead to more concentrated control of the ad-supported Internet.[93] As a result, regulations that limit data-driven advertising stand to irreparably harm competition by increasing market concentration and removing competition from the Internet.

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[89] "Loose-leaf tea seller Plum Deluxe used to gain a new customer for every $27 it spent on Facebook and Instagram ads. Then, Apple Inc. introduced a privacy change restricting how users are tracked on mobile devices." "Now, the company spends as much as $270 to pick up a new customer. "That's a huge jump and one that we just can't absorb." Patience Haggin & Suzanne Vranica, WSJ, *Apple's Privacy Change Is Hitting Tech and E-Commerce Companies. Here's Why.* (Oct. 2021),https://www.wsj.com/articles/apples-privacy-change-is-hitting-tech-and-e-commerce-companies-11634901357. *See also* SBE Counsel, Online Advertising Delivers BIG Benefits for Small Businesses (2019),https://sbecouncil.org/2019/09/10/online-advertising-delivers-big-benefits-for-small-businesses/.

[90] *See e.g.,* John Deighton, *The Socioeconomic Impact of Internet Tracking*, 4 (Feb. 2020), https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf.

[91] Center for Data Innovation, *The Value of Personalized Advertising In Europe* (Nov. 22, 2021), https://www2.datainnovation.org/2021-value-personalized-ads-europe.pdf.

[92] Nick Kostov & Sam Schechner, Wall. St. Jour., *GDPR Has Been a Boon for Google and Facebook* (Jun. 17, 2019), https://www.wsj.com/articles/gdpr-has-been-a-boon-for-google-and-facebook-11560789219. Poorly considered legislation, like the California Consumer Privacy Act ("CCPA"), also disproportionally harms small due to the high cost of compliance for limited corresponding consumer benefit. *See* Attorney General's Office California Department of Justice, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* (Aug. 2019) (finding that compliance with the CCPA could cost $55 billion dollars for companies).

[93] *See e.g.,* John Deighton, *The Socioeconomic Impact of Internet Tracking,* 4 (Feb. 2020), https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf; *see also*, Deloitte Dynamic Markets, *Small Business Through the Rise of the Personalized Economy*, 11 (May 2021); *Market-Making* at 5.

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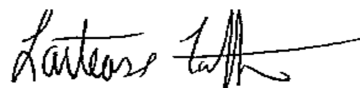
IAB thanks the Commission for this opportunity to submit these comments and looks forward to working closely with the Commission on this critical topic. Please do not hesitate to contact me at lartease@iab.com with any questions.

Sincerely,



Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau

CC: Stu Ingis, Venable LLP
Mike Signorelli, Venable LLP
Katie Marshall, Venable LLP