

November 26, 2018

Joseph J. Simons, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

VIA EMAIL TRANSMISSION

Dear Chairman Simons:

We, the undersigned consumer, privacy and civil liberties organizations, write to express our disappointment about the comments¹ that the Federal Trade Commission (FTC) staff recently submitted to the National Telecommunications and Information Administration's request for comments on "Developing the Administration's Approach to Consumer Privacy."² We appreciate the work that the FTC has done over the years to protect consumers' privacy, within the limitations that it describes in its comments.³ However, we remain frustrated by the agency's failure to act promptly on timely and important privacy-related complaints⁴ before the agency as well as by the lack of adequate enforcement actions for cases resolved in recent years.⁵

What is most troubling to us in these comments, however, is the FTC's apparent position, citing a study by the advertising industry, that a policy approach in which consumers were opted out of online advertising by default would not be appropriate because "the likely result would include the loss of advertising-funded online content."⁶ The study fails to cite any empirical data suggesting that without targeted advertising, free online content will decrease. We would have hoped that the FTC would take a broader look at the evidence, rather than relying on a self-serving study by one stakeholder.

¹ 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.

² Federal Register Vol. 83, No 187 (September 26, 2018), notice and request for comments, <https://www.gpo.gov/fdsys/pkg/FR-2018-09-26/pdf/2018-20941.pdf>.

³ *Supra* at pages 18-19.

⁴ For instance, the FTC has taken no action on a complaint that consumer and privacy groups made in 2016 alleging that cable and satellite providers were deceiving consumers about their privacy practices; see letter sent to the FTC one year after the complaint was submitted, <https://consumerfed.org/wp-content/uploads/2017/06/6-12-17-FTC-Consumer-Privacy-Letter.pdf>. Another example is the complaint that consumer and privacy groups made about the internet-connected doll, My Friend Cayla, in 2016, see December 2017 letter demanding action, <http://www.commercialfreechildhood.org/consumer-and-privacy-groups-demand-action-toys-spy-children>.

⁵ See, for example, April 6, 2018 complaint to the FTC from consumer and privacy groups alleging that Facebook violated previous Consent Order, <https://consumerfed.org/wp-content/uploads/2018/04/consumer-privacy-groups-ftc-complaint-facebook-facial-recognition.pdf>, and recent consumer and privacy group comments to the FTC about its failure to protect privacy in its merger review process, <https://consumerfed.org/wp-content/uploads/2018/08/consumer-privacy-groups-comment-on-intersection-between-privacy-big-data-and-competition.pdf>.

⁶ *Supra* at page 18.

The FTC's stated position ignores the fact that contextual advertising, which does not raise the same privacy concerns as behavioral advertising, would still be possible. In addition, the FTC fails to recognize that placing the burden on individuals to deal with the privacy-intrusive nature of behavioral tracking and targeting is unfair. Privacy management across hundreds of websites and untold numbers of advertisers and data brokers, many hidden from public view, is an impossible task for consumers.

That is why the General Data Protection Regulation (GDPR) in Europe places the burden on data controllers to demonstrate that they have a legal basis to collect, use or share an individual's personal information. A data controller can only process personal data if it has a legal basis to do so, which includes the processing on the basis of a freely given, specific, informed and unambiguous consent.⁷ In fact, European data protection authorities have clarified that opt-in consent should be required "for tracking and profiling for purposes of direct marketing, behavioural advertisement, data-brokering, location-based advertising or tracking-based digital market research."⁸ We suggest that the FTC's position is out of step with most of the rest of the world, and it makes consumers in the United States second class citizens when it comes to privacy protection.

In its comments, the FTC cites examples of how consumer data fuels innovation, most of which (such as better responses to emergency situations, improved fraud detection, safer homes, better health and wellness, improved inventory control, easier-to-find parking, and increased connectivity) can be accomplished without necessarily unduly impinging on individuals' privacy.⁹ These data uses 1) are specifically related to the purposes for which the individuals provided their data; 2) could be accomplished with aggregate data; or 3) could be allowed under reasonable exceptions (e.g. fraud control). "More relevant online experiences," on the other hand, is something that consumers should be given the option to affirmatively agree to if they wish. We do not think that "more relevant" should be read to mean more beneficial to advertisers.

The FTC staff also commented that the benefits of privacy regulation should be weighed against potential costs to competition and gives as an example a small outdoor equipment company seeking to expand its customer base.¹⁰ We suggest that a narrow-minded economic balancing test ignores the fundamental right to privacy that should be the proper starting point for analysis. In any event, nothing would prevent that small outdoor equipment company from serving ads on a contextual basis – for instance, on a camping or hiking site. Furthermore, if the FTC took more assertive action to ensure that search engines cannot dominate the online ecosystem and unfairly rig the results,¹¹ individuals would be

⁷ Information about the GDPR and other EU data protections is available at https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en.

⁸ Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, http://ec.europa.eu/justice/data-protection/index_en.htm.

⁹ *Supra* at pages 10-11.

¹⁰ *Id.*

¹¹ See European Commission press release announcing fine levied against Google for imposing illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm. The FTC missed an opportunity to rein in Google's anti-competitive behavior five years earlier, see Craig Timberg, "FTC: Google did not break antitrust law with search practices," Washington Post (January 3, 2013), https://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlement-today/2013/01/03/ecb599f0-55c6-11e2-bf3e-76c0a789346f_story.html?utm_term=.3d532f0e0425.

able to find that small company more easily. It seems that the FTC relies on its own failures to police competition in the online marketplace as justification for overriding the privacy interests of consumers.

We appreciate the fact that the FTC continues to call for Congress to enact privacy and security legislation, and we support enhancing the agency's resources, rulemaking authority and enforcement capabilities. We do not believe, however, that the scale should be tipped in favor of corporate interests over the fundamental civil and human rights of individuals.

Sincerely,

Campaign for a Commercial Free Childhood

Center for Digital Democracy

Consumer Action

Consumer Federation of America

Consumer Watchdog

Customer Commons

Electronic Frontier Foundation

Electronic Privacy Information Center

Media Alliance

National Hispanic Media Coalition

Privacy Rights Clearinghouse

Public Citizen

Public Knowledge

Stop Online Violence Against Women

US PIRG

CC: Commissioner Noah Joshua Phillips
Commissioner Rohit Chopra
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson
Andrew Smith, Director, Bureau of Consumer Protection
Maneesha Mithal, Director, Division of Privacy and Identity Protection