



Consumer Federation of America

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Comments to the Federal Trade Commission

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Consumer Federation of America

On Petition for Rulemaking from Accountable Tech

Agency Docket Number R207005

January 26, 2022

Consumer Federation of America (CFA), an association of more than 250 consumer organizations across the United States, strongly supports the petition¹ to the Federal Trade Commission (FTC) from Accountable Tech for rulemaking to prohibit surveillance advertising. This petition is in line with the recent White House Executive Order that called on federal agencies to combat monopolies and eliminate anticompetitive practices, including those wielded by dominant digital platforms, and specifically encouraged the FTC to use its rulemaking authority to address “unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy.”²

CFA has long urged the FTC and Congress to act to address concerns raised by what was initially called “behavioral advertising.” This work dates back to 2007, when CFA joined other organizations in comments to the FTC in advance of the agency’s Town Hall on “Behavioral Advertising: Tracking, Advertising and Technology.”³ At the time, the focus was on threats to consumers’ fundamental rights to privacy posed by tracking their activities on the internet and using networked devices and making inferences about them based on that data for advertising

¹Available at https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/r207005_-_petition_for_rule_to_prohibit_surveillance_advertising_0.pdf.

² E.O. 14036 of Jul 9, 2021, 86 FR 36987.

³ See https://consumerfed.org/archives/elements/www.consumerfed.org/file/other/FTC_sign-on_letter_Ehavioral_Advertising.pdf.

purposes – threats are even greater today as technologies that facilitate such tracking and profiling have advanced. CFA and other groups made recommendations to address these threats, including creating a National Do Not Track List. Unfortunately, those recommendations were not implemented. Instead, the FTC issued voluntary self-regulatory principles,⁴ which failed to adequately protect consumers’ privacy, as the agency later acknowledged.

CFA also pleaded with Congress to act, working with other groups to develop a legislative primer on behavioral tracking and targeting⁵ and testifying in hearings on the subject.⁶ While CFA and other organizations have continued to sound the alarm about these business practices, the absence of regulatory and legislative action has allowed the commercial surveillance system to grow and become dominated by large internet platforms such as Google, Facebook and Amazon. Accountable Tech’s petition to the FTC describes in detail how this is harming consumers, businesses, and society in general, and sets out the legal basis for the FTC to initiate rulemaking under its authority to curb unfair methods of competition.

Last year, CFA created a series of fact sheets about surveillance advertising.⁷ One explains why it is not the boon to small businesses that some claim it is, and in fact can actually be harmful to them.⁸ It also notes that since large companies like Google control so much of the digital advertising market and process, small publishers can be forced to play by Google’s rules, and often must choose to allow companies to collect data on their users and show targeted ads, or get no advertising at all. Furthermore, the factsheet explains that small ad tech businesses struggle to compete with big firms like Google and Facebook that have already acquired such a massive wealth of data. Another CFA factsheet counters the argument that

⁴ *FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising* (February 2009), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf>.

⁵ See <https://consumerfed.org/wp-content/uploads/2009/09/9-1-09-Online-Tracking-Legislative-Primer.pdf>.

⁶ See, for instance, CFA testimony on the need for “do-not-track” legislation before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection (December 2, 2010), available at <https://consumerfed.org/pdfs/Do%20Not%20Track%20Testimony%20of%20Susan%20Grant.pdf>.

⁷ Available at <https://consumerfed.org/surveillance-advertising-factsheets/>.

⁸ See https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-small-business/.

banning surveillance advertising would harm businesses by explaining why contextual advertising is a good alternative for them as well as for consumers.⁹

While Accountable Tech’s petition centers on the anti-competitive nature of surveillance advertising, CFA believes that this practice is also inherently unfair and deceptive to consumers. As we outline in our factsheet¹⁰ about how tracking works, surveillance advertising “uses invisible and invasive techniques to manipulate consumers and rob them of real choice in the marketplace. Even if anti-tracking tools come pre-installed on consumers’ devices and are on by default, they will not prevent all tracking and profiling, nor will legal requirements to honor GPC signals guarantee that companies will do so.” Furthermore, even when consumers believe that they have successfully used the options a data controller has provided them to stop tracking, they may not have.¹¹

We describe some of the potential harms of surveillance advertising in our factsheet about discrimination.¹² Consumers may also be harmed when the information collected about them is exposed in data breaches, misused by company employees, and accessed without due process by government agencies. We also agree with an important point made in comments in this docket by Consumer Reports and EPIC that “rather than focus entirely on specific injuries tied to the collection and use of data, the FTC should recognize that the unwanted observation, through excessive data collection and use, is harmful in and of itself.”¹³

These harms are difficult for consumers to avoid. Businesses’ privacy policies are too complicated to understand and often intentionally broad, to encompass anything that companies may wish to do with consumers’ data. Consumers may in some cases be able to avoid unwanted tracking and use of their personal information by paying more for a product or service, a choice that AT&T offered at one point under the guise of providing a “discount” to

⁹ See https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-contextual-is-good-alternative/.

¹⁰ See https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-how-tracking-works/.

¹¹ See, for example, Taylor Hatmaker, “Google gets hit with another lawsuit over ‘deceptive’ location tracking,” TechCrunch (January 24, 2022), available at <https://techcrunch.com/2022/01/24/google-lawsuit-location-dc-privacy/>.

¹² See https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-discrimination/.

¹³ Comments from Consumer Reports and EPIC submitted on January 26, 2022, no comment number available yet.

customers who agreed to waive their privacy rights,¹⁴ and which is allowed by the California Consumer Privacy Act,¹⁵ but that is unfair, especially for low-income individuals who are least able to afford what is essentially a “privacy surcharge.” Consumers could forgo using certain popular services, but that is also unfair because there may be no good alternatives. For instance, some people may feel that they need to be on Facebook to keep in touch with their grandchildren, even if they would prefer not to. As Professor Joe Turow and his colleagues explained in “The Tradeoff Fallacy”¹⁶ many consumers use products and services from companies that intrude on their privacy, not because they are happy to exchange their personal information for the ability to do so but because they are resigned to the fact that they don’t have much choice.

Consumers are clearly unhappy with how their data are being treated. In a privacy survey that CFA and Consumer Action recently commissioned of adults in California, many have opted out of their data being sold, and nine out of ten respondents said that businesses should be required to get their permission if they want to collect, use or share their personal information for any purpose other than to provide the product or service they requested.¹⁷

Furthermore, the benefits of surveillance advertising do not outweigh the harms, since relevant ads can be delivered to consumers in a much less privacy-intrusive manner through contextual advertising.¹⁸

CFA has endorsed the recently-introduced Banning Surveillance Advertising Act,¹⁹ but in light of the fact that many other privacy bills are languishing in Congress with no movement,

¹⁴ Karl Bode, “AT&T Tries To Claim That Charging Users More For Privacy Is A ‘Discount’,” Techdirt (April 5, 2016), <https://www.techdirt.com/articles/20160329/08514034038/att-tries-to-claim-that-charging-users-more-privacy-is-discount.shtml>.

¹⁵ California Civil Code § 1798.125
https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV§ionNum=1798.125.

¹⁶ Turow, J., Hennessy, M. and Draper, N., *The Tradeoff Fallacy*, Annenberg School for Communication, University of Pennsylvania (2015), available at https://repository.upenn.edu/cgi/viewcontent.cgi?article=1554&hx0026;context=asc_papers.

¹⁷ See https://consumerfed.org/wp-content/uploads/2022/01/CCPA_Privacy_Survey_Results.pdf.

¹⁸ See https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-contextual-is-good-alternative/.

¹⁹ See press release from Congresswoman Anna G. Eshoo (January 18, 2022) at <https://eshoo.house.gov/media/press-releases/eshoo-schakowsky-booker-introduce-bill-ban-surveillance-advertising>.

the chances of its enactment are uncertain. The FTC is better positioned to act. For one thing, privacy is a complicated issue. Having studied privacy for many years, the FTC has developed considerable expertise in the subject. Furthermore, the FTC is specifically mandated to combat anti-competitive behavior and unfair and deceptive acts and practices.

As further advances in technology facilitate new methods of tracking and analyzing consumers' behavior and dominant platforms continue to grow, it is more important than ever for the FTC to take regulatory action to prohibit surveillance advertising. As we said nearly two decades ago, the time is now.