October 27, 2017

Via electronic filing: *https://ftcpublic.commentworks.com/ftc/informationalinjuryworkshop/*

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary, Suite 5610 (Annex A)
400 7th Street, SW, 5th Floor
Washington, DC 20024

Re: Comments of Advertising Trade Associations for the FTC Informational Injury Workshop, P175413

The undersigned trade associations collectively represent thousands of companies, from small businesses to household brands, which engage in responsible data collection and use that benefits consumers and the economy. We provide these comments for the Federal Trade Commission's ("FTC" or "Commission") "Informational Injury Workshop."[1] We and our members believe that the existing legal framework of sectoral laws, designed to address specific areas where Congress has identified a potential for consumer injury, and complemented by self-regulatory codes of conduct, is the appropriate approach for addressing consumer injury. We urge the Commission to maintain concrete injury as the cornerstone of the FTC's privacy and data security enforcement regime and to work with industry to provide the right balance of promoting innovation and addressing privacy considerations.

I. The Data-Driven and Ad-Supported Online Ecosystem Benefits Consumers and Fuels Economic Growth

Our members engage in responsible data practices that deliver to consumers the goods and services they desire and also fuel economic growth. Revenues from online advertising support and facilitate e-commerce, and subsidize the cost of content and services that consumers value and expect, such as online newspapers, blogs, social networking sites, mobile applications, email, and phone services. Because of advertising, consumers can access a wealth of online resources at little or no cost. Online advertising supports the creation of new businesses, communication channels (e.g., micro-blogging sites and social networks), and free or low-cost services and products (e.g., email, photo sharing sites, weather, news, and entertainment media). Online advertising enables consumers to compare prices, learn about products, and find out about new local opportunities.

Consumers value these ad-supported services and products and benefit from the diversity of online companies. In a recent Zogby survey, over 90% of consumers stated that free content was important to the overall value of the Internet, and 75% noted that they prefer content to

[1] FTC, *FTC Announces Workshop on Informational Injury* (September 29, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/09/ftc-announces-workshop-informational-injury.

remain free and supported by advertising rather than pay for ad-free content.[2] Eighty-five percent of consumers surveyed stated they prefer the existing ad-supported model, and 75% also indicated they would greatly decrease their online engagement if the ad-supported Internet were to go away. These advertising-supported resources have transformed our daily lives.

Online marketing has significant direct benefits for consumers, supporting free or low cost services that help them connect, create, publish, store and consume digital information in countless ways. A poll commissioned by the Digital Advertising Alliance ("DAA") shows that consumers assign a value of almost $1,200 a year to ad-supported online content.[3] Similarly, a study commissioned by the Interactive Advertising Bureau ("IAB") led by Prof. John Deighton at the Harvard Business School, reported that the ad-supported Internet ecosystem generated $1.121 trillion for the U.S. economy and was responsible for 10.4 million jobs in the U.S. in 2016.[4] Any expansion of the definition of informational injury would likely limit the collection and use of data and would threaten these consumer and economic benefits.

II. Information Injuries Must be Concrete

We believe that legal frameworks in the privacy and security arenas should address specific, concrete injuries that cause or are likely to cause substantial injury to consumers, which are not reasonably avoidable by consumers themselves, and are not outweighed by countervailing benefits to consumers or to competition. A concrete injury standard creates predictability for businesses and consumers while also protecting consumers who have legitimate claims of injury. Without a concrete harm standard, allegations of injury based on subjective or potentially unverifiable harms would follow. The result would be significant uncertainty for consumers and businesses, a break from traditional approaches to legal injury in the United States, and an impractical and unworkable legal standard. These outcomes would create a chilling effect on online innovation to the detriment of consumers.

For example, the United States has long taken an approach to regulating data practices that is primarily "sector-specific." These laws include the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Health Insurance Portability and Accountability Act. These targeted laws are rooted in the Fair Information Practice Principles (the FIPPs), and were enacted by (and continue to be considered by) Congress in areas where Congress identified a concrete harm that could befall a consumer if a particular type of data were to be misused. Congress has also had the opportunity to consider broader privacy legislation that would depart from this sector-specific approach, and has never adopted such legislation. If the FTC were to break with this legislative tradition by creating an amorphous definition of speculative informational harms, it would be inconsistent with decades of legislative process.

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[2] Zogby Analytics, *Public Opinion Survey on Value of the Ad-Supported Internet* (May 2016), *available at* http://www.aboutads.info/resource/image/Poll/Zogby_DAA_Poll.pdf.

[3] Digital Advertising Alliance, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth $1,200/Year; 85% Prefer Ad-Supported Internet to Paid*, PR Newswire (May 11, 2016), *available at* http://www.prnewswire.com/news-releases/zogby-poll--americans-say-free-ad-supported-online-services-worth-1200year-85-prefer-ad-supported-internet-to-paid-300266602.html.

[4] IAB, *Economic Value of the Advertising-Supported Internet Ecosystem* (2017), *available at* https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf

In addition, the FTC's long-standing enforcement principle has been to address concrete consumer injury both in online and offline environments. For instance, the FTC's policy statement from 1980 on its Section 5 unfairness authority makes clear that the FTC is not concerned with "trivial or merely speculative harms."[5] Specifically, the FTC stated that "[e]motional impact and other more subjective types of injury . . . will not ordinarily make a practice unfair," noting that it would take "an extreme case…where tangible injury could be clearly demonstrated for emotional effects to "possibly be considered as the basis for finding of unfairness."[6]

Acting Chairman Ohlhausen's articulation of informational injury earlier this year reinforces the FTC's long-standing principle that injury in Section 5 cases cannot be trivial or merely speculative but must be tangible or concrete. Acting Chairman Ohlhausen noted that "[t]he agency should focus on cases with objective, concrete harms such as monetary injury and unwarranted health and safety risks. The agency should not focus on speculative injury, or on subjective types of harm."[7] We agree. The FTC should maintain concrete injury as the cornerstone of the FTC's enforcement regime.

III. A Subjective Harm Standard Would Create Uncertainty in the Market, Causing Harm to Consumers

The lack of a concrete injury standard could lead to marketplace confusion. Without clear standards for determining whether conduct is unfair under Section 5 of the FTC Act, the door would be open to arbitrary administration of the statute based on subjective standards, resulting in marketplace unpredictability and privacy actions even where no real, verifiable, or quantifiable injury occurred.

For instance, an injury standard based on subjective emotional distress is too vague to be applied consistently. Companies seeking to establish compliance programs will be challenged to implement standards designed to equitably apply protections to the customers particularly where harms are subjective. Since emotional privacy injuries are subjective to the individual, the same information use or sharing practice may be interpreted entirely differently by two people. Put simply, there is no consensus framework that could reasonably govern future FTC enforcement actions based on emotional or other subjective injuries or provide necessary guidance to business on how to quantify risks and apply safeguards against such speculative injuries.

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[5] Letter from FTC to Senators Ford and Danforth (Dec. 17, 1980), appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *95 (1984) (hereinafter "Policy Statement").

[6] Policy Statement, 1984 WL 565290, at *97.

[7] Speech by Maureen Ohlhausen, Opening Keynote before the ABA 2017 Consumer Protection Conference (Feb. 2017), *available at* https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf. Acting Chairman Ohlhausen also referenced two specific instances where substantial injury occurred in the form of suicide and the loss of sensitive medical information. Acting Chairman Ohlhausen separately noted that misuse of profiles of consumers could lead to substantial injury.

Moreover, class action lawsuits based on informational injury already are subject to abuse by the plaintiffs' bar. Any expansion of the concept of informational injury would only cause such litigation to proliferate and serve to chill innovation. The vast majority of these class actions rely on tortured interpretations of federal statutes as well as on state laws and common law claims.

IV. Self-Regulation Provides the Right Balance for Promoting Innovation and Addressing Privacy Considerations

Self-regulatory frameworks provide important consumer protections without stifling innovation or the growth of the ad-supported Internet. These frameworks are flexible and responsive and have been historically supported by the FTC and the White House.

a. Online data collection and use currently are governed by industry self-regulatory regimes

Existing self-regulatory standards are the appropriate tool to govern the dynamic and interrelated online content and advertising ecosystem. The Congress has considered online privacy issues many times based on ample hearings and debate, and each time has declined to enact legislation providing new authority to the FTC, recognizing that new rules and standards for information practices in this rapidly evolving area would hinder innovation and threaten the economic value of a thriving market sector.[8] Voluntary self-regulatory standards can continue to be used to find the right balance of promoting innovation and addressing privacy considerations.

b. Self-regulation is flexible and responsive

Self-regulation is flexible and responsive, both of which are key qualities for the regulation of rapidly evolving technologies and practices. Companies participating in self-regulation recognize that responsible data practices are essential for the continued success of the Internet economy, and such regimes are vigorously enforced and regularly updated as technologies change.

Industry provides model approaches for self-regulation, including those of the Data & Marketing Association ("DMA"), DAA, and the Network Advertising Initiative ("NAI"). By way of example, the DAA, led by the undersigned trade associations, has convened industry to address complex policy issues involving the collection and use of web viewing, application use, precise geolocation, and other online data for interest-based advertising and other applicable uses ("Self-Regulatory Program").[9] If a company fails to meet its obligations under the Self-Regulatory Program, the DAA's independent accountability programs, run by the Council for

[8] The FTC recently came to a similar conclusion in its Internet of Things report, finding that new rules to govern information practices are not needed or appropriate. FTC, *Internet of Things: Privacy & Security in a Connected World* 48-49 (Jan. 2015) (concluding that new privacy rules would be premature and that self-regulation is the appropriate tool to encourage privacy-sensitive practices), *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf.

[9] The NAI Code of Conduct requires similar notice and choice with respect to Interest-Based Advertising.

Better Business Bureaus ("CBBB") and the DMA, will work to bring a company into compliance and the programs may refer unresolved matters to the FTC. The DAA accountability programs have brought more than 70 enforcement actions since the DAA Self-Regulatory Program went into effect, underscoring the responsiveness of the program.

c. The DAA's self-regulatory program is the model for addressing online privacy, and is recognized for the benefits it provides to consumers and the economy

The DAA's innovative approach to self-regulation works to inform consumers about online data collection and use practices through its bedrock principles of transparency and control. The DAA began in 2009 with the Self-Regulatory Principles for Online Behavioral Advertising, and has expanded over time to keep pace with the ecosystem to cover the collection and use of Multi-Site Data, the mobile environment, and the collection and use of data across devices ("DAA Principles").[10] The DAA Principles require companies to inform consumers about their data collection and use practices, and to offer consumers control over DAA covered practices. One of the main avenues through which consumers receive this transparency is the DAA's YourAdChoices Icon. The YourAdChoices Icon is served over a trillion times a month worldwide in or around online advertisements delivered through interest-based advertising. The Icon provides transparency, and takes consumers to easy-to-use tools to exercise choice for the future collection and use of data for interest-based advertising. The DAA is a model self-regulatory program, and shows how industry can respond to the Internet data ecosystem more efficiently than stringent government regulation.

The successful approach taken by the DAA led to an event in February 2012 at the White House where the then-Chairman of the FTC, the then-Secretary of Commerce, and Administration officials publicly praised the DAA's cross-industry initiative. The White House recognized the Self-Regulatory Program as "an example of the value of industry leadership as a critical part of privacy protection going forward."[11] The DAA's work has garnered additional praise, including from Acting Chairman Ohlhausen who stated that the DAA "is one of the great success stories in the [privacy] space."[12] Also, in its cross-device tracking report, the FTC staff recently stated, "...DAA [has] taken steps to keep up with evolving technologies and provide important guidance to [its] members and the public. [Its] work has improved the level of consumer protection in the marketplace."[13]

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[10] Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009); Digital Advertising Alliance, *Self-Regulatory Principles for Multi-Site Data* (Nov. 2011); Digital Advertising Alliance, *Application of Self-Regulatory Principles to the Mobile Environment* (Jul. 2013); Digital Advertising Alliance, *Application of the DAA Principles of Transparency and Control to Data Used Across Devices* (Nov. 2015).

[11] Speech by Danny Weitzner, We Can't Wait: Obama Administration Calls for A Consumer Privacy Bill of Rights for the Digital Age (February 23, 2012), *available at* http://www.whitehouse.gov/blog/2012/02/23/we-can-t-waitobama-administration-calls-consumer-privacy-bill-rights-digital-age.

[12] Katy Bachman, *FTC's Ohlhausen Favors Privacy Self-Regulation*, Adweek (June 3, 2013), *available at* http://www.adweek.com/news/technology/ftcs-ohlhausen-favors-privacy-self-regulation-150036.

[13] FTC, *Cross-Device Tracking: An FTC Staff Report*, 10 (Jan. 2017).

We believe that the Commission's and previous Administration's recognition and encouragement of the role of self-regulation should remain a guidepost for the FTC's work on informational injuries. Any expansion of the definition of informational injury would undermine the robust, flexible, and responsive industry programs that have proven to provide the right balance for promoting innovation and addressing privacy concerns.

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We appreciate the opportunity to submit these comments, and we look forward to working with the FTC on this issue. If you have questions, please contact Michael Signorelli at 202.344.8050.

Respectfully submitted,

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers
Data & Marketing Association
Interactive Advertising Bureau
Network Advertising Initiative

October 27, 2017

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