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OF THE
UNITED STATES OF AMERICA

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VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113 (Annex W)
Washington, DC 20580

Re: *Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*

Dear Mr. Clark:

The U.S. Chamber of Commerce¹ is pleased to submit these comments² to the Federal Trade Commission (“Commission”) in response to the agency’s request for comments on the Preliminary FTC Staff Report on *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*.³

I. Introduction

Today, companies of all shapes and sizes communicate with consumers, employees, existing customers, potential customers, and business partners around the world. In this tough economy, businesses depend more than ever on having beneficial and trusted relationships with their customers. In particular, with better data, businesses can deliver more relevant and targeted products and services to their customers. Therefore, the Chamber believes that self-regulation and best business practices that are technology-neutral serve as the preferred framework for

¹ The U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

² The Chamber represents many different types of companies and economic sectors with different concerns in the telecommunications and Internet areas and while the position stated in the filed comments with the Commission is the official position for the U.S. Chamber of Commerce, our comments do not reflect the views of all company members.

³ Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, Dec.1, 2010, available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf> (“Report”).

enhancing innovation, investment, and competition, while—at the same time—protecting consumers’ privacy online.

II. The Internet is Critical for U.S. Economic Success

As President Obama recently recognized in the State of the Union address, the emergence of the Internet has driven American economic growth and innovation. “Thirty years ago,” he said, “we couldn’t know that something called the Internet would lead to an economic revolution.”⁴ He also emphasized that it is critical for the government to provide room for entrepreneurs to innovate. “What we can do—what America does better than anyone—is spark the creativity and imagination of our people....In America, innovation doesn’t just change our lives. It’s how we make a living.”⁵

The Internet has revolutionized the way business is conducted in all sectors of the global economy—including financial services, retail, wholesale-distribution, manufacturing, and many more. A broadband connection allows businesses, regardless of size or location, to sell to customers around the country and the world. Using the Internet, businesses can spur sales and job growth, enhance productivity, enable cost-savings, and improve efficiency.

Business collects and uses data in many beneficial and legitimate ways, many of which are not related to online advertising but are essential to operations and innovation. For example, data analytics help companies develop better products and services, including customized experiences, for their customers. By enabling personalization, Web sites can recognize user preferences on subsequent visits.⁶

Ad-supported content has been key to the success of broadband. With broadband accessible to the vast majority of Americans, the amazing array of content (including applications and services) available on the Internet has convinced more and more Americans to go online using a broadband connection every year. Frequently, online content is provided at little or no cost to consumers, and revenues are instead generated through advertising.

U.S. Internet advertising revenues totaled \$6.4 billion in the third quarter of 2010, representing the highest quarterly result ever for the online advertising industry and a 17 percent increase over the same period in 2009, according to the Interactive Advertising Bureau and

⁴ Prepared Remarks, President Barack Obama, *State of the Union Address*, Jan. 25, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-barack-obama-state-union-address>.

⁵ *Id.*

⁶ See Testimony of Daniel D. Castro, Senior Analysts, Information Technology and Innovation Foundation, Hearing on “Do-Not-Track” Legislation: Is Now The Right Time?, Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, U.S. House of Representatives, at 5, available at http://republicans.energycommerce.house.gov/Media/file/Hearings/CTCP/2010-12-2_Do_Not_Track/Castro.Testimony.pdf.

PricewaterhouseCoopers.⁷ “Whole new categories of Internet applications and services, including search, social networks, blogs and user-generated content sites, have emerged and continue to operate in part because of the potential value of targeted online advertising.”⁸

Consumers recognize and appear willing, in many situations but not all, to permit information to be collected about them in exchange for goods and services that are of value to them. Even FTC Chairman Jon Leibowitz has noted that targeted ads “are usually good for consumers, who don’t have to waste their time slogging through pitches for products they would never buy; good for advertisers, who efficiently reach their customers; and good for the Internet, where online advertising helps support the free content everyone enjoys and expects.”⁹ This ad-supported business model has been a key to the success of many Internet ventures and has helped to make the Internet an engine of growth in the U.S. economy.

A recent analysis found that the European Union’s Privacy and Electronic Communications Directive (2002/58/EC) caused a 65 percent decrease in advertising effectiveness (i.e., changing a consumer’s stated purchase intent).¹⁰ The paper’s empirical findings, according to its authors, “suggest that even moderate privacy regulation does hinder the effectiveness of online advertising, that these costs are not borne equally by all websites, and that these costs should be weighed against the benefits to consumers.”¹¹

Similarly, the Federal Communications Commission’s National Broadband Plan found that the “value of a targeted advertisement based on personal data can be several times higher than the value of an advertisement aimed at a broad audience. For example, the going rate for some targeted advertising products can be several times the rate for a generic one because consumers can be six times more likely to ‘click through’ a targeted banner advertisement than a non-targeted one.”¹²

⁷ Press Release, *\$6.4 Billion in Q3 2010 Sets New Record for Internet Advertising Revenues*, Interactive Advertising Bureau, Nov. 17, 2010, available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-111710.

⁸ Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010) at 53, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf (“National Broadband Plan”).

⁹ Prepared Remarks, Chairman Jon Leibowitz, *Where’s the Remote? Maintaining Consumer Control in the Age of Behavioral Advertising*, National Cable & Telecommunications Association’s The Cable Show 2010 at 2, May 12, 2010, available at <http://www.ftc.gov/speeches/leibowitz/100512nctaspeech.pdf>.

¹⁰ Avi Goldfarb and Catherine E. Tucker, *Privacy Regulation and Online Advertising*, Apr. 23, 2010, available at http://www.kellogg.northwestern.edu/marketing/faculty/seminars_2010/AviGoldfarb/GoldfarbTucker-Privacy.pdf.

¹¹ *Id.* at 2.

¹² *National Broadband Plan* at 53.

As the Commission considers the comments it receives on its preliminary Staff Report and assesses the best way forward, it must be mindful of the importance of the Internet economy—and the innovation so recently recognized by the President—and should be wary of imposing costs that would constrain the benefits the Internet brings to our economy and to Americans' personal lives.

III. Differing Risks of Harm are Caused by Different Types of Data Collection and Usage

When considering whether existing privacy regulations need to be strengthened or modified, the Commission should recognize that differing risks of harm are caused by different types of data collection and usage. For example, the risks associated with non-personally identifiable data are less, especially when anonymized or aggregated, than with data that identifies a user. Similarly, encrypted data also results in reduced risk. Additionally, postings on social media Web sites are often intended to be viewed by a wide audience, and, therefore, these communications should not be presumptively considered “private.” Moreover, any risk must be evaluated in a technology-neutral manner.

In addition, the Commission should proceed with caution in redefining the meaning of “harm.” It is of course incredibly important for the government to fulfill its traditional role of protecting consumers from financial theft, physical injury, and other tangible forms of harm. However, any move to broaden the definition of “harm” should be carefully considered.

IV. The Proposed Framework Should Not be Adopted as a Regulatory Regime Because It Does Not Provide Sufficient Flexibility and Would Harm Innovation

Through the use of self-regulatory regimes, the Chamber supports the development of voluntary codes of conduct that enable continued flexibility in rules that can evolve with new technologies and business models. Self-regulation is an effective method of protecting consumer privacy because the regulatory process is often incapable of responding rapidly to market developments—including changes in consumer preferences and concerns—as well as advances in technology. Entities that will have to comply with these codes of conduct should be responsible for their creation because it goes against the notion of self-regulation if these policies are actually developed and imposed on industry by the government. Uncorrected violations will be reported to the appropriate government agencies.

Effective online privacy guidelines and standards have been developed by a variety of industry groups, including the Direct Marketing Association (“DMA”), the Interactive Advertising Bureau (“IAB”), CTIA-The Wireless Association, the Network Advertising Initiative (“NAI”), TRUSTe, the AICPA's WebTrust, BBBOnLine, and the Online Privacy Alliance.

V. The “Commonly Accepted Practices” Approach to Choice is Excessively Narrow and Inhibits Innovation

The Chamber agrees that there are certain practices that are common and do not need choice to be provided before collecting and using consumers’ data. However, by creating a static list of “commonly accepted practices” that freezes in time these pre-identified practices, the Commission harms innovation by failing to recognize that new or improved practices and technologies might become common in the future. The Staff Report fails to articulate any criteria for how a practice is currently judged to be “commonly accepted.” For example, third-party marketing is currently common, but not identified as being eligible for treatment under a “commonly accepted practice” exception. Also, the Staff Report fails to explain how a practice could be added to the list in the future. One can only imagine the regulatory backlog that would occur if a proceeding is required each time a petitioner seeks to have a practice classified as new “commonly accepted practice.”

It is critically important to remember that online information collection and sharing practices help Web sites provide content and utilities free of charge to consumers. Many of the most popular Web sites remain free of charge because they earn revenue from advertising. Any government restriction on the ability of companies to gain revenue from advertising could result in less free content being made available to users and could inhibit innovative start-ups. And the more that companies fear that they could face investigations or penalties for their information practices, the higher their legal compliance costs and the more likely they will charge for their services.

VI. Today, Technology and Self-Regulation Offer Consumers the Type of Choice Envisioned by the Staff Report’s “Do Not Track” Proposal

Online behavioral advertising offers consumers the benefit of targeted ads that hopefully will be of interest. A consumer who decides to opt-out of online behavioral advertising will continue to receive ads online, but they will not be targeted and will likely be of less relevance and benefit to him or her. Thus, this is one way in which “Do Not Track” differs from the “Do Not Call Registry,” where signing up means an end to unsolicited telemarketing calls.

Industry is moving swiftly to provide consumers with choice regarding online behavioral advertising. Google recently released “Keep My Opt-Out,” an extension for its Chrome Web browser that provides users with “a one-step, persistent opt-out of personalized advertising and related data tracking performed by companies adopting the industry privacy standards for online advertising.”¹³ Mozilla announced a “Do Not Track” option for its Firefox 4 Beta Web browser that when selected sends a header that signals Web sites that the user wishes to opt-out of online

¹³ <https://chrome.google.com/webstore/detail/hhnjdplhmcniecampfdgfjilccfpfoe>; see Sean Harvey and Rajas Moonka, “Keep your opt-outs,” *Google Public Policy Blog*, Jan. 24, 2011, available at <http://googlepublicpolicy.blogspot.com/2011/01/keep-your-opt-outs.html>.

behavioral tracking.¹⁴ Microsoft announced that the next generation version of its Web browser, Internet Explorer 9, will “offer consumers a new opt-in mechanism (‘Tracking Protection’) to identify and block many forms of undesired tracking and ‘Tracking Protection Lists’ [that] will enable consumers to control what third-party site content can track them when they’re online.”¹⁵

Additionally, various self-regulatory efforts are underway. Launched in October 2010, the Self-Regulatory Program for Online Behavioral Advertising is a cross-industry self-regulatory initiative led by the American Association of Advertising Agencies (4A’s), the American Advertising Federation (AAF), the Association of National Advertisers (ANA), the Direct Marketing Association (DMA), and the Interactive Advertising Bureau (IAB). The initiative is promoting the use of an “Advertising Option Icon” with accompanying language, to “be displayed within or near online advertisements or on Web pages where data is collected and used for behavioral advertising.”¹⁶

The Chamber urges the Commission to support continued industry self-regulation of online privacy practices. Organizations and companies at all levels of this Internet advertising eco-system should be involved in the process. Online privacy policies should be technology neutral. Unless a market failure has occurred and consumer harm will result, policymakers should refrain from intervening. Otherwise, consumers could find themselves being charged for products and services they currently enjoy for free.

VII. Conclusion

The Chamber thanks the Commission for the opportunity to comment on this Staff Report and looks forward to working with you on this very important issue.

Sincerely,

William L. Kovacs

¹⁴ “Mozilla Firefox 4 Beta, now including ‘Do Not Track’ capabilities,” *The Mozilla Blog*, Feb. 8, 2011, available at <http://blog.mozilla.com/blog/author/chrismozillacom/>.

¹⁵ “IE9 and Privacy: Introducing Tracking Protection,” *IEBlog*, Dec. 7, 2010, available at <http://blogs.msdn.com/b/ie/archive/2010/12/07/ie9-and-privacy-introducing-tracking-protection-v8.aspx>.

¹⁶ Press Release, “Major Marketing / Media Trade Groups Launch Program to Give Consumers Enhanced Control Over Collection and Use of Web Viewing Data for Online Behavioral Advertising,” Interactive Advertising Bureau, Oct. 4, 2010, available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-100410. (“The Advertising Option Icon indicates a company’s use of online behavioral advertising and adherence to the Principles guiding the program. By clicking on it, consumers will be able to link to a clear disclosure statement regarding the company’s online behavioral advertising data collection and use practices as well as an easy-to-use opt-out option.”)