



**Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580**

**COMMENTS**  
  
**of the**  
  
**DATA & MARKETING ASSOCIATION**  
  
**on the**  
  
**Informational Injury Workshop P175413**

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The Data & Marketing Association (“DMA”) is pleased to provide the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Request for Comments on its “Informational Injury Workshop.”<sup>1</sup> The Commission has indicated that the workshop will “examine consumer injury in the context of privacy and data security[.]”<sup>2</sup> The existing regulatory framework, designed to address concrete harms associated with the misuse of data, complemented by self-regulatory codes of conduct backed by enforcement mechanisms, strikes the right balance of fostering market innovation while protecting consumers. DMA agrees wholeheartedly with the FTC’s statement in its Request for Comments: “Information flows drive the economy. And information about consumers has become a key input to innovative products and services, as well as to marketing about those product and services.”<sup>3</sup> DMA urges policymakers not to disrupt the current, well-functioning framework, compromised of both sectoral laws and robust self-regulatory programs, which provides consumer protections and protects vital information flows.

## **I. Background on the DMA**

DMA is the community that champions deeper consumer engagement and business value through the innovative and responsible use of data-driven marketing. DMA is comprised of today’s leading tech companies, data innovators, brand marketers, agencies, data service providers, and media companies from across the marketing ecosystem. DMA and its members take responsible data use seriously and work to ensure that data is not used in ways that are likely

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<sup>1</sup> Federal Trade Commission, *FTC to Host Workshop on Informational Injury; Seeking Public Comments*, [https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public\\_notice\\_injury\\_workshop.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public_notice_injury_workshop.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Federal Trade Commission, *FTC to Host Workshop on Informational Injury; Seeking Public Comments*, [https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public\\_notice\\_injury\\_workshop.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public_notice_injury_workshop.pdf).



to cause consumer injury. Our members deeply value consumer trust and understand that responsible data stewardship is critical to building and maintaining customer relationships over the long term.

## **II. The Current Privacy Framework Is Effective at Providing Consumer Protections**

The current framework of consumer protections for data collection, use, and sharing is effective and has been for decades. Collection and use of data is already appropriately regulated, both by sector- and channel-specific laws and regulations and by the FTC’s authority under Section 5 of the FTC Act to enforce any “unfair or deceptive acts or practices.”

This framework provides ample protections for areas where the nature or source of the data, if misused or misappropriated, could cause discernible harm to consumers. For example, the Health Information Portability and Accountability Act (“HIPAA”) regulates certain health data; the Fair Credit Reporting Act (“FCRA”) regulates the use of consumer data for eligibility purposes; the Children’s Online Privacy Protection Act (“COPPA”) addresses personal information collected online from children; and the Gramm–Leach–Bliley Act (“GLBA”) focuses on consumers’ financial privacy. This harm-based regulatory approach has allowed the private sector to continue to use data responsibly and, to enable the delivery of more relevant marketing, providing efficiency for consumers and boosting the economy in the process. These sectoral laws are supplemented by industry self-regulatory standards and active enforcement. This combination of strong consumer protections by the FTC, specific privacy laws, and robust industry self-regulation has proven to be a successful means of advancing innovation, while also providing consumers with immediate resolution of their concerns.



The framework of general consumer protection enforcement by the FTC and existing sectoral laws, complementing self-regulatory protections which govern the use of data for marketing purposes—which has been successful for consumers and businesses alike—stands in contrast to the more prescriptive data protection regimes that have been adopted elsewhere in the world. The U.S. framework combines specific legal restrictions, focusing on misuse of data that can cause identifiable harms, with enforceable industry self-regulation that nimbly responds to an ever-changing marketplace. It is this agile, flexible framework of protections that has helped drive innovation through responsible data practices and fuels the U.S. economy.

The robust and successful framework has already led to the thriving Data-Driven Marketing Economy (“DDME”),<sup>4</sup> and to a marketplace of innovative digital goods and services that consumers embrace. DMA encourages the FTC to see the value in the U.S. tradition of focusing on discernible, concrete harms to consumers, and to exercise caution in considering any new restrictions on the free flow of data that could impact the United States’ well-functioning and data-driven economy.

### **III. Data-Driven Marketing Fuels the U.S. Economy, Providing Benefits to Consumers**

As the FTC stated in its Request for Comments: “Information flows drive the economy. And information about consumers has become a key input to innovative products and services, as well as to marketing about those product and services.”<sup>5</sup> DMA agrees that consumers’ lives are enriched by data-driven resources, including an unprecedented array of high-quality information and entertainment. Thanks to innovative applications of data, consumers benefit

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<sup>4</sup> For a discussion of the Data-Driven Marketing Economy, *see* Section IV below.

<sup>5</sup> Federal Trade Commission, *FTC to Host Workshop on Informational Injury; Seeking Public Comments*, [https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public\\_notice\\_injury\\_workshop.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-workshop-informational-injury/public_notice_injury_workshop.pdf).



from more tailored and timely access to the goods and services they desire at competitive prices. As the FTC continues its important work, we urge the Commission to continue to recognize the myriad of benefits these practices provide consumers.

A recent study commissioned by DMA's Data-Driven Marketing Institute ("DDMI") and conducted independently by Harvard Business School Professor John Deighton and Adjunct Columbia University Professor Peter Johnson, entitled "The Value of Data: Consequences for Insight, Innovation, & Efficiency in the U.S. Economy" ("Value of Data"), quantifies the concrete economic benefits of data.<sup>6</sup> The Value of Data study found that the DDME generates vital revenue and jobs for the U.S. economy. Specifically, the study found that the use of data-driven marketing added \$202 billion in revenue to the U.S. economy and fueled more than 966,000 jobs in 2014.<sup>7</sup> In addition to increasing revenue, the study noted that the U.S. DDME catalyzed growth in the U.S. economy. For instance, according to the study, since 2012, the contribution of data-driven marketing to the U.S. economy grew by 35% and the jobs generated and sustained by data-driven marketing grew by 49%.<sup>8</sup>

Data-driven marketing is essential to the success of start-up companies and non-profits that drive innovation and frequently rely on advertising revenue to establish and grow their organizations. The Value of Data study found that the sharing of data across the DDME enables small and innovative businesses to compete effectively with big players. The responsible use of data gives all companies, and especially small businesses, the ability to effectively and responsibly match products to customers both online and offline, thereby lowering barriers to market entry for specialized or niche offerings that previously could not have succeeded.

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<sup>6</sup> JOHN DEIGHTON & PETER A. JOHNSON, THE VALUE OF DATA: CONSEQUENCES FOR INSIGHT, INNOVATION & EFFICIENCY IN THE U.S. ECONOMY (2015).

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.*



The remarkable growth of the DDME is due in part to the flexible regulatory framework applied to the use of data for marketing purposes. This framework combines specific, harm-based legal restrictions, with enforceable industry self-regulation that responds to a rapidly changing business landscape and backed up by FTC enforcement. It is this flexible framework of protections governing the responsible use of data for marketing purposes that has helped drive innovation and fuel the U.S. economy.

#### **IV. Policymakers Should Focus on Actual Harm**

Current Acting FTC Chairman Maureen Ohlhausen has stated that the FTC should focus on actual harm to consumers, consistent with the agency’s statutory mandate, stating on one occasion that:

The FTC should focus enforcement on matters where consumers are actually injured or likely to be injured, or where companies don’t keep their promises, to the consumer’s detriment. The 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.<sup>9</sup>

For instance, the Commission has itself noted that the only “harm” consumers might experience from inaccurate marketing data is an irrelevant advertisement, and additional requirements for marketing data to address harms that have not materialized would actually require the addition of more personally identifiable information to marketing databases in order to increase accuracy and permit authentication of individuals who request access or changes to records.<sup>10</sup>

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<sup>9</sup> Acting Chairman Maureen Ohlhausen, FTC, Opening Keynote, ABA 2017 Consumer Protection Conference (Feb. 2, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1069803/mko\\_aba\\_consumer\\_protection\\_conference.pdf](https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf).

<sup>10</sup> Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 29 (March 2012).



Instead of giving credence to speculation about harms that could possibly arise from the collection and retention of data and result in potentially restrictive new policies, the FTC’s focus should be addressing concrete harms that actually result from the misuse or unauthorized use of data and fostering the proven economic benefits that data-driven marketing provides. This approach has been the bedrock of U.S. privacy regulation, and it has served as a catalyst for the dynamic DDME that is fueling the U.S. economy.

## **V. Self-Regulation Provides the Appropriate Tools for the Responsible Use of Data in Marketing**

In its Request for Comments, the FTC “recognize[ed] the importance of protecting consumers while preserving the vital use of information flows in the economy.” Existing voluntary self-regulatory regimes present the appropriate tools to preserve this balance while governing the dynamic and interrelated data and marketing ecosystem. Industry self-regulation, such as DMA’s *Guidelines for Ethical Business Practice* (“*Guidelines*”),<sup>11</sup> is more nimble than agency regulation and is best suited to keep pace with an evolving marketplace and provide consumers with meaningful protections.

The *Guidelines* provide meaningful transparency, controls, and accountability to help ensure the responsible use of data in marketing. To account for changes in the way consumers and marketers create and engage with data, DMA’s Ethics, Standards and Guidelines Committee regularly updates the *Guidelines*. To this point, as part of DMA’s ongoing effort to set industry’s bar for how data should be used, in October of 2017, DMA announced the release of an updated

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<sup>11</sup> See generally GUIDELINES FOR ETHICAL BUSINESS PRACTICE (DATA & MKTG. ASS’N 2017), <https://thedma.org/accountability/ethics-and-compliance/dma-ethical-guidelines/> [hereinafter DMA Guidelines].



set of guidelines, including the culmination of our *Data Standards 2.0* initiative.<sup>12</sup> With input from a broad spectrum of stakeholders, the initiative focused on updating DMA’s current Guidelines to reflect the rapidly evolving data landscape. The Data Standards provide a practical framework for data practices in marketing across industry.

Specifically, the revised Data Standards underscore longstanding responsible data practices that: “Data collected exclusively for Marketing should be used only for Marketing purposes.”<sup>13</sup> In fact, the Data Standards specifically prohibit the use of data for marketing in the context of eligibility determinations for employment, credit, health care treatment, and insurance, areas of primary concern where actual harm to consumers could occur.<sup>14</sup> Additionally, the Data Standards incorporate data security standards, including provisions related to contractual safeguards, data transfers, and protection of sensitive data.<sup>15</sup>

For decades, DMA has proactively enforced the DMA Guidelines against both DMA members and non-member companies across the DDME. Such enforcement of the *Guidelines* by the DMA has occurred in hundreds of data-driven marketing cases concerning deception, unfair business practices, personal information protection, and other practices that could result in injury to consumers.

DMA receives matters for review in a number of ways, including from consumers, member companies, non-members, and consumer protection agencies. DMA works with thousands of consumers each year regarding their specific concerns about marketing practices and works to resolve these issues at the outset for the consumer. Barring such resolution, DMA’s

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<sup>12</sup> Press Release, Data & Mktg. Ass’n, DMA Announces Final Updated Standards on Marketing Data Use, To Go Into Effect July 2018 (Oct. 10, 2017), <https://thedma.org/news/dma-announces-final-updated-standards-marketing-data-use-go-effect-july-2018/>.

<sup>13</sup> DMA Guidelines at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 8-9.



Committee on Ethical Business Practice Enforcement reviews specific complaints that it receives against the *Guidelines*. If the Committee finds a potential violation, the Committee contacts, investigates, and advises the organization on how to come into full compliance. Most companies work with the Ethics Operating Committee to voluntarily cease or change the questioned practices. However, if a company declines to cooperate and the Ethics Operating Committee believes ongoing violations of the *Guidelines* exist, the Committee can refer the matter to the appropriate regulatory agency. Further, if the organization is a member of the DMA, the Committee will recommend that DMA's Board of Directors take action to expel and remove the member, and make case results public and referring these cases to federal and state law enforcement authorities for review.

The DMA self-regulatory program is an example of how the data-driven marketing industry effectively regulates its marketing data practices, delivering enhanced transparency and control to consumers. Informed by our experience, DMA strongly believes that industry self-regulation is the most efficient and effective means of addressing marketing and advertising data practices in a manner that provides consumers with resolutions to their specific concerns while allowing data-driven innovation to flourish for the benefit of consumers. As an organization that represents brands and organizations that rely on fostering consumer trust, our ability to resolve their concerns is tied to our future success as an industry.

## **VI. Conclusion**

The DMA appreciates this opportunity to comment on the appropriate framework for promoting both consumer protection and innovation. We look forward to continuing to work with the Commission on these issues in the future.