

November 21, 2022

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW  
Suite CC-5610 (Annex B)  
Washington, DC 20580

***Re: Proposed Rule, Federal Trade Commission; Commercial Surveillance (87 Fed. Reg. 51,273-51,299, August 22, 2022)***

Dear Commissioners:

We, the undersigned organizations, representing a diverse set of industries as well as organizations advocating for the promotion of innovation, write to express our concerns with the Federal Trade Commission's Advanced Notice of Proposed Rulemaking pertaining to so-called "commercial surveillance" and "lax security practices." Given the importance of the data-driven economy and the need to protect consumers, Congress should pass a national privacy law that protects all Americans. We urge the Federal Trade Commission to allow Congress to clearly speak to authorize the data privacy regulation and halt its current rulemaking.

Every company in America, small and large, is using data to help them solve everyday business decisions and more efficiently deal with economic challenges like inflation and supply chain shortages. The Internet economy was estimated to have contributed \$2.45 trillion to U.S. GDP.<sup>1</sup> Artificial Intelligence alone will have a \$3.7 trillion positive impact on North American GDP by 2030.<sup>2</sup> Small businesses that utilize technology platforms like business software, social media, delivery apps, and payment support the jobs of nearly 100 million Americans and \$17.7 trillion in economic value.<sup>3</sup> On a practical level, the data-driven economy is enhancing public safety by stopping violent crime, preventing and detecting fraud, promoting financial inclusion by using expanded datasets, and improving health outcomes.

Given the critical importance of data to societal welfare and global economic competitiveness, it is imperative that policymakers create an environment of certainty for the business community and consumers alike. The current Advanced Notice of Proposed Rulemaking fails to provide that certainty in the following ways:

- **FTC Lacks Authority to Promulgate a National Privacy Standard.** The Supreme Court in *West Virginia v. EPA* this year affirmed the Major Questions Doctrine and the legal principle that in cases of vast economic and political significance federal agencies must have clear authorization from Congress to make rules. Writing for a 6-3 majority, Chief Justice Roberts reminded administrative agencies that they "have

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<sup>1</sup> <https://www.iab.com/news/study-finds-internet-economy-grew-seven-times-faster/>

<sup>2</sup> <https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf>

<sup>3</sup> <https://americaninnovators.com/wp-content/uploads/2022/08/Empowering-Small-Business-The-Impact-of-Technology-on-U.S.-Small-Business.pdf>

only those powers given to them by Congress and ‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line.’” In their concurring opinion, Justices Gorsuch and Alito added that the Major Questions Doctrine “applies when an agency claims the power to resolve a matter of great ‘political significance.’” We believe there is not better current example of “Great political significance” than the economywide regulation of data. As noted, data is critical to the basic business decisions of all American companies, and it is clear a national privacy rule would have major economic and political consequences. California’s first set of privacy regulations alone was estimated to cost companies a total of \$55 billion in compliance costs.<sup>4</sup> A national privacy rule would have a much larger effect. A comprehensive privacy regulation would likely run afoul of the Major Questions Doctrine because Congress has not specifically authorized a nationwide data protection rule.

- **A Privacy Rule Would Further a Burdensome National Privacy Patchwork.** A comprehensive privacy and algorithmic rule would complicate the existing patchwork of state privacy laws. Because the FTC’s authorities under Section 5 likely would not be preemptive, a new national rule would add a new layer of regulation that would further confuse consumers and make compliance even more difficult for companies, particularly small businesses. A new national layer of regulation to a state patchwork would disproportionately impact small businesses as they would not have the same resources for compliance as larger firms. According to a report by ITI, a 50-state patchwork of laws could cost the economy one trillion dollars over ten years, with small businesses alone taking a \$200 billion hit.<sup>5</sup>
- **The FTC Gives the Public No Meaningful Notice and its ANPR amounts to a Fishing Expedition.** The FTC’s notice of proposed rulemaking asks 95 questions to the public starting with effectively how all businesses are using data and how that harms consumers. The FTC is on a fishing expedition and not meeting the FTC’s statutory requirements to provide the public meaningful notice of what it plans to regulate. We agree with former Commissioner Noah Phillips that “[t]his scattershot approach creates two obvious problems: stakeholders cannot discern how to engage meaningfully and provide comment, and the lack of focus for their comments will give the Commission a corollary ability to proceed in any direction it chooses.”<sup>6</sup> We also share the same concerns of Commissioner Christine Wilson that “the ANPRM

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<sup>4</sup> <https://www.cnn.com/2019/10/05/california-consumer-privacy-act-ccpa-could-cost-companies-55-billion.html>

<sup>5</sup> <https://itif.org/publications/2022/01/24/50-state-patchwork-privacy-laws-could-cost-1-trillion-more-single-federal/>

<sup>6</sup>

[https://www.ftc.gov/system/files/ftc\\_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf)

wanders far afield of areas for which we have clear evidence of a widespread pattern of unfair or deceptive practices.”<sup>7</sup>

Given the importance of providing certainty for both consumers and business, the many deficiencies with the Commission’s advanced notice of rulemaking, and the need for Congress to clearly authorize an economywide data protection standard, we urge the Commission to halt its rulemaking and work to help pass national privacy legislation.

Sincerely,

American Consumer Institute for Citizen Research  
American Escrow Association  
Association of Test Publishers  
Citizens Against Government Waste  
Consumer Data Industry Association  
Insights Association  
Interactive Advertising Bureau  
National Business Coalition on E-Commerce & Privacy  
Privacy for America  
R Street Institute  
Real Estate Services Providers Council  
Small Business & Entrepreneurship Council  
Taxpayers Protection Alliance  
U.S. Chamber of Commerce