



January 26, 2022

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Submitted via <https://www.regulations.gov/commenton/FTC-2021-0070-0002>

Re: Petition for Rulemaking to Prohibit Surveillance Advertising, Docket No. FTC–2021– 0070; File No. R207005

The Interactive Advertising Bureau (“IAB”) provides these comments in response to a petition filed by Accountable Tech (“Petitioner”) with the Federal Trade Commission (“FTC” or “Commission”) titled *Petition for Rulemaking to Prohibit Surveillance Advertising* (“Petition”).¹ For the many reasons described in the comments below, the Commission **should deny this petition** and not undertake the misguided and wasteful rulemaking process requested by the Petitioner. The Commission should recognize the petition for what it is, a self-interested stunt manufactured by competitors to further their own economic position through regulatory arbitrage.

Founded in 1996 and headquartered in New York City, the IAB (www.iab.com) represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, the IAB develops both technical standards and best practices. In addition, IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing. The organization is committed to professional development and elevating the knowledge, skills, expertise, and diversity of the workforce across the digital advertising and marketing industry. Through the work of our public policy office in Washington, D.C., the IAB advocates for our members and promotes the value of the interactive advertising industry to legislators and policymakers.

IAB supports the thriving, competitive, and multifaceted ad-supported open Internet. The Internet is built on the continuous exchanges of data between devices and servers; without these data exchanges, the Internet and its social, cultural, economic, and personal benefits would not exist. The reasonable use of data provides tremendous benefits to consumers, the economy, and society as whole, and helps assure our nation’s current competitive position globally. Reasonable uses of data should not be demonized, and certainly should not be banned, based on the unsupported assumptions and twisted tautologies on which the Petition relies to seek the elimination of the commercial Internet. Were the Petition to be granted, the FTC would disenfranchise the several million businesses that advertise on the Internet to attract, retain, and grow new customers, as well as the hundreds of millions of Americans that access it.

¹ Accountable Tech, *Petition for Rulemaking to Prohibit Surveillance Advertising*, FTC-2021-0070-0002 (Dec. 27, 2021), <https://www.regulations.gov/document/FTC-2021-0070-0002> [hereinafter *Petition*].



The untruths, distortions, and baseless assertions contained within the Petition are innumerable. These comments focus on three key fallacies that are woven throughout the Petition:

1. **Data-driven advertising limits competition.** This is false. Data-driven advertising fuels competition across various markets, as we show below backed by multiple fact-based economic studies.
2. **Data-driven advertising harms online publishers.** This is false. The use of data to deliver relevant advertising to consumers across the Internet has been shown through various studies to *increase* the revenue for publishers and other content providers.
3. **Data-driven advertising harms consumers and degrades their experiences online against their will.** This is false. Surveys show that consumers desire relevant content and advertising, preferring it to less relevant advertising. Consumers like the ad-supported Internet, understand the value it brings to their lives, and do not want it disrupted.

The Petitioner claims to be in favor of “competition,” and blames an undefined practice it calls “surveillance advertising” for the illusory parade of outlandish allegations the Petition lays at the feet of data-driven advertising. However, the poorly argued and unsupported assertions in the Petition suggest the Petitioner’s true goal is to declare the commercial Internet itself an unfair business practice. The only evidence the Petitioner musters is the success the Internet has had in opening markets, and the successes new entrants have had in both new and existing markets. To the contrary, our comments show through empirical evidence, not theoretical conjecture, that data-driven advertising helps create thousands of new small, medium, and self-employed businesses across multiple sectors of the economy, maintain tens of millions of jobs across the nation, and deliver trillions of dollars in consumer value. The draconian rules sought by the Petitioner would return to a *status quo ante* in which most smaller and local companies simply could not compete in an economy dominated by giant marketers and enormous media companies.

The comments that follow are backed by rigorous academic research and real-world studies and examples of how data-driven advertising, and the various markets and consumer benefits it supports, increases competition in the United States and supports millions of companies across the country. Included among these companies are tens of thousands of online publishers that rely on data-driven advertising to deliver the content and services that consumers rely on to be better informed, entertained, and to connect with one another. Section I provides three compounding arguments and examples of the vibrant marketplace, consumer benefits, societal goods, and positive economic impacts that data-driven advertising has brought to the United States. This section cites the real-world, concrete, data about the benefits data-driven advertising generates. Section II addresses the shaky, if not broken, legal ground upon which the Petition suggests the Commission should assert its ability to issue sweeping, economy-wide competition regulations. Finally, Section III highlights the lack of transparency around the Petitioner itself—a paucity of information that runs counter to the goals the Commission stated its new petition process is meant to achieve.

Overall, as explained below, the FTC should not undertake a rulemaking process that will waste its resources based on the poorly argued and unsupported Petition to exercise a legal



authority the Commission itself has exercised just once in its century-long history. Creating a rule that would effectively ban an entire class of advertising activity that has formed the bedrock upon which the modern commercial Internet was built based on the flawed, poorly argued, and unsupported claims in the Petition would be a complete waste of the Commission’s resources.

I. Advertising, especially data-driven advertising, provides immense value to society and the economy by opening new markets to small, mid-size, and large businesses alike to compete with one another, connect with consumers, and provide immense value across the nation.

For decades data-driven advertising has facilitated innovation and significant growth in the economy. This growth is fueled not only by the largest firms, but also by the explosion of small and mid-sized companies, including sole-proprietors, that use data and the Internet to compete nationwide with market incumbents and newcomers of all sizes. Recognizing the significant role data-driven advertising plays in the economy, we urge the Commission to deny the Petition and not take radical action premised on the baseless assertions contained in the Petition.

While the Petitioner claims that only some firms are the beneficiaries of the data-driven advertising marketplace, actual academic research shows otherwise. Digital advertising, and the Internet economy it supports and drives, contributed \$2.45 trillion to the United States’ gross domestic product (“GDP”) in 2020, accounting for 12 percent of GDP.² That is a growth rate of 22 percent between 2016 and 2020, in a total economy that grew only 2-3 percent per year during that same period.³ Further, the data-driven advertising-supported marketplace created jobs for more than 17 million Americans in 2020. Most of those jobs were created not by the largest Internet platforms, but instead by small firms and self-employed individuals in all 50 states.⁴ In fact, self-employed individuals and people working in small teams of five or fewer people made up 19% of the Internet job total.⁵ Additionally, the digital advertising ecosystem is much broader and deeper than the Petition posits, encompassing retailers, e-commerce stores, publishers, content developers, service providers, manufacturers, software developers, systems vendors, market research firms, CRM providers, security systems providers, advertising and marketing agencies, games companies, streaming video and audio services, and individual self-employed creators. For instance, there are 200,000 full-time equivalent jobs in the online creator economy.⁶ This number is close to the combined memberships of the following craft and labor unions: SAG-AFTRA (160,000), the American Federation of Musicians (80,000), the Writer’s Guild (24,000), and the Authors Guild (9,000).⁷ There are at least 5.5 million full-time and part-time jobs which otherwise would not have existed that have been generated by smaller platforms such as AirBnB, Lyft, eBay,

² John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5, (Oct. 18, 2021), https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf [hereinafter *Market-Making*].

³ *Id.*

⁴ *Id.* at 5-6.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 7.



Instacart, and Etsy.⁸ Rather than limiting competition, the digital advertising ecosystem has generated untold levels of access to new market entrants and created the vibrant Internet economy that has placed the United States at the head of the global marketplace.

In addition, while the Petition seeks the demise of a practice it calls “surveillance advertising”⁹ based on the spurious claim that this practice causes competitive and consumer harm, data-driven advertising has been the basis of a hundred-plus years of economic development and growth. For instance, advertising based on data and consumer interests helped create classic American advertising brands as well as the expanding direct-to-consumer market. Five of the top 10 “most loved brands in America” are digitally-native brands.¹⁰ Among Generation Z consumers – those born between 1997-2012 – 12 of the top 25 most loved American brands are Internet natives.¹¹ Over time, the ability of companies and consumers to engage with data-driven advertising has evolved, but the basic principle of delivering the right message to the right consumers at the right time in the right place is now the backbone of the American business-to-consumer economy, and the expectation among consumers. Below we provide clear examples of the competitive marketplace that data-driven advertising helps create and support, and of the societal good that data-driven advertising unlocks. The Commission should not take sweeping action based on the groundless assertions contained in the Petition to disrupt trillions of dollars in economic activity and such a large and vibrant part of the economy by effectively banning online advertising.

- a. **The digital advertising ecosystem fosters a competitive marketplace for advertisers, publishers, and technology companies. Overly broad regulations would limit competitive opportunities and lead to more marketplace concentration, not less.**

The current data-driven, ad-supported commercial Internet relies on a mix of different advertising technologies and techniques. While the Petition claims that “surveillance advertising” causes market concentration, unfair competition, and the demise of local media, multiple studies by leading economists show that unreasonable regulation of tracking and interest-based advertising (“IBA”)¹² would lead to “more concentrated” control of the ad-supported Internet.¹³ In stark

⁸ *Id.* at 8.

⁹ We note that through the over 100 times the Petition uses the term “surveillance advertising” it does not define the term in any way that would allow for entities other than the Petitioner, including the Commission, to truly understand the activity to which the Petition objects. This vagueness is likely purposeful, if unhelpful, for making a coherent reading of the Petition, suggesting that the Petitioner seeks to ban most, if not all, digital advertising.

¹⁰ Morning Consult, *Top 50 Most Loved Brands in America* (2020), <https://morningconsult.com/most-loved-brands-2020>.

¹¹ Morning Consult, *Special Report: Gen Z’s Most Loved Brands* (2020), https://go.morningconsult.com/rs/850-TAA-511/images/200825_MLB-2020_GenZ-Report.pdf.

¹² A term generally defined as the collection and use of data from a computer or device, as well as associated computers and devices, to deliver advertising to those computers and devices based on inferred interests based on the data collected, used, and transferred from those computers and devices. *See generally* Digital Advertising Alliance, *Self-Regulatory Principles and Guidance* (2018), <https://youradchoices.com/principles>.

¹³ *See e.g.*, John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), <https://www.iab.com/wp->



contrast to the Petition’s claims, the data-driven advertising ecosystem encourages myriad advertisers, manufacturers, service providers, agencies, distributors, retailers, software developers, news reporters, entertainment services, and other content, product, and service creators to enter the Internet ecosystem. The Commission should not follow misguided calls to effectively limit competition in the data-driven economy.

The Petitioner claims that “surveillance advertising” has helped stifle competition.¹⁴ This assertion is false. Data-driven advertising technology, and the reasonable uses of data that such technology relies on to function, has helped usher in an unprecedented amount of free and low-cost experiences online and in mobile environments that are easily accessible to consumers. This ad-fueled revolution has created and continues to create more jobs, businesses, services, and entertainment options for consumers and has drastically increased the places and mediums through which businesses can connect to consumers.

Prior to the explosion of content generated by the commercial Internet and enabled by data-driven advertising, consumers had access to a limited set of newspapers, radio stations, television stations, shopping experiences, and other content based on where they happened to live. Now, consumers have access to tens of thousands of content publishers and online services across multiple channels, unlimited by geographic constraints, generating growth in the content economy with corresponding employment opportunities. Thanks to data-driven advertising, the total employment in the online news market has risen threefold since 2008, to 142,000 jobs, 73% more than were employed in 2016.¹⁵ Additionally, 2.1 million e-commerce companies were operating in the United States in 2020, generating \$715 billion in revenue.¹⁶ Many of those millions of companies are small businesses and sole-proprietorships that are able to achieve success and grow their customer base thanks to data-driven advertising technologies that lower barriers to entry and broaden geographic reach.¹⁷

For example, one study found that 67% of surveyed small businesses used data-driven advertising to lower their overall advertising costs, with 75% of those surveyed small businesses reporting that digital ads specifically helped them find new customers.¹⁸ Sales growth at small companies using data-driven advertising was 16% greater than at small businesses that did not leverage data-driven marketing during the period of study.¹⁹ Thanks to the tools and technologies made available by the data-driven advertising ecosystem, consumers are able to find these new and innovative businesses. Now, instead of advertising to the neighborhood or town where a business sets up shop, a new company is able to access a nationwide or global audience to create

<content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf> [hereinafter *Socioeconomic*]; Deloitte Dynamic Markets, *Small Business Through the Rise of the Personalized Economy*, 11 (May 2021); *Market-Making* at 5.

¹⁴ See *Petition* at 6.

¹⁵ *Market-Making* at 7.

¹⁶ *Id.*

¹⁷ See Deloitte Dynamic Markets, *Small Business Through the Rise of the Personalized Economy*, 11 (May 2021).

¹⁸ *Id.* at 16.

¹⁹ *Id.*



a diverse consumer base that helps fuel robust growth—and enable even more competition with established entities.²⁰

Evidence also exists that competitiveness is harmed not by data-driven advertising, but rather by unfair and unreasonable efforts to restrict data-driven advertising. For example, since Apple restricted access to its Identifier for Advertising (“IDFA”), the cost of acquiring new customers for a business has increased tenfold.²¹ A nationwide prohibition on data-driven advertising would be incalculably more damaging than the already deleterious, unfair obstructions to trade imposed by the world’s richest technology company.

One pointed example of the Petition’s failure to fully grasp and understand the nature of the ad-supported Internet is the Petition’s false claim that existing digital advertising practices “drove a stake” through local “traditional” advertising platforms like local news outlets.²² Instead, the open Internet’s independent publishers and other companies that rely on data-driven advertising—including news outlets—would lose between \$32 and \$39 billion in annual revenue by 2025 if data-driven advertising were to be limited by unnecessary Commission regulations.²³ That action would bring about the loss of news outlets the Petition professes to care so much about.

The consolidation and disappearance of local news and advertising is a longstanding trend dating back at least to the rise of television in the 1950s and 60s. By the 1970s, local newspapers had declined to such an extent because of consumer and advertiser flight to television that President Richard Nixon signed the Newspaper Preservation Act of 1970 to grant an antitrust exemption to local news owners for certain advertising revenue sharing agreements.²⁴ Yet during this entire period, another government policy - a 1975 ban on newspaper-television station cross-ownership - prevented newspapers from following their consumers into the new medium of television, thus driving more newspaper closures and consolidation.²⁵ Data-driven Internet advertising, by contrast, has helped generate a proliferation of new news and information outlets across limitless interest categories. Banning data-driven advertising would repeat the policy errors of the past, and hasten the closures and consolidation of news and information outlets.

As the local news media market consolidated on its own, thanks in part to government action, the data-driven Internet ecosystem now supports far more media outlets and voices than

²⁰ *Id.* at 23.

²¹ “Loose-leaf tea seller Plum Deluxe used to gain a new customer for every \$27 it spent on Facebook and Instagram ads. Then, Apple Inc. introduced a privacy change restricting how users are tracked on mobile devices.” “Now, the company spends as much as \$270 to pick up a new customer. “That’s a huge jump and one that we just can’t absorb.” Patience Haggin & Suzanne Vranica, WSJ, *Apple’s Privacy Change Is Hitting Tech and E-Commerce Companies. Here’s Why.* (Oct. 2021), <https://www.wsj.com/articles/apples-privacy-change-is-hitting-tech-and-e-commerce-companies-11634901357>. See also SBE Counsel, *Online Advertising Delivers BIG Benefits for Small Businesses* (2019), <https://sbecouncil.org/2019/09/10/online-advertising-delivers-big-benefits-for-small-businesses/>.

²² *Petition* at 15.

²³ See *Socioeconomic* at 4.

²⁴ See 15 U.S.C. § 1801 *et seq.*

²⁵ Randall Rothenberg, *IAB, Big Tech Didn’t Kill the News. (And the “News” Isn’t Dead.)* (Nov. 2, 2020), <https://www.iab.com/blog/big-tech-didnt-kill-the-news-and-the-news-isnt-dead/>.



those few that were able to take advantage of the direct advertising sales supported by the Petition. In fact, data-driven advertising supports more effective advertising and is the main driver of economic value for small and mid-sized publishers that cannot afford to field expensive, direct, advertising sales forces. Data-driven advertising allows businesses to reach consumers with advertisements and messages that are relevant to them wherever they live, allowing publishers and media outlets to exercise unprecedented reach to help drive revenue to support their important work.²⁶ The Petitioners are asking the Commission to preemptorily decree an industrial policy that would favor the declining segments of the news and publishing industry and prevent both established and newer news and other content providers from adopting the practices that are propelling growth in their sector.

Not only does data-driven advertising increase the competition for consumer facing digital operations, but it also creates new business-to-business opportunities for providers of data-driven advertising technology and other business operations. Counter to the Petition's assertion, the Internet marketplace continues to be competitive. The Petition claims that only a limited number of firms are able to help businesses reach consumers online. However, the Petitioner contradicts itself later in its argument by acknowledging that there are a "slew of market participants" competing against the larger firms.²⁷ The competitive nature of the digital advertising ecosystem is further supported through a review of the data-driven advertising industry's own self-regulatory choice tool (discussed in more substance below in Section I.c). That tool allows consumers to make choices about data collection, use, and transfer for advertising purposes for over 120 different companies.²⁸ The Petition conveniently ignores these companies and their services, but that does not mean they do not exist in reality to compete and impact the marketplace. Compounding the absurdity of the Petitioner's claim that data-driven advertising represents a "price hike" for advertisers is the actual cost of data-driven digital advertising versus advertising in other media. The average cost-per-thousand impressions ("CPM") in direct mail in the United States is around \$300; for prime-time television advertising about \$35; for data-driven digital advertising, about \$2.80.²⁹ Quite clearly, were the Commission to grant the Petitioners' request to ban Internet advertising, the immediate effect would be a 12x to 100x increase in advertising costs, which most companies, in order to survive, would be forced to pass on to consumers in the form of higher prices.

Further, one study found that across approximately forty different sectors of the economy, the Internet's data-driven advertising drove market entry, employment, and revenue growth.³⁰ The democratizing of advertising and consumer connectivity has been a boon to the rapid emergence of self-employed, small, and mid-sized entities across the economy. While some digital businesses

²⁶ See *Market-Making* at 5; J. Howard Beales and Jeffrey A. Eisenach, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content* (Jan. 2014), https://digitaladvertisingalliance.org/sites/aboutads/files/files/DAA_images/fullvalueinfostudy%20-%20Navigant.pdf.

²⁷ Compare *Petition* at 6 with *Petition* at 17.

²⁸ See Digital Advertising Alliance, *WebChoices* (2021), <https://optout.aboutads.info/>.

²⁹ Stephanie Faris, Chron, *What Is a Typical CPM?* (Apr. 15, 2019), <https://smallbusiness.chron.com/typical-cpm-74763.html>.

³⁰ See generally, *Market-Making*.



have large user bases due to their valuable and useful products and services, and account for large amounts of the revenue and jobs created by the digital economy, it is clear that the data-driven advertising technology the Petition demonizes has in fact increased the amount of competition those large companies face. Year after year, new media sources, products, and services come online and find the audience and consumers they seek to serve through data-driven advertising. Consumers previously had access to only a handful of television and radio stations, one or two newspapers, and the stores within their community. Today, consumers have access to countless options for where to place their attention and where to obtain the products and services they desire. Data-driven advertising makes this vibrant and competitive ecosystem possible, contrary to the false assertions in the Petitioner.³¹

b. Data-driven digital advertising increases revenue for online publishers and the sustainability of Internet companies.

The Petition claims that the current data-driven advertising ecosystem harms publishers by providing them poor products and services.³² The truth is that data-driven advertising provided by hundreds of companies to countless websites, mobile apps, and other online consumer-facing properties increases publishers' revenue. Data-driven advertising is the resource that enables publishers to provide free and low-cost content to consumers, grow their audience, and generate increased revenues.

Several studies have challenged the claim the Petition parrots that the technology that enables data-driven relevant advertising is unnecessary and that the loss of such technology would increase revenues at online publishers. One study found that publisher ad prices could fall as much as 52% from the loss of targeting.³³ While such a price reduction may be viewed as a positive by some, it has a corresponding and significant impact on publisher revenue, which could cause a publisher's revenue to fall two to three times below what would have been generated through the use of data.³⁴ Although online publishers of all sizes rely on data-driven advertising, smaller

³¹ The same technology that powers this commercial economic growth is used by governments, nonprofits, and other public safety organizations. Data-driven messaging sent to various communities has also worked to encourage members of hard to reach communities to receive COVID-19 vaccinations that is most meaning for them. See Jeremy B. Merrill and Drew Harwell, *Telling conservatives it's a shot to 'restore our freedoms': How online ads are promoting coronavirus vaccination*, WASHINGTON POST (Aug. 24, 2021), <https://www.washingtonpost.com/technology/2021/08/24/vaccine-ad-targeting-covid/>. A particularly striking example of this dynamic is the Federation for Internet Alerts, which partners with the U.S. National Center for Missing and Exploited Children and the U.S. National Oceanographic and Atmospheric Agency to deliver life-saving alerts when a child is abducted or when a natural disaster is imminent. See, e.g., Digital Advertising Alliance, *Summit Snapshot: Data 4 Good – The Ad Council, Federation for Internet Alerts Deploy Data for Vital Public Safety Initiatives* (Sept. 1, 2021), <https://digitaladvertisingalliance.org/blog/summit-snapshot-data-4-good-%E2%80%93-ad-council-federation-internet-alerts-deploy-data-vital-public>; Federation for Internet Alerts, *About Us*, <http://www.internetalerts.org/about>.

³² *Petition* at 36.

³³ Garret Johnson *et al.*, *Consumer Privacy Choice in Online Advertising: Who Opt's Out and at What Cost to Industry?* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020503.

³⁴ *See Id.*



publishers depend on the practice for a significantly greater portion of their advertising revenue.³⁵ The thousands of media companies and news outlets that rely on data-driven advertising would be irreparably harmed by the Petition’s suggested rules.

Far from being the reason online publishers may face revenue challenges, data-driven advertising is the reason that more than half of all advertising spending in the United States has moved to digital media, a change that has buoyed online publishers.³⁶ Should the Commission follow through with a rulemaking banning data-driven advertising, it is likely that between “\$32 billion and \$39 billion of advertising and ecosystem revenue would move away from the open web by 2025.”³⁷ This type of result was observed in a study of the European mobile app marketplace. The European Union has considered a ban on data-driven advertising, and the study found that a ban would threaten “about €6 billion of advertising income for app developers. As a result [of a ban], European consumers would face the prospect of a radically different Internet: more ads that are less relevant, lower quality online content and services, and more paywalls.”³⁸ In fact, implementation of the General Data Protection Regulation (“GDPR”) in Europe has already foreshadowed what is likely to occur in the U.S. should unnecessary and unfair data constraints be implemented: It helps large firms grow their reach and revenues at the expense of smaller firms.³⁹ Indeed, small businesses in Europe have not flourished in the ways their U.S. counterparts have. For the above reasons, a change like the one the Petition asks for, contrary to the Petition’s assertions, would increase market concentration, limit consumer choice, negatively impact the use of the Internet, and remove competition from the Internet.⁴⁰

c. Consumers value the ad-supported Internet and the relevant advertising it delivers and understand their choices regarding data-driven marketing. Consumers are not harmed by data-driven advertising.

The Petition absurdly alleges that data-driven advertising practices have caused a price hike on consumers, despite the free, advertising-subsidized services consumers receive, charging that this is because product quality is “degraded” by increased advertising and “diminishing” user

³⁵ Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), <https://digitaladvertisingalliance.org/press-release/study-online-ad-value-spikes-when-data-used-boost-relevance>. See also Digital Advertising Alliance, *New Study Shows Ad Revenue Benefit through Cookies – Reinforcing Previous 2014 DAA Research: We Can Have Both Personalization & Ubiquitous Privacy Protections* (2019), <https://digitaladvertisingalliance.org/blog/new-study-shows-ad-revenue-benefit-through-cookies-%E2%80%93-reinforcing-previous-2014-daa-research-we>.

³⁶ *Market-Making* at 8.

³⁷ See *Socioeconomic* at 4.

³⁸ Center for Data Innovation, *The Value of Personalized Advertising In Europe* (Nov. 22, 2021), <https://www2.datainnovation.org/2021-value-personalized-ads-europe.pdf>.

³⁹ Nick Kostov & Sam Schechner, *Wall. St. Jour.*, *GDPR Has Been a Boon for Google and Facebook* (Jun. 17, 2019), <https://www.wsj.com/articles/gdpr-has-been-a-boon-for-google-and-facebook-11560789219>. Poorly considered legislation, like the California Consumer Privacy Act (“CCPA”), also harm small businesses disproportionately to larger entities due to the high cost of compliance for limited corresponding consumer benefit. See Attorney General’s Office California Department of Justice, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* (Aug. 2019) (finding that compliance with the CCPA could cost \$55 billion dollars for companies).

⁴⁰ *Id.*



control. This assertion is counter to both consumer surveys and economic analysis, as explained below. Instead, consumers desire free or low-cost access to the online services that digital advertising provides, prefer that ads they see be more relevant to their interests, and understand the value, exchange, and controls offered to them regarding data-driven advertising.

The Petition makes the unsupported assertion that consumers would not willingly engage with data-driven advertising, and that the value consumers believe they are receiving from the ad-supported services they use has declined over time. Actual research, however, shows the opposite. One study found that more than half of surveyed consumers desire relevant advertising, and a significant majority desire tailored discounts.⁴¹ Additionally, 90 percent of consumers in a different survey stated that free content was important to the overall value of the Internet, and 85 percent stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.⁴²

Moreover, consumer surveys show that the use of data for advertising is the least important issue to consumers when they consider digital privacy protections, and that consumers want any privacy regulation to protect the ad-supported Internet they enjoy today.⁴³ Additionally, surveyed consumers placed a value on the ad-supported digital services they use for free at more than \$1,400 in 2020, an increase of more than \$200 from 2016.⁴⁴ Another economic analysis published by the Massachusetts Institute of Technology (“MIT”) found that consumers place a value of tens of thousands of dollars per year on the free, ad-supported digital services they receive, including search engines, email, maps, video, e-commerce, social media, messaging, and music⁴⁵—a consumer surplus totaling trillions of dollars that would be wiped away if the Petitioner’s request were granted.

An example of the explosive growth in consumer surplus provided by data-driven advertising online is in the digital entertainment sector – a sector that was in its infancy fourteen years ago. Today, podcasts, gaming, streaming video and music, and the rest of the digital entertainment sector generate \$40 billion of revenue from Internet-related activity, and this sector doubled in employment in the last four years to approximately 34,000 people.⁴⁶ Data-driven

⁴¹ Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), https://www.thompsoncoburn.com/docs/default-source/Blog-documents/consumer-attitudes-toward-relevant-online-behavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0.

⁴² Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), <https://digitaladvertisingalliance.org/press-release/americans-value-free-ad-supported-online-services-1400year-annual-value-jumps-more-200>.

⁴³ Digital Advertising Alliance, *U.S. Consumer Attitudes on Privacy Legislation* (2018), https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/Nov2018-privacy-legislation-consumer-survey.pdf.

⁴⁴ Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), <https://digitaladvertisingalliance.org/press-release/americans-value-free-ad-supported-online-services-1400year-annual-value-jumps-more-200>.

⁴⁵ Erik Brynjolfsson *et. al.*, Proceedings of the National Academy of Sciences, *Using massive online choice experiments to measure changes in well-being* (Apr. 9, 2019), <https://www.pnas.org/content/116/15/7250>.

⁴⁶ *Market-Making* at 8.



advertising helped create a whole new sector of the economy, offering consumers new entertainment and information channels, access to myriad new and diverse voices that previously had been invisible to them. Without the support of data-driven advertising, consumers would not be able to derive the very valuable benefits provided by these companies.

What the Petitioner asks the Commission to undertake would not help consumers, but would in fact harm them with higher prices and fewer choices as the open ad-supported web contracts. As the Commission itself acknowledged in previous comments, if a subscription-based model replaced the ad-supported model for the Internet, consumers would likely not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they do today.⁴⁷

Consumers also understand the choices they have regarding data-driven advertising, and few of them choose to opt out of the practice. Consumers have various opportunities to opt out of data-driven advertising. For instance, in California, Virginia, and Colorado, laws will soon come into effect that allow state residents to opt out of interest-based advertising.⁴⁸ In addition, self-regulatory frameworks, such as the Digital Advertising Alliance Self-Regulatory Principles (“DAA Principles”), allow all consumers, regardless of their state of residency, to opt out of interest-based advertising and have been recognized by the FTC as providing important consumer protections.⁴⁹ Consumers recognize the DAA AdChoices Icon and understand that it provides easy access to data controls.⁵⁰ Even though consumers are offered various ways to opt out of data-driven advertising, studies show that few actually exercise that choice.⁵¹

With all of this information publicly available to the Petitioner as it drafted the Petition, it is clear that the Petitioner’s preconceived prejudice against advertising is at the center of the Petition’s requested remedy. While ignoring both consumers’ stated and revealed preferences for free, online products and services—supported by more relevant advertising delivered through the

⁴⁷ Federal Trade Commission, *In re Developing the Administration’s Approach to Consumer Privacy*, 15 (Nov. 13, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

⁴⁸ California Privacy Rights Act of 2020, Cal. Civ. Code § 1798.120; Virginia Consumer Data Protection Act, Va. Code Ann. § 59.1-573(A)(5); Colorado Privacy Act, Colo. Rev. Stat. § 6-1-1306(1)(a). Notably, none of these states attempted to ban the practice, or even require consumers opt-in to receiving data-driven advertising. Democratically accountable legislatures do not share the Petitioner’s views.

⁴⁹ Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (Jul. 2009), https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/seven-principles-07-01-09.pdf; FTC, *Cross-Device Tracking, An FTC Staff Report*, 11 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf (“FTC staff commends these self-regulatory efforts to improve transparency and choice in the cross device tracking space...DAA [has] taken steps to keep up with evolving technologies and provide important guidance to their members and the public. [Its] work has improved the level of consumer protection in the marketplace.”).

⁵⁰ Digital Advertising Alliance, *New DAA-Commissioned Survey Shows ‘AdChoices’ Icon Recognition Has Grown to 82 Percent in 2021* (Jun. 3, 2021), <https://digitaladvertisingalliance.org/blog/new-daa-commissioned-survey-shows-%E2%80%98adchoices%E2%80%99-icon-recognition-has-grown-82-percent-2021>.

⁵¹ Garret Johnson *et al.*, *Consumer Privacy Choice in Online Advertising: Who Optes Out and at What Cost to Industry?* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020503 (finding that 0.23% of consumers choose to opt-out of IBA).



responsible use of data—the Petition claims to speak for consumers and request the Commission take action that would create actual harm. The Commission should not give credence to the Petition’s claims regarding consumer preferences and harm when it is clear that the Petition’s claims of consumer harm are misleading and based solely on conjecture and personal distaste.

II. The Commission does not have clear authority to promulgate a rule banning data-driven advertising under its unfair methods of competition authority.

The Petition asserts that the FTC is able to issue a regulation to ban “surveillance advertising” as an unfair method of competition (“UMC”) pursuant to its authority under Section 6 of the FTC Act to classify corporations and “to make rules and regulations for the purpose of carrying out the provisions of this Act.”⁵² However, that assertion is far from the settled law that the Petition suggests, and it is unlikely that such a rule would withstand judicial review by a modern court applying modern statutory interpretation to the FTC Act. The immense amount of its limited resources the Commission would expend in any attempt to issue a rule as the Petition requests, one that would likely fail to ultimately take effect, would be better served to further other Commission priorities.

While there is precedent from almost four decades ago suggesting that the FTC can issue broad UMC rules,⁵³ Congress’s subsequent limitations of the Commission’s ability to regulate unfair or deceptive acts and practices (“UDAP”) and other express grants of authority to the FTC to issue rules suggest that Congress did not intend such a power to be within the Commission’s ambit. In particular, a modern court may not uphold the Commission’s ability to promulgate broad UMC rules pursuant to Section 6 of the FTC Act. The 1973 decision affirming the FTC’s Section 6 authority to promulgate broad rules is on unsteady legal footing.⁵⁴ Since the 1973 decision, Congress has repeatedly and explicitly given the FTC Administrative Procedure Act based notice and comment rulemaking authority through specific statutory directives, such as those in the Children’s Online Privacy Protection Act and the Telemarketing and Consumer Fraud and Abuse Prevention Act.⁵⁵ Congress has not, however, granted the FTC rulemaking powers relating to its broad Section 5 authority to prohibit UDAP, nor has it clarified the Commission’s alleged rulemaking authority under Section 6 of the FTC Act. Instead, Congress provided the FTC explicit rulemaking authority for UDAP under the Magnuson-Moss Warranty Act, which set forth detailed procedures and guardrails for rulemaking under the FTC’s Section 18 authority.⁵⁶ Congress clearly knows how to grant the FTC with rulemaking authority, and it has not done so related to UMC regulations.

Moreover, the FTC has asserted its supposed authority to issue regulations under its Section 6 authority just once in history by issuing rules in 1968 related to discriminatory practices in the

⁵² *Petition* at 8-10; 15 U.S.C. § 46(g).

⁵³ *National Petroleum Refiners Association v. Fed. Trade Comm’n*, 482 F. 2d 672 (D.C. Cir. 1973).

⁵⁴ See generally Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. CHAMBER OF COMMERCE (Aug. 12, 2021) [hereinafter, *Chamber 2021*].

⁵⁵ Children’s Online Privacy Protection Act, 15 U.S.C. § 6502; Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102.

⁵⁶ 15 U.S.C. § 57(a).



clothing industry.⁵⁷ In fact, the FTC did not create any new UMC rules after the 1973 case. The Commission, in the multiple decades since that ruling, appears to believe that it is without authority to promulgate UMC rules through its own lack of action. Moreover, the standards of statutory interpretation have changed since 1973, and courts no longer allow Congress to “hide elephants in mouseholes.”⁵⁸ Indeed, the Supreme Court stated just this month that when an agency fails to act on a claim of rulemaking authority in its history, and Congress has failed to provide a specific grant of authority to do so, it is a “telling indication” that such authority is not valid.⁵⁹

Further, issuing a UMC rule banning the use of data to deliver advertising based in Section 6(g) of the FTC Act, as the Petition requests, would certainly fail to be the specific grant of authority the Supreme Court expects when an agency seeks to regulate activity of “vast economic and political significance,” such as online advertising and the basis for the commercial Internet.⁶⁰ Clearly, modern courts give the nondelegation doctrine more credence than the D.C. Circuit did in 1973, and the Commission should be aware of that fact before it commits resources to a misguided cause. Given the evolution of the legal standards that underpin the Commission’s potential ability to issue the rules requested by the Petition, it is likely that the FTC will face an uphill battle to bring to rules into final effect.

Beyond the statutory interpretation issues with a ban on data-driven advertising, such a proposal would likely be in violation of the First Amendment. Commercial speech by a business is constitutionally protected speech.⁶¹ For a regulation to restrict commercial speech and be within constitutional bounds it must: (1) assert a substantial state interest in restricting the speech; (2) directly advance that substantial interest; and (3) be no more extensive than necessary to serve that interest.⁶² The sweeping ban of a century’s worth of established marketing practice requested by the Petition would not directly advance any substantial government interest, and would be more extensive than necessary if such an interest existed. The Commission should not follow the Petitioner into such a fraught and fruitless endeavor.⁶³

⁵⁷ Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry, 16 C.F.R. Part 412 (1968).

⁵⁸ *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

⁵⁹ *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U.S. ___, 8 (2022). See also *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014); *Fin. Planning Ass’n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007).

⁶⁰ *Id.* at 6.

⁶¹ See *Individual Reference Services Group, Inc. v. Fed. Trade. Comm’n.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001); *Boetler v. Advance Magazine Publishers Inc.*, 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

⁶² *Individual Reference Services Group, Inc. v. Fed. Trade Comm’n.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001).

⁶³ See also Daphne Keller, Stanford Law School Center for Internet and Society, *Six Constitutional Hurdles For Platform Speech Regulation* (Jan. 22, 2021), <http://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation>.



III. The Petitioners’ fail to disclose their interests to the Commission, and seek to hide what entities are behind their request.

The FTC’s Rules of Practice for rulemaking petitions require petitioners to explain “how the petitioner’s interests would be affected by the requested action.”⁶⁴ The Petition attempts to meet this requirement, but the disclosure therein amounts to a single sentence about the Petitioner’s nonprofit status.⁶⁵ This disclosure does not shed any light on the interests of the Petitioner, the entities that support the Petitioner, or whether or not the Petitioner speaks on behalf of consumers and the broader Internet marketplace the Petitioner seeks to harm through the Petition. The lack of a clear designation of the Petitioner’s interests leaves the Commission vulnerable to initiating a rulemaking proceeding based on a request from entities or individuals that may, in fact, have competitive and commercial motives for drafting and submitting the Petition in an effort to harm their competitors.

When the FTC updated its Rules of Practice to add more requirements for the petition process, it sought to increase “public participation and accountability around the work of the FTC.”⁶⁶ Then-Commissioner Rohit Chopra supported the rule change because he believed the rule change was intended to provide better clarity on who is funding rulemaking requests.⁶⁷ However, uninformative disclosures like the one in the Petition fail to satisfy the requirement to disclose a petitioner’s interests, both in fact and in spirit, leaving the Commission vulnerable to potential regulatory capture and shedding no additional transparency on the Commission’s work.

* * *

Thank you for the opportunity to submit comments on the Petition. Given the information provided above, it is clear that the Commission should **deny this petition** to take up the rulemaking requested by the Petition. Please contact us with any questions regarding these comments.

Sincerely,

David Cohen
Chief Executive Officer
Interactive Advertising Bureau

Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau

CC: Stu Ingis, Venable LLP
Mike Signorelli, Venable LLP
Rob Hartwell, Venable LLP

⁶⁴ 16 C.F.R. § 1.31(b)(1).

⁶⁵ *Petition* at 3.

⁶⁶ Fed. Trade Comm’n, Press Release, *FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability* (Sept. 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/09/ftc-opens-rulemaking-petition-process-promoting-public>.

⁶⁷ See Fed. Trade Comm’n, *Prepared Remarks of Commissioner Rohit Chopra Regarding New Procedures to Ensure the Right to Petition the FTC* (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596344/p072104choprastatementpetitionrulemaking.pdf.