

AMERICAN BAR ASSOCIATION

Section of Antitrust Law
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5550
FAX: (312) 988-5637
E-mail: antitrust@abanet.org
<http://www.abanet.org/antitrust>

**ASSOCIATION YEAR
2010 - 2011**

CHAIR
Allan Van Fleet
1000 Louisiana Street
Houston, TX 77002-5018

CHAIR ELECT
Richard M. Steuer
1675 Broadway
New York, NY 10019-5820

VICE CHAIR
Theodore Voorhees, Jr.
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401

COMMITTEE OFFICER
Brian R. Henry
Atlanta, GA

**CONSUMER PROTECTION
OFFICER**
William C. MacLeod
Washington, DC

FINANCE OFFICER
Howard Feller
Richmond, VA

IMMEDIATE PAST CHAIR
Ilene Knable Gotts
New York, NY

INTERNATIONAL OFFICER
Roxann E. Henry
Washington, DC

PROGRAM OFFICER
Bernard A. Nigro, Jr.
Washington, DC

PUBLICATIONS OFFICER
Jonathan M. Jacobson
New York, NY

**SECRETARY AND
COMMUNICATIONS OFFICER**
Leslie C. Overton
Washington, DC

SECTION DELEGATES
Christopher B. Hockett
Menlo Park, CA

Joseph G. Krauss
Washington, DC

COUNCIL MEMBERS
Adam J. Biegel
Atlanta, GA

Alicia L. Downey
Boston, MA

Michael G. Egge
Washington, DC

Andrew I. Gavil
Washington, DC

Kenneth L. Glazer
Washington, DC

Ray V. Hartwell, III
Washington, DC

August T. Horvath
New York, NY

Pamela Jones Harbour
Washington, DC

Elizabeth F. Kraus
Washington, DC

Jeffrey A. LeVee
Palo Alto, CA

Mark S. Popofsky
Washington, DC

J. Robert Robertson
Washington, DC

Douglas C. Ross
Seattle, WA

Patrick S. Thompson
San Francisco, CA

Mark D. Whitener
Washington, DC

**NON-U.S. LAWYER
REPRESENTATIVE**
Rachel C. Brandenburger
Washington, DC

**NON-LAWYER
REPRESENTATIVE**
David T. Scheffman
Washington, DC

DOJ REPRESENTATIVE
Christine A. Varney
Washington, DC

FTC REPRESENTATIVE
Jon Leibowitz
Washington, DC

JUDICIAL REPRESENTATIVE
Douglas H. Ginsburg
Washington, DC

**STATE ATTORNEYS
GENERAL REPRESENTATIVE**
James A. Donahue, III
Harrisburg, PA

**BOARD OF GOVERNORS
REPRESENTATIVE**
Carlos A. Rodriguez-Vidal
San Juan, PR

**YOUNG LAWYERS
DIVISION REPRESENTATIVE**
Svetlana S. Gant
Washington, DC

SECTION DIRECTOR
Joanne Travis
Chicago, IL

February 1, 2011

VIA ONLINE SUBMISSION

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

We are pleased to submit these comments on behalf of the Section of Antitrust Law of the American Bar Association (the “Section”). The Section highly values the important contribution of the Federal Trade Commission’s (“FTC”) preliminary staff report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (Dec. 2010)(hereinafter “Report”)¹ to the dialogue underway about the future of privacy law and policy. To assist in furthering that dialogue, these comments address procedural and substantive issues raised by the Report. The views expressed in these comments have been approved by the Section’s Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Based largely on themes and concepts developed through a series of privacy roundtables held by the Commission in 2009 and 2010, the Report sets out an ambitious proposed framework for how businesses should protect consumers’ privacy. At the outset of the Report, the staff notes the substantial interests at stake in the evolving technology of new media:

Stakeholders emphasized the need to improve transparency, simplify the ability of consumers to exercise choices about how their information is collected and used, and ensure that businesses take privacy-protective measures as they develop and implement systems. At the same time,

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

commenters and participants urged regulators to be cautious about restricting the exchange and use of consumer data in order to preserve the substantial consumer benefits made possible through the flow of information. Participants noted, for example, that the acquisition, exchange, and use of consumer data not only helps to fund a variety of personalized content and services, but also allows businesses to innovate and develop new products and services that offer consumers convenience and cost savings.²

The Report then addresses these interests in its recommendations, noting for example that the design of reasonable privacy programs should take into account the amount and sensitivity of the data collected and the uses to which the data are put.³ Likewise, the Report recognizes that consumers' expectations will vary according to the nature of their use of media, and that these expectations should influence the mechanisms offered to express their choices.⁴ The staff found, however, that consumers often do not understand or appreciate many of the potential uses to which their data can be put, or the potential consequences of those uses. In such circumstances, both the benefits and the costs of the Report's policy recommendations are more difficult to assess, even when the consequences can be substantial for consumers and for businesses.

As explained in more detail below, the Section believes that the benefits and costs should be carefully weighed before proposing that the policies become mandates. The Section also notes several aspects of the Report where clarifications would be helpful to stakeholders attempting to implement its recommendations.

I. Additional Analysis of the Potential Costs and Benefits of the Report's Proposals to Businesses and Consumers Would be Beneficial

The FTC has previously observed, "We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors."⁵ It has

² Report at iv.

³ *Id.* at v.

⁴ *Id.* at vi.

⁵ *California Dental Ass'n*, 121 F.T.C. 190, *37-38 (1996), citing generally, R. McAuliffe, *Advertising, Competition, and Public Policy* (1987); P. Nelson, *Advertising as Information*, 82 JOURNAL OF POL. ECON. 729 (1974); J. Langenfeld and J. Morris, *Analyzing Agreements among Competitors*, 1991 ANTITRUST BULLETIN 651, 667 and n.21; C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation* 29-36 (FTC Bureau of Econ. 1990).

further noted the corollary that reductions in the dissemination of truthful non-misleading information contained in advertising weaken incentives to compete on price and quality and reduce consumer welfare.⁶ Although the FTC has consistently recognized the crucial role that truthful non-misleading advertising plays in fostering competition between current participants in the market and lowering entry barriers for new competitors, the Report does not address the possible competitive effects that may occur as a result of the various proposals, including potentially reducing the flow of information in the marketplace (and services and products that depend on accessibility and use of such data) – which may be an unintended (or intended, depending on the type of data) effect caused by compliance with the Report’s proposals.⁷

The Report’s proposals regarding the collection, use, and sharing of broad categories of consumer information may have undesirable effects on competition and ultimately consumers.⁸ For example, a privacy framework that makes the sharing of customer lists more expensive and difficult could impede the ability of new entrants to reach potential customers through any means, including traditional ways such as catalogs. This would disfavor new entrants who offer innovative products or lower prices. It would conversely favor entrenched competitors who are both sheltered from the impact of new products or lower prices and advantaged by the ability to use the customer lists they have already compiled. This negative effect on competition will be further magnified if the definition of personal information is broadened beyond what has heretofore been considered “private” or “personal” to encompass any information that can reasonably be linked to a specific consumer, regardless of how innocuous that information may be.⁹

⁶ See, e.g., FTC, Staff Comments before the Department of Health and Human Services Food and Drug Administration in the Matter of Request for Comment on First Amendment Issues, Docket No. 02N-0209 (2002) at n.11 (“FTC Staff Comments”).

⁷ The Report does briefly discuss the benefits of data collection and use, such as free content and applications, and notes that workshop participants urged regulators to be cautious about restricting the exchange and use of consumer data. Report at 34-35. The Report does not analyze, however, the likely effects on competition resulting from the changes to data management practices, and potential restrictions on advertising and marketing practices that the contemplated measures could impose.

⁸ “[E]mpirical evidence overwhelmingly demonstrates that consumers benefit in the form of lower prices and higher quality from increased marketplace information.” Brief of the FTC as *Amicus Curiae*, In the Matter of the Petition for Review of Committee on Attorney Advertising Opinion 39, Docket No. 60,003 (N.J. S. Ct. May 8, 2007) at 6.

⁹ Report at 35-38.

Although the Report emphasizes that, to make meaningful choices, consumers need more information about how their data will be used, it does not assess the value of the additional information to the consumers who would benefit from it. We endorse such an assessment as a first step, and recommend an analysis of that value against the potential costs of providing that information. Finally the analysis could address whether consumers would choose more or different information. The staff has noted the potential benefits to consumers, such as facilitating consumer decisions during transactions, and their ability to compare privacy options offered in the marketplace. Some costs of providing such information that may merit further analysis could include a reduction in the choices of providers, products, and/or services available to consumers if they choose not to share their information, and the ways that this could occur directly from such choices, as well as indirectly via changes to existing advertising models (which up to now, to some extent, have been based on more flexible data sharing). For example, consumers who choose not to allow the collection or sharing of broad categories of information may no longer be exposed to offers by competitors selling products or services that provide better value, pricing, or other comparative superiority. This may occur directly because such consumers can no longer be identified by advertisers, or as an unintended consequence of the proposed restrictions to current and future advertising models.¹⁰ In turn, these changes could have negative consequences not just for individual consumers exercising their choice over how their information is used following a particular transaction, but also on the market economy in general. For these reasons, we recommend that the wider scope of potential direct and indirect consequences of the proposed choice model be evaluated before any sweeping changes or recommended best practices based on privacy concerns are adopted.¹¹

A policy that limits the ability of advertisers to access and use information (whether collected directly from consumers, or indirectly through affiliates, different

¹⁰ “Information about price, quality, and other attributes allows buyers to make the best use of their budget by finding the product whose mix of price and quality they most prefer.” H. Beales, *et al.*, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981). “Advertising can also reduce the costs consumers must bear when they seek to obtain and evaluate information from a variety of sources.” FTC, Staff Comments at n.10.

¹¹ As the Supreme Court has stated, “Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

brands within the company, or from third parties) to reach target audiences can have other unintended effects to consumers and the marketplace, which may only be identified through further cost/benefit analysis. A real-world example was highlighted at the FTC's recent workshops on journalism, during which numerous panelists attested that the reduction in advertising revenue has seriously undercut the news reporting function of many news organizations and endangered their existence.¹² This is not merely because online advertising is available in greater supply (thus depressing prices) but also because there are questions about the ability of online advertisements to reach the audience that an advertiser wishes to target. By contrast, local editions of newspapers and broadcast news programs have information about local readers and viewers that allow better audience targeting and thus support higher prices for advertising.¹³ Thus, for example, in the privacy context, further analysis would be beneficial of how the Report's proposals may affect the ability of businesses to provide existing and new products and services with the added costs that may result from the changes proposed, as well as consumer access to both free and discounted online and offline content and services.

In short, the impact to consumer welfare from the proposals regarding information collection and use would benefit from a more fulsome evaluation and weighed against the actual privacy-enhancing benefits and costs of such proposals. With such an analysis, the Commission can be confident that its proposed course will ensure the best outcome for consumers, both individually and in the aggregate.

II. Further Cost/Benefit Analysis May Be Beneficial Before The Commission Recommends a Universal Do Not Track Mechanism for Online Behavioral Advertising

The Report's endorsement of a universal Do Not Track mechanism for providing consumers a choice with respect to online behavioral advertising has

¹² See remarks of Rick Edmonds, Media Business Analyst, The Poynter Institute, noting that advertising display rates have fallen sharply and stating, "[B]asic questions linger about the effectiveness of banner and other display ads..." FTC Workshop: How Will Journalism Survive the Internet Age? Morning Session (Dec. 1, 2009), at 14.

¹³ See remarks of Mark Contreras, Vice Chairman of the Executive Committee, Newspaper Association of America; Senior Vice President/Newspapers, E.W. Scripps Co., stating "While there are no silver bullets, we believe that there are several areas that will help us continue our journalistic missions. First, many newspapers offer services which allow us to sell specific audience to advertisers. This is especially true in the online space as targeted advertising has become an essential part of our future." *Id.* at 25. See also remarks of Susan Athey, Professor of Economics, Harvard University. *Id.* Afternoon Session at 6-10.

garnered much attention, some favorable and some not.¹⁴ Whatever the reviews might say, the fact that the Report now seeks comment on the “potential costs and benefits” of such an approach, the “likely impact if large numbers of consumers elect to opt out,” how Do Not Track would affect the entire online publishing/advertising ecosystem, and “how it would affect consumers,”¹⁵ suggests that the staff’s recommendation of Do Not Track may need to be further explored. While there are potential benefits in Do Not Track or other choice mechanisms that are easily understood and applied in a “just-in-time” manner, the ambiguous evidence that the Commission has collected so far forms an uncertain basis for a universal Do Not Track legal obligation or legislative recommendation. We recommend more analysis of the consumer benefits and harms it seeks to address and the attendant impact that Do Not Track might have on consumers, the advertising industry, advertising-supported web content, and a fragile economic recovery more reliant than ever on e-commerce.

The staff’s endorsement of a universal Do Not Track mechanism appears to be based on the view that behavioral advertising “continue[s] to be largely invisible to consumers” and that “consumers who are aware of the practice are uncomfortable with it.”¹⁶ The Report itself bases its support for Do Not Track on three conclusions: (1) “industry efforts to implement choice on a widespread basis have fallen short;” (2) consumer awareness and adoption of currently available choice mechanisms is low; and (3) “existing mechanisms may not make clear the scope of the choices being offered.”¹⁷ Notably, the Report does not identify specific instances of harm to consumers resulting from online behavioral advertising, but instead seeks to address

¹⁴ See, e.g., Julia Angwin & Jennifer Valentino-Devries, *FTC Backs Do-Not-Track System for Web*, THE WALL STREET JOURNAL, Dec. 2, 2010, available at <http://online.wsj.com/article/SB10001424052748704594804575648670826747094.html?KEYWORDS=Do+Not+Track#printMode>; see also Byron Acohido & Jon Swartz, *Do Not Track Could Revolutionize Online Ad Industry*, USA TODAY, Dec. 13, 2010, available at http://www.usatoday.com/tech/news/2010-12-13-1Adonottrack13_CV_N.htm.

¹⁵ Report at 68.

¹⁶ Hearing on “Do Not Track Legislation: Is Now the Right Time?” Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. On Energy and Commerce, 111th Cong. 2 (2010) (statement of David Vladeck, Dir., Bureau of Consumer Protection, FTC) at pp. 12-13, available at http://energycommerce.house.gov/documents/20101202/Vladeck_Testimony.12.02.2010.pdf.

¹⁷ Report at 64-65.

more general and amorphous harms resulting from inadequate notice and choice offered to consumers in this context.¹⁸

To be sure, the Report references multiple benefits that consumers currently derive from online behavioral advertising, such as free online content and targeted ads.¹⁹ The Report emphasizes that any choice mechanism should preserve these benefits.²⁰ However, the Report does not assess how Do Not Track could or would be implemented in a manner that strikes the proper balance in providing consumers with choice necessary to address the perceived harm while preserving these benefits regularly cited by the Commission. A final report should address key questions regarding the implementation of Do Not Track by marketplace participants, including how such a mechanism should be presented to consumers, whether it would be default on or default off, and whether it would be pre-populated with sites or tracking devices that will be filtered by default or whether consumers have to configure the mechanism themselves.

The Report's review of industry efforts and related call for "robust, enforceable self-regulation" also should be more fully developed. The Report references a number of tools currently available, which allow online consumers to control their receipt of targeted advertisements, and it notes deficiencies regarding these tools, including lack of widespread industry adoption, lack of consumer awareness and adoption, and a lack of clarity regarding the scope of choice being offered.²¹ However, the Report does not analyze how current tools could be modified or implemented in a manner that would be beneficial, robust, and enforceable.

The lack of such guidance is notable given that self-regulation remains a policy option and that continues to evolve in response to market forces (and no doubt in response to FTC actions including this Report and the staff's earlier Report on

¹⁸ A comparison of Do Not Track and the Do Not Call registry used to limit unwanted telemarketing calls reveals at least two salient points that should be addressed in the final Report: (1) the harm to consumers caused by aggressive telemarketers is well documented, yet there is no similarly documented level of harm caused by the advertising practices that a Do Not Track mechanism is intended to regulate; and (2) online advertising is the engine that drives free online content, while telemarketing never provided a comparable benefit to telephone system users.

¹⁹ Report at 67.

²⁰ *Id.*

²¹ *Id.* at 63-64.

Online Behavioral Advertising²²). For example, Microsoft recently announced that the next version of its popular web browser, Internet Explorer, will include a privacy feature that allows users to prevent information gathering by certain websites and tracking companies.²³ Mozilla, creators of Firefox, the second most popular browser in the U.S. behind Internet Explorer, recently revealed that it too is considering a Do Not Track privacy tool.²⁴ These anticipated privacy features will build upon existing browser-based privacy controls that are currently available for use on the most popular browsers.²⁵

The Report's endorsement of Do Not Track also may be further explored after addressing the unanswered questions regarding the technical feasibility of the browser-based Do Not Track mechanism proposed by the staff. Clearly, browser-based tools are technically feasible as a general matter. In the absence of a robust cost-benefit analysis regarding the offering of Do Not Track, it would seem that Do Not Track offered in a manner that allows consumers to reject behavioral advertising on a website or category specific basis would be preferable because it is more incremental and less blunt than an option that simply blocks all behavioral advertising, which may result in unknown consequences on consumer expectations, the Internet advertising-supported content delivery ecosystem more broadly, and the economy. Whether it is technically feasible for a browser-based Do Not Track tool to address the concerns raised by the staff regarding "flash cookies" and other mechanisms stored outside the reach of browsers is another question that should be explored further.²⁶ If requiring a browser-based Do Not Track mechanism simply results in a shift to flash cookies and other technology features outside the reach of Do Not Track, it would seem unlikely that the benefits of imposing such a mechanism would outweigh the costs, which cannot be predicted with confidence.

²² FTC, *FTC Staff Report: Self Regulatory Principles for Online Behavioral Advertising* (2009), <http://www.ftc.gov/os/2009/02/P0085400behavadreport.pdf>.

²³ Nick Wingfield & Jennifer Valentino-Devries, *Microsoft to Add 'Tracking Protection' to Web Browser*, THE WALL STREET JOURNAL (Dec. 7, 2010).

²⁴ Hugh Collins, *Mozilla Considering Do Not Track Privacy Tool for Firefox*, DAILYFINANCE (Nov. 30, 2010), available at <http://www.dailyfinance.com/story/company-news/mozilla-considering-do-not-track-privacy-tool-for-firefox/19737977/>.

²⁵ Dennis O'Reilly, *Add Do Not Track to Firefox, IE, Google Chrome*, CNET (Dec. 7, 2010), available at http://news.cnet.com/8301-13880_3-20024815-68.html.

²⁶ See Report at n.154 and accompanying text.

At bottom, the Section recommends that the staff continue its assessment of a universal Do Not Track mechanism before delivering an endorsement of the feature as a federal policy. While such a tool conceivably could provide consumers with some beneficial utility, the level of benefit it would provide is at this point unclear. For example, the staff might further address the impact of consumers' potential adoption of such a mechanism. What would be the implications if consumers ignore it or conversely flock to it? The more substantial concern, however, is that these implications and others associated with Do Not Track have not been adequately explored. As a consequence, a cost-benefit analysis is not yet possible to conduct. What are the potential costs of adopting a Do Not Track mechanism? What would the implications be for the free Internet as we know it? Before adopting a final report and any further recommendation in favor of Do Not Track, the Section recommends that the Commission and its staff conduct a rigorous analysis of the effect Do Not Track might have on consumers, the advertising industry, advertising-supported web content, and the economy. In so doing, we recommend that the final report discuss and explain how legislation or a change in the Commission's approach would provide greater consumer welfare than the current self-regulatory approach driven by industry innovation in response to consumer demand and continuing Commission guidance, oversight, and enforcement.

III. The Final Report Should Define Privacy 3.0 and Focus on Protections for Sensitive Data and Focus Where There Is A Significant Risk of Harm First

While there are a number of divergent views among privacy scholars, it is a commonly held belief that current privacy theory does not adequately address current societal concerns over privacy, particularly in the Web 2.0 world.²⁷ Privacy theory can generally be divided into two prior theoretical models—Privacy 1.0—characterized by the Brandeis “right to be let alone”—and Privacy 2.0, based upon Dean Prosser's Restatement (Second) of Torts characterization, which relies upon harm-based constructs. As the Report recognizes, the Commission has utilized both a “notice-and-choice” model that follows in some form the Privacy 1.0 model, as well as a “harm-based” approach that is similar to Privacy 2.0. Both models were noted by the Commission as not being sufficiently responsive to the rapid technological

²⁷ See, e.g., Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643 (2007); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123 (2007).

changes that we see today.²⁸ The unanswered question is what the theoretical basis of Privacy 3.0 will be. When speaking recently on Privacy 3.0, FTC Commissioner Julie Brill recognized this question and stated: “So the debate underway now in Washington is what can we do to make a better model for dealing with privacy in this 3.0 realm. And there’s been a lot of discussion at the Federal Trade Commission about this, a lot of discussion in D.C. and a lot of discussion going on in Silicon Valley. I don’t think there is any consensus about the precise shape that regulation ought to take in this 3.0 realm.”²⁹

The lack of an overarching workable theory of privacy is an inherent limitation on doctrines such as privacy by design, as well as accountability models, and also the Commission’s desire to provide proactive guidance to businesses.³⁰ Without an agreed-upon theory of privacy, these concepts may be difficult for some businesses to understand and thus to implement effective privacy programs. In simple terms, without agreement upon the underlying theory of privacy, one could ask “Accountability regarding what?” or “Design to prevent what?,” and receive divergent answers from key stakeholders.

Rather than focusing on broad rights, such as the right to be let alone, or tort concepts that do not lend themselves to the age we live in, we recommend that the Commission prioritize Privacy 3.0 on protections based on the sensitivity of the data, and certain practices based on the compilation of certain aggregated data (e.g., such as a “super” consumer profile culled from various data sources). This would not focus, as the “harm-based” approach previously has, on harm that has occurred, but rather proactively focus on the data that are the most sensitive, or present the most significant risk of harm to consumers. We believe that such an approach is likely to balance better the costs of heightened privacy protections (to industry, competition, and ultimately consumers) with its benefits to consumers.

²⁸ See, Report, pg. iii (“In addition, both models have struggled to keep pace with the rapid growth of technologies and business models that enable companies to collect and use consumers’ information in ways that are often invisible to consumers.”).

²⁹ A video recording of the presentation can be found at <http://blogs.berkeley.edu/2010/07/21/commissioner-brill-and-privacy-3-0-at-the-cwag-privacy-panel-2/>, last visited Aug. 10, 2010.

³⁰ Report, at i, (“This proposal is intended to inform policymakers, including Congress, as they develop solutions, policies, and potential laws governing privacy, and guide and motivate industry as it develops more robust and effective best practices and self-regulatory guidelines.”)

One such approach to consider relies on the principle of proportionality.³¹ The principle of proportionality uses four tiers of personal information: highly sensitive information, sensitive information, slightly sensitive information, and non-sensitive information. The level of security and privacy associated with each tier would vary according to the sensitivity of the information, and the methods that can be used to collect, process, and use the information. This permits the implementation of Privacy 3.0 in a way that will not stifle innovation and that will also permit sufficient flexibility to address new forms of information as they become more relevant to society.

Categories of information would be placed in the tiers based upon a number of factors. The nature of the information, including how much the information reveals about an individual or a business (*e.g.*, predispositions, preferences, personality traits, or susceptibility to diseases) is a critical factor to consider. The level of impact caused by disclosure of the information, whether to an individual or society, must also be considered when placing a category of information into a tier. Perhaps one of the most important factors—the social utility of sharing information—would also be considered, as well as the actual location of the information, given that information that is in the public domain or in certain third parties' hands is often subject to reduced protection. Whether the information can be used to obtain or create other information (such as a Social Security number) is a further factor that affects the placement of information into a tier. The communication medium (including the form of the information) is also a factor to consider when examining the tier structure. Also, given the analysis used by courts in Fourth Amendment cases, as well as trade secret cases involving proprietary information, the steps the person or business took to protect the privacy of the information represent a critical factor as well.

Once information is placed into a tier, predicting how it can be collected and used is possible, because information collection, management, processing, use, and disposal all flow from the tier within which the category of information falls. Thus, for example, the tiers would permit Commissioner constituents to understand: if information can be gathered without notice or consent; if consent must be opt-in or opt-out; the effect of consent; the types of processing that can be conducted; applicable data security safeguard, retention, and disposal requirements; the steps required or permitted to mitigate any mishandling of information; and the consequences for misuse of the information, including the imposition of statutory penalties in certain cases.

³¹ Such an approach has been advocated previously by at least one practitioner. *See, e.g.*, Andrew Serwin, *Privacy 3.0--The Principle Of Proportionality*, 42 U. MICH. J.L. REFORM 869 (2009).

The final report offers the Commission and the staff the opportunity to define the contours of Privacy 3.0 and the Section urges the Commission to adopt a framework that will focus on protections for sensitive data and data that present the greatest risk of harm first.

IV. Request for Additional Clarity As To Which Recommendations in the Report Are Recommended Best Practices versus Current Requirements under Section 5 of the FTC Act

The Report is not clear on which elements of the framework are now proposed to be incorporated into Section 5 of the FTC Act (hereinafter “Section 5”), if any, and which elements are guidance in the form of best practices for businesses. Commission constituents – both companies and consumers – would benefit from additional clarification as to whether the Commission deems any part of the Report to be newly incorporated into Section 5 as a matter of enforcement. The Section respectfully requests that the FTC add an additional step toward the development of a final report whereby it clarifies – before issuing a proposed final report – which aspects of the Report are incorporated into Section 5, if any, and which aspects of the Report are recommended best practices for Commission constituents and/or proposals for legislative consideration.

The Report’s proposed privacy framework consists of three major elements: (1) privacy by design, (2) simplified consumer choice, and (3) greater transparency. We comment on the first two of these elements below.

With respect to “privacy by design,” some of these recommendations, such as reasonable security and secure disposal, are well-understood principles under current interpretation and FTC enforcement of Section 5. However, a categorical requirement limiting companies to collect data only for a purpose specified at the point of collection is not Section 5 law today. Does the Commission believe that this concept should be incorporated into Section 5? The concept has some appeal in the abstract, but it comes with costs, and not all products and services may merit this restriction. Given the potential costs of such a policy, some balancing of the effects would be worthwhile in order to establish a limiting principle. Examining such questions as when and under what circumstances the use of information collected under one purpose specification and used for another purpose is material to the consumer could illuminate the application of the Commission’s deception and unfairness authority.

The framework also proposes that a company should maintain comprehensive data management procedures throughout the life cycle of its products and services. If this is meant to imply an absolute requirement that companies conduct privacy impact

assessments initially and through the lifecycle of all products or services that potentially involve data associated and potentially associated with consumer data, such a requirement, too, introduces additional costs. Again, the Commission's views on whether such widely-applicable data management procedures are a recommended best practice or a new requirement under Section 5 would be very helpful to interested parties so that they may tailor any future comments to such proposed requirements accordingly (and allocate sufficient resources to ensure compliance, depending on scope of applicability).

Similarly, the simplified choice proposals are based on the phrase "commonly accepted practice." This concept can facilitate understanding the Commission's approach, but the particular phrase is new to the FTC lexicon, and its dimensions are not clear to Commission constituents. If this portion of the framework is intended to be incorporated into the current scope of Section 5, then additional guidance as to the concept's meaning and scope, and an opportunity for Commission constituents to comment (based on the further clarification), would be beneficial to the Commission and its constituents alike. Further clarity would reduce the risk inherent in assessing whether a practice is commonly accepted. Uncertainty in this area would create an incentive not to rely on the standard, which in turn would defeat the purpose of this exception.

If this framework is meant by the Commission to be incorporated into Section 5, comments from Commission constituents may differ from what they would be if the framework were a recommended best practice. If applying them as best practices, companies can use some flexibility in applying the concepts to their individual operations. If complying with them as legal requirements, Commission constituents would likely want to see more clarity, and then to have a meaningful opportunity to comment on the more clearly articulated proposed requirements.

V. Conclusion

Privacy is an important value for many consumers and the Section appreciates the FTC's efforts to ensure that law, business practices, and self-regulation stay abreast of technological and societal developments in this area. The Section recommends that the Commission consider further the costs associated with heightened privacy protections, not just to businesses who must comply with such requirements, but also to competition and consumers. To ensure that consumer welfare is enhanced overall, we recommend that the FTC conduct a rigorous analysis of the effect Do Not Track may have on consumers, the advertising industry, advertising-supported web content, and the economy, before endorsing legislation or a mandate requiring Do Not Track. The Section also recommends that any privacy framework prioritize protections based on the sensitivity of the data and how the data, including aggregate compilation, may be used, so that the framework addresses serious harms first to balance better the costs of heightened privacy protections with its benefits. Finally, the Section recommends that the Commission clarify whether any elements of the proposed framework (and which ones) it considers current requirements under the FTC Act and to allow constituents to comment on new proposals before releasing a final report.

If you have any questions regarding these comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Allan Van Fleet".

Allan Van Fleet
Chair, Section of Antitrust Law