



November 17, 2022

Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington D.C. 20580

**Re: Commercial Surveillance ANPR, R111004**

I write on behalf of the American Consumer Institute (“ACI”), a 501(c)(3) nonpartisan educational and research institute with the mission to identify, analyze, and protect the interests of consumers in select legislative and rulemaking proceedings. ACI appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC” or “Commission”) Trade Regulation Rule on Commercial Surveillance and Data Security ANPR (“ANPR”), 87 Fed. Reg. 51,273 (Aug. 22, 2022), where the FTC is soliciting comments on whether it should implement new trade regulation rules in the context of digital commercial surveillance and consumer data privacy.

ACI shares the FTC’s view that appropriately protecting consumers’ privacy and data security is paramount. With 137 out of 194 countries<sup>1</sup> having put in place legislation to secure the protection of data and privacy, including several U.S. states,<sup>2</sup> federal data privacy legislation is long overdue in the U.S. While we appreciate the FTC’s interest in promulgating new trade regulation rules around this issue, we believe that every regulation, and all legislation for that matter, must be carefully and appropriately balanced against other important considerations, including any statutory limits on the FTC’s authority. Regulators must also avoid imposing undue burdens on businesses, especially on startups and small businesses, which could have serious unintended consequences (i.e., deterring innovation and reducing consumer choice), leaving consumers worse off in the end.

While we are reluctant to answer the 95 questions that the FTC asks, we believe a better and more important use of this commentary is to address the plethora of issues with the scope and approach of this ANPR (although by doing so we indirectly address some of the questions, as we note below). These issues could have extensive ramifications on consumers, innovation, and on the larger regulatory environment, should the new rules be promulgated.

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<sup>1</sup> <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>.

<sup>2</sup> <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>.

In what follows, we discuss in more detail the scope of the ANPR and what it seeks to achieve in the current regulatory context, risks, and how the Commission's approach will affect consumers, innovation, and the U.S.' leadership in the global digital economy.

As the FTC considers what its role is in the data collection arena, we encourage it to consider the following arguments:

**I. ANPR's broad and poorly-specified agenda is overly expansive.**

Containing some 95 questions, the ANPR is rather ambitious in what it seeks to achieve. With such a broad scope in an initial ANPR process, it is not clear what the FTC actually plans to do. The voluminous burden of information production without clear focus will disproportionately affect startups and small businesses, as they are far less well-resourced than larger entities.

In contrast to acting under Congress's narrower view for the FTC, the ANPR sets forth questions on a wide range of issues from biometrics to targeted advertising. Since the ANPR states that it does not identify the full scope of potential approaches the FTC might undertake by a rule, the range of issues it covers can even be extended beyond this. If passed, final rules would impact many industries and multiple technologies without further congressional action.

Given the broad scope of the ANPR, important economic and legal questions arise. Most importantly, the ANPR fails to address whether and how the potential consumer benefits outweigh the costs of regulation on the economy, repercussions that would eventually cycle back to consumers.

We urge the Commission to maintain best practices in its rulemaking process, which warrants adequate cost-benefit analysis. Without clear guidance and in the absence of a thorough cost-benefit review, there will be increased risk of confusion about the enforceability of the rules.<sup>3</sup> As such, it is important to perform a sufficient level of cost-benefit analysis before the Commission moves forward with the rulemaking process.

The FTC makes a weak case in the ANPR about the economic benefits of its proposed regulations, setting forth no formal analysis but instead offering only hints about how trade regulation rules could "foster a greater sense of predictability for companies and consumers and minimize the uncertainty that case-by-case enforcement may engender."

Yet, the FTC admits that its contemplated rules (whatever they eventually turn out to be) could be costly.<sup>4</sup> For example, the Commission specifically notes that it will raise compliance costs across the board—regardless of firms' ability to afford these costs—instituting rules that "would

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<sup>3</sup> Gathani, Magdalena. "Internet of Things Report: The FTC Overstepped its Agency Rulemaking Authority." *Business and Public Administration Studies* 10, no. 1 (2016): 27-36.

<sup>4</sup> Lawrence J. Spiwak, "BITING OFF MORE THAN IT CAN CHEW? SOME THOUGHTS ON THE FTC'S ADVANCE NOTICE OF PROPOSED RULEMAKING ON "COMMERCIAL SURVEILLANCE AND DATA SECURITY," PHOENIX CENTER POLICY BULLETIN NO. 59, September 2022.

incentivize all companies to invest in compliance more consistently...”<sup>5</sup> The FTC misses that the overwhelming majority of startups and other small and medium-sized companies do not have the resources to incur these compliance costs.

Given the potential serious costs to society, we recommend the Commission provides an exhaustive cost-benefit analysis of what it proposes to achieve. Citing complaints, settlements, and news reports across a wide range of data practices that the Commission deems harmful does not suffice and should not be regarded as an equivalent for a thorough analysis.

Unfortunately, at this point, with no clear direction of what the Commission plans to do, the ANPR leaves much to be desired.

## **II. A one-size-fits-all approach to any new rule would be the wrong approach (Q35 & Q60).**

It is critical that the Commission does not institute a one-size-fits-all regulation on data. Levying a single onerous regulation across all sectors is unnecessary, will harm innovation, and would only limit consumer choice. The European Union’s journey with the GDPR perfectly exemplifies that. Such an approach will be the most onerous for small and medium-sized firms who may not have the resources to comply.

The GDPR was implemented four years ago and there continue to be questions around its long-term effects.<sup>6</sup> The U.K. has already announced a plan to replace the overly burdensome GDPR with its own system data privacy regime.<sup>7</sup> While no specific details about the proposal have been outlined yet, the regime is intended to be simpler and clearer for businesses to navigate.

While implementing more rigorous data protection requirements is generally good policy, we believe a better approach would be industry-based rules that would be implemented on a case-by-case basis. The breadth and depth of the tech ecosystem is such that economy-wide regulations would create irreparable harm to the industry, consumer, and national economy. Notably, a one-size-fits-all approach would benefit large, entrenched incumbents the most, which have the resources to deal with the repercussions, and would be extremely onerous for startups and small companies, which will have to sacrifice key resources to navigate the complexity of the legal implications.

If the FTC institutes new rules, they should be designed for the American ecosystem. The Commission could learn from the failures of the EU with the GDPR, and it should not seek to

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<sup>5</sup> Ibid.

<sup>6</sup> Edward Longe, “GDPR: Europe’s Warning to America,” American Consumer Institute, May 23, 2022. <https://www.theamericanconsumer.org/2022/05/gdpr-europes-warning-to-america/>.

<sup>7</sup> Krisztina Pusok, “Congress should take notes from the UK on data privacy protection,” American Consumer Institute, November 1, 2022. <https://www.theamericanconsumer.org/2022/11/congress-should-take-notes-from-the-uk-on-data-privacy-protection/>.

replicate similar rules. The EU failed to take into account sectoral differences when instituting the new rules, it made international data flows unnecessarily complicated, and made the rules extremely complex and onerous. Not taking this into consideration and creating burdensome compliance costs only raises barriers to entry for companies developing online tools and services, which in the long run will disincentivize startups from building or investing in online tools and services.

### **III. In light of ongoing Congressional attempts to pass federal data privacy and security legislation, the ANPR is premature.**

We believe it is premature for the Commission to act without clear direction from Congress, especially while Congress has shown both a willingness and effort to address many of the same concerns the ANPR has outlined. The ANPR could further complicate the patchwork of privacy laws and regulations because the FTC rules do not preempt state and local laws, thus adding another layer of regulatory uncertainty.

The balkanized system at state level already currently provides a massive disadvantage for small and medium-sized companies compared to larger firms that can better weather compliance costs. It is estimated that small and medium-sized companies spend \$20-23 billion dollars annually provided there is no federal legislation that would replace state laws.<sup>8</sup>

Most recently, the House Committee on Energy and Commerce passed the American Data Privacy and Protection Act (H.R. 8152) with broad, bipartisan support.<sup>9</sup> Provisions of the bill related to preemption and private right of action remain to be addressed by Congress.<sup>10</sup>

This bill may not be perfect in every respect, and while adjustments to the text should seek to reflect the successes and failures of the GDPR and California's Privacy Rights Act,<sup>11</sup> we believe that H.R. 8152 is an attempt to reach a middle ground. Most significantly, this bill shows that Congress is actively considering data privacy and security legislation. The Commission should allow debate on this legislation to progress before it decides to act.

### **IV. Conclusion**

While we support efforts to increase consumer data privacy and security, we disagree with the scope of this ANPR, and we recommend the Commission to rethink its approach.

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<sup>8</sup> Daniel Castro, Luke Dascoli and Gillian Diebold, "The Looming Cost of a Patchwork of State Privacy Laws," Information Technology and Innovation Foundation, January 24, 2022.

<https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws/>

<sup>9</sup> American Data Privacy and Protection Act, H.R. 8152, 117th Congress (2021-2022).

<https://www.congress.gov/bill/117th-congress/house-bill/8152>.

<sup>10</sup> Dylan Shepard, "Privacy Bill Should Reflect Prior Successes and Failures," American Consumer Institute, July 12, 2022.

<https://www.theamericanconsumer.org/2022/07/privacy-bill-should-reflect-prior-successes-and-failures/>.

<sup>11</sup> Ibid.

Consumers and the innovation ecosystem would benefit more when the Commission's rulemaking process is grounded in the core principles of consumer welfare, support for strong competition, cost-benefit considerations, and robust economic analysis.

We are happy to be a resource on issues related to consumer data privacy and security.

Respectfully,

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American Consumer Institute