

Client Alert: The Federal Trade Commission Intent on Regulating “Commercial Surveillance”

Publications

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On August 11, 2022, the Federal Trade Commission (FTC) issued an Advanced Notice of Proposed Rulemaking (ANPR) and announced an upcoming public forum about “commercial surveillance and data security practices.” Long-anticipated, the ANPR reflects the FTC’s increasing focus on and interest in regulating commercial data privacy and security practices, in addition to pursuing case-by-case enforcement actions. The announcement represents the first step in a lengthy rulemaking process that will likely take at least twelve to eighteen months.

The ANPR poses a series of open-ended questions about the need for new privacy rules in today’s “commercial surveillance economy,” an ever-expanding commercial ecosystem on the internet where businesses monitor consumers’ online activities and collect and monetize their personal data, often using automated and algorithm-based processes.

The ANPR seeks comments on a wide range of questions, including:

- The harm of commercial surveillance activities and lax data security practices on consumers and children;
- How the FTC should balance costs and benefits in regulating commercial surveillance and data security;
- Whether the FTC should commence rulemaking on commercial surveillance and data security, and what types of requirements the FTC should impose;
- How prevalent are algorithmic errors in automated decision-making systems and how the FTC may regulate automated decision-making systems and reduce the harmful effects of algorithmic errors;
- How widespread is algorithmic discrimination in automated decision-making systems and how the FTC should address algorithmic discrimination;

- Whether consumer consent remains effective or viable as a tool in regulating companies' commercial surveillance and data security practices;
- How to improve effective notice, transparency, and disclosure of companies' commercial surveillance practices; Consumer remedies; and
- How any rulemaking on commercial surveillance and data security should account for changes in business advertising models and commercial surveillance practices.

The FTC opened the ANPR with the concern that consumers share “a wide range of personal information about themselves to companies,” often without realizing they are doing so, and that an “elaborate and lucrative market” enables businesses to use this information to individually target goods and services to consumers. It then seeks public comment on harms relating to lax data security standards, including identity theft, fraud, and cyber-attacks on national critical infrastructure; the potential for abusive uses of consumer data, such as to automate the targeting of fraudulent products and services to vulnerable consumers, or enable stalking, cyber bullying, and distribution of harmful material; and harms to children, including from services that collect data about and are addictive to children. Additionally, the agency asks about practices that require consumers to share their data in order to get a service or that change privacy practices in material ways after a consumer has signed up for service. Furthermore, the FTC requests information about discrimination and inaccuracy in automated decision-making systems, including the algorithms that support them. Lastly, the commission asks questions reflecting its growing interest in “dark pattern” practices or efforts to manipulate consumers into sharing personal information.

The FTC adopted the ANPR on a 3-2 vote, with Commissioners Wilson and Phillips dissenting and arguing that Congress should regulate privacy through a comprehensive federal privacy law. In late July, the US House of Representatives Committee on Energy and Commerce sent the American Data Privacy and Protection Act (“ADPPA”) to the full House for a vote. If passed by both the House and Senate, ADPPA would establish the first comprehensive federal data privacy framework. FTC Chair Khan noted that if Congress adopts a federal privacy law, the commission will re-assess the need for trade regulation rules on commercial surveillance and data security. Commissioners Slaughter and Bedoya issued statements supporting both FTC and Congressional action on privacy.

Comments to the ANPR will be due 60 days after the ANPR is published in the Federal Register. The FTC will host a virtual Public Forum on the ANPR, including both panel discussions and a public comment session, on September 8, 2022.

The ANPR is the first step in the FTC's process for issuing trade regulation rules under Section 18(a)(1)(B) of the Federal Trade Commission Act.[1] Based on the public record developed in response to the ANPR, the FTC will decide whether—as is expected—to publish a Notice of Proposed Rulemaking (NPRM), proposing specific rules to regulate commercial data collection and data security practices. Any NPRM would be followed by a public comment period before adoption of final rules.

Footnotes

[1] 15 U.S. Code § 57a(a)(1)(B)

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