

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

Steve DelBianco, President
Carl Szabo, Vice-President & General Counsel
NetChoice
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7498



www.netchoice.org

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NetChoice Response to FTC Request for Comments on The Intersection Between Privacy, Big Data, and Competition

NetChoice respectfully submits this response regarding the Federal Trade Commission's ("FTC") request for comments on "The Intersection Between Privacy, Big Data, and Competition."

NetChoice is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and for free expression. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in Washington, and in international internet governance organizations.

National polling commissioned by NetChoice this month finds that Americans overwhelmingly prefer free online services with ads, as opposed to paying for these services.¹ This nationwide polling, conducted by Zogby Analytics, found that only 16% of Americans said they prefer paying for content instead of seeing ads. And 3 times more Americans prefer interest-based ads over paying for content.

3 times more Americans prefer interest-based ads instead of paying for their online content.

Moreover, we've seen how online privacy regulations can operate as barriers to competition.

FTC Commissioner Noah Phillips said last month at the Internet Governance Forum - USA:

[L]aws and regulations intended to promote privacy may build protective moats around large companies (some of which already possess significant amounts of data about

¹ See Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.

people) by making it more difficult for smaller companies to grow, for new companies to enter the market, and for innovation to occur—and insist that competition be part of our conversation about privacy.²

National Polling Commissioned by NetChoice Finds Americans Overwhelmingly prefer Free Services with Ads to Paid Services

A common rallying cry of advocates is that we should eliminate the business model of using advertising to drive the online engine.³ However, these advocates are out-of-touch with what Americans actually want.

This month, NetChoice commissioned Zogby Analytics to conduct nationwide polling of Americans and found that 73% of Americans prefer interest-based ads over paying for content.⁴

It is clear from this polling; the demands of anti-advertising advocates⁵ do not represent the will of most Americans. If the FTC follows calls to upend the advertising-supported business model, we will see a backlash from Americans who have come to depend on free online content and services.

Adopting an EU-Style Opt-In would Cost American Businesses and Harm Consumers

NetChoice analysis finds that following a European-style approach of a default choice against interest-based ads would erase \$340 billion in advertising revenue⁶ from American websites over the next five years. These findings are based on empirical studies showing⁷ that such an opt-in regime reduces online ads' effectiveness by 65%.

With a loss of \$340 billion in advertising revenue, we'll see one or more of these consequences:

- Websites will show *more* ads to make up some of the lost revenue.
- Websites will have less to spend on reporters, content, services, and innovation.
- Some websites will erect pay walls for content that users get for free today.

Under mandated opt-in consent, consumers are likely to be bombarded with pop-ups and interstitials, all of which are asking for consent in various ways: blanket consent for use of all

² Prepared Remarks of Commissioner Noah Joshua Phillips, *Keep It: Maintaining Competition in the Privacy Debate*, Internet Governance Forum USA (July 27, 2018).

³ Schwartz, Tien, and McSherry, *How to Improve the California Consumer Privacy Act of 2018*, EFF Website (Aug. 8, 2018), Jason Kelley, *We're in the Uncanny Valley of Targeted Advertising*, EFF Website (Apr. 20, 2018).

⁴ See Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.

⁵ See, e.g. Statements of Eleni Kyriakides at The Future of Privacy in America After GDPR (June 6, 2018)

⁶ NetChoice Website, *American Websites Would Lose \$340 Billion Over 5 Years If Congress Mandated Eu-Style Opt-In Consent For Interest-Based Advertising*, available at <https://netchoice.org/library/loss-of-340-billion/>.

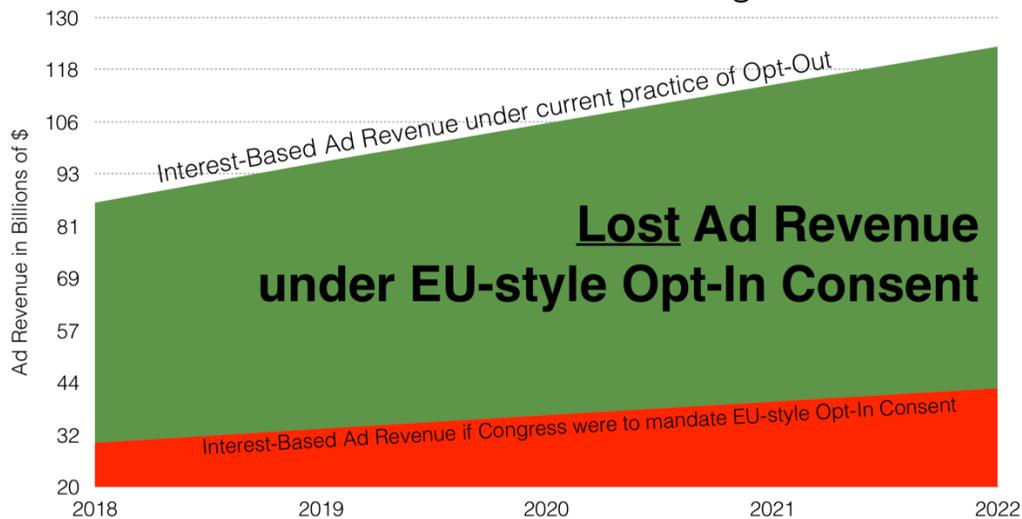
⁷ Goldfarb & Tucker, *Privacy Regulation and Online Advertising*, Univ. Toronto & MIT (Aug-2010) - finding that online ad effectiveness fell by 65% under the EU opt-in regime covering 3.3 million EU citizens.

"sensitive" information; consent for use of some sensitive information; consent for use of sensitive and non-sensitive information, etc.

These consequences would be bad for American consumers. Moreover, they are especially bad for low-income households that can't afford to pay for online services that are now free of charge. It is therefore likely that moving to an opt-in regime for interest-based advertising will increase the digital divide.

The loss of effective interest-based will also harm small businesses. These businesses must now increase the number of advertisements they purchase to acquire the same number of customers. In essence, small businesses must spend more money to successfully advertise to potential customers.

American websites would **lose \$340 Billion** over 5 years if Congress mandated EU-style Opt-In consent for interest-based advertising



Lower advertising revenue based on EU research by Goldfarb & Tucker, *Privacy Regulation and Online Advertising*, Univ. Toronto & MIT (Aug-2010) - finding that online ad effectiveness fell by 65% under the EU opt-in regime covering 3.3 million EU citizens.
Ad revenue forecasts by Nicole Perrin, eMarketer (March-2016)

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Requiring Opt-In for Data Collection Further Entrenches Large, Well-Known, And/OR Essential Businesses

FTC Commissioners Chopra⁸ and Phillips⁹ have noted that increased privacy regulations create barriers to entry and make competition more difficult.

At last month's IGF-USA event, Commissioner Noah Phillips warned:

⁸ See, e.g., Statements of Commissioner Rohit Chopra at The Future of Privacy in America After GDPR (June 6, 2018).

⁹ See, e.g., Prepared Remarks of Commissioner Noah Joshua Phillips, *Keep It: Maintaining Competition in the Privacy Debate*, Internet Governance Forum USA (July 27, 2018).

Consider requiring affirmative user consent and assume that consumers are considering the question and being selective with whom they share information. *Consumers are more likely to trust the companies they know. This is an application of what economists call “brand effect”.* And, to the extent large incumbents also provide popular services—for instance as a result of the network effects endemic to certain technology markets—the big guys win again.¹⁰

Commissioner Phillips is right. Large, well-known, and/or essential businesses are in the best position to encourage consumers to opt-in to services and interest-based advertising. This creates new barriers to competition and has the unintended effect of suppressing growth of new entrants.

Large Platforms Deliver Large Benefits for Small Businesses

Anti-business advocates claim that “big is bad.” But for America’s small and mid-size businesses, the bigger the online platform the better for trying to reach larger audiences.

Consider the local custom furniture store. Just fifteen years ago businesses like this could barely afford to place an ad in a local newspaper, let alone on TV or radio. But now, thanks to large online platforms, for less than ten dollars a small business can reach thousands of potential customers and target them more accurately than ever.

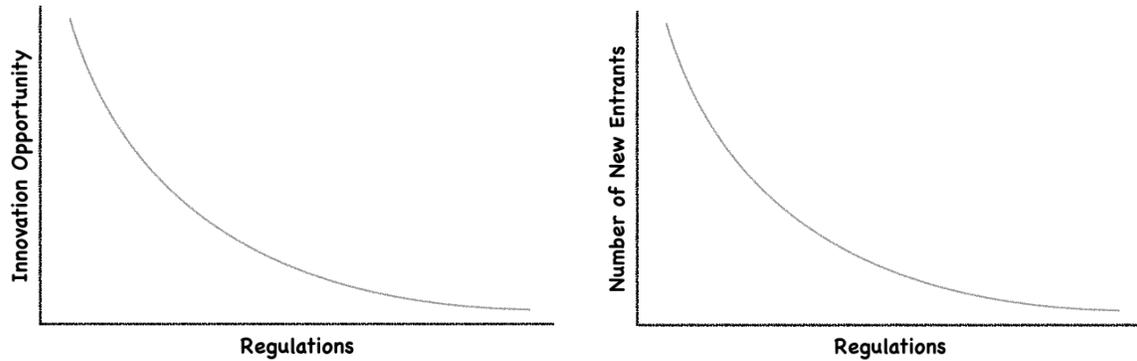
Large online platforms have given new growth opportunities to a panoply of small businesses. Consider the app stores on the Apple and Android platforms. Developers can reach markets of millions of customers. Fifteen years ago, this was only possible through significant outlays for advertising, distribution, and logistics to move their software to customers.

Or consider the platforms of Etsy and eBay enabling small sellers to find customers across the country and even around the world.

These benefits are the result of allowing online platforms to grow and flourish, because the FTC has relied upon the consumer welfare standard to regulate that growth.

The real beneficiaries of break-ups of large online platforms are legacy businesses whose models don’t work in today’s economic environment. Today large online platforms enable small businesses to easily find new customers at low cost. This has increased competition faced by legacy. Making it harder for small businesses to advertise on large online platforms would harm competition in many markets.

¹⁰ *Id.* (emphasis added).



Regarding Competition and Consumer Protection Implications of Use and Location Tracking Mechanisms

NetChoice supports requiring opt-in consent for precise geolocation collection from mobile devices. But there is no need for FTC to mandate this, since industry self-regulatory efforts are already working.

Benefits of Location-Based Services to Consumers and Businesses

Consumers and businesses love the services made possible using location-based technology. Many of the most successful apps and smartphone features have become popular because they know where users are located at any given time. And that's exactly how customers want it.

Anyone who has owned a smartphone has probably charted their location as a blue dot on a maps app. Many also use those same programs to see where the traffic bottlenecks are before starting their evening commute. Some apps use location to help users find the nearest gas station, post office, parking garage, or coffee shop. And location services on smartphones have also changed the way we interact socially, creating a market for follow and check-in features to allow your friends and family to know where you are.

There is clearly opportunity for large businesses in this marketplace. But location-based services and advertising offer a unique opportunity for small Main Street businesses as well. Some apps, like RedLaser, allow users to scan the UPC code of a product and, using the smartphone's location data, find several local retailers nearby where it can be purchased.

Meanwhile, a user searching for a particular product or service on their smartphone can receive an ad from a local store based on their current location data. These ads have the benefit of reaching potential customers at the exact time of a purchasing decision and cost far less than the newspaper circulars or the TV ads that big box stores are able to afford.

Similarly, local small businesses can also level the playing field with the national chain stores and internet retailers through shopping apps like Groupon. This app has 38 million North American subscribers who receive daily discounts at local establishments based on their location data.

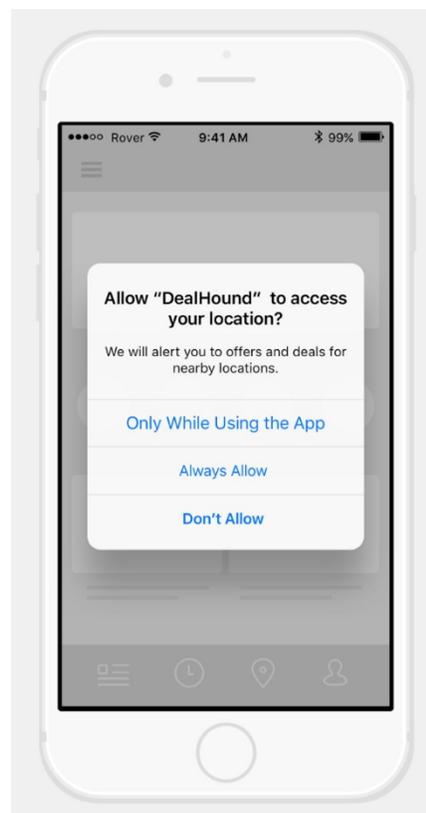
Self-Regulation is Working

Consumers have adopted online applications and services at an unprecedented rate when compared to previous new technologies.

Crucially, research shows that advertising and marketing practices are not making consumers more reluctant to go online. And of those consumers who *were* reluctant to shop online, just 0.1% cited concerns over privacy.¹¹ These sales and lack of privacy concerns include the use of location-based information to better provide features and services to consumers; services such as notifying a customer of nearby discounts on products.

Consumers Affirmatively Consent to Most Geo-Location Collection

Some of the most common devices collecting geo-location information, such as iPhones, iPads, as well as Windows, and Android mobile devices, require ***express affirmative consent*** from the user prior to collection of geo-location information. These platforms present users with a prompt before any application may begin collection of geo-location information. And users can retract any prior consent for the collection of geo-location information at any time.



Moreover, many of these platforms periodically re-ask users for consent, to ensure that their privacy preferences remain current.

Platforms operators give *consumers* control over the sharing of their geo-location data. This eliminates the need for any specific governmental regulation, since the industry itself is regulating the collection of geo-location information.

Avoiding Heavy-Handed Enforcement

We've seen the harm of heavy-handed enforcement regarding use and location tracking mechanisms. In the FTC's actions against Nomi Technologies¹² (hereinafter Nomi), the FTC failed to show a violation of the FTC Act. This action ran counter to the FTC's prosecutorial discretion, and disincentivizes businesses from giving consumers greater control over their privacy.

Nomi did not store any personal information (PI) about any consumers. All Nomi collected was the MAC address of a device. We continue to argue that unique identifiers of a device do not

¹¹ 2009 survey by the National Retail Association.

¹² Fed. Trade Comm'n, *In the Matter of Nomi Technologies, Inc.*, Matter No. 1323251 (Sept. 3, 2015).

constitute PI. However, *ad arguendo*, even if a MAC address were PI, Nomi did not store any consumer 's actual MAC address. Instead, Nomi immediately hashed the MAC address such that a device could not be identified based on the Nomi stored data.¹³ Moreover, the FTC complaint made no showing or allegation that Nomi shared any MAC addresses with stores. This means that stores could not, on their own, identify customers.

Nomi went further and created a global opt-out for consumers from any in-store tracking. This feature was available on Nomi's website.¹⁴ This feature gave consumers total control over Nomi's activities -- the type of consumer control that the FTC regularly calls for.

None of these efforts to protect consumer privacy was required by law. Despite Nomi's efforts to give consumers more privacy controls than legally required, the fact that one of the privacy features (opt-out) was not accurately described (available online but not in stores) resulted in this FTC enforcement action.

This enforcement action sent a message to any businesses considering privacy-by-design: if you attempt to protect consumers' privacy in multiple ways, you may multiply your legal risk of FTC prosecution.

When considering the issues surrounding location tracking mechanisms the FTC should allow the existing and successful self-regulatory system to continue.

We thank you for your consideration.

Sincerely,

Steve DelBianco
President, NetChoice

Carl M. Szabo
Vice-President & General Counsel, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org

¹³ "Nomi cryptographically hashes the MAC addresses it observes prior to storing them on its servers." FTC Complaint, *In re Nomi Technologies*, ¶ 6.

¹⁴ "Nomi provided, and continues to provide, an opt out on its website for consumers who do not want Nomi to store observations of their mobile device. Once a consumer has entered the MAC address of their device into Nomi's website opt out, Nomi adds it to a blacklist of MAC addresses for which information will not be stored." *Id.* at ¶ 11.