



What Advertisers Need to Know About Privacy: Predictions for 2021 and beyond

Spring 2021 Edition: Not a Symposium, but a Virtual Ad Law CLE Bonanza



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Current Commission Make-Up

- **Acting Chair:** [Rebecca Kelly Slaughter](#)
- **Commissioner (D):** [Rohit Chopra](#) (Will be replaced by the President; Nominated to Lead the CFPB)
- **Open Commissioner Seat:** (Will be nominated by the President)
- **Nomination:**
 - [Lina Khan](#) (D): Professor at Columbia University School of Law
 - Author of [paper proposing to modernize antitrust laws](#); big tech critic
- **Commissioner (R):** [Christine S. Wilson](#)
- **Commissioner (R):** [Noah Joshua Phillips](#)

FTC Call For Federal Privacy Legislation

- **Commissioner Phillips (R):** *“I want to stress the importance of the Commission’s call for data security legislation. We need to be flexible to deal with rapid technological development, and mindful of the fact that defendants in data security cases are often themselves victims of felonies. But a specific congressional mandate and additional incentives to protect data are critical... Data security legislation is one of the best things we can do to advance the goal of privacy.”*
- **Commissioner Slaughter (Acting Chair (D):** *“The need for comprehensive data-privacy legislation with meaningful limitations on the collection and use of data and prohibitions on discriminatory practices, dark patterns, and data abuses has never been greater. The FTC stands ready to enforce a federal privacy law, and my hope is that the pandemic’s catastrophic consequences for children will serve as the final push for such legislation.”*
- **Commissioner Wilson (R):** *“Federal privacy legislation is necessary for several reasons. First, businesses need predictability in the face of a growing patchwork of state and international privacy regimes. Federal privacy legislation would provide needed certainty to businesses in the form of guardrails governing information collection, use, and dissemination. Second, consumers need clarity regarding how their data is collected, used, and shared so they can make informed decisions about which goods and services to use... Third, there are growing gaps in the sectoral coverage of our existing privacy laws.”*

Current Privacy Bills in Congress

S. 224 / H.R. 847: Promoting Digital Privacy Technologies Act

- A bill to support research on privacy-enhancing technologies and promote responsible data use, and for other purposes

H.R. 1816: Information Transparency and Personal Data Control Act

- A bill to require the FTC to promulgate regulations related to sensitive personal information, and for other purposes

S. 919: Data Care Act

- A bill to establish duties for online service providers with respect to end user data that such providers collect and use

S. Res. 138

- A resolution urging the European Parliament to exempt certain technologies used to detect child sexual exploitation from European Union ePrivacy directive

FTC Initiatives

- **Dark Patterns Workshop: [Bringing Dark Patterns to Light: An FTC Workshop](#)** (April 29, 2021)
- **[PrivacyCon 2021](#)** (July 27, 2021)
- **[FTC Acting Chairwoman Slaughter Announces New Rulemaking Group](#)**
 - *FTC will reinvigorate rulemaking authority to level the playing field for consumers and businesses*
 - *New group in Office of the General Counsel will help build Commission's rulemaking capacity and agenda for unfair or deceptive practices and unfair methods of competition*
 - [Rules and Guides Currently Under Review](#)

FTC Initiatives

New Injunctive Relief in Data Security Orders

- *The FTC made three categories of improvements to its data security orders: orders (1) are more specific, (2) increase third-party assessor accountability, and (3) elevate data security considerations to the C-suite and board level*

Multi-Party Liability

- *The FTC has brought many cases alleging that a company can be liable for assisting and facilitating or otherwise participating with other companies in misconduct*
- *The agency has used a variety of legal theories to impose liability on companies where their customers, vendors, or business partners were also engaged in misconduct*

Using Artificial Intelligence and Algorithms

- *The FTC's enforcement actions, studies, and guidance emphasize that the use of AI tools should be transparent, explainable, fair, and empirically sound, while fostering accountability*

Dispute over FTC Section 13(b) Authority at the U.S. Supreme Court

Where Things Stand, Where They're Likely to End, and a Proposed Legislative Fix

In two consolidated cases currently pending before the U.S. Supreme Court, the Court will decide whether 13(b) of the FTC Act – which speaks only to injunctive relief – authorizes the FTC to seek monetary relief.

- *Federal Trade Commission v. Credit Bureau Center, LLC*
 - Under Section 13(b), the FTC ordered the owner of a credit-monitoring website to pay over \$5 million in restitution to the FTC
 - The 7th Circuit held that the FTC does not have authority to obtain monetary restitution under Section 13(b) because it is not specifically authorized under the statute
- *AMG Capital Management, LLC v. Federal Trade Commission*
 - The FTC ordered a business providing payday loans to pay \$1.27 billion in equitable monetary relief to the Commission
 - The 9th Circuit was bound by its own precedent broadly construing Section 13(b) to authorize equitable monetary relief

FTC Rules and Guides Currently Under Review

- **16 CFR 312: Children’s Online Privacy Protection (COPPA) Rule**
 - [View Comments](#) (Comment Period Closed)
- **16 CFR 313: Privacy of Consumer Financial Information Rule under the Gramm-Leach-Bliley Act**
 - [View Comments](#) (Comment Period Closed)
- **16 CFR 314: Standards for Safeguarding Customer Information**
 - [View Comments](#) (Comment Period Closed)
- **16 CFR 318: Health Breach Notification Rule**
 - [View Comments](#) (Comment Period Closed)
- **16 CFR 680: Affiliate Marketing Rule**
 - [File a Comment](#) (Comment Period Closed)
- **16 CFR 681: Identify Theft Rules**
 - [View Comments](#) (Comment Period Closed)
- **Magnuson-Moss Rulemaking**
 - **16 CFR 456: Eyeglass Rule**
 - [View Comments](#) (Comment Period Closed)
 - **16 CFR 453: Funeral Industry Practices Rule**
 - [View Comments](#) (Comment Period Closed)

Looking into the Future: Speeches, Articles, and Testimony of Commissioners

Acting Chair Slaughter (D)

- FTC investigations should determine involvement of senior executives, and enforcement teams should evaluate whether **naming corporate executives** will achieve specific and general deterrence
- Remedies should require greater transparency from companies by, for example, **requiring that data privacy assessments be made public and requiring public reporting of consumer complaints and company responses**
- Data **privacy enforcement efforts should focus on areas such as**
 - **(1) AI-based decision-making; and**
 - **(2) the use of data to increase levels of child and teen engagement on social media platforms**
- The FTC should **revive its Magnuson-Moss rulemaking authority**
- The FTC should seek **two types of relief in privacy cases:**
 - **(1) meaningful disgorgement of ill-gotten monetary gains; and**
 - **(2) effective consumer notice**
- The FTC should **aggressively use COPPA and general Section 5 authority to protect student privacy**

Looking into the Future (Cont'd)

Commissioner Chopra (D)

- Proposes requiring **forfeiture or deletion of any algorithm developed with ill-gotten images to stop the improper collection and use of biometric information**
- Given dangerous consequences stemming from unlawful **facial recognition** practices, one of the few practical remedies is to ban any future offering of that facial recognition technology
- To deter imposter fraud, the FTC should consider restating existing legal precedent through rulemaking, prohibiting companies from making misrepresentations or facilitating misrepresentations by others
- As more firms build their businesses on collecting data to shape decision-making, the **FCRA can be a powerful weapon with which to combat housing discrimination stemming from errors and inaccuracies**
- **The FTC should write rules to ensure there is accountability for undisclosed influencer connections and deceptively formatted ads.** This is a growing issue as platforms themselves play an increasing role in monetizing astrotrurf advertising

Looking into the Future (Cont'd)

Commissioner Wilson (R)

- The FTC should eliminate unduly burdensome, highly prescriptive, and outdated regulations
- The FTC should not insist on monetary relief in every settlement. Non-monetary settlements still impose compliance costs and reputational harm
- Consistently advocates for federal privacy legislation to provide clarity for businesses and to protect consumers from risks to privacy and civil liberties
- Believes in evidence-based enforcement as opposed to a “rules-based approach” in which a vast array of business practices would be made per se illegal
- Encourages the FTC to engage in Section 6(b) studies of the practices of technology companies, including social media practices. It can use information learned from such studies to evaluate trends and make policy adjustments accordingly

Looking into the Future (Cont'd)

Commissioner Phillips (R)

- Even though the Privacy Shield was declared invalid, companies still must comply with their ongoing obligations with respect to transfers made under Privacy Shield. The FTC will enforce the law against companies that do not keep their promises
- Believes it's very important to scrutinize online markets for anticompetitive manipulation of consumer information
- Recommends ensuring that any amendment to the COPPA Rule is grounded in congressional intent, supported by data and empirical evidence, and balances the possibility of harm to children with the potential promise of technologies
- Advocates for federal privacy legislation, explaining that a patchwork of different regulations favors large, national firms and disproportionately hurts smaller operators. Believes it should be enforced by attorneys general and the FTC as opposed to a private right of action

Peering into the Future: Cases Brought in Last 2 Years and Concurrences, Dissents of Acting Chair Slaughter and Commissioner Chopra

Flo Health, Inc.

- Alleged violations of the FTCA and Privacy Shield Principles by sharing users' health information with outside data analytics providers after promising such information would be kept private
- Non-monetary settlement (injunctive relief)
- **Commissioners Chopra and Slaughter** concurred with requirement to notify consumers that Flo Health had been charged with sharing information without consumers' consent, but they **dissented in part because the complaint did not allege violation of the Health Breach Notification Rule**

In the Matter of Everalbum, Inc.

- FTC **alleged that the Everalbum deceived consumers about its use of facial recognition technology** and its retention of the photos and videos of users who deactivated their accounts
- Non-monetary settlement (injunctive relief)
- **Statement of Commissioner Chopra:** agreed with requiring deletion of facial recognition technologies enhanced by improperly obtained photos, but **a lack of penalty was "unfortunate."** The FTC should **restate precedent into a rule under the FTCA Section 18 so it can seek penalties and other relief when the FTC first discovers the alleged violation**

Peering into the Future: Cases Brought in Last 2 Years and Concurrences, Dissents of Acting Chair Slaughter and Commissioner Chopra

In the Matter of Ascension Data & Analytics

- Alleged violations of the **Gramm-Leach-Bliley Act's Safeguards Rule** by failing to ensure one of the firm's vendors was adequately securing personal data about mortgage holders
- Non-monetary settlement required comprehensive data security program and biennial assessments
- **Dissent of Commissioner Chopra argued that the order failed to bind the right parties, such as others within the same corporate family, and the complaint should have included an unfairness violation;** argued that enforcement should be more evenhanded to ensure large firms do not get less scrutiny than small businesses

AppFolio, Inc.

- \$4.25 million fine imposed to settle allegations of **Fair Credit Reporting Act** violations for failure to ensure the accuracy of reports about potential tenants
- **Concurrence of Commissioner Slaughter supports the penalty and the FTC's aggressive use of its rules and civil penalty authority. In the future, consumer reporting agencies should be required to pay back victims.**
- **Dissent of Commissioner Chopra argues that given the widespread, harmful conduct, the FTC should have only agreed to a settlement with victim redress and should have sought more specific safeguards to prevent recidivism**

Peering into the Future: Cases Brought in Last 2 Years and Concurrences, Dissents of Acting Chair Slaughter and Commissioner Chopra

In the Matter of Zoom Video Communications, Inc.

- FTC alleged that Zoom misled consumers about the **level of security** provided and compromised the security of some Mac users
- Non-monetary settlement (injunctive relief)
- **Dissent of Commissioner Slaughter argued that the order did not address Zoom's privacy failures and did not require Zoom to provide any recourse to affected users.**
- **Dissent of Commissioner Chopra disagreed with the settlement because it was "weak, providing no help, no notice, no money for victims, and no meaningful accountability for Zoom."**

In the Matter of NTT Global Data Centers Americas

- FTC settled with a data storage services company that allegedly deceived consumers about its participation in the **EU-U.S. Privacy Shield framework**
- Non-monetary settlement (injunctive relief)
- **Dissent of Commissioner Chopra argued that the settlement fails to meaningfully hold NTT accountable with no fine, no help for victims, and no admission or findings of liability**

Peering into the Future: Cases Brought in Last 2 Years and Concurrences, Dissents of Acting Chair Slaughter and Commissioner Chopra

Google LLC and YouTube, LLC

- \$170 million penalty imposed for alleged violations of COPPA
- Statement of Commissioner Chopra argued that the penalty should have been higher (!) and noted that the outcome is inconsistent with how the FTC approaches other violators of COPPA. Here, a dominant incumbent was alleged to have engaged in widespread violations but only paid a slice of their profits and executives avoid scrutiny, whereas small companies pay dearly, and executives are often named in consents.
- Dissent of Commissioner Slaughter argued that the FTC should have required YouTube to police the channels that misdesignate their content, such as by requiring a technical backstop to identify child-directed content.

“Privacy First” and Use of Data in Advertising: A Rich History in Self-Regulation | 1960-Present

1960 | **Direct Mail Marketing Association (DMA) Crafts First Ethics Code Tied to Marketing Data**

1971 | **DMA Launches Mail Preference Service**

1985 | **DMA Launches Telephone Preference Service**

1996 | **DMA Ties ‘Privacy Promise to American Consumer’ as Condition of Association Membership**

1998 | **DMA Launches Email Preference Service**

2000 | **DMA Preference Services Consolidated as DMAchoice: <https://www.dmachoice.org>**

2010 | **Digital Advertising Alliance forms – birth of the DAA Principles & “AdChoices” Program**

2011 | **DAA Launches Consumer Opt-Out Page – WebChoices: <https://optout.aboutads.info/>**

2012 | **DAA Program Garner Support from White House, Federal Trade Commission
and Members of Congress**

2015 | **DAA Launches AppChoices: <https://youradchoices.com/appchoices>**

2019 | **Both WebChoices and AppChoices offered to Native Spanish Users in USA**

2020 | **DAA Launches CCPA Opt Out Tool: <https://www.privacyrights.info/>**

DAA Principles and “AdChoices” Program | Ubiquity in Transparency and Consumer Control

DAA Principles and Guidance: Keep Pace with Consumer Behaviors & Advertising Innovation

Interest-Based Advertising | Multi-Site Data Collection | Mobile Guidance | Cross-Device Guidance | Digital Political Advertising



Thousands of Brands Participate

100 million+ Unique Visits to our Sites

125+ Companies on WebChoices (Desktop & Mobile Web)

40+ Companies on AppChoices

1+ trillion “YourAdChoices” icons are served globally each month

125+ Publicly Announced Enforcement Actions

DAA “AdChoices” Icon | A Portal to Privacy Information



82% of Respondents Recognize the AdChoices Icon

- Most consumers (81%) understand the icon broadly offers them choice and control as it pertains to advertising.
 - Nearly seven in ten respondents (69%) and the AdChoices icon "useful."
 - Nearly two-thirds (64%) say the AdChoices icon is "easy to understand" as a way to access privacy information.
 - Three-quarters (75%) of respondents say the AdChoices icon increases their trust in websites and mobile apps.
 - A large majority (80%) say the AdChoices icon would increase their trust in an emerging digital platform.
- **Source:** The survey was conducted via SurveyMonkey among 1,052 U.S. adults from February 17-21, 2021. Based on a confidence interval of 95 percent, the margin of error for the survey is 3 percent.

Co-Regulation: Industry Wants a Federal Privacy Law

Privacy for America Framework: Attributes of an Effective Federal Privacy Law

- Prohibitions against using consumer data to determine eligibility for a job, healthcare, financial aid, insurance, credit, or housing outside of existing laws governing eligibility for these important benefits;
- Prohibitions against discrimination by using consumer data to set higher prices based on an individual's race, color, religion, sexual orientation, and more;
- Prohibitions against using sensitive information like health, financial, biometric, and geolocation data without first obtaining users' express consent;
- Provisions protecting so-called "tweens": a vulnerable group of consumers over age 12 and under age 16 that is actively engaged online but not often subject to constant parental oversight;
- A requirement that companies make privacy policies much easier to read and understand;
- Provisions that give consumers the right to request access to and deletion of the personal information that a company holds about them, as well as the right to port certain data from one platform to another;
- Individuals can choose to limit companies' use of personal information to draw detailed inferences or make predictions about them, with certain exceptions; and
- Significant new rulemaking authority, resources, and staff that will allow the Federal Trade Commission to more aggressively pursue and punish bad actors, bolstered by enforcement by state attorneys general.

Questions?



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Thank You!

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- April 15 : FTC Enforcement Priorities in the New Administration, a discussion with Daniel Kaufman, Acting Director, Bureau of Consumer Protection, FTC

To register: www.venable.com/AdLaw2021

Resources:

Venable's Advertising Law Blog: www.AllAboutAdvertisingLaw.com

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