HRPA HR POLICY ASSOCIATION®

November 21, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

RE: "Commercial Surveillance ANPR, R111004"

Dear Commissioners:

The HR Policy Association ("Association") welcomes the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") advanced notice of proposed rulemaking on "Trade Regulation Rule on Commercial Surveillance and Data Security"[1] ("ANPR"). The ANPR raises several critical issues that deserve attention by policymakers, and the Association looks forward to working with the Commission as it focuses on artificial intelligence and data privacy areas that intersect with the workplace context.

HR Policy Association represents the most senior human resource executives in more than 400 of the largest companies in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring technology is deployed in the workplace in such a way that builds trust while supporting safe and positive work environments.

Executive Summary

The Association has long supported comprehensive consumer privacy legislation that avoids interfering with employers' efforts to remain competitive and provide safe working environments and positive workplace cultures. Any federal comprehensive consumer privacy law should facilitate rather than hinder innovation, harmonize regulations, and achieve global interoperability. Importantly, such a law would preempt state and local consumer privacy legislation—a goal achievable only by Congress.

New regulations promulgated by the Commission would be duplicative and only add to the regulations and laws rapidly multiplying at the local, state, and federal levels, as well as long-established requirements, exacerbating an already confused regulatory environment rather than providing clarity or predictability.

[1] 87 Fed. Reg. at 51284

Further, it is questionable whether the Commission has the congressional authority to regulate in an area with major social and political implications and major economic and political significance, or whether the ANPR meets the requirements under Section 18 of the Federal Trade Commission Act.

Nearly the entire U.S. economy interacts with personal information of consumers and workers. In the workplace context, new technologies increase efficiency, boost productivity, and drive competitiveness by aligning with companies' talent strategies. Employers leverage technology to pursue talent retention through investing in employee professional development, elevate employee voice, drive a positive corporate culture, and enhance the employee and candidate experience.

The FTC should not continue its efforts to propose new regulations on commercial surveillance and data security that includes regulation of HR data. Any such rulemaking would harm the U.S. economy, adding duplicative requirements to employers and impeding innovations that have the potential to improve working conditions for American employees, while exceeding the FTC's statutory authority.

The Advance Notice of Proposed Rulemaking fails to meet various requirements under Section 18 of the FTC Act.

Section 18 of the FTC Act requires an advance notice of proposed rulemaking issued by the Commission to include a "brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission." [2] As the Commission moves to a proposed rulemaking, Section 18 authorizes the Commission to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[3] The ANPR as currently written fails to meet these requirements.

Rather, the ANPR casts a wide net of questions over an exceedingly broad range of issues in an apparent effort to uncover an unfair or deceptive practice to regulate, including in the employment context, as "consumer" is defined to also mean "worker" in the ANPR.[4] For example, questions 1 through 4 of the ANPR ask "Which practices do companies use to surveil consumers," the measures companies use "to protect consumer data," the prevalence of these practices and measures, and "how, if at all, do these commercial surveillance practices harm consumers or increase the risk of harm to consumers?" Question 10 asks, "Which kinds of data should be subject to a potential trade regulation rule?" Question 53 asks, "How prevalent is algorithmic error."[5] Question 55 asks, "Does the weight that companies give to the outputs of automated decision-making systems overstate their reliability? If so, does that have the potential to lead to greater consumer harm when there are algorithmic errors?"[6] Such questions strongly suggest the absence of any discernable unfair or deceptive practice in mind by the Commission. Indeed, stakeholders such as the HR Policy Association must make assumptions here as the ANPR fails to identify any unfair or deceptive trade practice at all.

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[2] 15 U.S.C. § 57a(b)(2)(A)(i).
[3] 15 U.S.C. § 57a(a)(1)(B).
[4] 87 Fed. Reg. at 51277
[5] 87 Fed. Reg. at 51281
[6] 87 Fed. Reg. at 51283

In addition, the pejorative term "commercial surveillance" is defined so broadly as to encompass nearly any conceivable use of consumer data in the business context, including its "collection, aggregation, analysis, retention, transfer, or monetization of consumer data and the direct derivatives of that information."[7] These practices far outstrip any reasonable or common understanding of "surveillance," and in many cases are necessary to the basic functioning of any modern business. The ensuing *95 questions* seek to cover an equally ambitious surface area, without discernable limiting principles. However, the ANPR clarifies it "does not identify the full scope of potential approaches the Commission might ultimately undertake by rule or otherwise. It does not delineate a boundary on the issues on which the public may submit comments. Nor does it constrain the actions the Commission might pursue in an NPRM or final rule."[8] In effect, the public is provided no meaningful means to provide feedback on potential rules, which are, as the Commission states, not discernable through the ANPR.

Finally, as Commissioner Noah Joshua Phillips dissents, "the objectives and regulatory alternatives are just not there."[9] Indeed, because the Commission explicitly does not commit to any "actions the Commission might pursue in an NPRM or final rule," stating alternatives is not possible. Stakeholders are therefore deprived of the statutorily required opportunity to provide comment on these areas.

A proposed rule would exceed the FTC's congressional authority

The Supreme Court's "major questions doctrine" requires that the "history and breadth" of the authority claimed by a federal agency, as well as the "economic and political significance" of that assertion, "provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." The doctrine rest on the Constitutionally established principle of the separation of powers, where the power to legislate rests with Congress alone, which can delegate policymaking authority to federal agencies under certain circumstances clearly prescribed by federal law. The Supreme Court reaffirmed this principle in *West Virginia v. Environmental Protection Agency*[10], which ruled that under the above circumstances an agency "must point to 'clear congressional authorization' for the authority it claims." The Commission's ANPR violates this doctrine given the history and significant breadth of its asserted authority, the political and economic significance of that authority, and clear evidence that Congress has not delegated such authority to the Commission.

- **A rulemaking by FTC would have major economic and political significance**
  Data's integral role in the basic functioning of the economy is clear, as well as its function a driver of economic growth. Artificial intelligence, for example, is projected to deliver an additional global economic output of $13 trillion by 2030.[11] In the employment context, new technologies are critical towards ensuring U.S. employers remain competitive in an increasingly digitized work environment. As large employers consider the development, deployment, and use of AI in the work environment, the U.S. economy is experiencing a historically tight labor

[7] 87 Fed. Reg. at 51294
[8] 87 Fed. Reg. at 51281
[9] 87 Fed. Reg. at 51294
[10] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).
[11] https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-potential-value-of-ai-and-how-governments-could-look-to-capture-it

market, where the number of job openings – 10.7 million – still far exceeds the 6.1 million individuals looking for work, and the quit rate remains near record highs.[12] It is therefore critical that new technologies are linked with a company's talent strategy. In addition to increasing efficiency and productivity through the use of AI, employers are considering how to leverage technology to, among other things:

- Pursue talent retention through investing in employee professional development.
- Close the skills gap by closing the opportunity gap: expanding the talent pool and getting the right talent into the right roles.
- Elevate employee voice, enhance management responsiveness, and encourage employee engagement.
- Drive a positive corporate culture, particularly in hybrid working environments.
- Enhance the employee and candidate experience, recognizing that HR technologies are often a first or major interaction with an employer, while ensuring that the human element of HR is not lost.

- **The history and significant breadth of the FTC's asserted authority**
  The breadth of the ANPR is stunning in scope. The ANPR acknowledges that "all aspects of the economy" are becoming "digitized and networked,"[13] noting that "most Americans today surrender their personal information to engage in the most basic aspects of modern life."[14] No additional analysis here is needed to supplement the FTC's assertions, as the trend toward the digitization of American life is abundantly clear. The Commission has asserted it has the authority to make rules that would touch on, as it puts it, "the most basic aspect of modern life" and "all aspects of the economy."

  The authority the FTC is attempting to claim over such an enormous scope bears no connection with the history of Congressional action in these areas. As noted below, Congress has clearly authorized federal agencies to make targeted rules regarding privacy. These include the Gramm-Leach-Bliley Act, which covers financial personal information and the Children's Online Privacy Protection Act, which provides online privacy protections for children under the age of 13. The Commission is responsible for enforcement of a number of sector-specific laws, including the Gramm-Leach-Bliley Act and the Children's Online Privacy Protection Act. Never has Congress granted to a federal agency the authority to promulgate economy-wide comprehensive privacy rulemaking, let alone to the Commission.

- **Congress has not clearly authorized the FTC to promulgate such rulemaking**
  The Commission relies on its authority to "propose rules defining unfair or deceptive acts of practices with specificity." Given the major economic and political significance of the issues raised by the ANPR, the authority as the FTC here asserts based on such a vague notion as "unfair or deceptive acts" would qualify as an "extraordinary grant of regulatory authority" accomplished through "vague terms" the Supreme Court noted in *West Virginia v. Environmental Protection Agency.* The Commission should reference clear Congressional

[12] https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm#
[13] 87 Fed. Reg. at 51281
[14] 87 Fed. Reg. at 51273

authorization to promulgate economy-wide rules on privacy and AI, but fails to do so, because there is none. Rather, the Commission notes sector-specific laws it is charged with enforcing, previous work as "the nation's privacy agency," and a history of bringing "scores of enforcement actions" against "certain practices [that] violate Section 5 of the FTC Act."

In addition, congressional lawmakers are currently seeking to legislate in both the comprehensive consumer privacy and artificial intelligence domains, but have not yet passed such legislation, signaling that Congress has not yet granted authority in these areas. In its *West Virginia v. Environmental Protection Agency* decision, the Supreme Court noted that the EPA sought to "adopt a regulatory program that Congress ha[s] conspicuously declined to enact itself." Similarly, the Commission is seeking to adopt a regulatory program in areas Congress has declined to adopt at this point. Many comprehensive consumer privacy bills have been considered but have failed in recent years—including bills granting FTC particular authority in this area[15]—indicating Congress presumes a need for such legislation while declining to grant any such authority to the FTC.

Proposed rules in the AI space would be duplicative of existing regulatory efforts

The use of technology in the employment context is regulated by many frameworks. In the United States alone, federal and state laws relating to anti-discrimination, labor laws, data privacy, and AI-specific laws affect the use of technology in the employment context. Rulemaking by the FTC on commercial surveillance and AI would only add to the growing patchwork of federal, state, and local requirements governing the use of data and AI technologies in the workplace.

- Anti-Discrimination: Title VII of the Civil Rights Act (Title VII) prohibits discrimination in the employment context on the basis of race, color, religion, national origin, or sex. An employer can violate Title VII for either disparate treatment or disparate impact. Disparate treatment occurs when similarly situated people are treated differently based on a protected class. Disparate impact occurs when facially neutral policies or practices have a disproportionately adverse impact on protected classes. Discriminatory intent is relevant to establish a claim of disparate treatment, but intent is not necessary for claims of disparate impact.

  Employers are also prohibited from unlawfully discriminating in the employment context based on age or disability due to the Age Discrimination in Employment Act and the Americans with Disabilities Act.

  Liability for discrimination may arise under anti-discrimination laws when employers use artificial intelligence systems that are trained on biased datasets or that infer or otherwise uncover protected class information and adversely impact members of the protected class. With respect to anti-discrimination, new requirements would impose novel obligations exceeding

[15] For example, the Consumer Online Privacy Right Act (S.3195) would create new enforcement powers for the Federal Trade Commission to take action against unlawful discrimination in the digital economy and to create a Bureau within the Commission to assist the FTC's authority under the bill, among other items. Additionally, the American Data Privacy and Protection Act (H.R.8152) tasks the Commission with guidance and enforcement duties, and would establish a "Youth Privacy and Marketing Division" within the Commission.

anti-discrimination laws that have already been interpreted to cover discrimination involving artificial intelligence and other technology systems.

- Data Privacy Laws: Data privacy laws at the federal and state level directly affect the use of technology in the employment context.

  Federally, the Fair Credit Reporting Act (FCRA) regulates, among other things, how consumer reporting agencies use and share consumer information. A "consumer report" is defined as information bearing on a consumer's credit worthiness, including information related to a consumer's credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The FCRA requires consumer reports to be used for only permissible purposes, such as for employment. Employers must provide disclosures and obtain consents if using consumer reports.

  In addition to the FCRA, employers must also navigate biometric information privacy laws in numerous states. For example, the Illinois Biometric Information Privacy Act (BIPA) prohibits organizations, including employers, from collecting and using biometric information unless they have provided notice and obtained written consent.

  Perhaps most significantly, as of January 1, 2023, the full suite of privacy rights granted under the California Consumer Privacy Act (CCPA) will apply to employees, job applicants, and contractors who are residents of California. These rights include the right to know, correct, and delete personal information held by an employer, or by the employer's vendor on the employer's behalf. Employees will also gain the right to opt out of the sale or sharing of their personal information by their employer and employer's vendors and to restrict the use of their sensitive personal information, and not be retaliated against for exercising these rights. The CCPA has a 12-month look-back period, meaning all data collected about employees in 2022 is also covered. Additionally, employers will have to comply with notice and privacy policy obligations with respect not only to their own employees, but also their independent contractors and applicants. California's new requirements will likely create a de-facto standard for employers that operate nationally.

  Meanwhile, congressional lawmakers are actively deliberating on comprehensive consumer privacy reform that may impact the use of technology in the employment context.

- AI-specific requirements: An increasing number of state and local laws are directly regulating the use of artificial intelligence in the employment context. The Artificial Intelligence Video Interview Act (AIVIA) in Illinois, for example, requires transparency, consent, and certain government reporting from employers who require candidates to record an interview and use artificial intelligence to analyze the submitted videos. In December of 2021, the New York City Council enacted a law requiring companies to obtain independent audits of certain automated employment decision tools used in the context of hiring and promotion. Myriad AI-specific requirements across states and cities makes compliance difficult to manage across intersecting domains.

- International efforts: The Commission should also take note of international developments. In Europe, the EU General Data Protection Regulation (GDPR) prohibits solely automated decision-making that has legal or similarly significant effects unless the decision is made pursuant to an individual's consent or another exception applies. Decisions relating to employment may have similarly significant effects, and employers have taken steps to ensure humans remain in the decision-making process for employment accordingly.

  In addition, the European Union is considering an EU-wide regulation of artificial intelligence systems under the proposed Artificial Intelligence Act (AI Act). Though the text remains under deliberation, the AI Act as introduced involves a risk-based classification system for artificial intelligence systems. AI systems in the employment context may be considered "high-risk," requiring employers using these systems to implement risk management processes, adopt governance structures, provide transparency, register the AI systems, and maintain documentation about the AI systems. AI-specific requirements are being discussed in many other international jurisdictions as well.

Conclusion

Several of the issues the Commission raises in its ANPR—particularly the need for consumer privacy protections and the threat of algorithmic discrimination—deserve attention by policymakers.

Any significant rulemaking, particularly one with economy-wide impact, should be clearly authorized by Congress after careful deliberation. Data privacy and artificial intelligence issues are extraordinarily economically significant, exceedingly complex and quickly evolving. New policy should be weighed against the significant benefits of a data-driven economy, including emerging use cases of technology to pursue talent retention through investing in employee career growth, elevate employee voice, drive a positive corporate culture, and enhance the employee and candidate experience.

The unfocused approach reflected in the ANPR leaves stakeholders with little chance to discern how to engage meaningfully through providing comment. The HR Policy Association respectfully requests that the Commission cease its current rulemaking until Congress has committed to a nation-wide approach clearly granting regulatory authority to the FTC.

The Association looks forward to continuing to work the Commission on these issues. Please reach out to dchasen@hrpolicy.org with any questions.

Sincerely,

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