FRANK PALLONE, JR., NEW JERSEY
CHAIRMAN

CATHY McMORRIS RODGERS, WASHINGTON
RANKING MEMBER

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

June 30, 2022

Mr. John Miller
Senior Vice President of Policy and General Counsel
Information Technology Industry Council (ITI)
700 K Street NW
Suite 600
Washington, DC 20001

Dear Mr. Miller:

Thank you for appearing before the Subcommittee on Consumer Protection and Commerce on Tuesday, June 14, 2022, at the hearing entitled "Protecting America's Consumers: Bipartisan Legislation to Strengthen Data Privacy and Security." I appreciate the time and effort you gave as a witness before the Committee on Energy and Commerce.

Pursuant to Rule 3 of the Committee on Energy and Commerce, members are permitted to submit additional questions to the witnesses for their responses, which will be included in the hearing record. Attached are questions directed to you from members of the Committee. In preparing your answers to these questions, please address your responses to the member who has submitted the question in the space provided.

To facilitate the printing of the hearing record, please submit your response to this question no later than the close of business on Thursday, July 15, 2022. As previously noted, this transmittal letter and your response, as well as the responses from the other witnesses appearing at the hearing, will all be included in the hearing record. Your written responses should be transmitted by e-mail in the Word document provided to Ed Kaczmarski, Policy Analyst, at ed.kaczmarski@mail.house.gov. To help in maintaining the proper format for hearing records, please use the document provided to complete your responses.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Ed Kaczmarski with the Committee staff at (202) 225-2927.

Sincerely,

Frank Pallone, Jr.
Chairman

Attachment

cc: The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce

The Honorable Jan Schakowsky
Chair
Subcommittee on Consumer Protection and Commerce

The Honorable Gus Bilirakis
Ranking Member
Subcommittee on Consumer Protection and Commerce

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Protecting America's Consumers: Bipartisan Legislation to Strengthen Data Privacy and Security"
June 14, 2022

Mr. John Miller, Senior Vice President of Policy and General Counsel, Information Technology Industry Council (ITI)

The Honorable Kathleen Rice (D-NY)

1. Your testimony addresses the importance of digital advertising to the U.S. economy, noting that we can "protect the privacy of Americans while also preserving data innovation, including the business models that have helped the internet thrive and powered the growth of the global internet economy." In addressing the key role that digital advertising has to our economy, your testimony highlights some concerns with the current definition of "digital advertising" in the draft and that several states, including Virginia, Colorado, Utah, and Connecticut, seem to have struck the right balance here.

    a. Can you speak more about ways we can improve our definition so that we don't end up with unintended consequences to the U.S. economy?

    Response:

Thank you for the question, which acknowledges the overarching point I made in my written testimony that the definition of targeted advertising as it appeared in the ADPPA discussion draft would in many ways not allow the ad-supported internet business model to continue, as, for instance, publishers would not be able to use their knowledge of the preferences and interests of their readers to show ads.

The good news is that the ADPPA Manager's Amendment remedied one of the central flaws in the Targeted Advertising definition that appeared in the draft by eliminating the language "derived from covered data collected over time *or* across third party websites or online services about the individual or unique identifier." (emphasis added). The problem in that original definition was the "or," which would have prevented first party publishers from being able to use the data that they collected from consumers viewing their content (as opposed to data provided by data brokers or other middlemen), which in turn would have prevented those entities from being able to show consumers ads that are relevant enough to generate the revenue needed to continue to support the content being provided. While simply replacing the

"or" with an "and" to limit the definition to the use of data collected over time *and* across third party websites or online services would have been consistent with the approach taken in the states, the ADPPA Manager's Amendment eliminated the phrase entirely and thus also eliminated that problem.

However, the revised definition of "targeted advertising" in the ADPPA Manager's Amendment unfortunately added some new problematic language, the result of which is continuing confusion regarding how the ADPPA intends to address targeted advertising. For example, the targeted advertising definition's revised exception for contextual advertising is unnecessarily limiting. Contextual advertising should be allowed to take into account general trends known about the viewers of the applicable content. While ITI supports the prohibition of user profiles and related user data in contextual advertising, an allowance for the use of statistical, aggregate audience data and other non-covered data to inform a company's ad selection algorithms in these cases makes good sense, preserves user privacy, and performs well for advertisers.

Furthermore, the "targeted adverting" definition was expanded to include "content," which implicates all personalized content (paid and organic) across all services. It also brings into scope advertising based on first-party data. To the extent the rationale for this change was to not subject transfers of certain sensitive covered data to an opt-in requirement, there are more straightforward ways for the bill to address this issue without unnecessarily complicating and muddling the definition of "targeted advertising."

How the "targeted advertising" definition should be read relative to the revised duty of loyalty/data minimization section of the ADPPA is particularly confusing. On the one hand, the bill is now structured similarly to GDPR in that the data minimization section now expressly includes a list of permissible purposes (in other words what is not expressly allowed is prohibited), and the clear intention of this section appears to be to allow targeted advertising, subject to an opt out. However, while collecting sensitive data is now exempt from the opt in requirement if done for a permissible purpose specified in 101(b) (a broad exemption), transferring sensitive data is effectively prohibited and subjected to an opt in. This section, when coupled with the still broad definition of sensitive data, creates substantial confusion regarding whether opt-in or opt out applies in a variety of contexts, most notably regarding various forms of targeted advertising.

In particular, including sub. (xii) regarding video content or services in the "sensitive covered data definition" is creating significant confusion when juxtaposed with the bill's intent that targeted advertising should be "opt out" on relevant platforms, and sub (vii) regarding communications content would subject a wide swath of everyday communications to an opt in requirement. Those data categories should not be defined as sensitive covered data to avoid this confusion, or the list of permissible purposes should be expanded to eliminate this confusion regarding "targeted advertising."

The Honorable Michael Burgess (R-TX)

1. Mr. Miller, this bill divides data into that collected by "collectors" and that serviced by "processors."

    a. As currently defined in this legislation, is there any chance that a processor could become, or be treated as, a collector?

Response:

Thank you for the question. First, let me say that we appreciate the Manager's Amendment to ADPPA makes the effort to disentangle the term service provider (or processor) from covered entity (or controller as such entities are referred to in Europe's GDPR, or collector as framed in your question), making clearer the so-called "controller/processor distinction." The Manager's Amendment now defines covered entities or collectors much like an EU controller, as an entity "that alone or jointly with others determines the purposes and means of ...processing covered data." We also appreciate the intention to make the obligations attaching to collectors vs. processors clearer, as processors are now subject to only those provisions that expressly apply to processors. This is a major and welcome shift.

However – and I think your question alludes to this fact – while the ADPPA clearly intends there to be more stringent obligations on covered entities/collectors than service providers/processors, the reality is that many companies will indeed wear different hats (collector vs. processor) at different times – so I would not say one entity "becomes" another, but I would completely agree with the premise of your question that sometimes a processor could appropriately be treated as a collector in certain business contexts.

Unfortunately, there is still some confusion in the ADPPA Manager's Amendment regarding which obligations should attach to which entities and when. Since whether an entity is wearing a collector vs. processor hat carries different obligations, we recommend the bill include an accommodation for entities to reasonably determine which hat – collector or processor - they are wearing in which business use case. For example, delineating responsibilities when the entity is collecting directly from an individual versus analyzing or processing data on behalf of the collector.

One way to make sure this definitional distinction between covered entity/collector and service provider/processor is implemented effectively and clearly in the legislative text would be to insert "acting as a covered entity" or "acting as a service provider" throughout to further clarify which obligations are appropriate for CEs versus SPs with respect to each of the obligations enumerated in the bill. One reason this approach could be helpful in clearing up the confusion is because there are still a number of obligations imposed on service providers/processors that do not make sense given the context of how these entities typically interact with not only covered entities/collectors but data and customers, and as a result many of the obligations imposed on service providers/processors are unduly burdensome insofar as it will be difficult if not impossible for many of these entities to reasonably or practically comply with them, for instance because they lack visibility into or access to data or customers, or because the way SPs process data on behalf of CEs often varies by client.

To illustrate this point, obligations in ADPPA that currently apply to service providers/processors but which should be clarified as applying only to covered entities/collectors, or to " service providers/processors acting as covered entities/collectors," include: various "duty of loyalty" obligations

that depend on the covered entity on whose behalf the service provider is processing data and that a service provider cannot possibly document at any one point in time. For example, categories of covered data collected or processed can change depending on the client, and the service provider often does not have visibility to the data it is processing on behalf of a covered entity/collector; the length of time a service provider intends to retain each category of covered data or the criteria for determining the retention time typically varies by client; and the description of data security practices employed may also differ from client to client.

Thank you again for the question and the opportunity to highlight the need to further clarify the obligations of collectors/covered entities vs. service providers/processors vs. service providers/processors acting as collectors/covered entities, as this is one of ITI's priority issues as the bill moves forward.

2. Mr. Miller, as a point of clarification, this legislation requires covered entities that engaged in targeted advertising to provide a clear way to opt-out of this targeted advertising.

    a. If a person opts-out of targeted advertising, would they still receive generic advertisements?

Response:

Thank you for the question. While I am not familiar with the term "generic advertising" my understanding is it typically refers to advertising related to a category or class of product rather than a particular brand. However, to the extent your question is asking is whether a person who opts-out of targeted advertising will nonetheless continue to receive some form of internet advertising, I think the answer likely depends on a variety of factors.

First, with respect to the premise of your question, while the ADPPA Manager's Amendment appears to intend to subject targeted advertising to a clear "opt-out" pursuant to the "targeted advertising" definition, when read in conjunction with various other provisions in the bill such as the definition of sensitive covered data, there actually exists quite a bit of confusion as to whether all targeted advertising is always subject to an opt-out, or whether some forms may sometimes be subject to an opt-in, and whether some species of targeted advertising may not be subject to even an opt-out.

To briefly illustrate some of the confusion that currently exists, the bill addresses at least three different meta-categories of targeted advertising: first-party targeted advertising, third-party targeted advertising, and contextual advertising. The restrictions in the bill vary from both meta-category to meta-category and sometimes within these categories, making it very difficult to answer your question in the abstract.

Examining how the ADPPA treats targeted advertising across these different meta-categories helps illustrate this confusion. For instance, it appears that first-party targeted advertising using data already collected for other permissible purposes may not be subject to either an **opt in or opt out** (sec. 101(b)(11), but first-party targeted advertising using data the covered entities did not collect for another permissible purpose and is not search/browsing history is **opt out** (101(b)(12)), but first-party targeted advertising using data covered entities did not collect for another permissible

purpose, and is search/browsing history is **opt in** (sec. 201(a)(4)). Examining the different ways in which the bill appears to treat third party targeted advertising reveals similar variances and confusion. And while we believe the contextual advertising exception needs to be further amended/clarified, it appears that engaging in contextual advertising is not subject to an opt-out or opt-in requirement to the extent that such advertising does not use covered data.

The bottom line answer to your question as I understand it is that people who opt-out of "targeted advertising" will still receive some types of internet advertising, including even some forms of "targeted advertising" which appear to be permitted under the bill as currently drafted and as explained above.