



October 17, 2022

****Via electronic submission****

April J. Tabor
Secretary
Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street SW,
5th Floor, Suite 5610 (Annex B)
Washington, DC 20024

Re: Commercial Surveillance and Data Security ANPR, R111004

Dear Ms. Tabor:

The Restaurant Law Center and the National Restaurant Association welcome the opportunity to submit these comments addressing the Federal Trade Commission’s (“FTC”) Advanced Notice of Proposed Rulemaking on Commercial Surveillance and Data Security (“ANPR”).

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts and before regulatory agencies. Through regular engagement on behalf of the industry, the Restaurant Law Center provides regulatory agencies and courts with the industry’s perspective on important issues, like this proceeding, that may

significantly impact the restaurant and foodservice industry.

The National Restaurant Association was founded in 1919 and is the nation's largest trade association representing and supporting the restaurant and foodservice industry. Its mission is to represent and advocate for industry interests, primarily with national policymakers. Nationally, the foodservice industry consists of more than one million restaurant and foodservice outlets employing about sixteen million people—about ten percent of the American workforce. The foodservice industry is the nation's second-largest private-sector employer.

The restaurant and foodservice industry is the lifeblood of the American economy. The industry is comprised of over one million establishments that represent a broad and diverse group of owners and operators—from large national outfits to small family-run neighborhood restaurants, and everything in between. The industry also contributes directly and indirectly to the livelihood of others, including suppliers, purveyors, farmers and ranchers, distributors, myriad professional service providers, as well as governments who benefit from added tax revenue. Restaurants are cultural centers and community anchors, too. They drive commercial revitalization, provide opportunities for upward mobility and ownership—particularly for minorities, immigrants, women, and historically disadvantaged communities—and foster neighborhood identities.

While the Restaurant Law Center and the National Restaurant Association support efforts to ensure the protection of consumer data, regulations that do not

account for the unique structure and needs of the restaurant industry could have potentially ruinous consequences. Specifically, 90 percent of restaurants across the country have less than 50 total staff, 70 percent of restaurants are single-unit operators, and restaurant industry sales are down \$65 billion from pre-pandemic levels.¹ And businesses of all sizes across the industry are still attempting to recover after bearing the brunt of the COVID-19 pandemic, facing major challenges resulting from inflation and supply chain issues, and experiencing steep increases in labor, energy, and ingredient costs, among others.

Heavy financial and legal burdens resulting from rigid, prescriptive regulations would be felt not only by restaurants themselves but also by all other participants in the broader restaurant industry. For example, imposing increased compliance and legal costs on restaurant businesses will cause customers to face higher prices and investors to face lower returns. Further, onerous regulations will also increase burdens on restaurant suppliers and partners who will suffer when the costs of regulatory mandates drive some restaurants out of business and create additional challenges for those that remain.

As the backbone of every community, restaurant operators build their business on trusted relationships with their guests, including by implementing robust data privacy and security practices to strengthen that trust. The Restaurant Law Center

¹ National Restaurant Association, National Statistics, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/>.

and the National Restaurant Association therefore urge the FTC to limit the scope of any proposed regulations to either exempt, or provide a safe harbor for, the restaurant industry, particularly those restaurants that qualify as smaller operations as measured by staffing and revenue, or alternatively defer Section 18 Rulemaking pending Congress's vote on the American Data Privacy and Protection Act ("ADPPA").

ARGUMENT

I. Data Collection Practices Provide Several Benefits to Consumers in the Restaurant Industry²

Data collection has become a valuable and essential tool for both restaurants and their diners. In an industry with increasingly tight profit margins and robust competition, restaurants can remain competitive and improve customer experience by tracking data to understand customer preferences.³ For example, restaurants can collect, store, and utilize customer data to, among other things, contact customers with special offers or promotions, adjust the items available on the menu, and plan for the volume of guests. These practices enable restaurants to attract more customers as well as to ensure repeat visits by designing an all-round better customer

²This section is intended to address Question No. 29 in the ANPR: "What are the benefits or costs of refraining from promulgating new rules on commercial surveillance or data security?"

³Why Restaurants Are So Hungry for Your Personal Data, Eater (Oct. 10, 2018), <https://www.eater.com/2018/10/10/17957350/restaurants-data-mining-personal-information-privacy-loyalty-programs>.

experience.

One data collection practice—loyalty and/or reward programs—is a particularly critical element of the restaurant business model. Restaurants and their customers increasingly use loyalty programs to foster rewarding long-term relationships. Loyalty programs allow a restaurant, with the customer's consent, to collect and track customer preferences via purchase activity in exchange for special incentives, including discounted and/or free food. Access to customer data through such programs allows restaurants to offer customized rewards to their customers, thereby increasing customer satisfaction and the likelihood of repeat business. Indeed, the data bear this out: 47 percent of diners have reported to using at least one loyalty program.⁴ Further, because loyalty programs operate on an opt-in basis, restaurants only collect and maintain data on those customers who have provided their affirmative express consent to join, and customers can withdraw their consent at any time.

Given the wide-ranging benefits of these programs, it is crucial that consumers and businesses remain free to voluntarily establish such mutually beneficial business-customer relationships. Further regulating where and how a restaurant can collect data, especially in the loyalty-program setting, may result in unduly burdensome obligations that outweigh the benefits—to both restaurants and

⁴ Report: 47% of diners use at least one loyalty program, Restaurant Dive (June 30, 2021), <https://www.restaurantdive.com/news/report-47-of-diners-use-at-least-one-loyalty-program/602404/>.

customers—that these programs provide. Small operators, in particular, may be forced to forego such programs altogether notwithstanding customer demand for them and the fact that loyalty programs serve as a vital source of feedback on guest satisfaction and other elements of the restaurant experience. Furthermore, the average restaurant prices their items 4% lower for loyalty program members than for the average website customer, offering cost-conscious consumers a way to save. In total, 96% of all restaurants mark down prices for loyalty program members.

Any proposed regulations thus should exclude from their scope these types of programs and other data collection practices the restaurant industry engages in to benefit the consumer. Alternatively, and at the very least, we recommend that the FTC provide some type of safe harbor for smaller operators using data collection in connection with a loyalty program, or to improve customer experience more broadly, particularly when the customer freely and knowingly consented to the data collection practice.

II. The Restaurant Industry Depends on Maintaining the Trust and Satisfaction of Its Customers⁵

Restaurants of all sizes and types depend on the trust and satisfaction of their customers for their continued operation, and are continually innovating to try to meet

⁵This section is intended to address Question No. 93 in the ANPR: “To what extent do companies have the capacity to provide any of the above information? Given the potential cost of such disclosure requirements, should trade regulation rules exempt certain companies due to their size or the nature of the consumer data at issue?”

their customers' evolving needs. Restaurants have been particularly hard hit by the impacts of the COVID-19 pandemic and related supply chain disruptions, and every additional regulatory burden squeezes already thin margins. In a world where business is supported and grown through technology, virtually every industry sector—whether consumer-facing or business-to-business—handles significant volumes of consumer information. As discussed above, restaurants are often a first point of collection for consumer data based on agreements in which customers are aware they are providing data to improve convenience and their dining experience.

However, if the FTC proposes and ultimately adopts regulations that are too broad or burdensome, those regulations will harm restaurants in particular. Restaurants generally experience an enormous amount of online traffic as customers visit websites to review menu offerings, check hours of operation or address, make reservations, and get contact information. And the majority of restaurants generate a substantial portion of revenue via online and remote orders⁶—a fact that is likely to only increase in the post-pandemic environment and as technology continues to improve. But this large amount of online traffic is often disproportionate to the size or staffing level of the restaurants themselves, especially when compared to the much larger companies outside the restaurant industry that collect similar amounts of

⁶The Data Point: 31% of Restaurants Do at Least Half Their Business Online, PYMNTS (July 21, 2022), <https://www.pymnts.com/restaurant-innovation/2022/the-data-point-31-pct-restaurants-do-at-least-half-their-business-online>.

data.

Further, few, if any, restaurants engage in practices the FTC is intending to target—i.e., those companies that “claim to collect consumer data for one stated purpose but then also use it for other purposes” by, for example, “sell[ing] or otherwise monetize[ing] such information or compilations of it in their dealings with advertisers, data brokers, and other third parties.”⁷ This is so for several reasons.

First, unlike those companies that engage in these targeted practices, restaurants that collect data are typically doing so to support their own operations and enhance customer experience, not to create a separate revenue stream or to monetize data on their customers. Restaurants have always sought feedback from customers, to improve the restaurants’ offerings and service and to provide for the best possible customer experience. Specifically, restaurants use consumer data to understand customer preferences, facilitate a seamless customer experience, and predict demand. In other words, collecting data is not central to the restaurant business model as it is for other companies; rather, it is collected to enable restaurants to enhance the diner experience. Today, to the extent restaurant industry participants collect customer data, it therefore reflects a modern, electronic version of what has been a longstanding, standard, and uncontroversial practice.

Second, the majority of businesses within the restaurant industry are significantly smaller and far more under-resourced than those businesses that

⁷ ANPR at 51274.

engage in practices the FTC appears to be targeting. As noted above, 90 percent of restaurants across the country have less than 50 total staff, and 70 percent of restaurants are single-unit operators.⁸ Further, post-pandemic, restaurants are operating at even tighter margins: sales are down \$65 billion from those pre-pandemic and industry employees are down by 1 million.⁹ As a result, most businesses in the restaurant industry do not have the resources to ensure compliance with additional regulations related to data security and privacy.

Third, even in the situation where restaurants may be the first point of collection of data which is then passed along to downstream businesses, many restaurants will not have control over, and are not responsible for, any data privacy violations that might be committed by downstream business partners like social media companies or third-party delivery or reservation platforms. Therefore, measures to hold restaurants accountable for the actions of others (especially those with greater resources and technological savvy) would only serve to further impair a restaurant's ability to improve the customer experience without providing a corresponding benefit to society at large. In other words, it would be imposing a burden on the restaurant industry rather than on the least cost avoider.¹⁰

⁸ National Restaurant Association, National Statistics, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/>.

⁹ National Restaurant Association, National Statistics, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/>.

¹⁰ See, e.g., Paul Rosenzweig, *Cyber Security and the Least Cost Avoider*, <https://www.lawfareblog.com/cybersecurity-and-least-cost-avoider> (Nov. 5, 2013).

Finally, despite the benefits to consumers and restaurants alike, most restaurants do not collect, store, or utilize customer data received via QR codes or from platforms or providers. Therefore, any effort to implement and enforce regulations regarding the data collection practices in the restaurant industry would yield negligible benefits, if any at all, and such efforts would be better focused on targeting the practices of companies in other industries that routinely and uniformly engage in such practices.

III. The FTC Should Take Into Account Costs of Burdensome or Overly Prescriptive Data Security Regulations¹¹

Security is a priority for restaurant operators—whether it is putting cash and receipts in a register or safe, maintaining the highest standards when selecting, storing, and preparing food, or providing a safe environment for customers and employees. Securing our customers' personal information is no different. As the backbone of communities throughout America, restaurant operators build their business on trusted relationships with their guests, and they rely on robust data privacy and security practices, such as opt-in processes and data encryption, to strengthen that trust in today's digital economy. Further, because restaurants seek and use customer data to better serve customers and enhance customer experience, they have an additional incentive to keep that data safe, secure, and confidential.

¹¹ This section is intended to address Question No. 31 in the ANPR: "Should the Commission commence a Section 18 rulemaking on data security?"

Notwithstanding this priority, overly prescriptive regulations related to data security do more harm than good. There already exists a patchwork of conflicting regulations and laws related to data privacy, which makes compliance confusing and burdensome for larger operations and effectively impossible for smaller ones. To further compound the problem, the restaurant industry writ large is currently experiencing a staffing crisis.

Restaurants that cannot hire enough employees to keep their doors open and adequately serve customers likely cannot devote an employee to ensuring adherence and compliance to such regulations, or hire someone focused on that task. Accordingly, a preemptive federal data privacy regime that creates a single, clear, uniform standard would be ideal. And at a minimum, any data privacy framework should account for a company's resource constraints and provide flexibility if not an outright exemption for smaller operators.

IV. The FTC Should Delay Section 18 Rulemaking Pending Congress's Vote on the American Data Privacy and Protection Act¹²

In considering the need for a uniform standard and the agency's statutory mandate, we strongly urge the FTC to defer to Congress as the appropriate body to adopt sweeping consumer privacy and security requirements. Congress, as compared

¹² This section is intended to address Question No. 30 in the ANPR: "Should the Commission pursue a Section 18 rulemaking on commercial surveillance and data security? To what extent are existing legal authorities and extralegal measures, including self-regulation, sufficient? To what extent, if at all, are self-regulatory principles effective?"

to the FTC, has significantly more resources, time, and expertise to enact a comprehensive consumer privacy law that extends beyond the issues over which the FTC has authority. And unlike with agency action, the American public can hold Congress accountable for any data privacy reform it enacts.

This accountability is especially important given that “any law our nation adopts will have vast economic significance” including the fact that “reducing the ability of companies to use data about consumers, which today facilitates the provision of free services, may result in higher prices.”¹³ Given the need for Congress to enact robust and uniform federal data privacy regime, the FTC should avoid any rulemaking until Congress has taken action to provide much-needed clarity and guidance.¹⁴

Accordingly, the FTC should delay Section 18 Rulemaking pending Congress’s vote on the ADPPA. If and when Congress implements such a comprehensive framework, the FTC can consider at that time whether to propose regulations that center on the areas that Congress has expressly delegated to the FTC and on any

¹³ ANPR, Dissenting Statement of Commissioner Phillips at 51293; *see also W. Va. v. EPA*, 597 U.S. __, 142 S. Ct. 2587, 2607-09 (June 30, 2022); *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

¹⁴ ANPR, Dissenting Statement of Commissioner Wilson at 51298. Such Congressional action will also provide important guidance as to the scope of the FTC’s regulatory authority.

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other areas of concern over which the FTC has authority.

Conclusion

On behalf of the Restaurant Law Center and the National Restaurant Association, we thank you for this opportunity to submit comments on this important issue and encourage you to contact either of us with any further questions or concerns.

Sincerely,



Angelo I. Amador
Senior Vice President & Regulatory Counsel
National Restaurant Association
Executive Director, Restaurant Law Center
aamador@restaurant.org
P: 202-331-5913



Brennan R. Duckett
Director of Technology &
Innovation Policy
National Restaurant Association
bduckett@restaurant.org
P: (240) 357-4112

*We would like to thank outside counsel for their assistance in drafting these comments:



Madeleine V. Findley
Elizabeth B. Scott
Gabriel K. Gillett
Jenner & Block
www.jenner.com