

January 7, 2019

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mr. Clark:

On behalf of Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”) and OCA - Asian Pacific American Advocates (“OCA”), we thank the Federal Trade Commission (“Commission”) for the opportunity to submit the following comments in response to the Commission’s Notice for Comments on the Commission’s Hearing #6: Privacy, Big Data, and Competition.¹ With a changing world that has become more connected through technological means, we appreciate the Commission holding these hearings and accepting comments to help the agency set its agenda and assess the need for improved laws to help it better protect consumer privacy and preserve marketplace competition. Advancing Justice | AAJC and OCA will focus its comments on question 4 raised in the Commission’s Notice.²

Advancing Justice | AAJC is dedicated to civil and human rights for Asian Americans and to promoting a fair and equitable society for all. We provide the growing Asian American population with multilingual resources, culturally appropriate community education, and public policy and civil rights advocacy. In the telecommunications field, Advancing Justice | AAJC works to promote access to critical technology, services, and media for our communities.

OCA – Asian Pacific American Advocates is a national membership-driven organization of community advocates dedicated to advancing the social, political, and economic well-being of Asian American and Pacific Islander (AAPI) communities. OCA strongly believes that as our country continues to digitize and create modern communications networks, it is pivotal that AAPI communities help shape the policies and regulations that create the framework for that innovation to ensure our communications can reasonably access such technologies.

¹ FTC Hearing #6: Competition and Consumer Protection in the 21st Century, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century> (last visited Jan. 7, 2019).

² See Hearings on Competition and Consumer Protection in the 21st Century, 83 Fed. Reg. 38307 (Aug. 6, 2018).

Introduction and Summary

In the digital space, AAPI consumers have clearly shown a strong presence by becoming quickly proficient on new platforms and swiftly adopting new technologies. While many AAPI households still do not have a home broadband connection or access to affordable modern communications networks,³ it does not preclude that, in the aggregate, our communities over index as high adopters of new technology. In fact, the majority of Asian Americans say they prefer products that offer the latest in new technology.⁴ Asian American consumers are also active spenders online, spending an average of \$1,151 on internet purchases per year, 20% higher than non-Hispanic White consumers, and over-index non-Hispanic White consumers for online purchasing at every dollar level over \$500.⁵ In addition, English-speaking Asian Americans have the highest percentage of internet usage amongst all racial groups in the United States, at 97% compared to 85% of non-Hispanic Whites.⁶

Becoming such influential and knowledgeable participants in the online space has made these communities one of interest to companies that exist or rely on a digital medium.⁷ In the era of big data collection being used to create personalized technological experiences, Asian Americans are particularly vulnerable to having their personal data divulged through data brokers who use legitimate means to collect this information or being left unaware of a breach after nefarious actors have stolen personal information through bypassing the security protocols of these online entities. However, the AAPI community is diverse in its makeup, separated by rich complex histories and varying relationships with institutions in this country. As such, any regulations that impact the overall AAPI community must account for this diversity and ensure protections for every ethnic group within the AAPI family.

While the Notice for Comment heavily focuses on the impact of data collection, usage, and privacy regimes on competition and innovation, it is important to reiterate

³ Camille Ryan, Computer and Internet Use in the United States: 2016 at 7, U.S. CENSUS BUREAU (Aug. 2018) *available at* <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf>.

⁴ *Asian Americans are Discerning, Trendsetting Online Shoppers*, NIELSEN (June 18, 2018) <https://www.nielsen.com/us/en/insights/news/2018/asian-americans-are-discerning-trendsetting-online-shoppers.html>.

⁵ *Id.* “A further examination shows the Asian-American e-commerce market is formidable and primed for continued growth in the future.”

⁶ English-speaking Asian-Americans are the Most Likely to Report Internet Usage, PEW RESEARCH CENTER (June 26, 2015) <http://www.pewinternet.org/chart/english-speaking-asian-americans-are-the-most-likely-to-report-internet-usage/>.

⁷ Lewis Lazare, *State Farm targets Asian-American audience in new ads*, CHICAGO BUS. J. (Aug. 2, 2018, 2:52 PM EDT) <https://www.bizjournals.com/chicago/news/2018/08/02/state-farm-targets-asian-americans-in-new-ads.html>.

that the goals of innovation and competition must not supersede privacy and protection of a consumer's data. Consumers should not be forced to choose one set of benefits over another. Given this, we encourage the Commission to consider the following principles in developing a framework to take on the intersection of big data and privacy in the online space while keeping AAPI communities in mind:

- 1) Support a strong Federal framework on digital privacy
- 2) Create parity among all online actors
- 3) Maintain transparency by companies
- 4) Allow strong access and control over personal data
- 5) Develop clear and consistent enforcement

Each of these points are discussed in more detail below.

Interest of Asian American and Pacific Islander communities

Culturally, ethnically, and socioeconomically, AAPI communities are not, and have never been, a monolith. AAPI communities encompass over 50 different ethnic groups and 100 languages and/or dialects.⁸ Asian Americans of all skills and backgrounds have immigrated to the United States for myriad reasons—including to pursue careers in STEM, escape oppressive political regimes, and reunite with family members. Disaggregating the datasets from across the numerous ethnicities represented within the Asian American population exposes the reality that Asian American communities encompass some of the highest and lowest rates of academic achievement and some of the highest and lowest rates of poverty among all ethnic groups in the United States.⁹

⁸ *Snapshot: Asian American, Native Hawaiian, and Pacific Islander Health*, ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM, at 1 (Sept. 2017),, available at https://www.apiahf.org/wp-content/uploads/2017/09/September2017_SnapshotAANHPIHealth_Factsheet_0-1.pdf.

⁹ As OCA – Asian Pacific American Advocates previously observed to the Federal Communication Commission, although the Pew Research Center and other organizations have continuously shown high rates of broadband adoption for Asian Americans, the data collected generally has been from overwhelmingly English-proficient Asian Americans, undersamples Pacific Islanders, and does not disaggregate data by major ethnic subgroups. See Comments of OCA – Asian Pacific American Advocates at 2, WC Docket No. 11-42 (Aug. 31, 2015), available at <https://ecfsapi.fcc.gov/file/60001223377.pdf> (hereinafter, “OCA Comments”). One-third of Asian Americans have limited English proficiency, and these studies most likely did not account for such individuals. See *generally* A Community of Contrasts: Asian Americans in the United States, ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE (2011), available at https://www.advancingjustice-aajc.org/sites/default/files/2016-09/Community_of_Contrasts_US.pdf (hereinafter “Asian Americans in the United States”); Lee Rainie, Asian-Americans and Technology, PEW RESEARCH CENTER(2011), available at <http://www.pewinternet.org/2011/01/06/asian-americans-and-technology/> (English polls result in “substantially upscale APA population [with higher] educational attainment and household income”).

Despite data showing that Asian Americans overwhelmingly access technology at higher rates than other racial groups and have a higher median income and education level relative to other groups,¹⁰ disaggregated data have also shown that AAPIs constitute some of the highest rates of poverty and lack of educational attainment amongst all US racial categories. According to the 2015 1-Year ACS, there are currently 2.14 million Asian Americans and Pacific Islanders living in poverty.¹¹ While Chinese and Indian Americans have the highest absolute number of individuals living in poverty at 449,356 and 246,399 respectively,¹² Southeast Asian and Pacific Islander Americans have some of the highest rates of poverty among all racial and ethnic groups in the United States.¹³

Education attainment also varies within the AAPI family. In the aggregate, Asian Americans have the highest rate of postsecondary and postgraduate degree attainment of all racial groups.¹⁴ However, when the data is disaggregated, it shows that there are also vast differences in the educational attainment among AAPI groups. For example, 34 percent of Southeast Asian Americans have less than a high school education, a rate second only to Hispanics.¹⁵ Tongan and Samoan Americans have a bachelor's and postgraduate degree attainment rate similar to African Americans and Hispanics. Thus, the myth of the model minority has too long obfuscated very real disparities between Asian ethnic groups.

Language proficiency is another area of diversity among AAPI communities. One third of Asian Americans are Limited English Proficient (LEP)¹⁶ compared to the eight percent of the general U.S. population.¹⁷ Certain ethnic groups have higher LEP rates,

¹⁰ Ryan, *supra* note 3, at 7.

¹¹ AAPI Poverty Profiles, NATIONAL CAPACD, <http://www.nationalcapacd.org/aapi-poverty-profiles/> (last visited Jan. 7, 2019).

¹² Josh Ishimatsu, *Spotlight: Asian American and Pacific Islander Poverty, at 11*, NATIONAL COALITION OF ASIAN PACIFIC AMERICAN COMMUNITY DEVELOPMENT (June 2013) (*hereinafter* "Spotlight: AAPI Poverty") available at http://www.nationalcapacd.org/wp-content/uploads/2017/08/aapi_poverty_report.pdf.

¹³ See Asian Americans in the United States, *supra* note 9 at 7. Indeed, according to a report by the National Coalition for Asian Pacific American Community Development, almost 2 million Asian Pacific Americans (APAs) live at or below the poverty line the United States. See Spotlight: AAPI Poverty, *supra* note 12.

¹⁴ Karthick Ramakrishnan and Farah Z. Ahmad, State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population, CENTER FOR AMERICAN PROGRESS (Sept. 2014) available at aapidata.com/wp-content/uploads/2017/09/AAPIReport-comp.pdf.

¹⁵ *Id.* at 13. For this data point, Southeast Asian Americans refers to the aggregated results of Vietnamese, Cambodian, Hmong, and Laotians.

¹⁶ Limited English Proficiency by Detailed Group (National), AAPI DATA <http://aapidata.com/stats/national/national-lep-aa-aj/> (last visited Jan. 7, 2019).

¹⁷ Jie Zong and Jeanne Batalova, *The Limited English Proficient Population in the United States*, MIGRATION POLICY INSTITUTE (July 8, 2015) <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

for example, 69 percent of Bhutanese, 50 percent of Vietnamese, and 44 percent of Bangladeshi Americans are LEP. Among Asian Americans, non-Taiwanese Chinese have the highest absolute number of LEP individuals at 1.4 million. As such, multilingual translations are necessary for AAPI communities to fully engage as reasonably informed consumers.

1. A Strong Federal Framework Provides the Most Benefits to Consumers

Consumers should have consistent federal standards of access and control over all personal information collected from their online actions. The inherent interstate nature of the internet initially prescribes the necessity for a strong federal framework rather than a patchwork of inconsistent state and local regulations. A multitude of rules would confuse consumers and are simultaneously prohibitive to small online businesses. Strong federal rules are beneficial to both consumers and small businesses.

There is already a nonpartisan call for simplified and understandable terms of service, privacy policies, and notifications. The introduction of multiple comprehensive state regulations in addition to a federal policy on top of international standards dilute the effort to make these communications more digestible for the average consumer. Small businesses also face additional hurdles if there are multiple regulations. Many do not have the capital to hire lawyers to comply with each state's privacy statutes on top of federal rules. However, states should not be precluded from regulating privacy in the absence of a strong federal privacy law.

2. All Entities in the Online Ecosystem must be Subject to Privacy Requirements

Any regulation efforts must cover all digital-based companies, including internet service providers, advertisers, e-commerce sites, entertainment and ad tech companies, social media platforms, search and browser providers, operating systems, data brokers, and everyone else within the online ecosystem. Even a leading telecommunication company, Charter Communications, agrees that a sectoral-based approach will only lead to consumer confusion and entrench the dominance of certain companies or sectors that are not subject to the same obligations as others.¹⁸

For a community as diverse as the AAPI community, in terms of digital engagement based on language proficiency, income and education level, a baseline treatment of all entities is necessary. Such treatment ensures that AAPI consumers can

¹⁸ Comments of Charter Communications, Inc., Project No. P181201, *available at* https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0051-d-0044-154939.pdf.

trust that data about them will be used, stored, and shared in ways that match their expectations of the online experience and the circumstances in which the data was collected. AAPI consumers should have this trust regardless of how the data is collected, who receives it, or how it is used. The potential of data as a tool for knowledge and innovation depends greatly upon user trust that can rely on consistent protections.

3. Transparency Requirements Must Include Multilingual Notifications to Ensure that Asian Americans are Informed Consumers

Oftentimes, consent policies require a college reading level to comprehend,¹⁹ assuming that the privacy policy is even available for review. As mentioned above, the Commission should focus on ensuring a uniform standard of transparency and disclosure. To this end, companies should be expected to have terms of services, privacy policies, and notifications that reasonably educate and inform their consumers. Without plain language communications, very few consumers would be able to actually make an informed decision whether or not they should consent to a company's terms or decide how their data can be utilized. Companies should also be required to simplify disclosure notifications, using graphics and images whenever helpful, to help alleviate this problem.

As an example of applying the above standards, the European Union's General Data Protection Regulation (GDPR) outlines several intuitive standards for how companies should communicate data collection and usage information to their consumers:

- Concise
- Transparent
- Intelligible
- Easily Accessible
- In clear and Plain Language
- Free of Charge²⁰

Adopting similar standards would allow Americans the ability to become active participants in understanding and choosing what data is collected and how their data is utilized.

¹⁹ See Tom Calver and Joe Miller, *Social site terms tougher than Dickens*, BBC NEWS (July 6, 2018) <https://www.bbc.com/news/business-44599968>.

²⁰ Recital 58: The principle of transparency, INTERSOFT CONSULTING, <https://gdpr-info.eu/recitals/no-58/> (last visited Jan. 7, 2019).

As shown above, many Asian Americans are LEP.²¹ As a result, the right to privacy must be provided to communities that are not fluent in English. Companies should allow their users the ability to identify their preferred language for policies and notices, and companies should be incentivized to provide additional language support aside from the ones identified above. Similar language access protections are present in other areas such as voting rights²² and health care²³. At a minimum, companies should be required to make web pages containing privacy disclosures readable by translation software. If notifications are written plainly for the average consumer, translation software will be more likely to correctly translate the information. This would help ensure that the right to privacy extends beyond communities that are fluent in English and reach a greater number of online users. In addition, companies should be incentivized to provide additional language support, allowing users an opportunity for effective notice.

In response to the Commission's original inquiry on whether consumers "prefer free/ad-supported products to products offering similar services or capabilities but that are neither free nor ad-supported,"²⁴ we would point to the number of AAPI communities that do not have the economic security to have a preference for one service over another.²⁵ Such a consideration makes privacy a paid right when all Americans should be entitled to the same protections irrespective of the business model.

Current business models that provide both a free service with ads and a paid, ad-free service create a two-tiered culture of privacy where low-income consumers' data are commoditized and less protected than those who can pay for premium services. Rather than further institutionalizing pay-for-privacy under the guise of innovation and competition, the Commission should seek a privacy framework that ensures every American's personal data is protected regardless of the business model employed by the provider collecting and using the data.

²¹ See Limited English Proficiency by Detailed Group (National), *supra* note 16.

²² About Language Minority Voting Rights, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/about-language-minority-voting-rights> (last updated Feb. 26, 2018).

²³ Section 1557: Ensuring Meaningful Access for Individuals with Limited English Proficiency, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *available at* <https://www.hhs.gov/sites/default/files/1557-fs-lep-508.pdf>.

²⁴ Federal Trade Commission Announces Hearings on Competition and Consumer Protection in the 21st Century, Federal Trade Commission, *available at* https://www.ftc.gov/system/files/attachments/hearings-competition-consumer-protection-21st-century/hearings-announcement_0.pdf.

²⁵ See Spotlight: AAPI Poverty, *supra* note 12 at 11.

4. Consumers Should Have the Ability to Reasonably Access and Control Their Data

Providing consumers reasonable access to the data they have provided companies and giving them the ability to rectify, complete, amend, and delete their data is necessary to ensure consumers have more control over their information. In this age, traditionally non-sensitive data can be amalgamated to identify households, individuals, and detailed information about their lives, including reasonable prediction of an individual's social security number.²⁶ In this process, erroneous conclusions inferred from the data can occur. As such, ensuring that all types of data authorized by consumers for collection by companies are correct or can be corrected is pivotal for the protection of consumer information.

In addition, given the prevalence of common surnames among Asian Americans,²⁷ it is necessary to provide them the ability to review and amend their information, especially in cases where the data of one individual is misidentified as another person's because of their name. With regard to other minority communities, the ability to correct information is necessary for transgender peoples to accurately identify their names and gender when such information is no longer reflective of their identity.

5. Strong Enforcement ensures AAPI communities are protected

Consumers in the digital space strongly rely on consistent and clear enforcement mechanisms to hold organizations accountable to established privacy standards. This is especially true for underserved communities who neither have the means nor the knowledge of what recourse can be taken against organizations who violate established privacy standards. If the FTC is expected to enforce established privacy rules, the agency must be equipped with sufficient resources and effective enforcement authority. This should include consideration of appropriate enforcement tools such as the ability to assess civil monetary penalties for violations, rulemaking authority, and additional resources for the FTC, including sufficient staff who are proficient in this area.

Furthermore, consideration should be made as to whether federal enforcement authorities can adequately protect consumer data alone or whether a role is also needed for state law enforcement authorities to work with the federal enforcement

²⁶ Alessandro Acquisti and Ralph Gross, Predicting Social Security numbers from public data, PNAS (July 7, 2019) *available at* <http://www.pnas.org/content/106/27/10975>.

²⁷ Family/Clan Structure, STANFORD SCHOOL OF MEDICINE, <https://geriatrics.stanford.edu/ethnomed/hmong/introduction/family.html> (last visited Jan. 7, 2019). There are roughly 299,000 Hmong Americans in the United States. They have a total of 18 surnames, meaning that many individuals often have the same or similar names.

authorities to enforce federal standards, as well as ensure that enforcement is consistent, addressed responsibly, and handled effectively. One privacy expert, Danielle Citron, believes that state attorneys general can play an important role in enforcing privacy standards:

State attorneys general have been nimble privacy enforcement pioneers, a role that for practical and political reasons would be difficult for federal agencies to replicate. Because attorneys general do not have to wrestle with the politics of agency commissioners or deal with layers of bureaucracy, they can move quickly on privacy and data security initiatives. Career staff have developed specialties and expertise growing out of a familiarity with local conditions and constituent concerns. Because attorneys general are on the front lines, they are often the first to learn about and respond to privacy and security violations. Because constituents express concern about privacy and data security, so in turn do state attorneys general who tend to harbor ambitions for higher office.²⁸

Conclusion

The Internet has proven itself to be a transformative tool, but one that can create great harm if not managed properly and to the benefit of those least able to protect their online data. A framework for privacy should include principles that support a strong federal framework on digital privacy, create parity among all online actors, maintain transparency by companies, allow strong access and control over personal data, and develop clear and consistent enforcement. Such principles will protect a community as diverse as the AAPI community while bolstering their presence as consumers in the digital space.

Sincerely,

Asian Americans Advancing Justice | AAJC
OCA-Asian Pacific American Advocates

²⁸ Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 750 (2016).