

MEMORANDUM

TO: ESPC

FROM: D. Reed Freeman, Jr.

DATE: April 24, 2013 FILE: 68223-0000001

RE: Senate Commerce Committee Hearing, "A Status Update on the Development of Voluntary Do-Not-Track Standards"

We write to provide you with a summary of the Senate Committee on Commerce, Science, and Transportation hearing entitled "A Status Update on the Development of Voluntary Do-Not-Track Standards." The hearing, chaired by Senator Jay Rockefeller (D-VA), took place at 2:30 in the afternoon on April 24, 2013. In addition to Senator Rockefeller, Senators Claire McCaskill (D-MO), John Thune (R-SD), Dean Heller (R-NV), and Richard Blumenthal (D-CT) each asked questions of the panel. The panel included:

- ◆ Harvey Anderson, Senior Vice President of Business and Legal Affairs, Mozilla
- ◆ Luigi Mastroia, Managing Director, Digital Advertising Alliance ("DAA")
- ◆ Justin Brookman, Director of Project on Consumer Privacy, Center for Democracy and Technology ("CDT")
- ◆ Adam Thierer, Senior Research Fellow, Mercatus Center at George Mason University

The impetus for the hearing, as Senator Rockefeller put it in his opening remarks, is that it is April 2013 and consumers are "still waiting for do not track" ("DNT"). He stressed that he "personally believes" that industry is "dragging its feet." Furthermore, he is "skeptical" that companies can implement effective self-regulatory regimes that would negatively impact their bottom lines. Hence, he believes that DNT legislation is necessary.

After Senator Rockefeller's [opening remarks](#), Senators Thune, McCaskill and Heller each spoke briefly, and then the panelists made opening statements (Senator Blumenthal arrived later in the hearing). The remainder of the hearing consisted of queries to the panelists by the Senators. An executive summary follows, with additional detail below.

EXECUTIVE SUMMARY

- ◆ Senator Rockefeller does not think industry self-regulation for DNT will work
 - He wants default-on DNT (like in Microsoft Internet Explorer 10) as an industry standard

- He thinks consumers fail to understand the extent of online tracking, and that they are harmed by this lack of understanding
 - He thinks legislation is the only solution to online tracking
- He accused DAA of being hostile to Microsoft and Mozilla because they have made it easier for consumers to avoid being tracked
- Senator Blumenthal's views seem to largely track Senator Rockefeller's
- ◆ Senators Thune, McCaskill, and Heller are each skeptical of top-down regulation of the internet
 - They believe, to varying degrees, that consumers can fend for themselves in the online ecosystem
- ◆ Harvey Anderson of Mozilla emphasized the importance of trust for the online ecosystem to work
 - Mozilla offers options that consumers want, and that help build trust
- ◆ Luigi Mastria of the DAA contended that the AdChoices icon provides transparency and choice
 - He blamed Mozilla and Microsoft for the W3C's lack of consensus on DNT

COMMITTEE STATEMENTS

Senator Rockefeller

- ◆ Consumers are still waiting for DNT, and industry is unwilling to deliver
- ◆ Has heard conflicting reports about the failure of the World Wide Web Consortium ("W3C") to create a voluntary DNT standard
 - On the one hand, some claim that Mozilla and Microsoft are preventing the consortium from achieving a consensus on DNT
 - Others suggest that industry is deliberately dragging its feet and moving the goalposts because it refuses to stop tracking
- ◆ Is sympathetic to a default DNT setting
- ◆ Goal (for the hearing) is to get to the bottom of the controversy, e.g., figure out:
 - What has gone wrong with the W3C process, and
 - How to make DNT a reality for consumers

Senator Thune

- ◆ Believes all players want to meet the interests of consumers
- ◆ Concern about any policy (including legislation) that raises barriers to entry and hurts smaller industry participants, and therefore consumers
- ◆ Believes consumers can largely take care of themselves
 - New tools make it possible to control the extent to which activity is tracked across the web

Senator McCaskill

- ◆ Both privacy and a vibrant economy are important goals
 - Thus balancing interests is important
 - Also must be careful not to implement policies that force smaller players out of the market, leaving very large companies dominant

Senator Heller

- ◆ Suggests that consumers are paying for free services with their data
- ◆ Thinks W3C is spinning its wheels, and needs to get a result in May
 - A private sector solution is preferred
 - Three principles for the standard: (1) technology neutral; (2) business-model neutral; (3) does not pick winners and losers
- ◆ Thinks that it is hard for W3C to achieve a consensus on DNT because the parties have conflicting agendas
- ◆ Wants to understand what—if any—*harm* tracking causes

PANELIST OPENING STATEMENTS

Harvey Anderson, Mozilla

- ◆ Collection and use norms for the internet are still evolving—it is a (relatively) young medium
- ◆ Industry has not moved fast enough to provide consumers with enough transparency and choice
 - They are necessary because the internet is based on trust—the loss of trust will be more costly (in terms of the bottom line) than any loss of revenues as a result of DNT
- ◆ The way to meet the needs of consumers who do not want to be tracked is to adopt DNT now, without waiting for finalized specifications
- ◆ But legislating technology is risky

Lou Mastria, DAA

- ◆ The AdChoices icon provides persistent choice for *all* marketplace participants
 - DAA is a solution, not the problem
- ◆ The DAA agreed to implement DNT in its February 2012 statement (the White House agreement), but progress was short-circuited by Microsoft and Mozilla

Justin Brookman, CDT

- ◆ There is a tradeoff of free content for advertising
 - But there is surveillance, and consumers cannot opt-out industry wide
 - DAA is not universal, and there needs to be a global opt-out
 - Ad networks can still collect data from consumers who opt-out—they just cannot use it for Online Behavioral Advertising (OBA) purposes
- ◆ All major browsers can accept DNT, but the industry won't accept it
 - Chrome meets the DAA criteria, but DAA ignores it
- ◆ W3C is at a standstill

Adam Thierer, Mercatus Center

- ◆ Three basic points
 - Restrictions on the collection of data can have a negative impact
 - A “silver bullet” solution—like the DNT header—is not realistic

- Better to rely on alternative approaches such as educating consumers and enforcement (by the FTC, buttressed by State Attorneys General and potential class action litigation)
- ◆ Private DNT already exists—there are free tools and methods that make anonymous browsing possible
- ◆ Flexible bottom-up approach is better

QUESTION AND ANSWER SESSION

Senator Rockefeller asked all the witnesses what was holding up the W3C.

- ◆ Anderson (Mozilla) took offense to the DAA suggestion that Firefox’s proposed implementation of technology to bar third party cookies was the reason the DNT standard was not progressing
- ◆ Mastria (DAA) said the DAA is ready to honor the White House agreement
 - DAA is focused on delivering consumer choice, but Microsoft and Mozilla are making decisions for consumers
- ◆ Brookman (CDT) said that he does not know why industry has responded to the W3C DNT effort by taking such a hard line
- ◆ Thierer (Mercatus) argued that setting technology standards is hard, and that sometimes good faith efforts don’t work
 - He reiterated that he is skeptical of technical “silver bullets”

Senator Heller asked the witnesses to comment on the proposition that the public largely does not understand tracking, and followed up by asking if there is a difference between first party and third party tracking. Senator Thune later asked this same question. In response to both queries:

- ◆ Anderson agreed that consumers don’t *really* understand tracking or OBA, but there is some awareness of how the online ecosystem works
- ◆ Mastria stated that consumers like free online content with relevant online ads
 - Smaller publishers would be hurt by limitations on third party tracking, such as Mozilla’s blocking of 3d party cookies.
 - Anderson disagreed, and pushed Mastria to explain why DAA won’t respect DNT
 - Mastria responded that “track” has no meaning right now
- ◆ Brookman said that first party tracking and data collection is more benign, because it is more intuitive.

Senator McCaskill identified three sets of competing interests: (1) browsers versus ad publishers; (2) first versus third parties; and (3) big players versus smaller players

- ◆ She emphasized her concern that small players not be crowded out
- ◆ She asked why the W3C is making significant policy decisions relating to DNT and standard-setting

In response,

- ◆ Mastria explained that the browser community got W3C involved in the first place
- ◆ Anderson explained that initially, adopting DNT was a problem because it was not clear what it meant, and the W3C was a place to go to try to resolve the standard
- ◆ Thierer argued that the W3C is better positioned to be a forum for the creation of a standard than the FTC or another regulatory body

Senator Rockefeller then commented that:

- ◆ Consumers are ignorant because they do not have the time to think about what happens when they are online
 - Behavioral advertising is broader than people realize, and consumers need to know what happens
- ◆ The harm to online consumers is *that they don't know what happens to them*
 - With the exception of necessary data collection for fraud and cyber security, consumers want to be left alone
 - But industry cannot leave consumers alone, regardless of what happens with W3C and DNT, because the business model relies on tracking
 - The solution is legislation
 - Senator Rockefeller returned to this theme throughout the hearing

In response,

- ◆ Mastria reiterated that the DAA offers consumers a choice, and that he agrees with the Senator about the importance of educating consumers
 - DAA supports browser-based choices in addition to AdChoices

Senator Rockefeller then accused DAA of being hostile to Microsoft and Mozilla because *they have made it easy for consumers to avoid being tracked*, and because they have figured out how to make money without taking advantage of consumers.

- ◆ He wants to make it more difficult to for advertisers because consumers want privacy
- ◆ He asked why Mozilla put DNT in its browser, and why it is looking at blocking third party cookies
 - Anderson explained that Mozilla's goal is to create an online experience that reflects users' expectations
- ◆ The Senator then asked how companies would respond to Mozilla's actions
 - Mastria said that DAA's members provide consumers with transparency and choice, which creates the trust necessary for an advertising-based internet to function

Senator Rockefeller then changed course slightly, declaring that he is disturbed by how data brokers can buy records of individuals' information, including health and financial records; he asked Brookman to explain why he thought that Rockefeller found it "repulsive"

- ◆ Brookman responded that it probably has to do with the fact that these companies that possess this data are not familiar to consumers, consumers have no relationships with them, and there is as a result no accountability
 - Hence proposals for data brokers to register with the FTC, so that consumers could figure out what information they have about them
 - Senator Rockefeller suggested that legislation could do that as well

Senator Blumenthal asked the panelists how much longer we (meaning the sponsors of the DNT legislation) should wait for a voluntary DNT agreement before acting. He ultimately suggested that *only legislation can enforce compliance*

- ◆ Mastria said DAA is ready but Microsoft and Firefox are frustrating efforts to achieve consensus through W3C
 - He added that legislative fiat is not what the internet needs
 - It needs a nimble self-regulatory approach that fosters trust while protecting privacy

Building on Senator Blumenthal's comments, Senator Rockefeller declared that the DNT standard is unenforceable, and DAA knows it.

Senator Rockefeller then concluded the hearing by stating that he wants to make consumers' online lives easier (e.g., protecting their privacy) by protecting them from the start (with an *opt-in* to tracking mechanism), because that is what they ultimately want, and will demand for the internet to prosper.