

Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising

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Policymakers may opt for government regulation of privacy when they feel that “something needs to be done;” however, the risk of overregulation is potentially greater than the risk of under-regulation.

Self-regulation, in all its myriad permutations, is a vital part of today’s global economy. Diverse industries, such as health care, higher education, fashion, advertising, mining, marine fishing, professional sports, and nuclear power, have used self-regulatory processes to govern industry practices.¹ The private sector relies on self-regulation to address a range of issues, from establishing industry standards, to developing and applying codes of professional ethics, to ensuring consumer confidence. Despite its widespread use, some policymakers are skeptical of the efficacy of self-regulation when it comes to protecting consumer privacy online. This report seeks to address that skepticism by explaining how self-regulation works and why it is essential to protecting consumer privacy in online behavioral advertising.

TYPES OF REGULATION

Regulatory styles vary considerably from country to country and industry to industry. Regulations may set market conditions, such as price controls, market-entry conditions, product requirements and contract terms, or social obligations, such as environmental controls, safety regulations or advertising and labeling requirements.² The impact of regulations on the economy depends on the nature of the regulation and how efficiently and effectively it is implemented. While regulations impose costs on firms, causing them to shift resources away from other activities to achieve compliance, these costs are often justified as a means of improving social welfare. For example, the benefits of regulations to

address concerns about public safety or the environment are intended to outweigh the efficiency cost of imposing the regulations. Regulations, especially if they are performance-based, may also induce innovations that benefit consumers, producers and society. In some instances, regulations may even increase competitiveness by improving the quality of products and services and giving firms that produce these products and services a first-mover advantage.³

While the nature of regulations and the institutions used to create them may vary, as shown in Figure 1, the regulatory process generally consists of three stages: creating regulations, monitoring for compliance, and enforcing regulations. At each of these stages, the level of industry participation in the regulatory process may vary, from industry being completely shut out of the process by government to industry being the leading actor in setting policy.



Figure 1: Three stages of the regulatory process

There are a variety of options for government and industry involvement in the regulatory process, ranging from laissez-faire economies with limited state regulation to tightly managed economies with significant government involvement. As shown in Figure 2, the spectrum of options ranges from non-state regulation to co-regulation to state-based regulation. Non-state regulation involves private, market-based institutions governing their actions through voluntary agreements, peer pressure and other methods to coordinate their actions. Examples of non-state regulation include industry standards and best practices, professional codes of ethics, and corporate social responsibility. Industry organizations may also engage in self-policing activities to enforce standards internally and among peers.

Co-regulation occurs when industry and government jointly administer the regulatory process. Examples include government watchdog organizations that provide oversight of industry standards or self-regulatory organizations, government agencies that enforce penalties for violations of self-regulation, and various forms of “soft law” such as government-issued recommendations, principles or codes of conduct that create a non-binding regulatory framework.⁴

Finally, state regulation involves government entities regulating the actions of firms in the private sector. Legislation, executive orders and administrative rules issued by government entities are all examples of state regulation. All of these options are alternatives to an absence of any (state or non-state) regulation where firms’ behavior is influenced only by the market.⁵ The absence of rules does not mean firms are engaging in bad behavior. Many other controls, including social norms, civil litigation, and market forces such as fear of reputational harm, help moderate firm behavior. As FTC Commissioner Julie Brill noted, “I can imagine a scenario where someone says ‘We respect your privacy and we don’t have a program in place,’ but they [actually] are respecting your privacy and they’re doing a good job.”⁶ Likewise, the presence of rules does not mean that all firms are engaging in

good behavior, as demonstrated by the behavior of mortgage originators, banks and investment firms during the financial crisis.

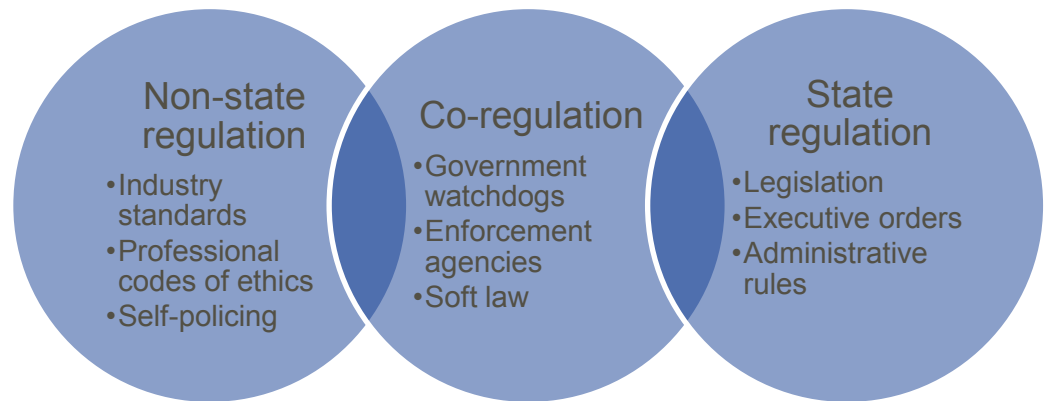


Figure 2: State versus non-state regulatory options

The distinction between the different types of regulation may blur in practice. Much of what many consider to be self-regulation is in practice co-regulation because of state involvement either in developing rules and standards or in providing a legal backstop for enforcement of self-regulation.

HOW SELF-REGULATION WORKS

Self-regulation can be defined as “a regulatory process whereby an industry-level organization (such as a trade association or a professional society), as opposed to a governmental- or firm-level, organization sets and enforces rules and standards relating to the conduct of firms in the industry.”⁷ Businesses use self-regulation to decrease risks to consumers, increase public trust, and combat negative public perceptions. It complements existing laws by imposing supplemental rules to govern the behavior of firms.⁸ Industries have chosen self-regulation in response to both the absence of government regulation and the threat of excessive government regulation. For example, the Forest Stewardship Council was formed in response to industry concerns about the lack of government regulation to address the sustainability of natural resources.⁹ Alternatively, self-regulation may be implemented in response to catastrophic events, such as the formation in the U.S. of the Institute of Nuclear Power Operations after the Three Mile Island accident to set power-plant safety guidelines.¹⁰ Self-regulation may even occur in a tightly-regulated industry. Even under such conditions businesses may still come together to form cooperative agreements to establish industry standards or best practices.

Most of these activities occur through self-regulatory organizations (SROs). SROs are the non-governmental organizations formed by the private sector to set standards, monitor for compliance, and enforce their rules. Some SROs operate with endorsement by government, such as the North American Electric Reliability Corporation (NERC), which is responsible for establishing and enforcing standards for the electric power grid. NERC is certified by the Federal Energy Regulatory Commission, and the Financial Industry Regulatory

Authority (FINRA), which regulates the securities industry in the United States with oversight from the Securities and Exchange Commission (SEC).¹¹ Other examples of SROs include industry bodies to regulate the use of natural resources, such as the Marine Stewardship Council formed to responsibly manage the global fish stocks. Others include ethics bodies to set guidelines for specific sectors, such as the Distilled Spirits Council of the United States, which sets advertising standards for alcoholic beverages, and professional associations, such as state bar associations that admit members to the legal profession, and standards organizations.

Government regulation is often industry specific. For example, the Health Insurance Portability and Accountability Act (HIPAA) and Gramm–Leach–Bliley Act govern practices in the health care and financial industries, respectively. Similarly, self-regulation also tends to govern a specific industry rather than apply across all industries. For example, the National Advertising Review Council (NARC) has created four specialized self-regulatory systems: the National Advertising Division (NAD), the Children’s Advertising Review Unit (CARU), the National Advertising Review Board (NARB), and the Electronic Retailing Self-Regulation Program (ERSP). Each of these SROs develops rules tailored to meet a specific need such as designing child-appropriate advertising and ensuring truth-in-advertising for direct-response marketing (e.g., infomercials).

SROs collaborate with many stakeholders, including those representing consumers and the public interest. These stakeholders participate in many self-regulatory processes, such as helping to craft rules and monitoring for compliance. As a result, SROs may address concerns beyond the narrow self-interest of the industry, such as to protect workers, consumers or other stakeholders. For example, the U.S. apparel industry established industry codes to eliminate the use of sweatshops and improve labor conditions through SROs such as the Fair Labor Association (FLA) and the Workers Rights Consortium. To cite another example, the Forest Stewardship Council not only manages global forest resources, but also sets principles to protect the interests of indigenous people and workers.¹²

Monitoring and enforcing regulations are important parts of the regulatory process. Self-regulation uses self-policing as the primary mechanism to ensure compliance and provide remediation. One example of a self-policing mechanism is the Aviation Safety Reporting System (ASRS), which allows individuals to confidentially report incidents to regulators so that they can improve policies and procedures to increase aviation safety. The Federal Aviation Administration (FAA) encourages participation in this voluntary system by not using information reported to ASRS for enforcement actions and waiving penalties for unintentional violations. The Environmental Protection Agency (EPA) Audit Policy uses incentives to encourage regulated entities to voluntarily detect and disclose violations of environmental laws and regulations. To qualify for the incentives, organizations must meet several criteria such as having a systematic discovery process in place to detect violations, promptly disclosing and correcting violations, and acting prior to any investigation by a government regulator. These incentives include a reduction or elimination of fines based on the severity of the violation and criminal penalties. EPA still assesses penalties on entities for any economic benefits they may have obtained due to noncompliance. In

addition, certain types of serious violations are ineligible for amnesty under the EPA Audit Program.¹³

SROs often will enforce self-regulation for the entire industry, not just for their members. SROs receive complaints from consumers, regulators or other businesses, and then investigate whether a particular firm is noncompliant with industry rules. If it is found to be noncompliant, then the enforcement process begins. The purpose of the enforcement process is to resolve an issue by turning bad actors into good actors; it is not meant to be punitive in nature. Part of the process is kept confidential in order to prevent businesses from using the process to lodge complaints against competitors. However, if a business is unwilling to resolve a violation, then the issue is made public by alerting consumers and the media. For example, an SRO may publish a semi-annual statement of filings or case reports on violations. In addition, an SRO would refer Section 5 violations (deceptive or unfair trade practices) to the Federal Trade Commission (FTC) for law-enforcement action. SRO enforcement can be highly effective, as shown in the compliance numbers. For example, NAD, a voluntary SRO that monitors the truthfulness of national advertising campaigns and provides a dispute-resolution process for complaints, had a 100 percent compliance rate with its rulings between 1971 and 1985, and a 96 percent compliance rate between 1985 and 2000.¹⁴

BENEFITS AND LIMITATIONS OF SELF-REGULATION

Benefits of Self-Regulation

Self-regulation is an important mechanism for governing industry practices and has many benefits over government regulation for consumers, producers, the government, and the economy as a whole. Consumers benefit from self-regulation in multiple ways. While some policymakers promote regulation as a way to reduce risk to consumers, the potential for overregulation also poses a risk to consumers. Unnecessary or inefficient regulation raises production costs for businesses without any corresponding benefits and these costs are ultimately borne by consumers. Government regulation by its nature addresses identified harms, and as such can inadvertently create barriers to innovation or competitive entry when it establishes norms that only address current market participants and practices. Self-regulation can be more efficient for business, and these savings are passed on to consumers. Rulemaking, monitoring, enforcement and remediation processes can also be faster using self-regulation rather than government regulation, which means that consumers are protected sooner.

Self-regulation can help reduce information asymmetry in the market. For example, consumers can more easily hire a good lawyer in the United States because of the certification provided by the state bar associations. Self-regulation can also help reduce information asymmetry when independent third-party organizations are responsible for evaluating compliance with standards. Organizations such as the Council of Better Business Bureaus (BBB) increase transparency of the monitoring and enforcement activities of the regulatory process, which in turn boosts consumer confidence. With the BBB, for example, consumers can learn about the history of consumer complaints against a particular company and how the company has responded. Other organizations, such as the

Underwriters Laboratories or TRUSTe, provide a seal of approval for products and services that consumers can trust.

Regulations may be rigid or flexible, gradual or disruptive. Government regulators may focus on creating rules to protect established interests, rather than creating rules that allow market participants and new entrants to innovate. In contrast, self-regulation benefits the economy by creating a more flexible regulatory environment than is typically found with state regulation. Industry experts review current activities, identify best practices, and develop these into industry guidelines. The guidelines continue to evolve over time in response to feedback from industry leaders. This more flexible regulatory environment may allow firms to operate more efficiently and minimize compliance costs. Flexible regulations tend to maximize economic efficiency by providing firms multiple pathways for innovation. SROs may be more likely to use less stringent “moving target” regulations that change over time in response to the market and social norms. This allows for both incremental and radical innovation. The flexibility of self-regulation also means that SROs may be more experimental than regulatory agencies and more willing to test rules since they can more easily retract them.¹⁵

Self-regulation may also help businesses internalize ethical behavior and principles since the rules are based on social norms and conduct of peers rather than top-down prescriptive rules. This may help instill deeper respect and acceptance of the rules and result in better firm behavior, and avoid adversarial situations in which firms try to find exceptions to externally imposed rules. For example, the Distilled Spirits Council of the United States (DISCUS), a trade association for producers of alcoholic beverages, has maintained a voluntary code of responsible advertising and marketing practices since the end of Prohibition.¹⁶ The association has repeatedly updated the code in response to changes in the marketplace and technologies. For example, DISCUS has extended its code to address new forms of online advertising and social media.¹⁷ DISCUS has also revised the code in response to recommendations by the government regulators to more effectively limit advertising to individuals under the legal drinking age. Similar self-regulatory programs have been created by other alcoholic beverage trade associations, including the Beer Institute and the Wine Institute.¹⁸ The FTC reported in 2008 that the industry has strengthened the independence and transparency of the monitoring and enforcement efforts of the self-regulatory program in response to its suggestions.¹⁹

Opponents of self-regulation may incorrectly assume that self-regulation is necessarily “weaker” than state regulation either because it has less stringent rules or because it ineffectively enforces its rules. First, SROs can be effective self-policing organizations, particularly when the institutions are designed to eliminate conflicts of interest.²⁰ Many SROs begin enforcement actions in response to complaints. Businesses provide a high degree of oversight since they regularly monitor the activities of their competitors and have an incentive to report violations. Second, SROs can be more effective than government agencies at rulemaking. When businesses come together to develop rules, those involved are likely to have a higher degree of technical and industry expertise than an outside government regulator. Using a participatory process to design regulations from the bottom-up helps prevent lawyers from writing rules that will not work for a particular industry.

The structure of a self-regulatory organization can also help avoid conflicts of interest by including stakeholders with different interests or business models. For example, the Forest Stewardship Council structured its decision-making body into three chambers, environmental, social and economic, each with equal representation.²¹ This has prevented the Council from being dominated by business interests, as has occurred during some government rulemaking. This example illustrates that the concern among critics that private-sector interests may trump legitimate public interests is not unique to self-regulation. Special interests can achieve “regulatory capture” and disproportionately influence a particular government agency. In both cases, this is a problem resulting from poor institutional design, either of the government agency or the SRO. Thus, this should not be seen as a weakness of either type of system, but rather as a challenge that must be addressed when creating effective regulatory organizations.

Third, the criticism that self-regulation is weaker implies that strong regulation is better than moderate regulation and stronger regulation is even better. But there is never a case where regulation does not involve a tradeoff between costs and protection of other public goals, including innovation. For example, exposure to most types of air pollutants are not set at zero because the benefits relative to the costs of doing so would be miniscule. Moreover, the costs of regulation are not negligible. According to a report commissioned by the Small Business Administration, in 2008, the estimated total cost of federal regulations in the United States totaled more than \$1.75 trillion. Small businesses bear a disproportionate share of this burden. The regulatory cost for small businesses with fewer than twenty employees was \$10,585 per employee, approximately 36 percent higher than the per-employee cost for large businesses.²²

Finally, self-regulation benefits government and taxpayers. Regulatory processes, including rulemaking, monitoring and enforcement, can be expensive and resource intensive. SROs may have more resources to deal with regulatory process than agencies like the FTC. This means, for example, that complaints can be investigated sooner and violations can be resolved quicker. This benefits government agencies by reducing regulatory overload and allowing them to focus their efforts on more productive activities, such as taking action against bad actors that refuse to follow the rules. The FTC even acknowledges as much. Writing in a 2008 report on self-regulation of alcohol marketing, the FTC concluded “A well-constructed self-regulatory regime has advantages over government regulation. It conserves limited government resources and is more prompt and flexible than government regulation, given the substantial time required to complete an investigation or to adopt and enforce a regulation.”²³

Self-regulation can also avoid jurisdictional conflicts and legal limitations. Whereas regulation imposed by the government on multi-national corporations (MNCs) may raise questions of sovereignty, self-regulation avoids this problem while still propagating rules beyond national borders.²⁴ Flexible rules allow MNCs to better serve a global market. In addition, self-regulation can sometimes provide rules to govern behavior when government regulators cannot act. For example, First Amendment protections may limit the types of rules government regulators can impose on advertisers, but these same limitations would not apply to voluntary action taken by advertisers.

Policymakers can achieve important reforms working cooperatively with the private sector. For example, the Federal Communications Commission (FCC) partnered with CTIA, a trade association for the wireless industry, and Consumers Union, a public interest group, to develop changes to the wireless industry's code of conduct to address concerns about unexpected increases in the monthly wireless bills for consumers.²⁵ By utilizing a multi-stakeholder approach, the FCC was able to more efficiently and effectively influence industry practices than it likely could have through a more expensive and lengthy rulemaking proceeding. By creating a cooperative regulatory model, rather than an adversarial one, self-regulation can yield sustainable benefits for government, industry and consumers.

Limitations of Self-Regulation

There are both legal and economic limitations to self-regulation. Some actions of SROs have raised anti-trust concerns in the past when their activities become anticompetitive. For example, the U.S. Department of Justice brought an anti-trust suit against the National Association of Realtors (NAR), which sets the rules for how brokers can access Multiple Listing Service (MLS), after finding that the NAR restricted Internet brokers from displaying MLS data on their websites.²⁶

One economic limitation of SROs is the free-rider problem.²⁷ To be effective, an SRO may set rules for an industry, including firms that do not participate in the SRO. These "outsider" firms obtain all of the benefits of the regulatory regime without paying any of the costs. Bad actors, who want to avoid the rules of the SRO, will also stay outside the system. Such a system is unfair to dues-paying businesses. Some of these limitations make self-regulation an inadequate choice for certain industries without additional government oversight. Many of the limitations of self-regulation, however, can be offset by a well-designed self-regulatory program.

Critics may reject self-regulation for other reasons. As noted previously, all regulation inherently involves tradeoffs among competing values and among costs and benefits. Self-regulation may make more sense in countries like the United States where privacy is often rightly seen as one value among many, with competing trade-offs. However, self-regulation is unlikely to satisfy proponents of government regulation intended to protect something seen as a fundamental right. Countries like France and Germany, where privacy is considered a basic human right, have been early adopters of state regulation to govern the use of data.²⁸ But consumers in these countries are not necessarily better off. Europe is generally seen as lagging behind the United States in e-commerce, in part because of its privacy regulations.²⁹ Europe's strict privacy rules threaten to reduce the potential revenue from online advertising, which will reduce the quantity and quality of content produced for European consumers.³⁰ Compliance costs for these regulations can be high as well. Viviane Reding, vice president of the European Commission, has stated that the complex and fragmented nature of the data-protection policies in the twenty-seven member states cost businesses 2.3 billion euros annually.³¹ Not only do businesses face higher costs, which are then passed on to consumers, but consumers may also miss out on certain online services. For example, strict privacy regulations have led Google to cease developments of its Street View map feature in Germany.³²

Some critics see self-regulation as putting the fox in charge of the hen house. This perception may be difficult to overcome in public opinion. Rather than operating in the public interest, critics may assume that SROs operate purely to protect the interests of individual firms or the industry as a whole. This is particularly true when the interests of a particular industry and society do not align. In this case, SROs may be inclined to protect their own interests rather than the interests of society absent any external pressure. Many of these concerns are allayed by government certifications, audits, or other forms of oversight of SROs. Independent third-party oversight, for example provided by a non-profit watchdog organization, can help monitor and enforce rules. Public-interest organizations and government stakeholders can also exert pressure on SROs to address concerns overlooked by industry. Plus, the threat of more restrictive and costly regulation is always in the background to keep SROs focused on ensuring compliance. Critics that want regulations to be punitive for transgressions may also be dissatisfied with self-regulation. Self-regulation is more likely to have rules that promote remediation rather than sanctions for violations.

Self-regulation may also lead to imperfect outcomes. Self-regulation may not be the best choice when solutions are known and unlikely to change or for certain high-risk situations. For example, government-imposed regulations on cigarette labeling are likely more severe than what the industry would have created on its own, but may have a net positive impact on reducing smoking among young adults. And in these cases, the costs of regulation are likely to be small (reduced consumption of cigarettes is actually a social good). Finally, without either explicit or implicit endorsement by government, self-regulation may have the negative impact of regulatory uncertainty. Regulatory uncertainty may cause businesses to delay investment decisions and stifle innovation.

SELF-REGULATION FOR ONLINE BEHAVIORAL ADVERTISING

Self-regulation clearly can be an effective tool for governing the private sector. Yet proponents of government regulation continue to call for strict rules on the collection and use of online consumer data. They believe self-regulation has failed, and will continue to fail, to protect consumer privacy online. As evidence, they note the growing use of online behavioral advertising (OBA), the practice of delivering ads to Internet users based on their activity online. Using OBA and other forms of personalization, advertisers can deliver more effective and relevant ads to consumers and website owners can better monetize the ads shown on their sites.³³ Some privacy activists oppose this type of advertising and the lack of strict rules governing businesses engaged in this practice. In addition, they point to the absence of a comprehensive self-regulatory regime for online privacy. For many of these privacy advocates, even a well-functioning self-regulatory privacy system is not enough, because, as for the French and German regulators referenced above, privacy for them is an inherent human right, and there is no step too far or costly when it comes to protecting privacy.

Such claims ignore the significant self-regulatory efforts to protect consumers and make industry behavior more transparent for OBA that have occurred as the industry has matured. In December 2007, the FTC released a set of proposed principles for industry self-regulation for OBA.³⁴ In response, the Digital Advertising Alliance (DAA), an industry

organization for the advertisers, advertising networks and publishers, developed and released its own set of principles in July 2009 based on the FTC staff report.³⁵ In 2010 the DAA codified these principles in a self-regulatory program. In addition, it developed the “Ad Choices” icon (Figure 3) to signal to users when data is collected and used for OBA. The Ad Choices icon is part of an educational effort to better inform consumers about advertising practices. In May 2011, the DAA partnered with the Better Business Bureau and the Direct Marketing Association (DMA) to develop an enforcement program for compliance to the self-regulatory program.³⁶ The FTC issued an advisory opinion in August 2011 on the enforcement program stating that it “has the potential to benefit consumers by increasing transparency of, and consumer control over, certain aspects of online behavioral advertising, and there appears to be little or no potential for competitive harm associated with the proposed program.”³⁷ This type of dynamic interaction between industry and government in response to changing circumstances is exactly the type of response observers should expect to see in a healthy self-regulatory environment.



Figure 3: Advertising Option icon (also known as "Ad Choices" icon)

Some critics complain that the self-regulatory rules for OBA are weaker than some proposed legislation. This is often because the costs of the proposed legislation far outweigh the benefits.³⁸ Unfortunately, policymakers may opt for government regulation when they feel that “something needs to be done;” however, the risk of over-regulation with respect to privacy is potentially greater than the risk of under-regulation. Regulators may focus on creating rules for existing businesses and business models rather than try to craft rules that allow for future innovation, new market entrants, and greater competition. The online world is one of the most dynamic sectors of the economy, where business practices continue to evolve. As such, practices such as OBA will likely benefit from self-regulation that can keep pace with rapid innovation.

Ideally self-regulation will include all stakeholders, produce clear and transparent rules, and be overseen by an independent organization to assess its effectiveness.³⁹ Certification by third parties can also assure consumers that their data is safe and increase trust online. SRO can incentivize monitoring and compliance through policies such as creating safe-harbor provisions for privacy breaches promptly disclosed by a firm.

The current regulatory environment for online privacy is best described as a co-regulatory system involving shared governance rather than a pure self-regulatory system. While there is no comprehensive self-regulatory regime for data privacy, there is robust self-regulation

for OBA. In addition, legal backstops to self-regulation include administrative enforcement by government agencies that can impose civil and criminal penalties, as well as tort litigation. These legal measures can help ensure that bad actors out of reach of the SRO, i.e. current market participants that both (1) do not partake of the self-regulatory program and (2) violate the self-regulatory principles, are still held accountable.

Going forward, regulators, both in government and in SROs, should avoid imposing one-size-fits-all rules on all businesses and individuals involved in online behavioral advertising. As privacy researcher Alan Westin has shown, the majority of consumers are “privacy pragmatists.” When faced with a business practice, these individuals consider the trade-offs between privacy risks and consumer benefits and accept the business practice when the trade-offs are reasonable.⁴⁰ In contrast, a minority of individuals fall into the two extremes of being “privacy fundamentalists” (those who always reject privacy trade-offs) or “privacy unconcerned” (those who always accept privacy trade-offs). Therefore, rather than regulating to either extreme, policymakers should consider rules that respect individual choice and protect the majority. Regulations should reflect the diversity among both consumers and business models.

CONCLUSION

Reducing unnecessary regulations is a high priority on the national political agenda. In 2011, President Obama issued an Executive Order calling for a comprehensive review to improve the regulatory system. As noted in the Executive Order, policymakers should “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.”⁴¹ Clearly not every public-policy problem should be solved with legislation or government action. Policymakers should remember that self-regulation is an important tool for governing rapidly changing businesses in the information economy. For example, multi-stakeholder agreements between the content industry, Internet service providers and user-generated content sites have been used to help reduce online piracy.⁴² The lessons learned from applying self-regulation to OBA may serve as a useful guidepost for developing broader self-regulatory policies to govern online privacy in other areas including biometrics, geo-location and mobile apps. Voluntary, collaborative rulemaking by multi-stakeholder organizations, such as the Internet Corporation for Assigned Names and Numbers (ICANN) and the Internet Engineering Task Force (IETF), has been the guiding principle in the development of the Internet since its earliest days. Rather than try to impose top-down rules on online behavioral advertising, government regulators should embrace a collaborative, multi-stakeholder approach to developing Internet policy.

Indeed, some policymakers have made similar proposals. The National Telecommunications and Information Administration (NTIA) has proposed that legislation define baseline privacy principles and then a multi-stakeholder process be used to create the rules to implement these principles. However, the NTIA expresses some reservations and notes that “in certain situations, we recognize more than self-regulation is needed.”⁴³ Legislation at this point would likely be premature. Rather than try to impose legislation on current self-regulatory efforts, the NTIA and other government stakeholders would likely better serve consumers by working cooperatively with existing SROs to create robust self-regulatory programs that foster innovation while protecting individual privacy.

ENDNOTES

1. See, for example, Neil Gunningham and Joseph Rees, "Industry Self-Regulation: An Institutional Perspective," *Law & Policy* Vol. 19, No. 4 (October 1997).
2. Luke A. Stewart, "The Impact of Regulation on Innovation in the United States: A Cross-Industry Literature Review," *Institute of Medicine* (forthcoming).
3. Michael E. Porter and Claas van der Linde, "Toward a New Conception of the Environment-Competitiveness Relationship," *Journal of Economic Perspectives* 9 (1995): 97-118. See also Robert D. Atkinson and Les Garner, "Regulation as Industrial Policy: A Case Study of the U.S. Auto Industry," *Economic Development Quarterly*, Vol. 1, No. 4 (1987): 358-373.
4. For example, see Christopher Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press, 2011, forthcoming).
5. J. J. Boddewyn, "Advertising Self-Regulation: Private Government and Agent of Public Policy," *Journal of Public Policy & Marketing* 4 (1985): 129.
6. Tony Romm, "Obama jobs council heads to the Valley," Politico, August 1, 2011, <http://www.politico.com/morningtech/0811/morningtech279.html>.
7. Anil K. Gupta and Lawrence J. Lad, "Industry Self-Regulation: An Economic, Organizational, and Political Analysis," *The Academy of Management Review* 8, no. 3 (1983): 417.
8. Boddewyn, "Advertising Self-Regulation," 131.
9. Lisa L. Sharma, Stephen P. Teret and Kelly D. Brownell, "The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures," *American Journal of Public Health* 100, no. 2 (2010): 242.
10. Lisa L. Sharma, Stephen P. Teret and Kelly D. Brownell, "The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures," *American Journal of Public Health* 100, no. 2 (2010): 242.
11. North American Electric Reliability Corporation, "About NERC," n.d. <http://www.nerc.com/page.php?cid=1|7>, (accessed July 22, 2011).
12. Sharma, Teret and Brownell, "The Food Industry and Self-Regulation," 243.
13. EPA's Audit Policy, U.S. Environmental Protection Agency (January 31, 2011), <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html> (accessed July 18, 2011).
14. Hugh Latimer and Christopher Hale, "NAD Procedures for Resolving Advertising Disputes: Simple, Swift and Effective," Vol. 9, No. 7 (July 2001), <http://www.wileyrein.com/docs/publications/11488.pdf>.
15. Boddewyn, "Advertising Self-Regulation," 131.
16. "Code of Responsible Practices," Distilled Spirits Council of the United States, May 26, 2011, http://www.discus.org/pdf/May_26_2011_DISCUS_Code_Word_Version.pdf.
17. See, for example, "Distilled Spirits Council's Guidance Note on Responsible Digital Marketing Communication," Distilled Spirits Council of the United States, September 30, 2011, http://www.discus.org/pdf/DISCUS_Digital_Communications_Guidelines.pdf.
18. "Advertising and Marketing Code," Beer Institute, n.d., <http://www.beerinstitute.org/tier.asp?bid=249> and "Wine Institute's Code of Advertising Standards," Wine Institute, n.d. <http://www.wineinstitute.org/initiatives/issuesandpolicy/adcode>.
19. Federal Trade Commission, "Self-Regulation in the Alcohol Industry," June 2008, <http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf>.
20. For example, the FTC noted in one report that "It is not clear...that the presence of company representatives on the review boards inherently biases the complaint process in industry's favor. DISCUS's review board, composed solely of industry members, rejected alcohol advertisements more often than did the Beer Institute's review board." Federal Trade Commission, "Self-Regulation in the Alcohol Industry," June 2008, <http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf>.
21. Forest Stewardship Council, "Governance," n.d., <http://www.fsc.org/governance.html> (accessed August 26, 2011).
22. Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," Small Business Administration, September 2010, <http://www.sba.gov/sites/default/files/rs371tot.pdf>.
23. Federal Trade Commission, "Self-Regulation in the Alcohol Industry," June 2008, <http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf>.

24. Steven Bernstein and Benjamin Cashore, "Can non-state global governance be legitimate? An analytical framework," *Regulation & Governance* 1 (2007): 352.
25. "Consumer Code for Wireless Service," CTIA, 2011, http://files.ctia.org/pdf/The_Code.pdf.
26. U.S. Department of Justice, "United States v. National Association of Realtors," n.d., <http://www.justice.gov/atr/cases/nar.htm> (accessed July 22, 2011).
27. Thomas A. Hemphill, "Self-regulating industry behavior: Antitrust limitations and trade association codes of conduct," *Journal of Business Ethics* 11, no. 12 (1992).
28. Francesca Bignami, "The Non-Americanization of European Regulatory Styles: Data Privacy Regulation in France, Germany, Italy, and Britain," Center for European Studies Working Paper Series #174 (2010), 11.
29. See for example, Robert D. Atkinson et al., "The Internet Economy 25 Years After .com," *Information Technology and Innovation Foundation* (March 2010), <http://www.itif.org/files/2010-25-years.pdf>.
30. Avi Goldfarb and Catherine E. Tucker, "Privacy Regulation and Online Advertising," (2010) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600259.
31. Viviane Reding, "Building trust in the Digital Single Market: Reforming the EU's data protection rules," Conference organized by the Industry Coalition for Data Protection, Brussels, November 28, 2011, http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/data-protection_en.pdf.
32. Erica Ho, "Alas, there Will Be No More Google Street View in Germany," Time.com, April 11, 2011, <http://techland.time.com/2011/04/11/alas-there-will-be-no-more-google-street-view-in-germany/>.
33. Daniel Castro, "Stricter Privacy Regulations for Online Advertising Will Harm the Free Internet," Information Technology and Innovation Foundation (September 2010), <http://www.itif.org/files/2010-privacy-regs.pdf>.
34. Federal Trade Commission, "FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising," February 2009, <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.
35. Stuart P. Ingis, Emilio W. Cividanes and Michael A. Signorelli, "Self-Regulatory Principles for Online Behavioral Advertising," July 2009, <http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf>.
36. AboutAds.info, "Digital Advertising Alliance Begins Enforcing Next Phase of Self-Regulatory Program for Online Behavioral Advertising," May 23, 2011, http://www.aboutads.info/resource/download/DAA_Compliance_FINAL.pdf.
37. Michael Bloom, Letter from Michael Bloom, Assistant Director for Policy and Coordination, Federal Trade Commission to Alan Cohen, Vice President and General Counsel of the Council of Better Business Bureaus, Inc., August 15, 2011, <http://www.ftc.gov/os/2011/08/100815cbbbletter.pdf>.
38. See for example, Daniel Castro, "'Do Not Track' Legislation: Is Now The Right Time?" Testimony before the House Subcommittee on Commerce, Trade and Consumer Protection, December 2, 2010, <http://www.itif.org/files/2010-do-not-track-testimony.pdf>.
39. Sharma, Teret and Brownell, "The Food Industry and Self-Regulation," 245.
40. Alan F. Westin, "How Online Users Feel About Behavioral Marketing and How Adoption of Privacy and Security Policies Could Affect Their Feelings," Harris Interactive / Westin Survey, (March 27, 2008), <http://www.ftc.gov/bcp/workshops/privacyroundtables/Westin.pdf>.
41. "Improving Regulation and Regulatory Review – Executive Order," The White House, January 18, 2011, <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.
42. Daniel Castro, "PIPA/SOPA: Responding to Critics and Finding a Path Forward," Information Technology and Innovation Foundation, December 2011, <http://www.itif.org/files/2011-pipa-sopa-respond-critics.pdf>.
43. The Department of Commerce, Internet Policy Task Force, "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework," Department of Commerce (December 2010), http://www.ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf.

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