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January 26, 2022

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Federal Trade Commission,

Pursuant to the notice published on December 27, 2021, in the Federal Register, thank you for the opportunity to comment on the “Petition for Rulemaking to Prohibit Surveillance Advertising” (“Petition”) submitted to the Federal Trade Commission (“FTC” or “Commission”) by Accountable Tech.

The Network Advertising Initiative (NAI) is the leading self-regulatory organization dedicated to responsible data collection and use by advertising technology companies engaged in Tailored Advertising and Ad Delivery and Reporting (ADR)¹ in the United States. The NAI, a non-profit self-regulatory organization and trade association, was formed in 2000, and has over 100 member companies who are leaders in privacy standards across the digital advertising ecosystem. NAI members are part of the technological backbone of the digital advertising ecosystem—helping advertisers reach audiences most likely to be interested in their products and services, while allowing consumers to receive ads and content that are tailored to their interests.

Each NAI member company is required to adhere to the strong digital advertising best practices set forth in the NAI Code of Conduct (“Code” or “NAI Code”). The Code is rooted in the widely

¹ Tailored Advertising is defined by the NAI Code as the “use of previously collected data about an individual, browser, or device to tailor advertising across unaffiliated web domains or applications, or on devices, based on attributes, preferences, interests, or intent linked to or inferred about, that user, browser, or device.” Ad Delivery and Reporting is “separate and distinct from Tailored Advertising, and it refers to the collection or use of data about a browser or device for the purpose of delivering ads or providing advertising-related services, including, but not limited to: providing a specific advertisement based on a particular type of browser, device, time of day, or real-time precise location; statistical reporting, traffic analysis, analytics, optimization of ad placement; ad performance, reach, and frequency metrics (including frequency capping); sequencing of advertising creatives; billing; and logging the number and type of ads served on a particular day to a particular website, application or device. ADR does not include data collection and use for security and fraud prevention.” See Network Advertising Initiative, 2020 NAI Code of Conduct § I.A, I.Q (2020), https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf.

accepted Fair Information Practice Principles (FIPPs)², and it applies those principles to create higher privacy standards for the digital advertising ecosystem by, among other things, instituting robust notice and choice requirements and restrictions on the use and sharing of data. Member compliance with the NAI Code is promoted by a strong accountability program that includes a comprehensive annual review and ongoing technical monitoring by the NAI staff of each Member company.

The NAI self-regulatory program is ultimately designed to interact with members and help them to stay in compliance with our Code; therefore, material violations are rare. NAI staff continually updates its Code and implementing guidance as technology and practices evolve to advise member companies about how best to implement privacy-centric practices and innovates on the best way to support consumer opt-outs. Companies join with the goal of enhancing consumer privacy, and annual compliance reviews cover Member companies' business models, privacy policies and data practices, and consumer-choice mechanisms, and they help identify gaps that are usually quickly remedied by members. Members who do not comply with the Code can face penalties for material violations including removal from the NAI and are ultimately accountable to the FTC under Section 5 for the commitments they make to comply.

The following comments are intended to inform the FTC's response to the Petition, as well as the broader discussions surrounding competition and privacy across the digital advertising ecosystem.

Introduction

Although the Petition does not provide a clear, precise definition of surveillance advertising³, it generally refers to this practice as the serving of advertisements to match inferences about consumers' interests, based on personal information collected from users across the Internet. This type of advertising, commonly referred to as "tailored advertising," can also be referenced as "targeted advertising," "personalized advertising," or "behavioral advertising." While these terms sometimes are used interchangeably, they are also sometimes used to describe distinct practices. For example, the NAI's definition of Tailored Advertising specifically pertains to the advertising or marketing use of data collected across unaffiliated websites, domains or applications, but not data collected on a singular site, app or platform on which a consumer is

² See Fed. Trade Comm'n, Privacy Online: A Report to Congress 7 (1998), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf>; see also Fed. Trade Comm'n, Privacy Online: Fair Information Practices in the Electronic Marketplace (2000), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf>.

³ Petitioners define "surveillance advertising" as "1) an information or communication platform collecting personal data and 2) targeting advertisements at users, based on that personal data, as they traverse the internet, including other digital platforms." See Pet. for Rulemaking to Prohibit Surveillance Advertising at 60. The NAI does not believe this is an accurate or helpful definition of what Petitioners seek to ban: it is not clear from the definition what is or is not included in Petitioners' estimation.

engaging. The Petition does not seem to recognize a distinction, rather applying this term to all advertising based on consumer data, and it therefore conflates various benefits and risks posed by different advertising models. For the purpose of these comments, we refer to the practices described by the Petition as “tailored advertising.”

The Petition recommends the Commission develop a rulemaking to prohibit so-called surveillance advertising, from which it proposes to exclude search and contextual advertising. Additionally, while the Petition focuses on actions of “dominant firms” or “dominant platforms,” and seeks to curtail alleged unfair methods of competition by those firms, the proposed ban on tailored advertising seemingly would apply to firms of all sizes.

In summary, the NAI strongly disagrees with the proposed broad prohibition of tailored advertising because this practice is a key driver of the robust and competitive digital media marketplace that provides substantial benefits to consumers, publishers and advertisers. Ironically, the proposed solution of prohibiting tailored advertising to curtail alleged harmful practices by dominant internet platforms is likely to have the opposite effect by strengthening the position of the dominant platforms, while decreasing competition in the marketplace, and limiting options and benefits for consumers. Further, a ban would likely deprive publishers of valuable advertising revenue, deprive advertisers of a critical method of reaching customers, and ultimately result in a decrease in the free or low-cost digital content and services consumers enjoy today. While the negative impacts of a prohibition on tailored advertising would be felt across the digital advertising industry, the smallest companies in each sector are likely to be harmed the most, including a potential barrier to entry. With these comments, the NAI highlights the following key points for the Commission’s consideration:

- The digital advertising industry, and particularly tailored advertising, powers the robust digital media marketplace, providing substantial benefits to consumers, publishers, and advertisers.
- Continuation of a healthy digital advertising industry, with a diverse set of market participants, can provide for *enhanced* competition against dominant platforms in providing tailored advertising services, to the benefit of consumers, publishers, and advertisers.
- Separate from the focus on threats to competition and the role of dominant platforms on the marketplace, the digital media ecosystem would benefit from a national consumer privacy law to create enhanced privacy protections that apply across the entire digital marketplace, not just to advertising and marketing uses of data.

I. The digital advertising industry, and particularly tailored advertising, powers our robust digital media marketplace, providing substantial benefits to consumers, publishers, and advertisers.

The digital advertising industry is broad, and composed of multiple sectors, primarily advertisers, advertising agencies, publishers, and advertising technology companies. Each of these sectors includes businesses ranging dramatically in size from startups to large, multinational companies. Digital advertising includes a diverse and evolving set of products and services that together help promote the thriving digital media ecosystem, including tailored advertising, contextual advertising, and search advertising, among others. This range of products and services creates a competitive marketplace that can serve both established and new businesses as they engage with existing customers and try to reach new audiences across all digital media.

Consumers

Consumers reap many benefits of tailored advertising. Tailored ads, as opposed to traditional, contextual, or direct-buy ads, improve the consumer's experience by providing ads that are more relevant, more interesting, and more likely to produce engagement. The value it provides to publishers, as noted below, is passed onto consumers and enables the broad array of rich content available on the Internet, including information and news, video and music streaming services, and interactive services such as email and communications services. The overall marketplace for these products and services has experienced robust growth over the last decade plus, providing a wide array of transformative benefits to consumers for free, or for little cost.

Consumers place a high value on their online content and services. NAI research on the topic has consistently revealed that consumers are disinclined to pay more for their online content than they are already paying. A consumer survey in 2019 revealed that nearly 60 percent of respondents prefer their online content to be paid for by advertising, while another question sought feedback from consumers on how much they currently pay for online content and how much they would be willing to pay.⁴

Nearly 90 percent said they are unwilling to pay a significant amount of money to continue receiving apps and online content that they currently receive for free. The survey provided a strong affirmation that the ad-supported content model is ideal for most consumers. With respect to the type of advertising, research also suggests consumers prefer ads tailored to their personal preferences. A 2016 study conducted by Adlucent found that 71 percent of

⁴ See Network Advertising Initiative, Consumer Survey on Privacy and Digital Advertising (Oct. 22, 2019), https://thenai.org/wp-content/uploads/2021/07/final_nai_consumer_survey_paper_22oct2019.pdf.

respondents preferred online advertisements that were influenced by their interests and habits as compared to purely contextual ads.⁵

If the digital media ecosystem is forced to shift towards a subscription or fee-based model, as a result of a ban on tailored advertising, the result is likely to be a furtherance of digital divide, where only customers with the financial means are capable of accessing quality digital content.

Advertisers

For advertisers, tailored advertising is the most cost-effective type of advertising, because it helps companies of all sizes serve relevant ads, reaching the customers that are not only most likely to be interested in their products, but also to interact with them. Tailored advertising is particularly beneficial for small business advertisers, providing effective advertising for companies without a dedicated ad-sales team, working with limited marketing and ad budgets, and those businesses that compete with dominant vertically integrated sellers. Tailored ads can help small businesses get information about their products and services in front of local buyers and can help reach buyers around the world interested in niche products. For instance, a local gourmet cheese shop can use tailored advertising not only to reach potential customers nearby, but also consumers who are quite likely to have an interest in gourmet cheese to whom they could ship their delicacies. This approach contrasts starkly with contextual advertising, where the same business would be limited to advertising on local or gourmet food sites, without the ability to reach interested audiences in other markets or with shared interest, and without focusing ad dollars on consumers who could actually be customers.

Tailored advertising also allows advertisers to identify marketing trends and be results-driven, enabling reallocation of budget to reach audience segments that are seeking their products. By providing data for measurement and attribution, advertisers can easily determine how many consumers are engaging with their ads, as well as the sites, apps and content that provide for the highest level of engagement.

A growing and increasingly important segment of the e-commerce marketplace are direct to consumer (D2C) brands. These companies are traditionally defined as not having a physical presence for selling their products and services, either through their own stores or others. Examples of well-known D2C companies include Peleton, Warby Parker, and HelloFresh, among many others that have become household names. This industry, while still relatively small in terms of overall U.S. commerce, is today a vital and rapidly growing segment of the U.S. retail industry, with growth often outpacing traditional suppliers of goods and services. Of course, as some of these companies mature, they begin to embrace traditional selling methods, but they are revolutionary for their ability to provide high-quality goods and services to consumers, usually serving niche customers for fashion, fitness or gourmet food.

⁵ See Holly Pauzer, *71% of Consumers Prefer Personalized Ads*, ADLUCENT (2016), <https://www.adlucent.com/resources/blog/71-of-consumers-prefer-personalized-ads/>.

These entities, because of their revolutionary business model, are particularly dependent on reaching specific audiences via the internet and digital media, and therefore rely heavily on data-driven advertising models. Such companies would be disadvantaged by the absence of tailored advertising, because they would only be able to reach potential customers alongside related content on a limited number of sites and services that align with their niche products. Tailored advertising is essential for them to compete with large mainstream sellers despite having limited advertising budgets. A recent forecast predicts D2C ecommerce sales will reach \$151.2 billion in 2022, an increase of over 15 percent compared to 2021.⁶ The study reveals that, “while this will only account for 2.5 percent of total retail sales, these brands have challenged and successfully disrupted the retail industry by diversifying consumer experience.”⁷ In fact, many large traditional U.S. businesses are embracing this model for some of their own niche products and relying more heavily on direct sales. Overall, this is a major shift in the e-commerce industry that has been powered by tailored advertising.

Publishers and Digital Content Providers

For publishers and providers of digital content and services, tailored advertising generates more revenue because advertisers are willing to pay significantly more for ad placements that are more likely to be relevant to the consumers they are trying to reach. This often means publishers can show fewer ads overall to fund their content, which also improves user experience and can reduce irrelevant and annoying ads.

Tailored advertising particularly benefits smaller publishers and app providers who lack the resources to negotiate directly with larger advertisers. These small businesses can rely on ad-tech companies to make their ad inventory available to a broad array of advertisers interested in displaying ads based on consumer interests, not just the content the ads will appear with, such as the contextual advertising model. This is crucial for small web publishers and app providers who have smaller or more specific audiences, allowing them to serve their customers with a wide range of relevant ads for products and services that do not relate to their niche content.

Research has consistently reflected the increased value of tailored advertising over traditional digital ads. An assessment of the multiple studies on the value of data for ad pricing reveals that this generally increases ad prices by a factor of two to three, according to the majority of research.⁸

While most of the historical work is based on data pertaining to third-party cookies, the conclusion that data-driven tailored advertising is more valuable cannot reasonably be denied. At the same time, taking this into account, The NAI and others in the industry are actively

⁶ See generally INSIDER INTELLIGENCE, *INDUSTRY INSIGHTS: SPOTLIGHT ON D2C* (Dec. 2021).

⁷ *Id.*

⁸ See, e.g., Sarah Sluis, *Marketing Professor Garrett Johnson Wants You To Know that Cookies Increase Ad Revenue*, ADEXCHANGER (Sept. 3, 2019), <https://www.adexchanger.com/online-advertising/marketing-professor-garrett-johnson-wants-you-to-know-that-cookies-increase-ad-revenue/>.

exploring a range of alternatives to third-party cookies to capture the value of ad tailoring while minimizing privacy risks. However, a shift away from tailored advertising would be a mistake that would deprive publishers of critical insights and much needed revenue at a time when monetizing digital content is increasingly difficult among consumers who are unwilling to pay, particularly for smaller publishers lacking effective alternatives.

As identified by our surveys referenced above, and additional survey research, consumers have consistently been resistant to subscriptions and content paywalls. In 2019, only 16 percent of Americans paid a subscription for online content. Even among those willing to pay for content, most subscribers are only paying for one subscription. Despite this, in 2019 a full 76 percent of American newspapers established some form of paywall for access to their content.⁹ As publishers search for ways to fund themselves, the paywall model, while presenting opportunities for funding some publishers, particularly the larger ones, suggests a future where consumers have access to less digital content, and the marketplace for this content becomes dominated by larger, dominant platforms that can rely on large historical user bases. Additionally, a paywall-based model serves to keep online content away from most consumers; consumers willing to pay subscription fees are substantially wealthier and more highly educated than most Americans.¹⁰

Ultimately, the petition fails to recognize the extensive benefits provided by tailored advertising, and that a broad prohibition on this practice would have negative effects across the entire digital media ecosystem. This would likely have a compound effect on the marketplace, driving many smaller publishers and advertisers out of business, while shoring up the market position of the larger and dominant platforms. This would likely also lead to limited options and additional increases in digital ad-pricing on dominant platforms as the only avenue to reach wide and diverse audiences.

II. Continuation of a healthy digital advertising industry, with a diverse set of market participants, can provide for *enhanced* competition against dominant platforms in providing tailored advertising services, to the benefit of consumers, publishers, and advertisers.

The Petition alleges a wide range of anticompetitive conduct by the dominant platforms, and it claims that “surveillance advertising” is an “inherently unfair method of competition.” To support this assertion and the proposed rulemaking, the Petition identifies three different, but related, categories of allegedly anticompetitive conduct: (i) unfair extraction and monetization of data by dominant firms; (ii) integration of data across business lines; and (iii) suppression of competition via exclusive dealing.

⁹ See Laura Hazard Owen, *Even People Who Like Paying for News Usually Only Pay for One Subscription*, NIEMAN LABS (June 11, 2019), <https://www.niemanlab.org/2019/06/even-people-who-like-paying-for-news-usually-only-pay-for-one-subscription/>.

¹⁰ *Id.*

Publishers and advertisers partner with ad-tech companies who specialize in helping to tailor and serve ads, and to help measure and increase the effectiveness of these ads. These ad-tech partners can include large internet platforms as well as smaller companies, including the vast majority of NAI members. Ads are served through an auction process known as Real Time Bidding, and are based on inferences made about internet users in order to serve them the most relevant, and therefore, the most engaging and effective ads. A healthy digital media ecosystem depends on robust competition in the marketplace for digital advertising, and specifically tailored advertising, that supports large and smaller players.

The dominant platforms that are the focus of the Petition have inherent advantages in the digital advertising industry. With respect to tailored advertising services, the greatest threat to the digital advertising ecosystem is the potential for anticompetitive practices by dominant platforms who serve as both first-party and third-party advertisers. In this role, they not only collect large amounts of personal information from their large user bases, but also combine that with massive amounts of consumer data they collect as third-party operators across other digital properties. This unique ability is one of the key attributes that sets some dominant platforms apart from the other entities in the ad-tech ecosystem, providing for scale that is increasingly difficult to compete against. However, the petition fails to recognize the myriad benefits of tailored advertising, and therefore, how the absence of this practice across the digital media ecosystem would actually *benefit* the largest platforms, to the detriment of consumers, advertisers, publishers, small businesses, new entrants into the market, and perhaps most importantly, innovation.

If tailored advertising were prohibited as the Petition suggests, the biggest losers in the digital advertising marketplace would be the smallest publishers and advertisers, which would negatively impact the robust marketplace for digital content services and the experience of consumers who utilize these services. Ultimately, such an action would decrease competition among independent ad-tech companies and likely result in further consolidation among the largest advertising platforms and services. Conversely, continuation of a robust digital advertising industry with a broad set of market participants will provide for *enhanced* competition against dominant platforms in providing tailored advertising services, to the benefit of consumers, publishers, and advertisers.

In contrast to the Petition's assertion, the Commission staff has previously acknowledged that "any approach to privacy must also consider how consumer data fuels innovation and competition[,]" and has warned that "regulation [of data-driven practices] can unreasonably impede market entry or expansion by existing companies."¹¹ Therefore, in attempting to regulate the data-driven advertising industry, benefits "should be weighed against ...potential

¹¹ See Comment, In re Developing the Administration's Approach to Consumer Privacy, Dckt. No. 180821780-870-01 (Nov. 9, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf

costs to competition.”¹² We would also encourage evaluation on the impact of over-regulation to consumers to whom the costs would likely be passed.

The Commission, and other regulators in the U.S. and around the world, could better serve consumers and the digital advertising marketplace by assessing the alleged anticompetitive practices by the dominant internet platforms, to contemplate policies that seek to ensure fair competition across the ecosystem, and prevent further market dominance by the largest players. This more calculated approach is more pragmatic than seeking to erect broad bans on business models that are critical to consumers and the vast majority of market participants.

III. Separate from the focus on threats to competition and the role of dominant platforms on the marketplace, a national consumer privacy law is needed to create enhanced privacy protections to apply across the entire digital media ecosystem, not just advertising and marketing uses of data.

As explained above, a blanket ban on surveillance advertising would empower dominant platforms at the expense of small businesses and a robust digital advertising ecosystem. However, the NAI strongly supports the goal to establish greater privacy protections for consumers, extending beyond what U.S. laws currently require, and what self-regulation has been able to accomplish. Despite our great pride in providing industry-leading self-regulation for more than two decades, the time has come for a comprehensive national framework to ensure that consumer data privacy and security protections are applied uniformly across all digital market participants, and applied consistently across the country, regardless of which state a consumer resides. Without the backing of a federal law, self-regulatory efforts ultimately only apply to market participants who seek to uphold high standards, lowering the bar by leaving bad actors unregulated.

To this end, the NAI urges lawmakers to work cooperatively to enact a national privacy law that provides a clear, consistent set of requirements for all businesses operating in the United States. Such a framework should ban certain uses of data and allow for innovative uses of data for advertising and the social good. Specifically, this framework should accomplish the following key objectives. It should:

- Explicitly identify and prohibit a set of practices that are harmful and unreasonable to consumers, give the Commission authority for rulemaking in this area, and create strong enforcement against bad actors.
- Build on our current risk-based regime, weighing the sensitivity of data and the potential for harm.
- Incentivize sound data practices, such as the use of data minimization, de-identification, and privacy enhancing technologies, including data pseudonymization where technological and administrative controls prohibit linking to identified individuals.

¹² *Id.*

- Leverage self-regulatory efforts by providing a new model for robust co-regulation, approved and overseen by the FTC, to help apply the law to rapidly evolving new technologies and specific industry practices.
- Provide for responsible data stewardship and increased transparency by all entities in the ecosystem, rather than favoring first or third parties.

Unfortunately, most recently enacted consumer privacy measures do not meet many of these widely shared objectives, and actually *enhance* the market position of dominant platforms with masses of first-party data. For instance, policies that have arisen across the states focus heavily on providing consumer control over “sales” or “sharing” of their data and fail to recognize that dominant platforms with extraordinary amounts of consumer data collected directly from their first-party users give them a market advantage. Those dominant platforms can offer tailored advertising services directly to their users, regardless of whether they also collect, share or sell additional consumer data across other smaller web sites, apps and digital services.

Conclusion

Again, thank you for the opportunity to comment on this Petition. If you have questions or would like to discuss these comments or related issues, please contact me at leigh@thenai.org, or David LeDuc, NAI Vice President for Public Policy, at david@thenai.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Leigh Freund", enclosed in a thin blue rectangular border.

Leigh Freund
President and CEO
Network Advertising Initiative (NAI)