

February 16, 2023

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

Dear Federal Trade Commission,

Pursuant to the notice published on January 17, 2023, in the Federal Register, thank you for the opportunity to comment on the *“Petition For Rulemaking Under 15 U.S.C. § 57(a) Seeking Regulation Of Advertising Technology Companies And Agencies Engaged In Programmatic Advertising”* (“Petition”) submitted to the Federal Trade Commission (“FTC” or “Commission”) by Jonathan Askin (“Petitioner”).

I. Introduction & Summary

The Petitioner requests that the Commission engage in rulemaking to address various alleged unfair, deceptive, and anticompetitive trade practices throughout the programmatic advertising industry.¹ Specifically, the Petitioner proposes complex regulation by the Commission to “standardize the programmatic auctions that monetize much of the internet outside of search and social media” as a solution to prohibit alleged unfair and deceptive practices.² At the core of the Petition’s proposal is an FTC rulemaking to “deem the sharing of the ‘User Object’ (Personal information) without a ‘Deterministic Login’ (a user inputs an email address or creates a similar username to gain use of the site or app) during programmatic ad auctions to be an unfair or deceptive trade practice.”³

The Petition also makes a key distinction regarding the application of the rule it is proposing, “... to regulate the online programmatic buying and selling of ads across websites and applications, outside the context of social media feeds and search results.”⁴ In discussing the market impacts of the proposed rule, the Petitioner asserts that the proposal “seeks to level the playing field in non-login-based programmatic advertising by creating (software-based) rules somewhat analogous to those in securities-like markets.”⁵

The Network Advertising Initiative (NAI) shares the stated goals of the Petition to eliminate unfair, deceptive, and privacy-invasive behaviors across the programmatic advertising industry, and to accomplish key antitrust objectives such as “lowering switching costs, reducing network effects and

¹ Jonathan Askin, *Petition for Rulemaking under 15 U.S.C. § 57(a) Seeking Regulation of Advertising Technology Companies and Agencies Engaged in Programmatic Advertising*, FTC-2023-0002-0002 (Jan. 4, 2023), at 5.

² *Id.* at 53.

³ *Id.* at 5.

⁴ *Id.* at 52.

⁵ *Id.* at 61.

lowering the costs of entry for new market participants who do not have as comprehensive user-bases as compared to Google or Facebook.”⁶ These are broad objectives. However, the Petition mixes concerns and suggested solutions pertaining to “privacy” and market competition, and it does so in ways that, while well intentioned, conflate these two different objectives and create conflicts with recognized market realities. The Petition’s proposed rulemaking includes granular regulations that are untested and could have a series of unintended negative side-effects. Additionally, the Petition’s proposal fails to accurately reflect the Commission’s rulemaking authority, asking the FTC to take actions without adequately establishing the underlying facts that would allow the Commission to undergo such a rulemaking.

In summary, the NAI strongly disagrees with many key findings, proposed solutions and anticipated outcomes outlined in the Petition. While there are too many disparate conclusions and recommendations posed in the Petition for the NAI to respond in detail to all during the short comment period, we provide responses below to several of the most important areas where we disagree with the Petition’s conclusions and recommendations. The net effect of the policies proposed in the Petition would be to reduce competition, harm small businesses that rely on a robust, competitive digital advertising market to reach key audiences, and damage the consumer experience online.

Ultimately, the NAI disagrees with the Petition’s conclusion that the Commission, instead of publishing principles and guidance documents, should produce a broad, far-reaching regulation. However, the NAI shares the conclusion that the Commission has not continued to provide sufficient and timely updates to its principles and guidelines for industry that could be effectively integrated and amplified by self-regulatory organizations such as the NAI during most of the last decade. The Commission’s last comprehensive and widely cited report on consumer privacy and industry best practices was issued more than a decade ago, in 2012.⁷ The NAI urges the Commission to take a practical approach to enhancing consumer privacy. That is, rather than publishing a sweeping regulation that is likely to be an inefficient and time-consuming process, the NAI encourages the Commission to spend its resources providing policy statements and interpretive guides. The NAI could be a strong partner to the Commission in promoting enhanced practices across the industry in a timely manner.

II. About the Network Advertising Initiative’s Self-Regulatory Program

The 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).⁸ For over 20 years, the NAI has promoted a robust digital advertising industry by maintaining and

⁶ *Id.* at 6.

⁷ See Fed. Trade Comm’n, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

⁸ 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

enforcing the highest voluntary standards for the responsible collection and use of consumer data for digital advertising. Our membership is currently—and has historically been—composed of approximately 100 advertising technology companies, ranging from large multinational corporations to small startups and represent a significant portion of the digital advertising technology ecosystem. These companies are the subset of the ad-tech industry that are most committed to upholding the highest standards and strong self-regulatory principles.

All NAI members are required to adhere to the NAI’s FIPPs-based,⁹ privacy-protective Code of Conduct (“NAI Code” or “Code”), which continues to evolve and underwent a major revision in 2020 to keep pace with changing business practices and consumer expectations of privacy.¹⁰ In some cases, the NAI Code creates requirements that extend further than existing legal and other self-regulatory requirements. For example, since its founding in 2000, the NAI has restricted the circumstances under which members can merge or combine cross-site or cross-app information with directly identifying information by requiring additional notice and consent. Perhaps one of the unfortunate consequences of recent legislation, which defines nearly all data points—including privacy enhancing pseudonymous identifiers—as Personal Information, without recognizing the value of these technologies when combined with restrictions on commingling and otherwise combining that data. The NAI fears that this will lead to the dilution of the relative sensitivity of some of these diverse data points, and the potential for the normalization of the merger of cross-site browsing information with directly identified consumers. The NAI was founded in part to help prevent the linking of browsing information, and later information from other media, with directly identified individuals. Further, NAI members are restricted from making inferences based on web browsing, app use, or digital content viewership that can point to user interest in treatments or medications for a variety of sensitive conditions, including mental health treatments, sexually-transmitted infections, cancer, and children’s health conditions that cannot be treated with over-the-counter medication without the opt-in consent of the user. Many other examples are detailed below.

Member compliance with the NAI Code is incentivized by a thorough accountability program. NAI compliance staff subject each member to a comprehensive annual review of their products, practices, partner contracts, privacy policies, and consumer-choice mechanisms for adherence to the NAI Code, advising members on an ongoing basis about how best to comply with the Code and guidance. The NAI relies on the insights from these annual compliance reviews to identify and close any potential gaps in the Code, and to address new technologies and products developed by member companies. As the pace of innovation in the advertising technology industry continues to accelerate, the NAI will consistently revise the Code to address novel products, technologies, and applications by member companies, based largely on insights obtained through the valuable compliance review process.

The NAI team also conducts technical monitoring and review of company opt outs and privacy tools. The NAI’s enforcement efforts focus on ensuring members’ rapid curing of deficiencies in good faith, but enforcement of the NAI Code can also include penalties and sanctions for material violations. The NAI

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.

⁹ See 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>.

¹⁰ See NETWORK ADVERTISING INITIATIVE, 2020 NAI CODE OF CONDUCT (2020) [hereinafter “NAI Code”], https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf.

reserves the discretion to refer violations to the FTC, particularly if companies refuse to implement required remedies or attempt to mislead NAI staff.

The Petition is highly critical of industry self-regulation, asserting that, “there is no meaningful self-regulation at all, and ad tech companies have been left unchecked to develop unfair, deceptive, and privacy-invasive trade practices.”¹¹ The Petition also asserts that the lack of referrals to the FTC by the NAI is an indication of lackluster enforcement. However, such referrals have historically not been necessary, as members value the NAI’s feedback and the reputational benefit of membership. Consequently, members overwhelmingly provide swift voluntary resolution of relevant problems.

The NAI compliance team works with NAI members year-round, and we require new documentation of compliance each year. Through that process, many companies have changed their plans or practices to comply with the NAI Code of Conduct. The goal is to ensure broad compliance, and quickly fixing potential issues, rather than publicizing missteps or mistakes by its members, as this helps ensure broader adoption and candid responses from members. The threat of enforcement and referral to the FTC are sufficient to push companies to fix issues and problems. Therefore, the NAI has not historically needed to refer members to the FTC. This process helps protect consumer privacy and elevate industry standards overall. Our investigation of Epic Marketplace in 2011 is one of the few cases where the NAI publicly identified a member company’s practices and serves to highlight the type of process that the NAI conducts when it finds member violations, and how we go about addressing these practices, requiring modification, and ensuring compliance with our Code and Guidance.¹²

The NAI also continually assesses gaps in the U.S. legal and regulatory framework. Staff monitor state and federal legal and regulatory developments, and we are actively working to evolve our Code and compliance program to reflect those requirements and assist companies in compliance, particularly with the new and diverse U.S. state privacy laws. Over the last few years, the NAI has published guidance in step with the Commission’s positions, including guidance for the responsible use of precise location information (“PLI”) for non-marketing purposes,¹³ best practices for user choice and transparency to avoid “dark patterns,”¹⁴ and draft guidelines for the use of deterministic shared addressability identifiers.¹⁵ Most recently, the NAI collaborated with member companies that specialize in the collection of location-based information to craft a set of Precise Location Information Provider Voluntary Enhanced Standards (“Enhanced Standards”) for processing and sharing of PLI that exceed legal

¹¹ Askin, *supra* note 1, at 5.

¹² See NETWORK ADVERTISING INITIATIVE, *An Update on NAI Compliance* (2011), <https://thenai.org/an-update-on-nai-compliance/>.

¹³ See NETWORK ADVERTISING INITIATIVE, *Best Practices: Using Information Collected for Tailored Advertising or Ad Delivery and Reporting for Non-Marketing Purposes* (2020), https://thenai.org/wp-content/uploads/2021/07/nai_nonmarketing-bestpractices-0620_final-1.pdf.

¹⁴ See NETWORK ADVERTISING INITIATIVE, *Best Practices for User Choice and Transparency* (2022), <https://thenai.org/wp-content/uploads/2022/05/NAI-Dark-Patterns-Final-5.12.22.pdf>; See also Ryan Smith, *Takeaways for Digital Advertising Businesses from the FTC Staff Report on Dark Patterns*, Network Advertising Initiative (Oct. 20, 2022), <https://thenai.org/takeaways-for-digital-advertising-businesses-from-the-ftc-staff-report-on-dark-patterns/>.

¹⁵ See NETWORK ADVERTISING INITIATIVE, *Draft NAI Guidelines for Deterministic Shared Addressability Identifiers* (2022), <http://thenai.org/wp-content/uploads/2022/03/Draft-NAI-Deterministic-Addressability-Guidelines.pdf>.

requirements.¹⁶ While currently voluntary for NAI members, it is our hope that demands for increased privacy protections in this area, in part driven by societal and political pressure, will spur NAI members and non-members alike to adopt these standards broadly.

The breadth of the NAI Code and the rigor of the NAI compliance program positions NAI members well to respond and adapt to the FTC's policy and enforcement initiatives. For example, in September 2021 the FTC announced a policy statement that clarified the scope of its Health Breach Notification Rule (16 C.F.R. § 318.2).¹⁷ The NAI amplified this policy statement to members,¹⁸ noting that it aligned closely with requirements adopted in the 2020 NAI Code regarding the collection and use of sensitive data, as well as our guidance more broadly pertaining to sensitive health data.¹⁹

III. Contrary to the Petition's Criticism of Self-Regulation, the Commission can Better Achieve its Goals by Empowering and Leveraging Strong Self-Regulatory Programs and Increased Participation and Adherence by Businesses

The NAI was created because of support from the Commission and other U.S. policymakers who recognized the added value we could provide. We believe that the value is increased today, not diminished. The NAI is proud to have worked closely with the Commission for over two decades, as it developed into a leading regulator of consumer data privacy and security, not just in the United States, but around the world. Since our inception, the NAI has regularly engaged with commissioners and staff as they have developed new policies and has evolved our self-regulatory efforts to keep pace with these policies, as well as technological and process developments across the digital marketplace.

The Petition also fails to recognize the added value that self-regulatory programs provide in aiding the Commission and state attorneys general to enforce directly if a company is found to be in violation of deception, such as in a case of companies not upholding public commitments to adhere to these heightened industry self-regulatory standards. The Commission's settlement with Google in 2012 resulted from an enforcement action that asserted, in part, Google's non-compliance with the NAI's voluntary requirements regarding clear disclosures to consumers. Additionally, the Commission's recent settlement with GoodRx, where it asserted that the company violated the Digital Advertising Alliance's Sensitive Data Principle, is a timely reminder to industry of how regulators can provide a strong backstop to self-regulation, even in the absence of a new privacy law.²⁰ The Petitioner fails to recognize the importance of Section 5 of the FTC Act that provides for the Commission to enforce against unfair practices, regardless of the role of self-regulation, and without undergoing a complex, technical regulatory process.

¹⁶ See NETWORK ADVERTISING INITIATIVE, NAI Precise Location Information Solution Provider Voluntary Enhanced Standards (2022), <https://thenai.org/wp-content/uploads/2022/06/Precise-Location-Information-Solution-Provider-Voluntary-Enhanced-Standards.pdf>.

¹⁷ Press Release, Fed. Trade Comm'n, FTC Warns Health Apps and Connected Device Companies to Comply with Health Breach Notification Rule (Sept. 15, 2021) (<https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-warns-health-apps-connected-device-companies-comply-health-breach-notification-rule>).

¹⁸ NETWORK ADVERTISING INITIATIVE, NAI Regulatory Summary and Analysis: Statement of the Federal Trade Commission on Breached by Health Apps and Other Connected Devices (Feb. 2022), <https://thenai.org/nai-regulatory-summary-and-analysis-statement-of-the-federal-trade-commission-on-breaches-by-health-apps-and-other-connected-devices/>.

¹⁹ See NAI Code.

²⁰ Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, *United States v. GoodRx Holdings, Inc.*, No. 3:23-cv-460 (N.D. Cal. Feb. 1, 2023), ECF No. 3-1.

Self-regulation, while not obviating the need for strong laws, regulations, and enforcement, can flourish as a framework that complements and bolsters the Commission's goals in two key ways. First, self-regulation serves to extend and amplify the Commission's policies and enforcement goals across industry, helping to compensate for the Agency's limited resources across a vast commercial marketplace. For example, a model such as the NAI's continually evolving guidance and annual review of member companies provides an opportunity to not only scrutinize company compliance with our own self-imposed requirements, but also to highlight the latest policies and enforcement trends from federal and state regulators, and to help companies identify potential regulatory infractions before they occur. This model can provide a valuable service for both responsible companies and the Commission, but it depends on cooperation between the Commission and other regulators with self-regulatory organizations to enable clear expectations. For this to work well, it is essential that the Commission and other regulators provide clear enforcement guidelines about evolving regulations.

Second, self-regulation offers a bridge between industry and policymakers that enables the creation of voluntary standards that address avoidable legislative gaps and shortcomings. For example, NAI's annual compliance reviews require staff to interface with lawyers, product developers, and sometimes CEOs of member companies on a regular basis. This provides unparalleled insight into new business practices and technologies deployed by our members, and it allows us to develop new needed safeguards that are specific to the digital advertising industry. For instance, the NAI's recently released Voluntary Enhanced Standards for Precise Location Information Solution Providers were developed based on conversations with member companies, stakeholders, and regulators, who identified the need to address the use of contextual information with sensitive locations, such as abortion clinics and places of worship.²¹ Notably, this work *predated* the *Dobbs v. Jackson Women's Health Organization* Supreme Court decision, which spurred lawmakers and regulators, including the Commission, to embrace similar standards. What is more, as noted above, our relationship with members and knowledge of the industry prompted an update to the 2020 NAI Code that expanded requirements around sensitive data, such as opt-in requirements for the use of sensor data and other sensitive data for advertising and marketing, that was later mirrored by the Commission's 2021 policy statement regarding the Health Breach Notification Rule applying to non-HIPAA entities collecting consumer health data and using that for advertising purposes.

In 2022, the Commission sued Kochava, Inc., a location data broker, alleging Kochava engaged in unfair or deceptive acts or practices in violation of the FTC Act. In its complaint, the Commission specifically cited Kochava's failures to "employ []... technical controls to prohibit its customers from identifying consumers or tracking them to sensitive locations."²² The NAI's Enhanced Standards would have prohibited Kochava from doing just that. Additional restrictions in the NAI Code, including a prohibition on combining pseudonymous device-identified information with personally-identifying information (e.g., combining unique persistent identifiers such as MAIDs with unhashed email addresses or first names) would have served as safeguards against such practices, protecting consumer privacy not just with Kochava but with every member of the NAI.

While recognizing the Commission as the primary federal privacy regulator in the United States, the Petition is critical of the Commission's lack of activity in providing guidance for industry. Specifically, the

²¹ See NETWORK ADVERTISING INITIATIVE, NAI Precise Location Information Solution Provider Voluntary Enhanced Standards (2022), <https://thenai.org/wp-content/uploads/2022/06/Precise-Location-Information-Solution-Provider-Voluntary-Enhanced-Standards.pdf>.

²² Compl., *Fed. Trade Comm'n v. Kochava, Inc.*, No. 2:22-cv-377 (D. Idaho Aug. 29, 2022) at 7.

Petition cites that the Commission’s “‘Rules of the Road’ for digital advertising are more than twenty years old, the FTC’s Self-Regulatory Principles for Online Behavioral Advertising are more than 12 years old; and the FTC’s latest report to Congress on Consumer Privacy online was issued in 1998.”

IV. A National Consumer Privacy Law is Essential for Consumer Protection, and to Bolster Self-Regulation

Unfortunately, self-regulatory efforts have limitations, only extending to companies that choose to adopt them. While NAI’s membership is composed of those companies willing to spend additional resources to increase their data privacy and security practices, and to make an enforceable public commitment, some companies are looking to cut corners and save money at the cost of data privacy protections. Unfortunately, in the absence of greater market demand for additional privacy protections, self-regulation alone without a strong, consistent legal framework can create a market imbalance that disadvantages good actors, thereby limiting the overall effectiveness of industry self-regulation.

Therefore, the NAI continues to work with congressional lawmakers and other stakeholders 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, provide for greater enforcement against harmful uses of data, and allow for innovative uses of data for advertising and the social good. Such a national framework should also establish a formal role for self-regulatory organizations to work cooperatively with federal and state regulators, with strong oversight and accountability mechanisms.

However, while a national privacy law is the ideal path to better empower self-regulatory organizations to amplify and help enforce legal requirements, the Commission could empower strong self-regulatory organizations in the absence of such a law through targeted industry outreach and cooperation on key initiatives, and to encourage greater participation across the business community.

V. The Petition’s Criticism of the NAI’s Engagement in the Policymaking Process Discounts the NAI’s Commitment to Policies that Balance Privacy and the Use of Data for Advertising and Marketing Purposes that Drive the Digital Media Industry

The Petition criticizes the NAI for engagement in the public policy process, asserting that letters directed to state and federal legislatures are in opposition to privacy-focused legislation.²³ However, the NAI’s public policy efforts seek to improve proposed legislation and provide valuable insights for policymakers and regulators who lack detailed understanding of the digital media industry, and therefore unaware of potential unanticipated impacts. Our engagement reflects our conviction that strong consumer privacy protections can and should exist together with robust digital content that is supported by innovative digital advertising solutions, and that self-regulatory programs complement regulations by supplementing and enhancing state and federal legislation. As discussed above, the NAI has been a leading proponent of a strong federal privacy law that outlaws the most harmful uses of data, empowers the FTC and state regulators, and formally recognizes the role of self-regulation as a complementary tool to accommodate for limited regulatory resources.

Over the last several years, the NAI has actively engaged at the state level, in both the legislative and regulatory processes, to promote the balance between privacy and digital advertising that is at the core of our mission, with a particular focus on collaborating with state regulators in the development of

²³ Askin, *supra* note 1, at 15–16.

implementing regulations for new state consumer privacy laws in California and Colorado, where we draw from our expertise on digital advertising to encourage pragmatic implementing regulations that can benefit consumers while streamlining compliance. For instance, the NAI has been a leader in the digital advertising industry in supporting the implementation of universal opt-out mechanisms deployed appropriately to avoid unfair competition across the digital media industry.²⁴

VI. The Petition’s Attempts to Enhance Competition in Digital Advertising, While Well-intentioned, Are Inconsistent with Market Realities and Would Harm Competition, Publishers, and Advertisers

The Petition, in addition to seeking to address concerns about unfair and deceptive practices, also seeks to accomplish key antitrust objectives such as by, “lowering switching costs, reducing network effects and lowering the costs of entry for new market participants who do not have as comprehensive user-bases as compared to Google or Facebook.”²⁵ The Petition’s goal to enhance competition across the digital advertising marketplace is specifically focused on “non-login-based programmatic advertising,” placing an oversized emphasis on *types* of “personal information,” to be regulated.²⁶ The Petition also reaches the conclusion that, “...if a consumer briefly visits a news website or downloads a non-login-based weather application, the consumer should have a greater expectation of privacy compared to having a 10-year-old Facebook profile.” Finally, the Petition asserts that tailored advertising provides little to no benefit to publishers.²⁷

Regarding the impact of the current digital advertising model on publishers, this Petition’s conclusion appears to rely heavily on a 2019 study often referenced by opponents of data-driven advertising, suggesting a minimal decrease in ad value in the absence of consumer data.²⁸ This study is a statistical outlier among similar research, and it has been substantially refuted as lacking a sound methodology.²⁹

The NAI agrees with the Petitioner’s desire to ensure robust competition across the digital advertising industry. However, the challenges and potential solutions surrounding consumer privacy and competition are both complex and different in many ways. Seeking to address both objectives through the same approach is not likely to achieve satisfactory results on either front. Further regarding digital advertising market competition, the Petition is correct in identifying disproportionate market share among the largest internet companies. This is a topic also explored in detail by the UK Competition Markets Authority, who concluded that the two largest platforms account for more than 60 percent of

²⁴ See NETWORK ADVERTISING INITIATIVE, Comments re CPA Proposed Draft Rules (Nov. 7, 2022), <https://thenai.org/wp-content/uploads/2022/11/NAI-Comments-re-CPA-proposed-draft-rules.pdf>.

²⁵ Askin, *supra* note 1, at 6.

²⁶ *Id.* at 61.

²⁷ See *id.* at 49 (“These KPI-driven algorithms actually . . . harm[] publishers . . .”), 51 (arguing that ad-tech companies “all charge a fee and take a portion of the money that publishers would otherwise receive, resulting in what is known as the ‘ad tech tax.’” (emphasis in original)).

²⁸ Veronica Marotta, Vibhanshu Abhishek, & Alessandro Acquisti, *Online Tracking and Publishers’ Revenues: An Empirical Analysis*, Working Paper (2019) (finding that absent cookies, ad revenue decreased by four percent based on a study of a publisher).

²⁹ See Garret Johnson, Comment Letter on Trade Regulation Rule on Commercial Surveillance and Data Security (Oct. 24, 2022), <https://www.regulations.gov/comment/FTC-2022-0053-0680>.

the market for display advertising.³⁰ Further, neither the Petition nor the CMA report sufficiently identifies the large and growing market share of *other* large internet platforms³¹ with immense customer bases, and “logged-in users,” as referred to by the Petition.

Considering the substantial and increasing share of the digital marketplace held by large internet platforms with large user bases, the opportunities for independent publishers, including but not limited to small and medium news publishers, is increasingly at risk. Third-party companies provide an essential net benefit for competition across the digital media marketplace, providing opportunities for the smallest publishers and advertisers to compete with the largest internet platforms. At the core of the current digital advertising marketplace, publishers and advertisers often partner with service providers and third-party companies, including but not limited to ad-tech companies like NAI members, who specialize in helping to tailor and serve ads, and to help measure and increase the effectiveness of these ads.

Therefore, regulating the digital advertising industry, and specifically seeking to ban non-login-based programmatic advertising, while allowing login-based targeted advertising and marketing across large platforms, runs counter to the goals of empowering small and medium publishers and digital media companies from competing more effectively with the largest platforms. The NAI discussed this dynamic in detail in our comments to the 2022 Advanced Notice of Proposed Rulemaking (“ANPR”) on commercial surveillance and data security, also explaining the benefit that tailored advertising provides to consumers and advertisers, particularly small companies and direct to consumer brands.³²

The NAI is committed to developing new policies to enable tailored advertising to continue across the internet, with the goal of promoting robust competition and maintaining the benefits to consumers, publishers, and advertisers. While the NAI believes that a national consumer privacy law is necessary to achieve this goal, we continue to work with members and partners to explore new technologies and self-regulatory leadership that could help. Specifically, in 2022, the NAI released a draft set of guidelines for the use of deterministic shared addressability identifiers.³³ This approach is consistent with the NAI’s commitment in 2020 to work with other stakeholders around the development and implementation of new solutions that put consumers first, provide for clear mechanisms to exercise privacy choices that work across devices and platforms, and over time.³⁴ In contrast to the perspective presented in the Petition, the NAI believes that publishers and advertisers, and ultimately consumers, could benefit from new deterministic identifiers—like what the Petition refers to as “login-based.” If implemented in accordance with strong technological protections and policies governing their deployment, they could

³⁰ Competition and Mkts. Auth., *Online Platforms and Digital Advertising: Market Study Final Report*, ¶¶ 2.4-9 (2020), <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> (“The inability of smaller platforms and publishers to access user data creates a significant barrier to entry.”).

³¹ See Seb Joseph, *The Rundown: Google, Meta and Amazon Are on Track to Absorb More than 50% of All Ad Money in 2022*, DIGIDAY (Feb. 4, 2022), <https://digiday.com/marketing/the-rundown-google-meta-and-amazon-are-on-track-to-absorb-more-than-50-of-all-ad-money-in-2022/> (“Together they accounted for more than \$7 in \$10 (74%) of global digital ad spending last year . . .”).

³² See NETWORK ADVERTISING INITIATIVE, *Comments of Network Advertising Initiative on the Advance Notice of Proposed Rulemaking for a Trade Regulation Rule on Commercial Surveillance and Data Security* (Nov. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0053-1194>.

³³ See NETWORK ADVERTISING INITIATIVE, *Draft NAI Guidelines for Deterministic Shared Addressability Identifiers* (2022), <http://thenai.org/wp-content/uploads/2022/03/Draft-NAI-Deterministic-Addressability-Guidelines.pdf>.

³⁴ See Press Release, NETWORK ADVERTISING INITIATIVE, *NAI Responds to Google Announcement about Chrome’s Support for Third-Party Cookies*, <https://thenai.org/wp-content/uploads/2022/02/PR01152020.pdf>.

also substantially *enhance* consumer transparency and control, and limit harmful, unintended access and use of consumer data. Unfortunately, without the backing and direction from a national law, achieving a strong, standardized policy framework to govern such technologies could be elusive for quite some time.

In summary, the NAI fears that in the absence of privacy-safe data sharing across digital properties, the digital advertising industry, and the revenue from it, will soon be dominated by only a handful of the largest internet companies, detrimentally affecting consumers, publishers, and advertisers. Similarly, the likely outcome of the Petition's proposal to regulate and prohibit tailored advertising across digital properties and limiting advertising on these sites to contextual ad-serving would force advertisers to be more heavily dependent on just a handful of the largest platforms to reach their intended consumers.

VII. Conclusion

Again, thank you for the opportunity to comment on this Petition. The NAI requests that the Petition be denied, and that the Commission spend its resources providing policy statements and interpretive guides that can provide clear direction to industry and be integrated into our robust self-regulatory program. However, with respect to the recommendation to create a Technical Advisory Committee (TAC), the NAI partially agrees with this suggestion. The Petition calls for such a TAC to be "comprised exclusively of privacy-focused professionals and those without an interest in monetizing the exchange of user information to flesh out the full details of an ideal API for the programmatic advertising industry."³⁵ The NAI concurs that a TAC could be a valuable initiative for the Commission to explore practices to enhance consumer privacy across the digital media industry, but *only* if such an effort involves "privacy-focused professionals who represent a wide range of industry to provide essential input about the marketplace and economic impacts.

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,



Leigh Freund
President and CEO
Network Advertising Initiative

³⁵ Askin, *supra* note 1, at 65.