PRIVACY, TRUST & ACCOUNTABILITY

409 7th Street, NW Suite 250
Washington, DC 20004

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Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

Dear Director Chopra and Consumer Financial Protection Bureau Staff,

On behalf of the Network Advertising Initiative (NAI), thank you for the opportunity to comment in response to the Consumer Financial Protection Bureau ("CFPB" or "Bureau") Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information ("RFI").

These comments discuss the following key issues raised by the RFI, and make recommendations to the CFPB and other policymakers to enhance consumer privacy and data protection, while also maximizing competition across the digital media industry:

- The NAI and self-regulation helps to prevent consumer harm from data collected and used for tailored advertising.
- Third-party ad-tech companies play an essential role in enhancing competition across the digital media industry.
- Tailored advertising provides substantial economic and social benefits to consumers, publishers and advertisers, particularly small businesses.
- The Fair Credit Reporting Act (FCRA) is a core element of the U.S. sectoral privacy legal framework, but it was narrowly crafted to apply to determinations of eligibility.
- Congress is best positioned to develop enhanced consumer privacy standards, particularly rather than regulatory agencies seeking to apply specific, limited statutory authority more broadly than it was intended.

I. About the NAI and Core Protections Established by Self-Regulation.

A. Overview of the NAI

Founded in 2000, the NAI is the leading non-profit, self-regulatory association for advertising technology companies. For over 20 years the NAI has promoted strong consumer privacy protections, a free and open internet, and a robust digital advertising industry by maintaining and enforcing the highest industry standards for the responsible collection and use of consumer data. Our member companies range from large multinational corporations to smaller startups and represent a significant portion of the digital advertising technology ecosystem, all committed to enhancing privacy, trust, and accountability across the digital advertising industry. As a non-profit organization, the NAI promotes the health of the digital media ecosystem by maintaining and enforcing strong privacy standards for the collection and use of data for digital advertising across all digital media.

All NAI members are required to adhere to the NAI's industry-leading Code of Conduct (the "NAI Code"), which was created two decades ago based on the Fair Information Practice Principles (FIPPs), and has continued to regularly evolve to keep pace with changing business practices and consumer expectations of privacy. The NAI continues to monitor state and federal legal and regulatory changes, and our Code evolves to reflect–and in some cases exceed–those requirements. Member compliance with the NAI Code is promoted by a strong accountability program. NAI attorneys subject each NAI member to a comprehensive annual review of their businesses and data collection and use practices for adherence to the NAI Code. In addition, NAI staff advises companies on an ongoing basis about how to best comply with the Code and guidance and how to implement privacy-first practices. Finally, the NAI team conducts technical monitoring and review of company opt outs and privacy tools. Enforcement of the NAI Code can include penalties for material violations, and potential referral to the Federal Trade Commission ("FTC"). Annual reviews cover member companies' business models, privacy policies and practices, and consumer-choice mechanisms.

B. Key Self-Regulatory Protections for Consumers from Harm Posed by Data Collected for Tailored Advertising and Ad Delivery and Reporting

As the CFPB assesses the current digital media industry, and particularly companies considered to be "data brokers," it is important to note two of the strongest consumer safeguards that have been established through NAI's self-regulatory program and adopted more broadly across the industry. First, for NAI members, there are strict prohibitions on reuse of data collected for advertising purposes for other activities that would fall within the scope of the Fair Credit Reporting Act (FCRA), such as for credit or insurance eligibility.[1] Members' compliance with these prohibitions are assessed annually by NAI attorneys; further, NAI members' public attestations regarding compliance with the NAI Code creates an opportunity for enforcement under state and federal consumer protection laws if they are untruthful. Preventing the misuse of advertising data for eligibility purposes is a key value across the digital advertising industry, initially established in the NAI Code, and this has also been adopted by the Digital Advertising Alliance's Self-Regulatory Principles for Multi-Site Data.[2]

Second, an additional important safeguard relevant to the Bureau's RFI, is the NAI Code's prohibition on merging data associated with pseudonymous identifiers, or what the NAI Code defines as "Device-Identified Information," with "Personally-Identified Information, without consumer consent.[3] The NAI defines Device-Identified Information as data linked to a particular browser or device (such as an IP address or a mobile advertising identifier) that is not used, or intended to be used, to directly identify a particular individual.[4] Personally-Identified Information, on the other hand, is any data that is linked, or

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[1] *See* NETWORK ADVERTISING INITIATIVE, 2020 NAI CODE OF CONDUCT (2020) [hereinafter "NAI Code"], https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf, § II.D.2. The full list of prohibited eligibility purposes includes: employment eligibility; credit eligibility; health care eligibility; insurance eligibility and underwriting and pricing; tenancy eligibility; and education admissions.

[2] *See* Digital Advertising Alliance, *Self-Regulatory Principles for Multi-Site Data* § II, https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/Multi-Site-Data-Principles.pdf.

[3] NAI Code § II.E.2.

[4] *Id.* § I.F.

intended to be linked, to an identified individual, such as a name or an email address.[5] In addition to making this commitment, NAI members are required to contractually prohibit their partners from merging Device-Identified Information with Personally-Identified Information.[6] This emphasis on pseudonymous data and related merger restriction is not found in state privacy laws, but is one that protects the privacy of consumers by keeping the data collected about them for advertising purposes truly pseudonymous. To the contrary, most new U.S. state and federal laws and regulations relating to consumer privacy and data protection discourage the use of pseudonymous data by characterizing this data equally as "personal information," with limited exceptions. The NAI strongly believes that the use of pseudonymous data should be encouraged, along with restrictions from linking that to identifiable individuals.

These two protections, particularly applied together, provide strong and enforceable protections to limit the potential harmful outcomes for consumers as a result of data collected from tailored advertising. The CFPB and other regulators should promote and reinforce these important, existing protections, rather than seeking to broadly limit beneficial uses of consumer data that can be provided with limited risk to consumers.

II. Third-Party Ad-Tech Companies Play an Essential Role in Providing Tailored Advertising, which Enhances Competition Across the Digital Media Industry.

The RFI makes reference to the CFPB's statutory mandate to "promote fair, transparent, and competitive markets for consumer financial products and services."[7] The RFI specifically seeks input on where consumer data collected by "data brokers" facilitates a less competitive marketplace or more expansive financial products for consumers, and if so how?[8] Given the RFI's broad definition of what constitutes a "data broker" and its focus beyond the financial sector, these comments speak to the third-party ad-tech companies and the critical role they play across the digital media industry.

Tailored advertising is most commonly defined as the use of previously collected data across unaffiliated websites or applications to deliver advertisements based on inferred interests.[9] A similar but distinct practice is first-party ad targeting, which differs in that the ad targeting is based on inferred interests derived from consumer data collected directly from the business with which a consumer is interacting. First party ad targeting provides some of the same benefits as targeted advertisements discussed in detail below, but it can only be performed with high effectiveness by the largest internet and retail platforms.

Today, a handful of the largest internet platforms, also commonly referred to as "walled gardens," are dominant players in the digital advertising marketplace, based primarily on their ability to do first-party

[5] *Id.* § I.K.
[6] *Id.* § II.E.2. Exceptions exist for when the Device-Identified Information is the proprietary data of the receiving party, or if the receiving party provides the user with notice given at the time and place of collection of Personally-Identified Information and the user provides opt-in consent.
[7] Request for Information Regarding Data Brokers and Other Business Practices INvolving the Collection and Sale of Consumer Information, 88 Fed. Reg. 16953 (Mar. 21, 2023).
[8] *Id.*
[9] The full definition in the NAI Code captures the complexities of tailored advertising: "[T]he 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." NAI Code § I.Q. Notably, this definition excludes certain processing activities that allow businesses to analyze the effectiveness of their ad campaigns, commonly referred to as ad delivery and reporting.

ad targeting. This small group of unique, large companies have significant advantages in the marketplace that make it difficult for smaller website and app publishers to compete with for advertising revenue, such as: (1) the vast number of users, in the millions; (2) their ability to efficiently collect data and make valuable inferences for advertising and marketing on these users from the extensive time they spend across their own digital properties; and (3) the ability to efficiently perform measurement and attribution for consumer engagement with digital ads run across their digital properties. As a result, Google and Meta were recipients of approximately half of all U.S. digital advertising spending in 2022.[10] Research demonstrates that while the digital ad share of these two companies is declining gradually, the beneficiaries experiencing the most robust growth in U.S. digital advertising revenue are only a small handful of other very large retailers and first-party internet platforms such as TikTok, Amazon, Walmart, and Apple.[11] Additional research examining the digital advertising marketplace more broadly found that in addition to robust digital advertising revenue growth by the large internet platforms and e-commerce retailers, digital streaming companies, such as Netflix, are also poised to significantly increase their share of the market.[12] All other digital businesses currently receive less than one-third of all U.S. digital advertising spending.[13]

Third-party ad-tech companies are essential to a competitive digital media marketplace for providing essential services to smaller publishers and advertisers, enabling them to leverage the collective value of smaller, individual pools of consumer data to compete with the largest internet platforms more effectively. Publishers and advertisers traditionally partner with ad-tech service providers that specialize in helping to collect and analyze consumer data across unaffiliated websites and apps, and across unrelated retail brands, in many cases combining the data to achieve greater scale and provide for more valuable advertising that is competitive with the services provided by the largest internet companies. These companies are essential to enabling high quality tailored advertising, along with valuable measurement and attribution of these ads. This partnership incentivizes advertisers large and small to provide relevant and more valuable advertising across the hundreds of millions of web sites and apps otherwise lacking sufficient customers or capabilities on their own to compete.

Without a robust industry of ad-tech companies, digital content providers, particularly small web and app publishers, would be stripped of their current capability to provide valuable advertising services that compete with those provided by the largest platforms. The likely result would be even more advertising spending diverting away from small web and app publishers towards large platforms. In turn, this would require these smaller companies to charge consumers for their services, or ultimately could lead to a decrease in the number of web and app publishers, and therefore less choice for consumers–or perhaps a combination of these two outcomes.

Smaller businesses, particularly smaller digital businesses such as the direct to consumer (often referred to as "D2C" or "DTC") companies or small niche web and app publishers we discuss below, lack their own large user bases and would be ill equipped to compete with larger established incumbent businesses in an environment where they could not rely on data sharing with third-party partners.[14] This

[10] See Max Willens, *US Ad Spending 2022*, INSIDER Intelligence (May 18, 2022), https://www.insiderintelligence.com/content/meta-google-s-hold-on-digital-advertising-loosens-tiktok-others-gain-share.
[11] *Id.*
[12] See Sara Fischer, Slow Fade for Google and Meta's Ad Dominance, Axios (Dec 20, 2022), https://www.axios.com/2022/12/20/google-meta-duopoly-online-advertising
[13] *Id.*
[14] *Fed. Trade Comm'n v. Polygram Holdings, Inc.*, 416 F.3d 29 (D.C. Cir. 2005) ("the Court repeatedly has recognized that advertising facilitates competition"); *FTC v. California Dental Association*, 526 U.S. 756 (1999) ("We believe in the basic premise,

is particularly true, and particularly concerning to these companies seeking to monetize their digital content, given that consumers are continually unwilling to pay subscription fees for these services.[15] This burden falls disproportionately on smaller publishers lacking network effects to entice paid subscribers or alternative revenue strategies, such as event curation.[16]

Policymakers should not seek to reduce or eliminate third-party ad-tech companies and responsible data sharing among smaller businesses. Rather, they should seek to ensure that this data is processed safely, and to eliminate bad actors from access to the marketplace, to maximize competition across the digital media industry.

III. Tailored Advertising Provides Substantial Economic and Societal Benefits to Consumers, Publishers and Advertisers, Particularly Small Businesses.

Tailored advertising provides substantial benefit to consumers and a wide range of companies that comprise the digital media industry, including advertisers, advertising agencies, and publishers. Each sector includes businesses ranging dramatically in size, from startups to large, multinational companies, and each derives significant benefit from tailored advertising. In this section, we highlight the benefits to consumers, small businesses, and digital content providers (publishers) provided by tailored advertising. The diverse set of ad-tech companies–most of which are generally referred to similarly as data brokers in the RFI–are essential in enabling tailored advertising and these benefits.

A. Consumers

Tailored advertisements improve consumers' experience and access to quality digital products and services. The FTC Bureau of Economics recognized this conclusion in a recent paper, noting that "consumers highly value the free online goods and services provided by websites."[17] The report concludes that consumers have free and low-cost access to valuable digital goods and services as a result of targeted advertising revenue. The report also finds that In the absence of such advertising, consumers would likely pay in dollars, which has been predicted to "disproportionally affect more wealth-constrained users, who may end up losing access to these free services."[18] This is an important point, because while some consumers have the financial ability to pay for subscriptions, less wealthy consumers would find themselves going without these services–we address this point below in these comments referring to research that demonstrates consumers' overall unwillingness to pay subscriptions and fees for online content. The report concludes that "policy decisions in this arena must account for all these various aspects of economic analysis."[19] Findings and conclusions such as these, demonstrating the role and value of tailored advertising, have been reflected not just by academic and

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as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors.").

[15] Competition and Mkt. 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.")

[16] *Id.* at 61.

[17] Fed. Trade Comm'n, A Brief Primer on the Economics of Targeted Advertising from the Bureau of Economics, 15 (Jan. 2020), https://www.ftc.gov/reports/brief-primer-economics-targeted-advertising.

[18] *Id.*

[19] *Id.*

industry research, but have also been recognized and cited by the FTC consistently over the years in publications, prepared statements, appeal decisions, and reports to Congress.[20]

NAI consumer survey research revealed that consumers are disinclined to pay more for their online content than they already do. A consumer survey in 2019 revealed that nearly 60 percent of respondents prefer their online content to be paid for by advertising, and 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—a strong affirmation that an ad-supported content model is ideal for consumers.[21]

Additionally, research suggests consumers prefer ads tailored to their personal preferences. A 2016 study found 71 percent of respondents preferred online advertisements that were influenced by their interests and habits as compared to purely contextual ads.[22] Another survey from 2019 conducted found 90 percent of consumers consider advertising content from companies not personally relevant to their interests "annoying," with 53 percent saying ads for an irrelevant product are the "most annoying."[23] Support is particularly strong among Millennials, who consider personalization "critical" to earning and keeping their business.[24] In fact, Millennials and Generation Z are overwhelmingly comfortable with companies using relevant information about them in exchange for personalized advertisements and in fact, even expect it.[25]

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[20] *See In re 1-800 Contacts, Inc. , 2018 FTC LEXIS 184, *58 (Fed. Trade Comm'n Nov. 7, 2018)* (the opinion of the Commission is that "[r]estrictions on advertising interfere with that flow of information and raise the cost to consumers of finding the most suitable offering of a product or service… [and] "as a result of the reduced information flow, some consumers will pay higher prices for the particular good or service while others stop their search before they find a price that induces them to buy, which reduces the quantity sold.")*, see also, e.g.,* Fed. Trade Comm'n, Cross-Device Tracking: an FTC Staff Report (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf ("cross-device tracking technology may enhance competition in the advertising arena"); Prepared Statement of the FTC on Emerging Threats in the Online Advertising Industry Before the Senate Committee on Homeland Security and Governmental Affairs (May 15, 2014), https://www.ftc.gov/system/files/documents/public_statements/309891/140515emergingthreatsonline.pdf ("Online advertising offers many benefits to consumers. . . It also can be used to tailor offers for products and services most relevant to consumers' interests."); Protecting Consumer Privacy in an Era of Rapid Change, Recommendations for Businesses and Policymakers (Mar. 2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf ("the collection and use of consumer data has led to significant benefits in the form of new products and services. . . The Commission recognizes the need for flexibility to permit innovative new uses of data that benefit consumers"); Prepared Statement of the FTC on Do Not Track Before the House of Representatives Committee on Energy and Commerce (Dec. 2, 2010), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-do-not-track/101202donottrack.pdf ("In considering a uniform choice mechanism for online behavioral advertising, the Commission recognizes the benefits of such advertising, which helps support some of the online content and services available to consumers and allows personalized advertising that many consumers value").

[21] *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.

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

[23] *See* Tom Zawacki, *Why Consumers Prefer Personalization*, infogroup (2019), https://multichannelmerchant.com/blog/why-consumers-prefer-personalization/.

[24] *Id.*

[25] *See State of the Connected Customer*, Salesforce Research (Apr. 2019), https://c1.sfdcstatic.com/content/dam/web/en_us/www/documents/briefs/customer-trust-trends-salesforce-research.pdf

B. Small Business Advertisers and Direct to Consumer Brands

For many companies, tailored advertising is the most cost-effective method to reach existing customers and to generate new ones, as it helps companies of all sizes reach customers that are most likely to be interested in their products and to interact with their ads. Tailored advertising is particularly beneficial for small business advertisers—those without a dedicated ad-sales team–working with limited marketing and ad budgets, in competition with larger, vertically integrated sellers.

Tailored advertising also allows small and large businesses alike to maximize the efficiency of their ad-spend by identifying marketing trends and using their marketing budgets to directly reach audience segments that are seeking their products. In fact, data reveals small businesses that utilize tailored advertising are sixteen times more likely to report sales growth as opposed to competitors who do not.[26] By leveraging 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 brands that sell products directly to customers online while bypassing third-party retailers and wholesalers—these businesses are recognized for providing high quality products at lower costs to consumers.[27] This industry, while still relatively small in terms of the overall U.S. economy, is vital and rapidly growing, often outpacing traditional suppliers of goods and services.[28] A recent forecast predicted D2C e-commerce sales will reach $151.2 billion this year, an increase of over 15 percent compared to 2021.[29] The study revealed 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."[30] 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. This business model is revolutionary for its ability to provide high-quality goods and services to consumers, and serving niche segments of consumers interested in fashion, fitness, gourmet food, etc.

D2C companies, and other small, newly formed businesses serving specific customer bases are particularly dependent on tailored advertising due to the nature of their business models and dependence on reaching niche audiences via the internet. Contextual advertising, although provides some value in reaching the right consumers, is not an effective alternative for small business advertisers and D2C advertisers because it requires these businesses to spend a higher percentage of their budgets advertising to a broader set of consumers, many of whom are less likely to become customers than those reached through tailored advertising.[31] Using only contextual advertising, these companies would suffer, unable to reach their target consumer base efficiently.

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[26] Deloitte Dynamic Markets, Small Business Through the Rise of the Personalized Economy (2021).

[27] V. Kasturi Rangan, Daniel Corsten, Matt Higgins, & Leonard A. Schlesinger, *How Direct-to-Consumer Brands Can Continue to Grow*, Harvard Bus. Rev. (Nov. 2021), https://hbr.org/2021/11/how-direct-to-consumer-brands-can-continue-to-grow.

[28] Direct-to-consumer (D2C) e-commerce sales in the United States from 2019 to 2024, Satista (2022), https://www.statista.com/statistics/1109833/usa-d2c-ecommerce-sales/.

[29] *See generally* Insider Intelligence, Industry Insights: Spotlight on D2C (Dec. 2021).

[30] *Id*.

[31] Australian Competition & Consumer Comm'n, Digital Platforms Inquiry: Final Report 132 (2019), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf (finding that digital advertising benefits small businesses by providing them with "an ability to specifically target relevant audiences and by providing advertisers with an additional channel to reach consumers, often at a lower cost than traditional forms of advertising.").

Over 90 small and D2C businesses recently sent a letter to the FTC, stating that the elimination of third-party data-driven advertising "could be devastating for many small businesses – and the millions of Americans they employ ...," and that "[p]olicy changes of [this scale] would fundamentally remake the ad-supported digital economy, which accounts for 12% of GDP."[32]

It is without a doubt that small businesses see the value in tailored advertising. A 2022 survey of small businesses found that 54 percent plan to increase their current spend, citing a wide range of benefits.[33] Empirical research also demonstrates the value of data-driven advertising to small businesses, noting that they would see a 37 percent increase in the costs of acquiring new customers without offsite data.[34] Compared to larger scale advertisers, smaller advertisers rely more heavily on effective ads, and would be disproportionately hurt by the loss of offsite data at every point in measurable ad distribution.[35] As such, tailored advertising is essential for these companies to compete with incumbent mainstream sellers with larger, more robust advertising budgets.[36]

C. Publishers and Digital Content Providers

For publishers, providers of digital content and services, and other sites that offer ad space for purchase, tailored advertising is also extremely important. By using data to provide ad placements that are more likely to reach a business' target audiences, publishers are able to sell these placements for a premium. This often means publishers can show fewer ads and decrease the need for paywalls to fund their content, while also improving user experience and reducing irrelevant ads.

Opponents of tailored advertising have suggested that contextual advertising can generate the same amount of revenue, while requiring less sharing of consumers' personal information. However, this claim is not backed by solid evidence.[37] If that were the case, publishers and digital media providers would be relying on contextual advertising as a higher percentage of their overall advertisements. Instead, publishers, and particularly small and medium-sized publishers, rely most heavily on tailored advertising because this is more effective and thus generates more revenue.[38]

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 who make their ad inventory available to a broad array of publishers interested in displaying ads based on consumer interests, not just the content the ads will appear alongside. This is crucial for website and app publishers that specialize in a specific service or narrow set of topics, allowing them to serve their

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[32] Letter from Internet for Growth to the Federal Trade Commission (Nov. 10, 2022) https://internetforgrowth.com/wp-content/uploads/2022/11/I4G-sign-on-letter_FINAL_11.10.22.pdf, citing John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, Interactive Advertising Bureau, 5, (Oct. 18, 2021).

[33] Anna Peck, *2022 Small Business Advertising Report*, Visual Objects (Mar. 14, 2022), https://visualobjects.com/advertising/blog/small-business-advertising-2022.

[34] Nils Wernerfelt et al., *Estimating the Value of Offsite Data to Advertisers on Meta* (Becker Friedman Inst. for Econ. at the Univ. of Chi., Working Paper No. 2022-114, 2022), https://bfi.uchicago.edu/wp-content/uploads/2022/08/BFI_WP_2022-114.pdf.

[35] *Id.* at 3, 26.

[36] *See* Competition and Mkt. Auth., *Online Platforms and Digital Advertising: Market Study Final Report*, 45 (2020), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

[37] Daniel Castro, *No, Contextual Advertising Is Not a Substitute for Targeted Advertising*, Center For Data Innovation (Nov. 29, 2021), https://datainnovation.org/2021/11/no-contextual-advertising-is-not-a-substitute-for-targeted-advertising/.

[38] *Id.*

customers with relevant ads for products and services that do not relate directly to their niche content, but rather to the unique interests of their visitors.

Research has consistently reflected the increased value of tailored advertising over traditional digital ads for publishers and digital content providers. Data suggests that the inability to target consumers resulted in a loss of $8.58 in ad-spend per user, a decrease in value over 50 percent.[39] Further, studies on the value of data for ad pricing show that targeting ads generally increases ad prices by a factor of two to three.[40] These economic implications are even more pronounced among news publishers, as one study concluded that news publishers showing ads to consumers where no data was present generated 62 percent less revenue.[41] Of particular note, research from 2011 and 2019 reveals that news and general content websites are disproportionately affected negatively, and therefore less likely to deploy contextual advertising while generating similar revenue.[42] These findings are consistent with 2014 research by Eisenach and Beales, concluding, "cookies appear to be particularly valuable to companies that lack alternate sources of information about the user," such as smaller publishers.[43]

A single 2019 study is often referenced by opponents of data-driven advertising, suggesting that ad value decreased by only 4 percent in the absence of third-party cookies.[44] However, this study is the only known outlier among similar research. As such, that contrasting conclusion should be approached with caution. The methodology for that study has been criticized and the conclusions have been substantially refuted as lacking a sound methodology.[45]

As noted above, consumers have consistently been resistant to subscriptions and content paywalls. In 2019, only 16 percent of Americans paid subscription fees for online content. Even among those willing to pay for content, most subscribers only pay for one subscription. However, in the same year, 76 percent of American newspapers established some form of paywall for access to their content.[46] As

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[39] *See* Johnson, Shriver, Du, *Consumer Privacy Choice in Online Advertising: Who Opts Out and at What Cost to Industry?* (Last revised: Jan. 9, 2020).

[40] These studies predominantly relied on third-party cookie data as a measurement, given that cookies have historically been the primary method for enabling tailored advertising, *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/.;
see Johnson, Shriver, Du, *supra* note 17 (finding that absent cookies, ad revenue decreased by 52 percent based on a study of users opting-out using the AdChoices program).
see Ravichandran & Korula, *Effect of disabling third-party cookies on publisher revenue*, Google (2019), https://www.blog.google/products/ads/next-steps-transparency-choice-control/ (finding that absent cookies, ad revenue decreased by 52 percent based on an analysis of Google's top 500 publishers);
see Beales, Howard & Eisenach, Jeffrey, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content*, Navigant Economics (2014), 10.2139/ssrn.2421405 (finding that absent cookies, ad revenue decreased by more than 66 percent based on a study of impression level data and observations of display ad placements for the top 4000 publishers);
see Goldfarb & Tucker, *Privacy Regulation and Online Advertising*, Management Science (2011), https://econpapers.repec.org/article/inmormnsc/v_3a57_3ay_3a2011_3ai_3a1_3ap_3a57-71.htm (finding that ad prices were 65 percent less effective based on an analysis of responses from 3.3 million survey takers randomly exposed to 9,596 online display advertising campaigns).

[41] *See* Ravichandran & Korula, *supra* note 49.

[42] *See* Goldfarb & Tucker, *supra* note 39; *see also* Ravichandran & Korula, *supra* note 39.

[43] *See* Eisenach & Beales, *supra* note 39 at 13.

[44] Marotta, Abhishek, & 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).

[45] *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.

[46] *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/.

publishers search for ways to fund themselves, the paywall model suggests a future where consumers have access to less digital content. The marketplace for this content will inevitably become dominated by larger platforms that will rely on vast user bases. Additionally, a paywall-based model serves to keep access to online content away from a large number of consumers, as those willing to pay subscription fees are generally wealthier and more highly educated.[47]

IV. The Fair Credit Reporting Act is a Core Element of the U.S. Sectoral Privacy Legal Framework, But it was Narrowly Crafted to Apply to Determinations of Eligibility.

The Fair Credit Reporting Act ("FCRA") (15 U.S.C. § 1681 *et seq.*) was enacted in 1970, as a way to ensure "consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[48] FCRA regulates the collection and processing of certain consumer information for purposes where misuse presents heightened risk to consumers, such as for employment decisions or assessing a consumer's credit worthiness.

FCRA's definition of "consumer reporting agency" is narrowly focused on the purpose of processing consumer data, specifically for eligibility purposes:

> [A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating, and maintaining consumer credit information or other information on consumers *for the purpose* of furnishing consumer reports to third parties and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[49] [emphasis added]

The definition hinges on the furnishing of a consumer report, which FCRA defines as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under [FCRA].[50]

These other authorized purposes authorized under FCRA include credit transactions, employment purposes, underwriting insurance, eligibility for a license, as a potential investor, other legitimate business needs in connection with a transaction initiated by the consumer or to review an account to determine whether the consumer continues to meet the terms of the account.[51]

These terms are well defined and have served as a bedrock of the government's enforcement of FCRA for fifty years. Notably, data collected by ad tech companies would fall outside the scope of this definition. When an ad tech vendor collects information on consumers, it is for the explicit purpose of serving consumers relevant advertisements.

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[47] *Id.*
[48] 15 U.S.C. § 1681(a)(4) (2022).
[49] *Id.* § 1681a(f).
[50] *Id.* § 1681a(d).
[51] *Id.* § 1681b(3).

Unlike traditional consumer reporting agencies, ad tech vendors do not collect and sell personal data for the purposes enumerated in Section 1681b. FCRA's definition of consumer reporting agency necessarily excludes ad tech vendors: the data collected by ad tech vendors is for the purpose of serving advertisements, not for furnishing consumer reports. While this data represents inferences about consumers' personal interests, preferences and characteristics (such as an interest in traveling or basic demographic information), neither the data nor the application by ad tech companies meets the FCRA's definition of "consumer report." The use cases enumerated in FCRA intentionally and explicitly present higher risk for consumers; when a consumer is wrongfully denied credit, access to insurance or employment, or a similar decision on personal eligibility, the repercussions for the consumer are greater than when a consumer is served an advertisement based on inferences about their interests and personal characteristics.

Given the narrow focus of the FCRA, the CFPB and other federal policymakers should seek to develop new protections as part of a national consumer data protection framework discussed below, rather than seeking to expand application beyond its intended purpose.

V. Recommended Policy Solutions

The NAI strongly supports the establishment of greater privacy protections for consumers that extend beyond what U.S. federal laws and regulations currently require, and firmly believes that the path to such protections lies in the passage of comprehensive federal privacy legislation. We are proud that the NAI, through our industry-leading self-regulation, has been able to impose voluntary privacy protections for consumers over more than two decades. We believe, however, that the time has come for a comprehensive national privacy framework to provide clear rules for all companies, not just those volunteering to submit to such standards, as well as additional privacy enhancements for consumers.

Therefore, the NAI continues to urge congressional lawmakers to enact a national privacy law that provides a clear, consistent set of requirements for all businesses operating in the United States, and to replace the disparate patchwork of state consumer privacy laws that is developing across the country. Such a framework should ban certain uses of data and allow for innovative uses of data for advertising and the social good.

The NAI believes Congress is best positioned to develop nationwide privacy standards, particularly as opposed to regulatory agencies seeking to apply specific, limited statutory authority more broadly than it was conceived. Such an approach is likely to lead to a waste of industry and regulatory resources on litigation, which does not benefit consumers, businesses or the overall U.S. economy.

As we discuss above in these comments, curtailing the role of third-party ad-tech companies 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 market choices for advertisers and increases in digital ad-pricing. Therefore, the NAI urges the CFPB and other policymakers to approach this issue cautiously, and not to develop new policies that seek to substantially curtail the role of these important companies.

VI. Conclusion

Again, thank you for the opportunity to comment on this important issue. Please do not hesitate to contact me with any questions or to discuss. The NAI looks forward to further engaging with the CFPB and other policymakers as they strive to maximize privacy and data protection for third party collection and processing of consumer data for tailored advertising.

Respectfully Submitted,

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