

December 29, 2023

Financial Data Rights
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G St. NW
Washington, DC 20552

RIN: 3170-AA78

Dear Director Chopra and Consumer Financial Protection Bureau Staff:

On behalf of the Network Advertising Initiative (“NAI”), thank you for the opportunity to provide comments on the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) Notice of Proposed Rulemaking (“NPRM”) and the Proposed Rule on Personal Financial Data Rights (“Proposed Rule”) under section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.¹

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 voluntary industry standards for the responsible collection and use of consumer data. Our member companies range from the largest companies in the industry to smaller startups, and they collectively represent a substantial portion of the digital advertising technology ecosystem, all committed to strong self-regulation and protecting consumer data across all digital media.

Digital advertising helps support a free and open internet, allowing publishers to provide consumers with content they want to access without putting up paywalls. Digital advertising also allows for small brands to reach relevant audiences and directs advertisements to consumers for products and services that are relevant to their interests. The NAI therefore strongly supports laws and regulations that bolster our self-regulatory efforts in consumer privacy and allow for data-driven advertising to continue to grow and flourish.

¹ Proposed Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (proposed Oct. 21, 2023) (to be codified at 12 C.F.R. pt. 1033).

I. The NAI Supports Most of the Objectives Established in the NPRM, But We Are Concerned that the Prohibition on the Use of Covered Data by Third Parties for Advertising is Misaligned with the Broader Objectives

The NAI supports many of the broad objectives outlined in the NPRM, such as clarifying the scope of consumer data rights for covered data, establishing basic standards for data access, transitioning the marketplace away from screen scraping, clarifying the mechanics of data access, promoting fair, open, and inclusive industry standards to ensure a competitive marketplace, and ensuring that third parties are acting on behalf of consumers. However, the NAI is concerned with some of the conclusions articulated in the NPRM and the solutions proposed to address these conclusions; particularly those pertaining to third parties advertising.

The NAI agrees with the following objectives identified by the Bureau in the NPRM: improving consumer understanding of third party data practices through the use of “clear and conspicuous authorization disclosure including key facts about the third party and its practices[;]” and “requiring deletion of consumer data in many cases when a consumer’s authorization expires or is revoked.”² These are sound objectives based on key principles of good data stewardship, such as transparency, consumer control, and data minimization. These recommendations are also consistent with the objectives that underlie the NAI’s industry leading Code of Conduct.

While we agree with these priorities, the NAI is concerned that the goals of the NPRM are not effectively aligned with consumer’s best interests, and that the Proposed Rule ultimately goes a step too far in proposing to limit the role of third parties to “only collect, use, and retain the consumer’s data to the extent reasonably necessary to provide the consumer’s requested product or service.”³ Such a strict limitation reflects some combination of two key conclusions that we strongly disagree with: (1) that consumers neither want, nor derive significant value from marketing and advertisements based on this data; and (2) it is not possible for consumers to make informed decisions about the use of their data. In the following two sections of these comments we explain how these conclusions, and the prohibition on the use of covered data for advertising, are misaligned with the goals articulated in the NPRM.

II. Consumer Prefer Ad-Supported Digital Media and Benefit from Tailored Advertising

Consumers reap many benefits from tailored advertising. Using tailored ads instead of traditional contextual or direct-buy ads improves the consumer's experience by providing ads that are more relevant, 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

² Proposed Rulemaking at 74800.

³ *Id.* at 74800, see § 1033.421(c) regarding Third Party Obligations, at 74873.

marketplace for these products and services has experienced robust growth over the last decade, 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% of respondents prefer their online content to be paid for by advertising.⁴ Nearly 90% of respondents 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% of respondents preferred online advertisements that were influenced by their interests and habits as compared to purely contextual ads.⁵

III. The Bureau Should Require Reasonable Safeguards for Sensitive Consumer Financial Data, Rather than Prohibiting Certain Advertising Practices Entirely

The NAI understands the need to provide protections for the use of consumers' financial data to ensure this data is used responsibly and to prevent bad actors from harming consumers both online and offline. However, in the proposed rulemaking, the Bureau notes that third party digital advertisers "monetize consumer data by targeting consumers with unwanted ads or services or selling the consumer data, undermining consumers' ability to limit data use."⁶

When implemented properly and backed by clear and consistent legal requirements, transparency and control requirements can play an extremely valuable role in consumer education, empowerment, and data protection. The NAI concurs with others who have recognized that transparency and control continue to have substantial value for consumer protection, but these tools must be streamlined and applied more effectively to prevent fatigue, particularly to reflect the current digital media landscape.⁷ We recognize the inadequacy of relying on transparency and control mechanisms as a singular means for consumers to protect their own privacy, and the potential for "consent fatigue" resulting from over-reliance on this approach.⁸ However, both long-form privacy policies and more concise

⁴ 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.

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

⁶ Proposed Rulemaking at 74799.

⁷ See Richard Warner & Robert Sloan, *Beyond Notice and Choice: Privacy, Norms, and Consent*, J. High Tech. L. (2013); See also Jen King et al., *Redesigning Data Privacy: Reimagining Notice & Consent for Human-Technology Interact*, World Economic Forum, 1, 26 (July 2020).

⁸ Luis Alberto Montezum & Tara Tauman-Bassirian, *How to Avoid Consent Fatigue*, IAPP (Jan. 29, 2019), <https://iapp.org/news/a/how-to-avoid-consent-fatigue/>.

“just-in-time” privacy notices and choice mechanisms play a valuable role in enhancing privacy and data protection for consumers, particularly when applied thoughtfully for sensitive data. Short form notices, such as those promoted by the NAI in our 2020 Code and subsequent guidance, can help consumers compare products and services and make informed decisions based on data collection and use practices. They have also been adopted by leading technology companies and support increasing consumer awareness. Comprehensive privacy policies also remain valuable tools for regulators, self-regulatory organizations, and privacy watchdogs to assess data collection and use practices by businesses. Even if these are often too long to be central to consumer decisions about sharing their data, they are essential for companies to be held accountable for compliance with these commitments. These two key elements of the notice and choice framework are complementary and essential, and they can be utilized effectively with clear, pragmatic guidelines that aim to streamline key details for consumers and prevent consent fatigue.

Not only is notice and choice one of the key legal basis provided under the GDPR, but it is also at the core of the five comprehensive state consumer privacy laws enacted over the last several years. All of these state laws, while also providing data minimization requirements for businesses, create new requirements for enhanced transparency and consumer choice, in a consistent effort to enable consumers to better control the collection and use of their data.

The NAI has long been a leader in setting voluntary industry standards for members with respect to increasing transparency about data collection, and by ensuring that choices are available to consumers. Our 2019 Guidance on Opt-In Consent explains how members should provide detailed just-in-time notice when using opted-in data for Tailored Advertising or Ad Delivery and Reporting, explicitly requiring companies to provide consumers additional details about the use of their sensitive data for advertising and marketing use cases before they consent.⁹ Since this requirement came into effect for NAI members and their partners in 2020, adoption has been growing. However, given that these are still viewed by some businesses as voluntary, the CFPB could join the FTC and other U.S. regulators who have enforced against insufficient privacy disclosures, bolstering the ability of consumers to make effective choices about their sensitive data.¹⁰

Additionally, in 2020, the NAI published a set of Best Practices for Nonmarketing Uses of Consumer Information, proposing broadly that the industry adopt similar practices beyond

⁹ Network Advertising Initiative, Guidance for NAI Members: Opt-In Consent (Nov. 2019), https://thenai.org/wp-content/uploads/2021/07/nai_optinconsent-guidance19.pdf.

¹⁰ Press Release, The NAI, NAI Praises L.A. City Attorney’s Settlement Over The Weather Channel App (Aug. 10, 2020), <https://thenai.org/wp-content/uploads/2021/07/PR08192020.pdf> (The Weather Channel used the location tracking technology present in its app to monitor where users live, work, and visit and shared that information with third parties without consent. The NAI prohibits practices such as this, and we require members to obtain opt-in consent before using a consumer’s location information in this way).

advertising and marketing uses not covered by our Code of Conduct.¹¹ These Best Practices were produced with a specific emphasis on sensitive information, as the NAI recognizes that the use of this data poses greater risk of harm. This document establishes that companies can reasonably be expected to apply a materiality test to determine whether their processing—or sharing with partners for processing—of a consumer’s data should be disclosed in the just-in-time notices provided to consumers before they consent to share this data. The NAI follows the FTC’s guidance on what constitutes a “material” consideration: “The basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.”¹² Our Best Practices provide hypothetical scenarios in which a company may determine that the sharing of data is material and therefore discloses that in a just-in-time notice.

The NAI has long sought to promote practices that exceed current legal requirements, but self-regulatory efforts have limitations, only extending to companies who choose to adopt them. The NAI would therefore support the Bureau’s efforts to promote practical, consistent requirements to enhance consumer transparency and control over the collection and processing of covered data for advertising purposes by third parties. We believe the NAI Code, guidance and best practices for non-marketing uses of data are consistent with consumers’ expectations, and that the Bureau could require a similar set of practices, rather than simply prohibiting the ability of third-party partners to utilize this data for advertising that benefits consumers as discussed above. The NAI welcomes the opportunity to further engage with the Bureau in such an approach, and to help to enforce practices established by a new regulation that applies to the entire industry.

IV. Promoting Competition in Financial Services and Digital Advertising is Essential to Benefit Consumers

As a trade association, the NAI represents businesses of varying sizes, from small startups to some of the largest companies providing digital advertising services. We understand the value of competition within the digital media industry, and we strive to create a “race to the top” for consumer privacy that encourages all actors, large and small, to provide innovative ways to protect consumer privacy while continuing to deliver services that support a free and open internet.

Across the industry broadly, the NAI is particularly concerned with unintended consequences that empower the largest technology companies with expansive first-party data, at the expense of small publishers and advertisers. A diffuse marketplace for consumer data encourages companies to specialize in certain types of data, preventing any one actor from accruing too much data.

¹¹ Network Advertising Initiative, Best Practices: Using Information Collected for Tailored Advertising or Ad Delivery and Reporting for Non-Marketing Purposes (June 2022), https://thenai.org/wp-content/uploads/2021/07/nai_nonmarketing-bestpractices-0620_final-1.pdf.

¹² See Policy Statement on Deception, *supra* note 81.

The NAI agrees with the objectives established in the NPRM to maximize competition, particularly through the development and application of standards across the market and not entrenching the roles of incumbent data providers. The NAI particularly agrees with the sentiment that where “...standards are controlled by dominant incumbents or intermediaries, they may enable rent-extraction and cost increases for smaller participants[,]” and that “[f]air, open, and inclusive standard-setting bodies are vital to promote standards that can support a data access system that works for consumers, rather than the interests of dominant firms.”¹³ The NAI encourages the Bureau to promote the reliance on open standards in technology; this is a critical step to achieve increased competition.

However, the NAI notes that in seeking to provide for the interests of consumers and competition, the proposed Rule should not conclude that a diverse set of third-party ad-tech companies providing for a competitive advertising environment is inherently in conflict with consumer interests. To the contrary, a competitive advertising marketplace has long driven a rich and diverse set of ad-supported products and services that are available to consumers for free or at a low cost. By ensuring a diverse financial advertising ecosystem, the Bureau can help to provide for a broader range of financial services to consumers, while also enhancing consumer awareness of tailored financial products and services that they can benefit from but may otherwise not otherwise know about.

V. NAI Recommended Amendments to the Proposed Rule

As discussed in these comments, the NAI does not support the inclusion of targeted advertising on the list of activities that are not reasonably necessary to provide consumers’ requested products or services.¹⁴ Particularly, the NAI disagrees with the Bureau’s contention that “targeted advertising, cross-selling, and data sales do not primarily benefit consumers in most cases for various reasons.”¹⁵ The current proposal extends beyond all existing legal data protections in the United States by not allowing consumers to elect for their data to be used for advertising and marketing that may suit their interests and benefit them.

The NAI therefore recommends that rather than creating a blanket prohibition on the ability of digital advertising companies to use covered data for advertising and marketing, the CFPB should allow for such practices where a consumer has received explicit notice and provided affirmative consent.

¹³ Proposed Rulemaking, Sec. 6. Promoting Fair, Open, and Inclusive Industry Standards, at 74801.

¹⁴ *Id.* at 74873.

¹⁵ *Id.* at 74834.

VI. Conclusion

Again, the NAI appreciates the opportunity to submit comments to the Bureau on this important topic. If we can provide any additional information, or otherwise assist your office as it continues to engage in the rulemaking process, please do not hesitate to contact me at leigh@networkadvertising.org, or David LeDuc, Vice President, Public Policy, at david@networkadvertising.org.

Respectfully Submitted,

Leigh Freund

President and CEO

Network Advertising Initiative (NAI)