



February 16, 2023

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

Submitted via <https://www.regulations.gov/document/FTC-2023-0002-0002>

Re: Petition for Rulemaking of Jonathan Askin, Professor of Clinical Law, Brooklyn Law School; Docket No. FTC–2023-00671; File No. R307001

The Interactive Advertising Bureau (“IAB”) provides these comments in response to a petition filed by Jonathan Askin, Professor of Clinical Law, Brooklyn Law School (“Petitioner”) with the Federal Trade Commission (“FTC” or “Commission”) titled *Petition for Rulemaking Under 15 U.S.C. § 57(a) [sic] Seeking Regulation of Advertising Technology Companies and Agencies Engaged in Programmatic Advertising* (“Petition”).¹ For the reasons described in the comments below, the Commission **should deny this petition** and not undertake the rulemaking requested by the Petitioner.

Founded in 1996 and headquartered in New York City, IAB (www.iab.com) represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, IAB develops both technical standards and best practices. In addition, IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing. The organization is committed to professional development and elevating the knowledge, skills, expertise, and diversity of the workforce across the digital advertising and marketing industry. Through the work of our public policy office in Washington, D.C., IAB advocates for our members and promotes the value of the interactive advertising industry to legislators and policymakers.

IAB is committed to consumer privacy. We support industry-self regulation and federal legislation that strengthens consumer protections. As a founding member of the Digital Advertising Alliance (“DAA”), the main self-regulatory program for interest-based advertising, we must correct the record and address the Petitioner’s erroneous assertion that there is “no meaningful self-regulation” for the ad tech industry. The Petitioner fails to recognize the significant and ongoing enforcement of the DAA Self-Regulatory Principles,² with more than 125 enforcement cases publicly announced in the past ten (10) years and a number of cases referred to

¹ Jonathan Askin, *Petition for Rulemaking Under 15 USC 57a Seeking Regulation of Advertising Technology Companies and Agencies Engaged in Programmatic Advertising*, FTC-2023-0002-0002 (Jan. 17, 2023), <https://www.regulations.gov/document/FTC-2023-0002-0002> [hereinafter *Petition*].

² Specifically, the Principles are robustly enforced by both the Digital Advertising Accountability Program of BBBNP and the Association of National Advertisers Center for Ethical Marketing.



regulators like the FTC.³ Reflective of the strength of such self-regulation, a former FTC Chair has recognized that this style of enforcement has “teeth.”⁴ Importantly, the FTC staff stated, “...DAA [has] taken steps to keep up with evolving technologies and provide important guidance to [its] members and the public. [Its] work has improved the level of consumer protection in the marketplace.”⁵ In tandem, IAB, as a founding member of Privacy for America, has long supported federal legislation that strengthens consumer protections. If data privacy will be federally regulated, such efforts should start with Congress—not the FTC. We encourage the Commission to deny this Petition based on this fact alone.

Even so, as explained below, the Petition should be denied as it reflects a significant misunderstanding of the Commission’s rulemaking authority. In fact, the Petition requests precisely the type of rule that courts have struck down as an invalid use of the FTC’s Section 18 authority. It would therefore be unreasonable for the Commission to grant the Petition. It would also be misguided for the Commission to grant the Petition given the substantial harms to innovation, consumers, and competition the Petition presents. IAB supports the thriving, competitive, and multifaceted ad-supported open Internet. The Internet is built on the continuous exchanges of data between devices and servers; without these data exchanges, the Internet and its social, cultural, economic, and personal benefits would not exist. The reasonable use of data provides tremendous benefits to consumers, the economy, and society as whole, and helps assure our nation’s current competitive position globally. However, were the Petition to be granted, the unreasonable restrictions on the data-driven digital advertising ecosystem would significantly impede innovation, reduce consumer choice and increase consumer costs, as well as create barriers to entry for new market participants. For reasons such as these, the Commission should deny the Petition.

I. Contrary to the Petitioner’s assertions, the FTC does not have the authority to issue the requested rule.

The Petition should be denied because the Commission does not have the authority to issue the rule proposed by the Petition. By seeking to mandate the adoption of a specific application programming interface (“API”), the Petitioner requests that the FTC issue a technical standard for programmatic advertising. However, the FTC lacks the authority to issue such a standard under its Section 18 authority. As the Commission knows, the FTC’s authority under Section 18 is limited to issuing rules that define with specificity acts or practices that are unfair or deceptive within the meaning of Section 5 of the FTC Act.⁶ Here, the Petition does not suggest a rule defining specific acts or practices are unfair or deceptive. Instead, the Petition requests that any “RTB Participant” that does not adhere to the proposed API “be deemed to have engaged in unfair and deceptive trade

³ See, e.g., *United States v. GoodRx Holdings, Inc.*, Case No. 23-cv-460 (N.D. Cal. 2023) (demonstrating that, in addition to the DAA’s own accountability record, the FTC asserts alleged violations of the DAA Principles as a basis for FTC enforcement actions).

⁴ Remarks of FTC Chairman Jon Leibowitz at White House Privacy Event (Feb. 23, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-ftc-chairman-jon-leibowitz-prepared-delivery/120223whitehouse-privacy.pdf.

⁵ FTC, *Cross-Device Tracking: An FTC Staff Report*, 10-11 (Jan. 2017)

⁶ 15 U.S.C. § 57a(a)(1)(B), b(3); see *Katharine Gibbs School v. Fed. Trade Comm’n*, 612 F.2 658, 663 (2nd Cir. 1979).



practices[.]”⁷ What the Petitioner fails to recognize is that courts have held that such an approach to Section 18 rulemaking is invalid.

In particular, the Petitioner’s proposed rule would squarely violate *Katharine Gibbs School v. F.T.C.*, which held that rules merely establishing means to prevent allegedly unfair or deceptive acts or practices do not comply with the requirements of Section 18. In *Katharine Gibbs School*, the Commission established affirmative requirements for schools and defined a school’s failure to observe those requirements as a deceptive practice.⁸ The Second Circuit held these rules to be invalid, finding that rules that only treat violations of requirements for preventing unfair practices as “unfair practices” are insufficient to comply with Section 18.⁹ Appearing to disregard both this case and the FTC Act itself, the Petitioner requests precisely such a rule. By requesting the FTC to issue a rule providing that violations of the proposed API are unfair and deceptive, the Petitioner, in effect, requests the FTC to issue a rule that the FTC lacks authority to issue.

We recognize that the Petitioner cites to a different case as evidence of the Commission’s authority to issue such a rule—*National Petroleum Refiners Association v. F.T.C.* However, this case, frankly, is irrelevant. Putting aside other reasons why this case is inapplicable, the trade regulation rule issued in *National Petroleum Refiners* was issued under Section 6 of the FTC Act.¹⁰ Section 18, upon which the Petitioner requests the FTC undertake this rulemaking, did not yet exist at the time the case was decided.¹¹ The Petitioner neglects the fact that this case predates the Magnuson-Moss Warranty Act which granted the Commission its limited rulemaking authority under Section 18. Therefore, we see no reason why *National Petroleum Refiners* would reasonably establish the Commission’s authority to issue the Petitioner’s proposed rule.

II. Even if the FTC had the authority to issue the rule requested by the Petitioner, the Petition should be denied.

While the Commission does not reasonably have the authority to commence the rulemaking requested by the Petitioner, even if it did, the Petition should be denied as it: (a) requests a technology-specific rule, which would hinder innovation and be untenable to maintain; (b) would unreasonably restrict data-driven digital advertising and harm consumers as a result; and (c) would harm competition by increasing barriers to entry for the digital advertising ecosystem.

a. The FTC should not consider granting rulemaking petitions that are not technology neutral.

Even if the FTC had the authority to issue the proposed rule, which as explained above, it does not, the Petition should be denied, as any trade regulation rule issued by the Commission should be technology neutral. Although the Petitioner’s requests are at times disjointed,¹² we

⁷ See *Petition* at 60.

⁸ *Katharine Gibbs School v. Fed. Trade Comm’n*, 612 F.2d 658, 671 (2nd Cir. 1979) (Newman, J., dissenting).

⁹ See *id.* at 662.

¹⁰ See *National Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 482 F.2d 672, 673 (D.C. Cir. 1973).

¹¹ See PL 93–637 (S 356), PL 93–637, JAN. 4, 1975, 88 Stat 2183.

¹² For instance, the Petitioner states it is requesting a rule that would “deem the sharing of the ‘User Object’ (Personal Information) without a ‘Deterministic Login’ . . . to be an unfair or deceptive trade practice.” See *Petition* at



understand that, in essence, the Petitioner requests that the FTC mandate the uniform adoption of a specific API for programmatic advertising auctions. The Petitioner uses IAB’s own OpenRTB standard as a starting guide for such API. As a result, IAB is particularly well positioned to explain why pursuing such a rulemaking would be problematic.

OpenRTB is an opensource standard developed in conjunction with nearly 700 stakeholders.¹³ However, adherence to OpenRTB is voluntary and IAB recognizes that OpenRTB does not address every solution or use case in the programmatic ecosystem.¹⁴ Because of this, when individuals or entities want to solve a problem that is not covered by OpenRTB, they can freely develop and implement other solutions.¹⁵ Requiring all participants in programmatic advertising auctions to adhere to the API requested by the Petitioner would impede the ability for existing and emerging market participants to engage in digital advertising and would restrict innovation. As an example of how the requested rule is already outdated, the proposed API recognizes only four types of devices,¹⁶ but the most recent OpenRTB recognizes eight.

Related, such an API would quickly become outdated, and it is unlikely the FTC would be able to update the API as needed. Today, OpenRTB is updated regularly, such as to address privacy and security concerns, the advent of new technologies, market needs, and general feedback. Specifically, in the past eleven (11) years, IAB has released nine (9) updates to OpenRTB.¹⁷ Stakeholders also meet monthly to consider updates to OpenRTB. Even if the FTC had the authority to require adherence to a specific API under its Section 18 authority, the FTC would not be positioned to update the API on the cadence reasonably required. herefore, we urge the Commission to deny the Petition.

b. The Petitioner fails to recognize the significant consumer harms that would likely result if the Petition were granted.

We agree with the Petitioner in one regard—data-driven digital advertising supports the availability of free content on the Internet.¹⁸ While the Petitioner seems to recognize this significant consumer benefit, the Petition minimizes its importance to consumers and disregards the consumer harms that would result if the Commission unreasonably restricted data-driven digital advertising, as requested in the Petition. Were the Petition to be granted, consumers would likely face higher prices and fewer choices as the open ad-supported Internet contracts. The Petition should be denied to avoid such consumer harms.

5. However, later, the Petitioner explains that its proposed API would not permit the use of any User Objects. *See Petition* at 60. As a result, it is unclear what the Petitioner requests.

¹³ IAB Tech Lab, Programmatic Supply Chain Working Group, <https://iabtechlab.com/working-groups/programmatic-supply-chain-working-group/> (last visited Feb. 3, 2023).

¹⁴ IAB Tech Lab, OpenRTB (Real-Time Bidding), <https://iabtechlab.com/standards/openrtb/> (last visited Feb. 3, 2023).

¹⁵ *Id.*

¹⁶ *See Petition* at 61.

¹⁷ IAB Tech Lab, OpenRTB (Real-Time Bidding), <https://iabtechlab.com/standards/openrtb/> (last visited Feb. 3, 2023).

¹⁸ *Petition* at 4.



As the Petitioner appears to at least understand, data-driven advertising is fundamental to consumers having access to easily accessible, free, and low-cost products and services online. The Internet is built on the continuous exchanges of data between devices and servers—without these data exchanges, the Internet and its social, cultural, economic, and personal benefits would not exist. For instance, out of the top ten websites in the United States, nine are free to consumers in no small part because of data-driven advertising.¹⁹ Additionally, the number of options available to consumers has exponentially increased due to the ad-supported Internet. For instance, there were over 2.1 million e-commerce retail businesses operating in the U.S. in 2020—generating \$715 billion in revenues in 2020.²⁰ By subsidizing businesses, data-driven digital advertising has provided a means for businesses both new and old to offer increased content, products, and services to consumers. Before the ad-supported Internet, for example, consumers had access to a limited set of newspapers, radio stations, television stations, educational opportunities, and shopping experiences based on where they happened to live. Now, consumers have access to tens of thousands of content publishers, e-commerce options, and online services across multiple channels—unlimited by geographic constraints.

If data-driven digital advertising was unreasonably restricted, however, many of the benefits the ad-supported Internet provides to consumers today would be dramatically reduced, if not eliminated. For decades, data-driven digital advertising has supported and subsidized businesses that provide the free and low-cost services that allow consumers to communicate, learn, connect, and access entertainment online. As the Commission has acknowledged, if today’s data-driven digital advertising model was displaced, this would likely result in the loss of ad-supported online content.²¹ Even if businesses were able to survive the loss of this ad revenue, many businesses likely would be forced to turn to subscription-based models to survive, resulting in higher costs for consumers and consumer fatigue. This would be particularly challenging for today’s consumers, as one third of consumers report being overwhelmed by the number of subscriptions they already have.²² Further, e-commerce sites could struggle to identify and connect with consumers interested in their products, which may result in products offered by these businesses disappearing altogether and consumers having fewer choices. According to a survey, 42% of online shoppers purchased from a specialty marketplace that focused on a unique category in 2020.²³ Without data-driven digital advertising, these specialty marketplaces may struggle to

¹⁹ As of the date of these comments, the top ten websites in the U.S. were Google, YouTube, Facebook, Amazon, Yahoo, Twitter, Wikipedia, Instagram, Reddit, and Pornhub.

²⁰ John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 80, (Oct. 18, 2021), https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf [hereinafter *Market-Making*].

²¹ See Fed, Trade Comm’n, *In re Developing the Administration’s Approach to Consumer Privacy*, 15 (Nov. 13, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

²² Brooke Auxier and Paul H. Silverglate, *About One-Third of Consumers Report Feeling Overwhelmed By Tech Management During COVID-19*, DELOITTE (Aug. 19, 2021), <https://www2.deloitte.com/xe/en/insights/industry/technology/digital-fatigue.html>.

²³ Stephanie Crets, *Etsy continues to grow sales and find new buyers*, DIGITAL COMMERCE 360 (Aug. 6, 2021), <https://www.digitalcommerce360.com/2021/08/06/etsy-continues-to-grow-sales-and-find-new-buyers/> (citing a Digital Commerce 360 and Bizrate Insights April 2021 survey).



connect to consumers, disrupting a significant stream of commerce. For instance, last year, Etsy had over 7.5 million active sellers on its marketplace and over 96 million active buyers.²⁴

Regulations that would adversely impact the ad-supported Internet would also be inconsistent with consumer's interests, which the Petitioner does not appear to view as important. Consumers desire free or low-cost access to the online services that data-driven advertising provides and understand the value data-driven advertising offers them. According to a 2020 survey, an incredible 90 percent of consumers stated that free content was important to the overall value of the Internet, and 85 percent stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.²⁵ Likewise, when given the option between paying more for non-ad supported content in the streaming context, consumers prefer the lower cost, ad-supported service.²⁶ Recognizing the significant value data-driven digital advertising brings to consumers, the Commission should deny any petition that would unreasonably restrict such advertising, including this Petition.

c. Granting the Petition would harm competition—not promote it.

Rather than promote competition, as the Petitioner argues, the Petition would harm competition and should be denied as a result. As a proposed rationale for the Petition, the Petitioner claims that the measures requested in the Petition are needed to lower switching costs and lower costs of entry for new digital advertising market participants.²⁷ However, by significantly disrupting the existing digital advertising ecosystem, the rule requested by the Petition stands to have the opposite effect. Today, data-driven digital advertising benefits competition by supporting the growth of small businesses and by reducing barriers to entry through lower cost advertisements. However, these benefits would be limited, if not lost entirely, were the Commission to unreasonably regulate digital advertising as requested by the Petitioner. Therefore, the Petition should be denied.

Contrary to the Petitioner's statements, data-driven digital advertising substantially benefits competition by lowering barriers to entry. For example, one study found that across approximately forty different sectors of the economy, the Internet's data-driven advertising drove market entry, employment, and revenue growth.²⁸ This is in part due to the fact that data-driven digital advertising is exceptionally cost effective, which helps to enable small businesses to thrive and reduces barriers to entry for new market entrants. As background, the average cost-per-thousand impressions ("CPM") in direct mail in the United States is around \$300 and about \$35 for prime-time television advertising—but only \$2.80 for data-driven digital advertising.²⁹

²⁴ Etsy, *Etsy, Inc. Reports Fourth Quarter and Full Year 2021 Results* (2021),

https://s22.q4cdn.com/941741262/files/doc_financials/2021/q4/Exhibit-99.1-12.31.2021.pdf.

²⁵ Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), <https://digitaladvertisingalliance.org/press-release/americans-value-free-ad-supported-online-services-1400year-annual-value-jumps-more-200>.

²⁶ Hub Research Insights, <https://hubresearchllc.com/reports/?category=2021&title=2021-tv-advertising-facts-vs-fiction>.

²⁷ See *Petition* at 6.

²⁸ See generally, *Market-Making*.

²⁹ See Stephanie Faris, Chron, *What Is a Typical CPM?* (Apr. 15, 2019), <https://smallbusiness.chron.com/typical-cpm-74763.html>.



In particular, small businesses are able to leverage the lower cost of data-driven digital advertising to enter new markets, build their businesses, and deliver goods and services to consumers. One study found that 64% of surveyed small businesses in the U.S. used personalized advertising to lower their overall advertising costs, with 76% of those surveyed small businesses reporting that such ads specifically helped them find new customers.³⁰ Data-driven digital advertising also delivers results, with sales growth at small companies using data-driven digital advertising being 16% greater than at small businesses that did not leverage such advertising during the period of study.³¹

However, a rule unreasonably restricting digital advertising could result in 12x to 100x increases in advertising costs, as businesses would be forced to increase their reliance on much more expensive direct mail and television advertising to reach consumers. Such an act would disproportionately adversely impact small businesses with more limited budgets. Although online businesses of all sizes rely on data-driven digital advertising, smaller publishers depend on the practice for a significantly greater portion of their advertising revenue.³² Further, businesses would be forced to pass on increased advertising costs to consumers through higher prices in order to survive. Small businesses would be less equipped to withstand such a change, and the higher costs of reaching potential customers would increase barriers to entry for new businesses. As a result, rules that limit data-driven digital advertising stand to irreparably harm competition by increasing market concentration and removing competition from the Internet. To avoid these and other harms to competition, the Commission should deny the Petition.

* * *

Thank you for the opportunity to submit comments on the Petition. Given the information provided above, it is clear that the Commission should **deny this petition** to take up the rulemaking requested by the Petitioner. Please contact us with any questions regarding these comments.

Sincerely,

Lartese M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau

³⁰ See Deloitte Dynamic Markets, *Small Business Through the Rise of the Personalized Economy*, 27 (May 2021).

³¹ *Id.* at 16.

³² Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), <https://digitaladvertisingalliance.org/press-release/study-online-ad-value-spikes-when-data-used-boost-relevance>. See also Digital Advertising Alliance, *New Study Shows Ad Revenue Benefit through Cookies – Reinforcing Previous 2014 DAA Research: We Can Have Both Personalization & Ubiquitous Privacy Protections* (2019), <https://digitaladvertisingalliance.org/blog/new-study-shows-ad-revenue-benefit-through-cookies-%E2%80%93-reinforcing-previous-2014-daa-research-we>.