



May 24, 2024

Stacey Gray
Senior Director, U.S. Policy
Future of Privacy Forum

Re: Risk-Utility Framework for Novel Advertising Solutions (v 1.0)

Dear Stacey,

Consumer Reports sincerely thanks you for your work to ensure that consumer privacy concerns are incorporated into the Future of Privacy Forum's (FPF) Risk-Utility Framework for Novel Advertising Solutions. As the introduction to the report notes, we are currently in the midst of a time of great fluctuation in the consumer privacy and advertising spheres, with a continually shifting legal landscape occurring simultaneously with a major rethinking of the broader strategies and technology underlying the digital advertising marketplace. As such, we commend the timing of the release of this framework, which will hopefully serve as a grounding force to interested stakeholders as they seek to assess how novel and proposed advertising solutions will affect the broader ecosystem.

FPF seeks comments regarding “any additional utility, privacy, competitive, or other social consequences that should be considered in a holistic analysis of a novel advertising solution or system?” Below, Consumer Reports proposes several such thoughts.

- *Lawfulness, Fairness, and Transparency.* The proposed framework asks whether personal information was collected as a result of a “direct relationship” with an individual, but that question insufficiently addresses whether data collection and use for advertising is contextually consistent with that relationship. Data collected directly as part of an e-commerce transaction is very different than data collected by a platform in facilitating a consumer’s transaction with a different company, for example. The question of fairness should look more broadly at contextual expectations, and should explicitly acknowledge the important difference between direct commercial transactions and data collected by platforms intermediating other relationships. A significant omission of the framework is that it does not confront the different roles of platforms (compared to more direct first parties), which is essential in broadly assessing risk-utility advertising tradeoffs.

- More broadly, the framework should explore whether data collection and processing is functionally necessary and consistent with the nature of the consumer relationship. The mere existence of a direct relationship should not mean that all bets are off. As discussed below, while the term “data minimization” is used in other parts of the framework, it is used there only to mean data processing should be constrained to the company’s own advertising-related purposes. To the contrary, from a consumer’s point of view, the notion of “data minimization” is that data processing will be constrained to what is operationally necessary for the consumer’s desired relationship with the business. In some cases, data processing for advertising will be contextually expected and even desired. In other cases, data processing for advertising would be wholly inconsistent and unexpected, despite the existence of a “direct relationship.”
- Another important element to assess here is whether the advertising framework allows the consumer to understand, precisely, *the extent to which* their personal data is being used to target ads (rather than just that *some amount* of their personal data is being used). One of the issues with the existing behavioral advertising framework is that while consumers may intuit that their personal data is being used to track and target them with ads, they have a difficult time understanding, with specificity, what data is being collected about them for these purposes. Company privacy policies aren’t typically constructed in such a way as to be helpful for this task. Ideally, advertising frameworks should be able to produce a higher degree of precision when consumers wish to understand how they are being targeted with ads. For example, many controller privacy policies only share the broad categories of information collected about consumers for the purposes of ad targeting (i.e. browsing activity), which falls well short of meaningful transparency.
 - Relatedly, we’d argue for a higher degree of precision when it comes to the transparency of ad delivery. The Risk-Utility Framework currently asks stakeholders to assess “[d]oes the individual have the ability to easily access the underlying data, including any inferences about them.” Consumers should also be able to understand *why* they have received a specific advertisement. Such information is relevant to consumer consent decisions, as well as regulator and researcher oversight efforts.
- Finally, while the framework explores the issue of economic power and information imbalances between various business entities, it does not look at economic power relationships between *consumers* and businesses. One key consideration in assessing the merits of data processing systems is whether consumers will have their data used to make them worse off than they would be otherwise. For example, will data be used to manipulate them to make choices they otherwise would not that result in an overall loss of utility for the consumer?

Will data collection allow a company to set personalized prices that allow the company to extract a relatively greater portion of the economic surplus of a transaction than they otherwise would? Such questions are fundamental to the question of fairness of advertising and data collection but they are not mentioned in the proposed framework (these questions should also be addressed in the Economic and Competitive Implications section).

- *Purpose Limitation (Secondary Uses)*. One additional factor to add to this category may be whether the proposed advertising solution allows “sensitive data” to be treated differently from other types of personal data. Every comprehensive state privacy law currently includes enhanced protections for sensitive data, with some states (Vermont and Maryland) recently banning the sale of sensitive data outright, as well as (in Maryland’s case) arguably banning the use of sensitive data for cross-contextual targeted advertising altogether. Any future proposed advertising solution should provide a mechanism for controllers to segregate information depending on its classification as sensitive under different legal frameworks.
- *Data Minimization*. The Risk-Utility framework asks advertisers to assess whether the information collected “is necessary to achieve specific advertising purposes and uses communicated to the user.” But if the “specific advertising purpose” communicated to the user is simply “to provide behavioral advertising”, the answer in most cases is likely to be yes, which does not provide meaningful protections for consumers. The Risk-Utility framework should also ask: does the advertising solution need as much behavioral data as possible to be effective? Or can it function only using information generated from the provision of the underlying product or service requested by the consumer? Is the consumer able to limit the universe of data the controller can collect about them for the purpose of advertising?
- *Accountability*. Accountable advertising frameworks should provide the opportunity for meaningful review and oversight by enforcers. Are controllers able to map where personal data is flowing to and from? Are relationships with third-parties codified via written contract? Controllers should be able to provide answers to these important questions to enforcement bodies.
- *User Control (Opt-Ins, Opt-Outs, “Do Not Sell”) and Design*. To the extent that advertising frameworks rely on user consent choices to manage privacy standards, they should allow consumers to make these decisions in standalone format and not bundle these choices with broader terms of services or other user agreements that are prerequisites for the provision of the product or service. More specifically, advertising frameworks should ensure that consumer choices are not punished and that they will retain access to the underlying product or service and not be retaliated against for their decision. Otherwise, consumer choice is illusory.
 - Relatedly, a relevant question to ask advertisers is whether their framework provides consumers the choice of advertising experience. Can consumers choose

to block cross-contextual targeted advertising and only receive contextual advertisements? Can they choose to block first-party advertising or advertising altogether?

- *Impact on Marginalized or Vulnerable Populations.* Similar to the broader comments about sensitive data above, it may be relevant for advertising frameworks to determine whether they can meaningfully segregate personal information collected about individuals' race, religion, sexual orientation or other categories of personal data relating to marginalized or vulnerable populations, or to turn-off ad delivery based on these characteristics altogether, in order to comply with relevant state laws.

Once again, we appreciate the work that has gone into this valuable tool. Please feel free to reach out if we can be helpful in any way or if you would like to discuss our views in more detail.

Sincerely,

Justin Brookman
Director, Technology Policy

Matt Schwartz
Policy Analyst