

August 20, 2018

Joseph J. Simons, Chairman  
Rohit Chopra, Commissioner  
Maureen K. Ohlhausen, Commissioner  
Noah Joshua Phillips, Commissioner  
Rebecca Kelly Slaughter, Commissioner

Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

## **Re: Comments for Hearings on Competition and Consumer Protection in the 21st Century**

Upturn, a 501(c)(3) organization that promotes equity and justice in the design, governance, and use of digital technology, appreciates the opportunity to comment on the Federal Trade Commission's forthcoming examination of competition and consumer protection issues. We offer the following response to topic 9(a), the consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics, and the welfare effects and privacy implications associated with the application of these technologies to consumer advertising and marketing campaigns.

### **I. § Lack of visibility into online advertising practices and technologies is an impediment to effective consumer protection. The FTC should encourage digital ad platforms to open all ads and targeting criteria to public scrutiny.**

Many digital platforms sell advertisers the opportunity to serve algorithmically targeted messages to consumers who might not otherwise see them. While many of these paid messages promote innocuous consumer goods and services, malicious advertisers use the same tools to push harmful financial products,<sup>1</sup> fraudulent rehab centers,<sup>2</sup> damaging conversion

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<sup>1</sup> Upturn, *Led Astray: Online Lead Generation and Payday Loans*, October 2015, <https://www.teamupturn.org/reports/2015/led-astray>.

<sup>2</sup> See, e.g., Written Statement of Eric Gold, Assistant Attorney General of Massachusetts, Before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations, *Examining Concerns of Patient Brokering and Addiction Treatment Fraud*, December 12, 2017, <https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Gold-OI-Hrg-on-Examining-Concerns-of-Patient-Brokering-and-Addiction-Treatment-Fraud-2017-12-12.pdf> (testifying that patient brokers “solicit a wider audience on-line or through social media, including on Facebook”); Brad Witbeck, *How to Use Facebook Ads to Grow Your Addiction Recovery Center*,

therapy organizations,<sup>3</sup> affiliate marketer scams,<sup>4</sup> and other unsavory offerings. They can also target ads for housing, jobs, and credit in ways that raise discrimination concerns.<sup>5</sup> Regulators and advocates who are not among the advertisers' target audience can find it nearly impossible to detect patterns of deceptive or harmful behavior.<sup>6</sup>

While recent revelations about the practices of Cambridge Analytica have prompted attention to how platforms share user data with partners, few remedies address how the platforms themselves use the very same data *within* their platforms — in partnership with advertisers — to propel targeted, paid messages that may cause harm separate and apart from privacy harms.

In response to foreign manipulation of US elections and pressure from Congress, major social media platforms have taken steps to make election-related and political ads more transparent to consumers and watchdogs.<sup>7</sup> But vast swaths of the online advertising system remain opaque and inscrutable to advocates, regulatory agencies, attorneys general, and others who are devoted to protecting consumers from harms including fraud, discrimination, and financial injury.<sup>8</sup> Without visibility, these actors will have great difficulty pursuing investigations to detect

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Disruptive Advertising, April 10, 2017, <https://www.disruptiveadvertising.com/social-media/addiction-recovery-facebook-ads>.

<sup>3</sup> Fariha Karim, Facebook under fire for targeted 'gay cure' adverts, *The Times*, February 25, 2017, <https://www.thetimes.co.uk/article/facebook-under-fire-for-targeted-gay-cure-adverts-2b7lh0td2>.

<sup>4</sup> Zeke Faux, How Facebook Helps Shady Advertisers Pollute the Internet, *Bloomberg Businessweek*, ! March 27, 2018, <https://www.bloomberg.com/news/features/2018-03-27/ad-scammers-need-suckers-and-facebook-helps-find-them> (describing how these advertisers rely on algorithmic targeting tools to reach ! vulnerable consumers. One advertiser “who sells deceptively priced skin-care creams with fake ! endorsements from Chelsea Clinton” described that in providing automated targeting and optimization tools, Facebook effectively “go[es] out and find the morons for me.”).

<sup>5</sup> *E.g.* Samantha Schmidt, Facebook sued for allegedly allowing housing advertisers to discriminate, *The ! Washington Post*, March 28, 2018, [https://www.washingtonpost.com/news/morning-mix/wp/2018/03/28/facebook-sued-for-allegedly-allowing-housing-advertisers-to-discriminate/?utm\\_term=.f9ef058e6360](https://www.washingtonpost.com/news/morning-mix/wp/2018/03/28/facebook-sued-for-allegedly-allowing-housing-advertisers-to-discriminate/?utm_term=.f9ef058e6360).

<sup>6</sup> Moreover, platforms often effectively limit public interest researchers from doing so in terms of service. ! See *e.g.* Knight Institute Calls on Facebook to Lift Restrictions on Digital Journalism and Research, ! Knight First Amendment Institute at Columbia University, August 7, 2018, ! <https://knightcolumbia.org/news/knight-institute-calls-facebook-lift-restrictions-digital-journalism-and-research>. !

<sup>7</sup> In September 2017, Facebook announced it would make all active ads visible on advertisers' pages and ! “work with others to create a new standard for transparency in online political ads.” Colin Stretch, ! Facebook to Provide Congress With Ads Linked to Internet Research Agency, September 21, 2017, ! <https://newsroom.fb.com/news/2017/09/providing-congress-with-ads-linked-to-internet-research-agency>; ! Rob Goldman, Twitter, February 17, 2018, <https://twitter.com/robobjective/status/964884872882982912> ! (last accessed March 7, 2018); Anthony Ha, !

Twitter launches its Ads Transparency Center, where you can see ads bought by any account, ! TechCrunch, June 28, 2018, <https://techcrunch.com/2018/06/28/twitter-ads-transparency-center>.

<sup>8</sup> Senator Cory Booker (D-NJ), questioned Mr. Zuckerberg over discriminatory uses of Facebook's advertising platform to target ads to users by race, and tools that law enforcement officials have ! reportedly used to surveil activists of color. Transcript of Mark Zuckerberg's Senate hearing, *The Washington Post*, April 10, 2018, <https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing>. !

and respond to advertisers who take advantage of algorithmic targeting tools to harm consumers.

In a recent report, Upturn recommended that Facebook should provide useful, robust access to all of the paid messages that flow across its platform, as well as disclose metadata like the size and nature of each ad's audience to aid public interest actors in diagnosing and addressing a wide range of harm.<sup>9</sup> The same principles could be extended to other large online advertising platforms.

**II. § Advertising algorithms can play a meaningful role in discriminatory advertising, separate and apart from advertiser targeting choices. The FTC should encourage further study, particularly as to how ad platform optimization relates to equitable delivery of ads for credit, housing, and employment.**

Under pressure from news outlets and civil rights advocates,<sup>10</sup> Facebook has taken steps to limit advertisers' ability to exclude on the basis of protected characteristics.<sup>11</sup> However, an advertiser's targeting choices are only the first step of determining who ultimately will see a given advertisement. In fact, platforms' own ad delivery optimization techniques can create or exacerbate concerns about discrimination.

The rise of "programmatic" and "header bidding" advertising — near-real time advertising based on personalized user data — means that the platforms themselves play an increasingly important role in determining which users see ads. Because advertisers often pay a premium for clicks or other engagement actions over mere impressions, platform companies often have a financial incentive to prioritize the delivery of advertisements to users they predict are more likely to take those actions. This means the platforms will use all available data to identify the "right" people for a given ad, separate from targeting preferences explicitly selected by the advertiser.

Today, the inner workings of these auction and prediction algorithms are not well understood, even among advertisers.<sup>12</sup> But recent research suggests ad delivery algorithms can result in

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<sup>9</sup> While Facebook has said it is making all (nonpolitical) ads visible, Facebook's plans do not include an effective way for the public to make sense of the millions of ads running on its platform at any given time. ! It is also important to emphasize that users' personal data are entirely distinct from the paid, commercial ! messages that fuel online platforms' profits. See generally Aaron Rieke and Miranda Bogen, Leveling the ! Platform: Real Transparency for Paid Messages on Facebook, May 2018, ! <https://www.teamupturn.org/reports/2018/facebook-ads>.

<sup>10</sup> Julia Angwin, Ariana Tobin and Madeleine Varner, Facebook (Still) Letting Housing Advertisers Exclude Users by Race, ProPublica, November 21, 2017, <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>.

<sup>11</sup> Nick Statt, Facebook signs agreement saying it won't let housing advertisers exclude users by race, ! The Verge, July 24, 2018, <https://www.theverge.com/2018/7/24/17609178/facebook-racial-discrimination-ad-targeting-washington-state-attorney-general-agreement>.

<sup>12</sup> Header Bidding for Ad Buyers: What Brands, Agencies and Buy-Side Platforms Need to Know, ! eMarketer, <http://totalaccess.emarketer.com/reports/viewer.aspx?r=2002127> (last visited June 26, 2018). !

facially discriminatory delivery, independent of the advertiser's intent.<sup>13</sup> In our own experiments, ten real job advertisements placed on Facebook, which targeted all users in the U.S. over the age of 18, all ended up with final audience gender ratios above 60:40.<sup>14</sup> In one advertisement, for a Marketing Coordinator position, Facebook delivered over 90 percent of the 9,830 ad impressions to women.

While these audience compositions could reflect coincidental results from the market mechanics of the real-time auctions,<sup>15</sup> some programmatic advertising platforms have stated publicly that they include demographic data in their optimization algorithm. Facebook's support documentation, for example, states that its ad delivery algorithm automatically uses gender as part of determining who will see advertisements.<sup>16</sup>

By optimizing ad delivery along demographic lines, platforms narrow the delivery of advertisements away from some users and toward others. In effect, people may be locked out of seeing beneficial paid messages based on the behavior of others in their peer demographic group.

More study is needed to disentangle how advertiser targeting choices and platform algorithms each contribute to determining the makeup of an ad's audience. Nevertheless, the FTC should be aware that ad platforms' actual and proposed remedies to *discriminatory ad targeting* (e.g. restricting or removing certain targeting categories) will not be sufficient to prevent the *discriminatory ad delivery* that can result from algorithmically optimized ad audiences.

**III. § Many companies claim to be using social media data to help make important decisions about consumers, despite platform policies that prohibit such uses. The FTC should consider investigating companies that violate platform policies in ways that might harm consumers.**

Insurers, creditors, employers, and landlords are increasingly interested in using new sources of data to evaluate consumers. Recognizing this, major social media platforms like Facebook and Twitter have enacted policies that limit the ways third party companies can use data about their users.<sup>17</sup> Facebook's policy, for example, prohibits any developer from using Facebook data "to make decisions about eligibility, including whether to approve or reject an application or how

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<sup>13</sup> Anja Lambrecht and Catherine E. Tucker, Algorithmic Bias? An Empirical Study into Apparent Gender-Based Discrimination in the Display of STEM Career Ads, Social Science Research Network, (Oct 15, 2016; revised Mar 12, 2018), <https://papers.ssrn.com/abstract=2852260>.

<sup>14</sup> The ratio among the 230 million users who were eligible to see our advertisements is 52:48. !

<sup>15</sup> For example, ad real estate for certain users might be more expensive than for others and as a result, ! lower budget advertisers will be unlikely to reach them.

<sup>16</sup> "If there are more and lower-cost optimization events [e.g. clicks on advertisements] among men than ! women, then we'd automatically spend more of your budget on the men in the larger target audience of ! your single ad set." Facebook Help Center, <https://www.facebook.com/business/help/1754368491258883> ! (last visited Jul 20, 2018).

<sup>17</sup> Facebook Platform Policy, <https://developers.facebook.com/policy> (last visited August 17, 2018); ! Developer Agreement and Policy, May 25, 2018, <https://developer.twitter.com/en/developer-terms/agreement-and-policy> (last visited August 17, 2018). !

much interest to charge on a loan."<sup>18</sup> (The policy appears to apply notwithstanding user consent.) Despite these policies, third party scoring companies routinely claim to be leveraging social media data.<sup>19</sup>

The FTC should consider investigating companies that make claims indicating they might be violating these platform policies. When companies use social media data to evaluate consumers' eligibility for important products or services in ways that violate social media platforms' policies, they might be causing injuries that "consumers themselves could not reasonably have avoided."<sup>20</sup> There may be an opportunity for FTC to protect consumers and solidify these self-regulatory norms with carefully selected investigations and enforcement actions.

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We look forward to contributing to the Commission's ongoing study of and investigations into these important matters. For more information, contact Miranda Bogen, Senior Policy Analyst, at [miranda@teamupturn.org](mailto:miranda@teamupturn.org).

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<sup>18</sup> Facebook Platform Policy, *supra* note 17.

<sup>19</sup> Glyn Moody, Facebook blocks insurance company's plan to base premiums on your posts, Ars Technica, November 2, 2016, <https://arstechnica.com/tech-policy/2016/11/facebook-scuppers-algorithmic-car-insurance>; See, e.g., Aaron Rieke, Don't let the hype over "social media scores" distract you, Equal Future, August 11, 2016, <https://medium.com/equal-future/dont-let-the-hype-over-social-media-scores-distract-you-33b5ccfbceb0> and Adele Peters, These Tools Help You Mislead The Algorithms That Track You On Social Media, Fast Company, April 10, 2018, <https://www.fastcompany.com/40556730/these-tools-help-you-mislead-the-algorithms-that-track-you-on-social-media>.

<sup>20</sup> FTC Policy Statement on Unfairness, Federal Trade Commission, December 17, 1980, *available at* <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.