



Considerations for NAI Members Regarding the Classification of Ad-tech Data Flows as “Sales” Under the CCPA: An NAI Analysis

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About the NAI

Founded in 2000, the Network Advertising Initiative (NAI) is the leading self-regulatory organization representing third-party digital advertising companies. As a non-profit organization, the NAI promotes the health of the online ecosystem by maintaining and enforcing high standards for data collection and use for digital advertising in multiple media, including web, mobile, and TV.

Acknowledgments

This document was prepared by participants in the NAI's CCPA Implementation Working Group, a joint effort consisting of leading CCPA experts from NAI member companies and the NAI staff.

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I. Introduction

When the California Consumer Privacy Act (CCPA)¹ goes into effect on January 1, 2020, it will grant all California consumers new rights to notice and choice about how businesses use their “personal information.”² For example, the CCPA provides consumers the right to notice about the personal information businesses collect about them, the purposes for such collection, and other related disclosures.³ Further, the law provides consumers the right to opt out of the “sale”⁴ of personal information about them by a business to other businesses or third parties.⁵

As evidenced by its industry-leading Code of Conduct, the NAI has long supported the principles of notice and choice that are at the core of the CCPA, and the NAI believes that California consumers will enjoy privacy benefits from being able to exercise their new rights, not just with NAI member companies that already participate in an industry-wide opt out, but with all businesses covered by the CCPA. Still, as the NAI has expressed to the California Attorney General in written comments, the way that the CCPA codifies the principles of notice and choice has some shortcomings.⁶ Indeed, the NAI Code goes beyond the CCPA in some ways by providing privacy protections that exceed the CCPA’s requirement to provide an opt out of “sales” of personal information.

For example, the NAI Code of Conduct, unlike the CCPA, provides privacy protections keyed to the level of sensitivity of the data being used. One result that follows from this difference is that the CCPA does not treat a consumer’s sensitive health data any differently from technical information like an IP address associated with a computer that the consumer has used. Because the CCPA does not offer heightened protection for sensitive health data, the use of such information by a business is limited only by a consumer’s right to opt out of its “sale.” In contrast, the NAI Code of Conduct requires a user’s Opt-In Consent for any use of sensitive health data for Personalized Advertising.⁷ The NAI Code of Conduct distinguishes between sensitive health data and other types of information about a user or device, and

¹ CAL. CIV. CODE §§ 1798.100 *et seq.*

² Under the CCPA, “personal information” is information that “identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household[.]” Personal information explicitly includes IP address, internet or other electronic network activity, device identifiers, cookies, beacons, pixel tags, mobile ad identifiers, probabilistic identifiers, and many other kinds of information frequently used in programmatic advertising, as well as “characteristics of protected classifications under California or federal law” (e.g., race, age, national origin, sex, religion, disabilities, etc.) where applicable. *Id.* § 1798.140(o)(1).

³ *See, e.g., id.* § 1798.100(a) (requiring notice regarding categories of personal information collected and purposes of such collection).

⁴ “Sell,” “selling,” “sale,” or “sold,” means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business to another business or a third party for monetary or other valuable consideration. *Id.* § 1798.140(t)(1).

⁵ *Id.* § 1798.120(a).

⁶ *See* Comments from the Network Advertising Initiative to the Honorable Xavier Becerra, California Attorney General (March 8, 2019) [hereinafter NAI Comments], <https://www.networkadvertising.org/sites/default/files/naicommentletterccpaimplementingregulations.pdf>.

⁷ *See* NETWORK ADVERTISING INITIATIVE, 2018 NAI CODE OF CONDUCT § II.C.1.e (2018) [hereinafter NAI CODE OF CONDUCT], http://www.networkadvertising.org/sites/default/files/nai_code2018.pdf.

offers heightened privacy protections for sensitive data, because of the greater potential for privacy harms where sensitive data are involved.

In addition to these shortcomings, a central concern with the CCPA as it stands today is ambiguity around certain key terms that make it very difficult for businesses to know precisely what the CCPA's requirements are, and therefore how businesses can put processes in place to comply with them. A prime example is the CCPA's definition of a "sale." NAI member companies are accustomed to offering consumers a choice to opt out from the use of information like cookie IDs and mobile ad IDs for Personalized Advertising.⁸ But these companies are now faced with a new set of issues when seeking to comply with the CCPA—how does the CCPA opt out of "sales" differ from the NAI opt out of "Personalized Advertising"? Which of their business activities fall under the CCPA's ambiguous definition of "sale"? Are they the same as the business activities already covered by the NAI opt out?

Unfortunately, the NAI is not in a position to provide definitive answers to these difficult questions. The California Attorney General (the "AG") has released proposed regulations to implement the CCPA, but those proposed regulations are silent on the topic of what constitutes a "sale."⁹ The NAI will continue to seek further guidance from the AG through written comments on the proposed regulations, and, potentially, through advisory opinions contemplated by the statute.¹⁰ Still, despite the lack of guidance from the AG on this important topic, the NAI has developed this high-level analysis for its member companies with the hope that it will help them hone their thinking about which, if any, of their business activities may be classified as "sales" under the CCPA, and the extent to which an opt out from Personalized Advertising under the NAI Code of Conduct may, or may not, overlap with the CCPA's requirements for an opt out of "sales" of personal information. The NAI recommends that members consult with their own legal advisors to assess their CCPA obligations in connection with their specific business activities, and to monitor developments from the AG that may provide additional clarity or detail about those obligations.

The NAI may update this analysis from time to time in response to legislative amendments, regulations, and other guidance.

II. Understanding "sales" of personal information under the CCPA

How does the CCPA define "sales"?

Under the CCPA, "sale" means "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating . . . a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration."¹¹ This definition is broader than the everyday meaning of a "sale," and includes merely "making available" personal information in exchange for any kind of valuable consideration. Such non-monetary consideration could include, for example, the provision of services or in-kind exchanges.

⁸ "Personalized Advertising is a collective term for Interest-Based Advertising, Cross-App Advertising, and Retargeting, as well as any combination of these practices." *Id.* § I.J.

⁹ See Proposed California Consumer Privacy Act Regulations, <https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf>.

¹⁰ See CAL. CIV. CODE §§ 1798.155(a).

¹¹ *Id.* § 1798.140(t).

Why does it matter?

Whether an ad-tech company's use of personal information (PI) constitutes a "sale" is a critical question for CCPA compliance because it helps determine whether an ad-tech company's publisher and/or advertiser partners must include a "Do Not Sell My Personal Information" link on their online properties, and whether the ad-tech company must include one on its own homepage.¹² Further, where a consumer has directed a business not to sell PI about them, what counts as a "sale" helps determine which activities the business must cease, as well as any circumstances where the business may continue to collect and process PI in the presence of a CCPA opt out in accordance with other provisions of the law.

How can NAI members determine whether any of their business activities involve "sales" of personal information?

Given the CCPA's broad definition of a "sale," and a lack of guidance on this topic from the California Attorney General to date, all companies should undertake a careful analysis of their business activities to determine which, if any, specific activities satisfy all of the elements of the statutory definition of CCPA "sale." Such an analysis would inform: (i) when companies have to post (or cause to be posted) a "Do Not Sell My Personal Information" link; (ii) which activities they must cease after a consumer opts out of "sales;" and (iii) which activities can continue after such an opt-out.¹³

The definition of "sale" includes three main elements that must be satisfied for an ad-tech use case to count as a sale:

1. The use case must involve "personal information"

If an ad-tech use case does not involve personal information ("PI"), it is not a sale.¹⁴ But because cookie IDs, IP addresses, probabilistic identifiers, "characteristics of protected classes," and many more specific types of data fall within the definition of PI, many ad-tech use cases that rely on user-level information likely involve covered PI. Still, ad-tech companies may also evaluate whether a given business activity involves only "aggregate consumer information"¹⁵ or "deidentified" information,¹⁶ since the CCPA includes a general carveout for consumer information that is "deidentified or in the aggregate."¹⁷ The

¹² See *id.* § 1798.135(a)(1).

¹³ See *id.* § 1798.135(a)(4) (requiring businesses to refrain from selling personal information for consumers who have exercised their right to opt out of sales).

¹⁴ See *id.* § 1798.140(t) (stating that covered "sales" are those involving "a consumer's personal information").

¹⁵ "Aggregate consumer information" means information that relates to a group or category of consumers, from which individual consumer identities have been removed, that is not linked or reasonably linkable to any consumer or household, including via a device. "Aggregate consumer information" does not mean one or more individual consumer records that have been deidentified. *Id.* § 1798.140(a).

¹⁶ "Deidentified" means information that cannot reasonably identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular consumer, provided that a business that uses deidentified information: (1) Has implemented technical safeguards that prohibit reidentification of the consumer to whom the information may pertain. (2) Has implemented business processes that specifically prohibit reidentification of the information. (3) Has implemented business processes to prevent inadvertent release of deidentified information. (4) Makes no attempt to reidentify the information. *Id.* § 1798.140(h).

¹⁷ See *id.* § 1798.145(a)(5).

CCPA also excludes “publicly available” information¹⁸ from the definition of PI,¹⁹ although this exemption is likely available to ad-tech companies in only limited circumstances.

2. *The use case must involve the movement of PI from one business to another business or third party*

If an ad-tech use case does not involve the movement of a consumer’s PI from one business²⁰ to another business or third party,²¹ it is not a sale. However, this concept is very broad under the CCPA, and includes “selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating [PI] orally, in writing, or by electronic or other means.”²² Many ad-tech use cases appear to involve the movement of PI in this sense, e.g., when a website publisher makes a cookie ID associated with a consumer available to ad-tech companies through real-time bidding (RTB) bid requests, or when a website publisher makes PI available to a demand-side platform (DSP) by allowing the DSP to tag or pixel its page. However, this definition, while broad, does not appear to apply to cases where a business collects PI directly from a consumer (i.e., without a publisher acting as a kind of intermediary making the PI available, or alternatively where the consumer is clearly notified about what entity is collecting PI from them). The definition likely would still apply, however, to any downstream transfers of such PI for consideration.

3. *The use case must involve the exchange of monetary or other valuable consideration for the PI*

If an ad-tech use case does not involve a transfer of PI by one business to another business or third party *for monetary or other valuable consideration*, it is not a “sale.”²³ This element appears to involve two sub-elements.

First, the transfer must in some way involve “monetary or other valuable consideration.” For example, a gift of PI from one business to another that did not involve an exchange of consideration arguably would not satisfy this sub-element. However, it is unlikely that any ad-tech functions are truly performed gratis. An exchange of services for PI, or an in-kind exchange of PI, for example, would still likely constitute “other valuable consideration.”

Second, and assuming a transfer of PI *does* involve consideration, the consideration must be given to the transferor of the PI *for* the PI. Put another way, the consideration must be given for receipt of and independent rights to the PI by the transferee.

¹⁸ “[P]ublicly available” means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information. “Publicly available” does not mean biometric information collected by a business about a consumer without the consumer’s knowledge. Information is not “publicly available” if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained. “Publicly available” does not include consumer information that is deidentified or aggregate consumer information. *Id.* § 1798.140(o)(2).

¹⁹ *See id.*

²⁰ For the definition of “business” under the CCPA, *see id.* § 1798.140(c).

²¹ For the definition of “third party” under the CCPA, *see id.* § 1798.140(w).

²² *Id.* § 1798.140(t).

²³ *See id.*

Several independent analyses support this way of interpreting the “consideration” element of the definition of “sale.”

The first analysis starts its approach to the issue by arguing that not all disclosures of PI by a business to a third party in a commercial context are “sales” of PI under the CCPA.²⁴ That’s because, while the current definition of “sale” is quite broad, the original language in the ballot initiative was even broader. Under the original ballot initiative, “selling” was defined to include any sharing of “a consumer’s personal information with a third party, *whether for valuable consideration or for no consideration, for the third party’s commercial purposes.*”²⁵ The fact that the CCPA did not adopt this language from the ballot initiative, and instead adopted a narrower definition, is evidence that not all disclosures of PI to a third party for a commercial purpose are “sales” under the CCPA, although that *would* have been the case if the California legislature adopted the original ballot initiative language verbatim. Instead, disclosures of PI to third parties are not “sales” unless they are undertaken in exchange for valuable consideration.²⁶

Next, the first analysis shows that California common law treats “consideration” (which is not defined by the CCPA) as a “bargained-for exchange,” a test that would require a transfer of PI by a business to be motivated or induced by a third party’s promise or performance to count as “consideration.”²⁷ If the receipt of PI is the “plan and purpose for which consideration is paid,” that would be evidence of a “sale.” Conversely, the receipt of PI could be an “ancillary” or “remote” benefit for the recipient if the parties did not consider the exchange of PI to be material to the bargain. In that case, “the fact that a third party might be able to derive some incidental benefit from the data that it receives (such as product or service development or improvement) should be immaterial to the “sale” analysis under the CCPA.”²⁸

According to a second analysis, only consideration given specifically for PI should constitute a “sale” of PI—the PI must be the “object of” (or purpose of) the transaction.²⁹ This analysis gives the example of a lender selling a loan portfolio to another lender, which will invariably include personal information. However, consideration is not paid in exchange for the PI, but instead in exchange for the loan. The disclosure of personal information in that context should not be deemed a sale of PI, as the exchange of personal information is required for the purchase of the loan, which is the actual right that is the object of the sale.³⁰

Under a third, and separate analysis, the transfer of PI by a public company to an independent auditor as required by the federal securities laws may not constitute a “sale” of PI because “there is no valuable consideration exchanged for the personal information obtained in the audit given that an auditor does

²⁴ See Alexandra Scott, Elizabeth Canter, and Lindsey Tonsager, ‘Sale’ under CCPA may not be as scary as you think, IAPP: THE PRIVACY ADVISOR (Oct. 29, 2019), <https://iapp.org/news/a/sale-under-the-ccpa-may-not-be-as-scary-as-you-think>.

²⁵ *Id.* (emphasis added).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Lydia F de la Torre, *Interpreting CCPA using the “Golden Rule”: Purposes for processing, sales, and records threshold*, MEDIUM: GOLDEN DATA (Sept. 7, 2019), <https://medium.com/golden-data/interpreting-ccpa-using-the-golden-rule-6fcb1a8d03b5>.

³⁰ *Id.*

not in any meaningful sense pay for the data.”³¹ Put another way, while it is clear from this example that the public company and its auditor have exchanged consideration in a commercial context, and PI has been transferred in connection with the transaction, no consideration was given to the company by the auditor *for* the PI.

While these three independent analyses (and the illustrative examples they use) are not specific to ad-tech use cases, the premise that a “sale” does not occur for CCPA purposes unless consideration is provided specifically for the purpose of obtaining PI provides a useful way to frame and circumscribe the scope of a “sale” to avoid unintended consequences. That is one reason why the NAI has also advocated for this position in its comments to the California AG in connection with CCPA rulemaking,³² although the proposed regulations remain silent on the issue. Companies should consider discussing with legal counsel the key elements of the definition of “sale” as they apply to their business practices.

Exceptions to the definition of “sale”

Even if an NAI member concludes that one of its business activities meets all of the elements required for a “sale” of PI under the CCPA, there are two important exceptions to the definition to consider.

1. Service provider exception

A business that uses or shares the PI of a consumer with a service provider that is necessary to perform a business purpose has not “sold” that information to its service provider if both of the following conditions are met: (i) the business has provided notice that such information is being used or shared in its terms and conditions; and (ii) the service provider does not further collect, sell, or use the personal information of the consumer except as necessary to perform the business purpose.³³

A CCPA “business” should not be precluded from acting as a “service provider” for some of its business activities or for some of its business partners, if the “business” meets the statutory requirements for the “service provider” exception. Similarly, the fact that an ad-tech company may act as a service provider in some contexts should not prevent it from being a “business” in others. In other words, “service provider” and “business” designations under the CCPA may hinge on the activities of the NAI member company in handling PI for different purposes.

However, NAI members should closely examine the requirements necessary to qualify for the service provider exception to ensure they can qualify for it where applicable. Under the CCPA, a “service provider” is defined as:

[A] sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other

³¹ Brian Hengesbaugh and Amy de La Lama, *How to know if your vendor is a ‘service provider’ under CCPA*, IAPP: THE PRIVACY ADVISOR (July 30, 2019), <https://iapp.org/news/a/how-to-know-if-your-vendor-is-a-service-provider-under-ccpa/>.

³² See NAI Comments, *supra* note 6, at 5–6 (arguing that regulations implementing the CCPA should clarify that the definition of “sale” applies only when the purpose of a transaction is the exchange of personal information for consideration).

³³ See CAL. CIV. CODE § 1798.140(t)(2)(C).

owners, that processes information on behalf of a business and to which the business discloses a consumer's personal information for a business purpose ***pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business, or as otherwise permitted by this title, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business.***³⁴

If NAI members intend to act as service providers for any of their business partners, they should consider carefully evaluating with legal counsel whether they can meet the requirements in this definition given the nature of the business activities in question, and consult the implementing regulations recently proposed by the AG.³⁵ NAI members should likewise consider whether the fact that they may be acting as a 'controller' under the GDPR for the same or similar activities in connection with their business in the EEA is consistent with qualifying for this exception.

2. *Exception for disclosures of PI at the direction of the consumer.*

Under the CCPA, a business does not sell PI when a consumer:

[U]ses or directs the business to intentionally disclose personal information or uses the business to intentionally interact with a third party, provided the third party does not also sell the personal information, unless that disclosure would be consistent with the provisions of this title. An intentional interaction occurs when the consumer intends to interact with the third party, via one or more deliberate interactions. Hovering over, muting, pausing, or closing a given piece of content does not constitute a consumer's intent to interact with a third party.³⁶

Some observers believe this exception would apply to cases where a consumer has given informed, opt-in consent to a business for the disclosure of PI to a third party. However, NAI members should consult with legal counsel to determine whether any current procedures they have in place to obtain Opt-In Consent for their use of PI rise to the level of a consumer intentionally directing the disclosure of PI to them.

³⁴ See *id.* § 1798.140(v) (emphasis added).

³⁵ See Proposed California Consumer Privacy Act Regulations § 999.314, <https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf>.

³⁶ CAL. CIV. CODE § 1798.140(t)(2)(A).

III. What does this mean for NAI members who already offer an opt out from interest-based advertising?

The existing policy around NAI opt outs covers a broad array of ad-tech activities, including Interest-Based Advertising, Cross-App Advertising, Viewed Content Advertising, and Retargeting.³⁷ In 2020, the NAI Code of Conduct will require an opt out covering Audience Matched Advertising for the first time.³⁸ However, other activities central to the delivery, measurement, and analysis of digital advertising may continue in the presence of an NAI opt out.³⁹ That is because the purpose of the NAI opt out is to empower consumers to limit the use of certain information about their activities online and offline to inform the digital advertisements they see—the NAI opt out is not intended, for example, to block all uses of data for programmatic advertising (such as for delivering and measuring generic contextual ads), or to prevent legitimate business activities like web and mobile analytics, fraud detection, frequency capping, payment and delivery functions and other similar activities that support business operations.

In contrast, the CCPA provides consumers with the right to opt out of “sales” of PI,⁴⁰ which may apply differently to digital advertising, and provide different outcomes for consumers, compared to existing opt-out mechanisms required by the NAI Code of Conduct. That is because the right to opt out of “sales” under the CCPA is not intended to address any specific ad-tech use cases, but instead to empower consumers to opt out of “sales” of PI by each covered “business” operating in California, both online and offline. For that reason, NAI members should consider assessing whether particular activities subject to the NAI Code are also “sales” under the CCPA. Such an assessment would be important in particular for Ad Delivery and Reporting (ADR) activities that are not subject to user control under the NAI Code. NAI members should consider carefully evaluating with legal counsel the ADR activities they undertake to determine whether they are “sales” subject to a CCPA opt out.

While the NAI cannot give legal advice or speak to the particulars of any one member’s business practices in connection with the CCPA, we can still offer a few high-level observations about when ad-tech uses cases may be “sales,” and in particular when the “consideration” element may be satisfied.

Example of a use case that appears to satisfy the elements of the “sale” definition

Suppose hypothetically that a demand-side platform (DSP) were to receive a cookie ID and associated information from a supply-side platform (SSP)/Exchange as part of a bid request. If the DSP has bargained with the SSP for the right to retain the information it receives in the bid request for its own

³⁷ See NAI CODE OF CONDUCT § II.C.

³⁸ See NETWORK ADVERTISING INITIATIVE, 2020 NAI CODE OF CONDUCT (2020), https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf.

³⁹ The NAI Code of Conduct refers to these and related activities as “Ad Delivery and Reporting,” defined as “the collection or use of data about a browser or device for the purpose of delivering ads or providing advertising-related services, including, but not limited to: providing a specific advertisement based on a particular type of browser, device, or time of day; statistical reporting, traffic analysis, analytics, or optimization of ad placement; ad performance, reach, and frequency metrics (e.g., frequency capping); security and fraud prevention; billing; and logging the number and type of ads served on a particular day to a particular website, application, or device. See NAI CODE OF CONDUCT § I.A. Ad Delivery and Reporting activities are not subject to user control under the NAI Code. See *id.* § II.C.

⁴⁰ See CAL. CIV. CODE § 1798.120(a).

commercial purposes,⁴¹ such as to build or enhance an audience segment, this exchange may constitute a sale under the CCPA. This is because the transaction appears to satisfy each element of the “sale” definition:⁴²

1. The transaction likely satisfies the “personal information” element because it involves a cookie ID, which is PI under the CCPA definition.
2. The transaction likely satisfies the “transfer” element because the SSP transmitted the cookie ID to the DSP in a bid request.
3. Assuming the DSP pays the SSP/Exchange for the service it provides, the transaction involves valuable consideration. Further, the DSP has bargained for additional rights to retain the PI under the contract, indicating that at least part of the consideration it paid to the SSP/Exchange was *for* the PI.

Arguably, this hypothetical exchange would be a “sale” under the CCPA and hence could not continue under those conditions in the presence of a consumer’s direction to the SSP to stop selling PI. Further, under the NAI Code, neither the SSP or the DSP in the hypothetical could to use the cookie ID collected from the SSP/DSP for Personalized Advertising after a consumer uses the NAI opt out.⁴³

There are other ad-tech use cases involving PI that may satisfy the CCPA “sale” definition, and we have provided this one for illustrative purposes only.

Use cases where it is unclear whether the elements of the “sale” definition are satisfied

With respect to the consideration element of the definition of “sale,” a key issue is whether a particular transfer of PI to an ad-tech company by a publisher or another ad-tech company is bargained for in exchange for separate or additional consideration. That is, at least in some cases, the transfer and use of PI—in the form of cookie IDs or mobile ad IDs (MAIDs)—may be seen an integral part of a business purpose such as selecting, delivering, or measuring an advertisement that is essential for a programmatic transaction for digital advertising to take place.⁴⁴ In those cases, consideration could be seen as being given *for* participation in a transaction for digital advertising, and not *for* the PI itself. In these cases, the passage of PI may be seen as incidental to a transaction for digital advertising, and not the purpose for which the transaction was undertaken.

However, as discussed above, any further right to retain such PI for profiling or segmenting purposes, which could be monetized independently, would likely negate any claim that PI is used incidentally, and provide evidence that consideration was given, at least in part, *for* the receipt of PI. Precisely what consideration is given *for* PI is a fact-specific inquiry. Ad-tech use cases involving PI are many and varied, and contractual arrangements around similar activities may vary across companies.

⁴¹ “Commercial purposes” means to advance a person’s commercial or economic interests, such as by inducing another person to buy, rent, lease, join, subscribe to, provide, or exchange products, goods, property, information, or services, or enabling or effecting, directly or indirectly, a commercial transaction. “Commercial purposes” do not include for the purpose of engaging in speech that state or federal courts have recognized as noncommercial speech, including political speech and journalism. § 1798.140(f).

⁴² See *id.* § 1798.140(t).

⁴³ See NAI CODE OF CONDUCT § II.C.1.a.

⁴⁴ See, e.g., CAL. CIV. CODE § 1798.140(d)(1).

More generally, we observe that the CCPA contemplates a business's transfer of PI to *third parties* (not service providers in particular) for a business purpose as a *separate category from sales* of PI to third parties. That is because when a consumer makes a verifiable consumer request to a business that sells PI or discloses it for a business purpose, that business must disclose to the consumer *two separate lists*: (1) the categories of the consumer's PI the business has *sold*; and (2) the categories of PI the business has *disclosed for a business purpose*.⁴⁵ This disclosure requirement suggests there are at least three categories of PI transfers under the CCPA: sales, disclosures to a service provider for a business purpose,⁴⁶ and disclosures to a third party for a business purpose.⁴⁷ Insofar as an NAI member's ADR activities (and possibly other use cases) do not involve the exchange of PI *for* valuable consideration, and are not undertaken as a service provider to another business, the most accurate classification for some of those activities under the CCPA may be disclosures of PI to a third party for a business purpose—*i.e.*, not “sales.”

For these reasons, even if a company considers its use of PI for digital advertising to be incidental, it should carefully review the specific arrangement at issue with its legal counsel.

IV. Conclusion

NAI members are already familiar with the fundamental concepts underlying the CCPA—notice and choice. However, because the CCPA attaches consumer choice to the concept of “selling” personal information, a concept not specific to any one industry, NAI members should not simply assume that their existing Opt-Out Mechanisms⁴⁸ required by the NAI Code will wholly satisfy the CCPA's opt out/Do Not Sell requirements. Instead, NAI members should carefully evaluate their business practices with their own legal counsel to determine whether those practices satisfy each element of the CCPA's “sale” definition. Further, even if the business practices do satisfy the definition, NAI members should consider whether their business use cases could fall under the exceptions to the definition of “sales” for service providers or for disclosure of PI at the direction of the consumer.

⁴⁵ See *id.* §§ 1798.115(c), 1798.130(a)(4)(C) (stating that a business must disclose to a consumer making a verifiable consumer request “the categories of third parties to whom the consumer's personal information was disclosed for a business purpose”).

⁴⁶ Due to the definition of “service provider,” disclosures of PI by a business to a service provider must always be for a “business purpose.” See *id.* § 1798.140(u).

⁴⁷ Due to the definition of “third party,” third parties are mutually exclusive from service providers. See *id.* § 1798.140(w)(2)(A) (excluding from the definition “third party” a person to whom a business discloses PI pursuant to a written contract that would qualify that person as a service provider). As such, when the CCPA requires a business to disclose to a consumer the categories of PI it has shared with a third party for a business purpose, it appears to require something different from that business's sharing of PI with a service provider.

⁴⁸ NAI CODE OF CONDUCT § I.H.