

April 10, 2008

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

**RE: NETWORK ADVERTISING INITIATIVE (“NAI”) WRITTEN COMMENTS IN
RESPONSE TO THE FEDERAL TRADE COMMISSION STAFF’S PROPOSED
BEHAVIORAL ADVERTISING PRINCIPLES**

Dear Mr. Secretary,

On behalf of the Network Advertising Initiative (NAI), I am pleased to submit the following Comments relating to the Federal Trade Commission staff's *Proposed Principles for Online Behavioral Advertising* (hereinafter “FTC Proposed Principles”). The NAI believes firmly that consumer protection related to online behavioral advertising is an important issue that must be addressed in a balanced and thoughtful way. We thank the Commission for its leadership in this area and for providing a forum for this dialogue to occur.

We are also pleased to take this opportunity to contribute to the goal of promoting more robust self-regulation by today opening a 45-day public comment period concurrent with the release of a new draft 2008 NAI Principles, attached to these Comments. The NAI is most notably proposing updates to self-regulation that strengthen prohibitions on use of sensitive consumer segments and the creation of segments specifically targeting children under the age of 13 for behavioral

advertising. In this draft, the NAI also proposes to establish new rules requiring opt-in consent prior to use of certain “restricted” non-PII consumer segments in behavioral advertising, and enhanced security requirements. These proposed revisions are designed to respond to consumer privacy concerns that are quite unique to the kind of third-party online behavioral advertising businesses that comprise the NAI’s membership. A more comprehensive discussion of the proposed draft 2008 Principles update is incorporated in Part II of these Comments.

Introduction

The NAI is a cooperative group of online companies engaged in the practice of online behavioral advertising. NAI members currently include 24/7 Real Media, Acerno, Advertising.com (an AOL company), AlmondNet, Atlas (a Microsoft company), BlueLithium (a Yahoo! Company), Doubleclick (a Google company), Media6degrees, Mindset Media, Revenue Science, Safecount, Specific Media, Tacoda (an AOL company), [X+1], and Yahoo!. In addition, we are currently processing pending membership applications from Undertone Networks, Google and Microsoft (distinct from the memberships held by their subsidiaries).

Although it is difficult to determine with precision what percentage of the behavioral advertising ad serving market is currently covered by member companies of the NAI, according to a recent study by *Attributor* and *Compete*, five companies—all NAI members or pending applicants—represent over 95% of the online ad serving market.¹ Given that online behavioral advertising is a smaller

¹ See http://www.emarketer.com/Article.aspx?id=1006157&src=article1_home.

subset of the overall online ad serving market, it appears likely that a significant majority of online behaviorally-targeted ads are being delivered by NAI members.

NAI members have, since 2000, participated in the only self-regulatory program specifically designed to address online behavioral advertising. Perhaps most importantly, members commit to a series of consumer protections – including notice of behavioral advertising practices across a huge number of sites and the availability of choice to limit such activities on a browser.

Our Comments are presented in two Parts. Part I lays out the high-level policy considerations that inform the commentary in Part II, where specific feedback to the Commission on the FTC Proposed Principles is offered, and discussion of the draft 2008 NAI Principles revisions process is presented. We see this commentary as another step in an ongoing dialogue about appropriate standards for privacy online and, therefore, it is offered in a spirit of continued engagement.

I: OVERARCHING POLICY CONSIDERATIONS FOR ONLINE BEHAVIORAL ADVERTISING

To establish a framework for discussion of the issues associated with online behavioral advertising, it is important to outline some of the broad policy considerations in this area. Also, prior to a specific discussion of the various components of the FTC Proposed Principles, it is helpful to describe some broad concepts that have guided the NAI in its work. The concepts discussed in this Part certainly apply to the wide range of data collection and uses described as “behavioral advertising” in the FTC’s Proposed Principles. Note, however, that the NAI feels strongly that this definition is excessively broad. In Part II of our Comments, we offer our view on the differences between various marketplace activities and why we feel that a more limited definition of online behavioral advertising is appropriate for use in self-regulation at this time.

Marketing is Not Harm

Of all of the discussions that occurred at the FTC Town Hall Forum on Behavioral Advertising, one of the most compelling was the exploration of consumer harm that could occur as a result of such practices online. Despite repeated questioning, the panelists – and, indeed, many of the commentators in attendance – have struggled to find a direct harm associated with online behavioral advertising. Put simply, online behavioral advertising has not been shown to create increased risks to consumers.

This position certainly does not discount that there are strong privacy concerns at work in the online advertising world. Indeed, the unique nature of the online economy raises many important questions about the collection and use of consumer data. However, in the absence of a demonstrable harm from online behavioral advertising, we must balance any public policy response against the benefits provided by such practices. And in the case of online behavioral advertising, we feel strongly that the benefits to consumers are enormous.

Online behavioral advertising certainly does not create additional intrusion into consumer's lives. Online behavioral advertising does not result in *more* advertising, it creates *more relevant* advertising. The lack of relevance of online advertising is, in fact, one of the major complaints consumers have expressed with respect to their online experiences. In a recent study sponsored by TRUSTe, 72% of respondents find online advertising intrusive or annoying when the products and services being advertised are not relevant to their wants and needs². Online behavioral advertising is based on the premise that consumers will respond more to relevant advertising. As a result, online behavioral advertising is aligned with a desired outcome for consumers: *making the online experience more relevant to the wants and needs of consumers.*

Data Used for Online Behavioral Advertising is not Inherently Risky

Certain online behavioral advertising is somewhat unique in its ability to use non-personally identifiable information (non-PII) to deliver more relevant

²See 2008 Study: Consumer Attitudes about Behavioral Targeting, TRUSTe, March 28, 2008.

advertising to individual browsers. Indeed, the members of the NAI today exclusively use non-PII for purposes of the behavioral targeting practices covered by the 2000 NAI Principles. This means that information used to individually contact a person outside of the context of the ad being served is not implicated by the vast majority of online behavioral advertising practices today.

This simple fact is important to reinforce the truth of the assertion that online behavioral advertising is not, in and of itself, harmful. The data predominantly used for online behavioral advertising is not subject to risks of identity theft or other abuses associated with personally identifiable information (PII). This would be true even by applying the very broad definition of online behavioral advertising proposed by the Commission in the FTC Proposed Principles. Further, the 2000 NAI Principles and the contemplated updates described in the draft 2008 NAI Principles, discussed in Part II, create significant barriers to the use of the types of data that do create risks of identity theft.

Online Behavioral Advertising Provides Many Benefits to Consumers

The benefits of online advertising were well documented at the FTC Town Hall Forum. The Commission has rightly recognized the benefits provided to consumers through the use of such practices in their FTC Proposed Principles. We strongly concur with the Commission in this regard. Online behavioral advertising powers great swaths of free content and services that previously were unavailable to consumers.

The benefits of online behavioral advertising are not limited to free content. Many have noted the fact that online advertising allows niche opinions to emerge and find an audience. Indeed, the growth of the “blogosphere” shows just how powerful advertising-supported content can be. Similarly, communities of interest that were previously too small or too far-flung to coordinate their voices have been able to convene and communicate as never before. Online behavioral advertising is not the exclusive tool of the largest web properties. It provides a mechanism for a previously unfathomable number of people to communicate, learn, and share information.

The great diversity of content and services on the web is predominantly powered by advertising. Online advertising is the primary business model that funds the great majority of online offerings. We must therefore be extremely cautious – particularly in the current market of enormous innovation – with any public policy controls that may restrict online advertising. The consumer benefits derived from online advertising are too significant to risk without a clear showing of harm to consumers.

A final benefit of online advertising is tied to the fact that the online channel itself is to a great extent more transparent than other marketing channels. Academics, consumer advocates, companies and regulators alike can literally see what companies (including third parties) are engaging in online advertising by prompting for cookies, or using the technology that allows computer users to view source code or actual web traffic. The “back room” workings of other marketing channels lack this level of transparency. It is this very transparency that has led to

more open review and scrutiny of online advertising companies than has historically occurred in other marketing channels.

Concerns Still Exist

Recent surveys have shown that consumers nevertheless remain uncomfortable with online behavioral advertising. The survey sponsored by TRUSTe showed that 57% of respondents were “not comfortable with advertisers using their browsing history to serve relevant ads.”³ Similarly, a study by Harris Interactive and Alan Westin found that 59% of respondents were not comfortable when “websites use information about [their] online activity to tailor advertisements or content to [their] hobbies and interests.”⁴ Clearly, consumers have expressed concerns related to the collection and use of their data for online advertising purposes.

But the TRUSTe survey also shows that, increasingly, consumers are aware and in control of their online experience. In the TRUSTe survey, 71% indicated that they were aware that browsing information may be collected by a third party for advertising purposes. This suggests that a very strong majority of online consumers are aware of online behavioral advertising practices. The question then arises: if consumers are aware of these practices, what are they doing to respond to their concerns? In the TRUSTe study, 85% of consumers indicated that they were deleting cookies stored on their computer at least once a month. This

³ *See id.*

⁴ *See* “How Online Users Feel About Behavioral Marketing and How Adoption of Privacy and Security Policies Could Affect Their Feelings,” Harris Interactive / Westin Survey, March 27, 2008.

demonstrates an enormous amount of consumer control in the online world – consumers understand and act upon their concerns by using the tools available to them.

Nevertheless, the NAI has long recognized the importance of consumer notice and choice to preservation of trust in the online advertising marketplace. It is notable that the Harris Interactive / Westin survey found that a majority (55%) of consumers are comfortable with their clickstream data being used to serve customized ads when rudimentary consumer privacy protections are put in place. It is in this spirit that the NAI has provided self-regulatory protections for many years.

Self Regulation is the Appropriate Response

The NAI affirms its continued resolve to ensure that transparency and choice are available to benefit consumers online. Given the various factors discussed above, the members of the NAI agree strongly with the Commission that self-regulation is still the appropriate response to the consumer concerns raised by online behavioral advertising. Regulatory or legislative responses are frankly not warranted where no discernable harm can be found and where strong consumer benefits are provided. This position is strengthened by the reality that online behavioral advertising predominantly uses data that *does not* pose adverse risks to consumers. However, one of the unique qualities of self-regulation is that it can be used as a vehicle for companies to adopt policies that promote consumer trust in the medium, which flows as a benefit not only to consumers but to businesses themselves. If appropriate privacy protections are implemented that reinforce

consumers' willingness to engage in the medium, then self-regulation has helped preserve a medium for commerce.

Self-regulation is also a far more flexible policy response in a rapidly changing industry. The NAI Principles were widely hailed upon their release in 2000. Today, the NAI releases proposals that reflect the reality of changes in the online marketplace. Legislative and regulatory responses are not nearly so flexible or adaptable over time to changes in technology.

A Spectrum of Policy Responses are Needed in Self-Regulation

While the NAI Principles provide a strong self-regulatory framework for companies engaged in online behavioral advertising, the online economy is too broad and business models too diverse and dynamic to be covered by a single self-regulatory program. As a result, we feel strongly that a spectrum of self-regulation, codes of practice, and best practices should be used to provide a cohesive set of standards.

In the ecosystem of online advertising, the NAI perceives responsibilities and standards for three broad categories of actors in the marketplace: advertisers, publishers, and service providers. For advertisers, best practices and codes of practice are provided through organizations like the Direct Marketing Association (DMA) and the American Advertising Federation (AAF). Both of these groups provide strong guidance on the provision of notice and the handling of consumer choice. For publishers (websites) and the online marketplace more broadly, the Interactive Advertising Bureau (IAB) and the Online Privacy Alliance (OPA) have

offered best practices that encourage transparency and choice. And finally, the core industry segments— third-party businesses that actually provide services to enable online behavioral advertising—have coalesced in support of the Network Advertising Initiative and the NAI Principles. Through this broad spectrum of policy documents, the online advertising industry has a comprehensive response to consumer concerns associated with online privacy.

Consumer protections continue far beyond the best practices and self-regulatory mechanisms adopted by the marketplace. Consumers have unprecedented control over their privacy in the online realm. The near-ubiquitous posting of privacy policies has provided consumers with notice of data practices in a manner that is without equal in any other marketing channel. The availability of technological controls – such as browser privacy settings, privacy-enhancing software, and the Platform for Privacy Preferences – does not exist in other marketing realms. Consumer privacy is thus provided “defense in depth” via industry policies, consumer controls, and technological solutions.

Within the broad spectrum of layered policy responses, the NAI believes that self-regulation, particularly for third-parties engaged in online behavioral advertising, plays a critical role in maintaining consumer trust in a medium that provides such diverse benefits. In the next Part, we turn to a more detailed discussion of the specific policy issues implicated in appropriate self-regulatory approaches to this subject.

II. THE FTC STAFF'S PROPOSED PRINCIPLES AND REVISIONS TO THE NETWORK ADVERTISING INITIATIVE'S SELF-REGULATORY PROGRAM

Consistent with the FTC staff's call to reconsider existing self-regulation in its Proposed Principles document, on January 3, 2008, the NAI announced a process⁵ whereby it would systematically review the existing 2000 NAI Principles program for possible revision, accounting for the growth of the field, and changes to technology, business models, and practices in the marketplace. This process was also designed to allow the NAI to consider feedback it had received to date on the 2000 NAI Principles, and to compare those aspects of the FTC Proposed Principles that applied to members' business models against the NAI's existing self-regulatory framework.

Through the latter months of 2007, and at the FTC's Town Hall Forum hosted in November of 2007, the NAI received substantial feedback on several aspects of its code of conduct. Much of this commentary focused heavily on the NAI's implementation of its 2000 Principles, to the extent that certain aspects of the program had remained static since inception.

In response to this feedback, the process announced by the NAI in January explicitly invited companies interested in participating in the NAI's initial review of its Principles to contact the NAI to join the effort. Many companies answered this call, which allowed the NAI to benefit from input in this first stage of review from a wider range of players than currently make up the NAI's membership base. Further, significant ad networks took formal steps to join the NAI concurrent with this process. Since the Town Hall, the NAI Board has expanded its membership to

⁵ See <http://networkadvertising.org/networks/bt010308.asp>

include three more significant industry players: Blue Lithium,⁶ Media6degrees,⁷ and Mindset Media.⁸ Multiple new applications are also pending NAI staff and Board review as of the date of this submission.

Having completed its initial review of the 2000 NAI Principles program, a copy of a draft 2008 NAI Principles revision is attached to this submission. As the following discussion will show, adjustments to several aspects of the code of conduct are contemplated. One of the persistent criticisms of the 2000 NAI Principles by participants and prospective members has been the difficulty associated with reading, parsing and applying its provisions. In this proposed revision, the NAI has attempted to extract and simplify its code, while expanding and refining key concepts in a more readable and accessible fashion.

Further, another sustained criticism of the 2000 NAI Principles has been that they do not draw upon the expertise or input of a broad enough range of privacy commentators. Therefore, in the interest of greater marketplace transparency, and in the hopes of benefiting from still broader feedback from the public, interested companies (ad networks and other behavioral advertising business models, advertisers and publishers alike), advocacy groups and regulators, the NAI will open a 45-day public comment period through Thursday, June 12th, whereby it will ask for public feedback on this draft revision.

The NAI Board will not formally vote to adopt amendments to the 2000 NAI Principles until such time as it has been able to consider input received via the

⁶ BlueLithium is a Yahoo! ad network property. See <http://www.bluelithium.com/optout.html>.

⁷ See <http://www.media6degrees.com/privacy.php>.

⁸ See <http://www.mindset-media.com/network-policy.php>

mechanism offered on the homepage of its website.⁹ During this review period, the 2000 NAI Principles will remain in effect. This draft 2008 NAI Principles document is neither finalized nor intended to reflect the conclusive thinking of any NAI Board member on any issue addressed. As suggested by the FTC's own release of its proposed principles as the basis for discussion, the NAI continues the public dialogue with this contribution, in the hope that it can help move the discussion among industry players and the public further still.

It is also important to re-emphasize the distinction between standards appropriate for self-regulation and those appropriate for formal legislation. One of the driving motivators behind self-regulation contemplated in this revision is the maintenance of consumer trust in the medium, even in the absence of harm. Legislation codifying any of the approaches contemplated in the attached revision misses the point that self-regulation is uniquely situated to respond to concerns of public perception that affect industry and the marketplace – matters of unique and heightened concern to companies themselves.

A summary of the review led by the Board of the NAI since January follows. It is organized topically (privacy principles and critiques) to track the initial thinking behind changes reflected in this draft 2008 NAI Principles revision, while offering feedback on corresponding FTC Proposed Principles.

⁹ See <http://networkadvertising.org/>

OPM and Scope

Some commentators expressed concern that the definition of Online Preference Marketing (“OPM”) first adopted in the 2000 NAI Principles fails to account for all online behavioral advertising practices in the marketplace today. This issue has also been linked to concerns about the level of participation in the NAI Principles program more broadly. Other commentators expressed concerns that the 2000 NAI Principles are so uniquely tailored to respond to the privacy implications of a distinct type of data collection and use, predicated on B2B publisher relationships with ad networks, that the notice, choice and use limitation provisions of the Principles ought not be extended to directly apply to B2C companies, nor to companies that do not contract with publishers.

At the outset, it is important to recognize that although most of the original signatories to the NAI in 2000 either went out of business, or were acquired by larger companies, the NAI membership has nevertheless grown in the last five years from two to 15 participating companies. This growth in participation reflects great depth in the ad serving marketplace, which was specifically identified as a distinct unit in the FTC’s recent merger review of Google-DoubleClick.¹⁰

One of the reasons the NAI still believes there is relevance to focusing on the privacy implications of third parties as distinct from first parties is that they engage in a unique and rather distinct type of data use. This distinction exists in part because B2C companies enjoy a direct consumer relationship with consumers, who affirmatively visit publisher sites and have come to expect content to be tailored to

¹⁰ See Statement of the Federal Trade Commission Concerning Google-DoubleClick at 4-6, available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

the context of their unique visit to those sites (or network of sites owned and controlled by the same entity). This is not the only way context is created. When a consumer enters a search term into an engine, the consumer naturally expects the content shown on the subsequent page to be tailored to the subject matter that the user affirmatively inputted into the engine.

In practice, if a consumer is visiting a car site, they are likely to see advertisements for automotive services. This would be traditional “contextual” advertising, which does not involve higher-level behavioral analysis to select an appropriate ad. In the case of search, a user might enter the name of a certain car brand and then see search results (and ads) naturally related to the subject of the search.

The term Online Preference Marketing (“OPM”), however, has historically sought to describe a unique kind of data use. Ad networks collect data from multiple websites and then use that data to inform ad selection once a consumer may have left the context of the initial sites they are visiting. In contrast to contextual forms of advertising, using a visit to a car site to help inform selection of an automotive ad to be shown on another website relating to fitness could mean that the ad was selected based on the presumed interests associated with the consumer’s visit to a prior website. Consumers may or may not immediately perceive a difference in experience, because they are not seeing more ads. Instead, the ad selected is merely likely to be of greater interest to the consumer. Yet, it is the possibility that the ad selection process might yield content that does not relate to the context of the site where the ad is being served that makes this different.

Although similar technology can be used to inform ad selection across various pages of complex first-party sites, the consumer nevertheless remains in the expected context created by that first-party site itself. It is the change of context that can, if handled without appropriate privacy notice and controls like those required in the NAI, make certain consumers uncomfortable.

One additional reason for treating first parties and third parties differently in the privacy context flows from the first party's inherent accountability to consumers that directly know it. Incentives for a first party to be responsive to its customers about privacy expectations are stronger than that of third parties that may not be known directly to consumers. Self-regulation is one vehicle for addressing this gap.

Yet, it is the apparent similarity of the technology used by certain first parties and third parties alike to tailor advertising that has led some to consider these distinct players colloquially in policy, business and technology circles as comparable "behavioral advertisers." The FTC's proposed definition of behavioral advertising, for example, is deliberately broad and posits that all types of tracking of consumers' activities online should be treated similarly, notwithstanding the fundamental differences in consumers' privacy expectations when they are engaging with first parties, versus having their browser behavior observed by third parties with whom they have no direct relationship. The NAI found in its review that the term OPM, as first invoked in 2000, also did not go far enough in distinguishing between first-party and third-party frameworks, given that both may collect data "over time and

across web pages to determine or predict consumer characteristics or preferences for use in ad delivery on the Web.”¹¹

The NAI’s proposed revision of the term OPM,¹² attempts to refine the term “behavioral advertising” within its code of conduct by describing what is unique about the third-party ad serving context. Accounting in part for changes implicated in mergers and acquisitions activity, and media consolidation, the new definition recognizes that “web pages,” are no longer the benchmark for changes in context. Instead, movement across web domains owned or operated by different entities serves as a clearer and more accurate description of the unique cross-domain data collection and ad serving process implicated by NAI-governed activities. Additional clarity is also given in this definition as to how ad selection commonly occurs, through use of marketing segmentation or scoring. It also accounts for an important difference between third-party online behavioral advertising and first-party uses of similar technology—that data used for behavioral advertising is shared between at least two distinct business entities.

Beyond the distinctiveness of the data use that the NAI is now describing as Third-Party OBA, it is important to recognize that as a trade association, the NAI can only agree to self-imposed constraints of *its* members. Adopting provisions that purport to govern non-members is of limited self-regulatory value. The NAI is interested in contributing to a framework whereby its standards can align appropriately with those created by trade associations representing publishers, ISPs, and advertisers. Both the Direct Marketing Association (DMA) and the

¹¹ See 2000 NAI Principles at 2, available at http://networkadvertising.org/pdfs/NAI_principles.pdf (defining OPM).

¹² See Draft 2008 NAI Principles §II.1 (defining “Third-Party Online Behavioral Advertising”).

Interactive Advertising Bureau (IAB) have demonstrated leadership with respect to their members and constituencies, and the NAI sees this leadership as positive.

The NAI is well aware of calls to expand application of its Principles beyond the third-party ad serving context to a broader set of industry business models. Although its proposed 2008 draft does not extend the Principles to other business models, the NAI will seek specific comment on which provisions of its code could be adapted to other business models. If extended to other business models, the NAI believes that each business model variation inevitably would call for a differently-tailored implementation of the same standard (particularly for notice). Although some of these standards *may* be adaptable to various other online behavioral advertising models, the NAI would benefit from more feedback from those models on whether they can or should be extended and how implementation of the standards would work for those companies, if different than ad networks' own implementations.

Transparency: Notice to Consumers

Some commentators expressed concern that too few consumers knew about the NAI, its members' practices, and their choices with respect to opt-out. Others expressed concerns that privacy policy disclosures don't work, because they are either too lengthy or difficult to read, or simply because they would never be sought out by a consumer that is unaware that behavioral advertising practices exist. Others expressed concern that the NAI's requirement that notice appear in a

publisher's privacy policy is outdated, too restrictive and disallows innovation in the marketplace with respect to notice.

The NAI's two-pronged requirement that notice appear both on a member's own website and on publishers' sites has been preserved in the proposed draft.¹³ Given that with limited exceptions NAI member ad networks are B2B companies, notice only appearing on member sites would unlikely be found by consumers. This must be supplemented by the strong privacy protection afforded by providing notice at the place of data collection and ad delivery where consumers are more likely to see such notice. For this reason, with respect to the third-party behavioral advertising contemplated by the NAI, its members agree with the FTC's approach that every website where data is collected for behavioral advertising should provide appropriate notice. The NAI also maintains the clear and conspicuous standard referenced in the FTC's footnote to its proposed transparency and consumer control principle.

However, it is worth noting that business models apart from ad networks are developing such that websites may not be the "point of collection" where notice can or should naturally occur to provide appropriate disclosures. The ISP-BT model is of interest in this regard, as data is processed at the ISP-level rather than through collection at the publisher/individual website level.

The 2000 NAI Principles *required* that notice be posted in a privacy policy on the publisher site. Although the NAI believes that notice should still be required, it agrees that the code should not stifle innovation with respect to the mechanism

¹³ See *id.* §§III.2(a) and (b).

used for delivery of notice. Many companies are currently experimenting with alternate ways to deliver meaningful notice. Some companies prefer to take direct responsibility for notice delivery on sites, even on sites that they do not directly control. To the extent this is feasible for certain companies, the revised Principle¹⁴ expands to allow notice to occur in any clear and conspicuous form, either by contract with the publisher delivering such notice or by ensuring, as applicable, that such notices be made available on the website where data are collected for OBA purposes. Although the NAI still believes in the ongoing relevance of privacy policies for both notice and enforcement purposes, it does not wish to impede innovation.

As a general matter, though, the NAI still believes that a privacy policy is the appropriate home for notice of privacy practices, as consumers have come increasingly to expect the posting of a privacy link on either the top or bottom of most commercial sites. To the extent that experimentation in delivery of notice is favorable, consumers ought not be left “guessing” or waiting to see how notice will be delivered by various industry players. Also, of all the important privacy practices that should be disclosed in a privacy policy (e.g., PII collection and sharing), it is unclear why behavioral advertising—which relies overwhelmingly on non-PII-- should be called out for special treatment above other *material* PII disclosures, or outside the privacy policy at all.

Unlike identity theft and data breaches that have garnered growing public awareness, the absence of risk associated with the typical data used in behavioral advertising, along with business’ incentives to avoid use of PII in this process, make

¹⁴ See *id.* §III.2 (b).

it somewhat expected that fewer consumers would be preoccupied with this specific online advertising practice. The general “macro” awareness of online advertising practices is depressed in contrast to pernicious online privacy concerns. The FTC itself reflects these priorities when it focuses its own consumer awareness campaigns on identity theft, fraud, security, spyware and phishing.

Nevertheless, the NAI agrees that to preserve trust in a medium that it believes is of great benefit to consumers, if the NAI can promote greater awareness of notice and choice in behavioral advertising, the marketplace will benefit. The draft 2008 NAI Principles confirms that members agree to both individual and collective efforts to promote broader transparency.¹⁵ The NAI will ask for input during the 45-day comment period on how its consumer website, and transparency campaigns in general, can be more effective and practical. The NAI will also be releasing more information about individual and collective member transparency campaign initiatives in the coming months. To the extent that transparency and awareness campaigns operate as an overlay to the “micro” notices available on sites, the NAI believes that a layered approach will deepen consumers’ engagement with the choice mechanisms made available by individual members and on the NAI website.

Transparency: Accountability and Enforcement

Some commentators have expressed frustration with self-regulatory enforcement in general, and with the NAI’s enforcement policies specifically.

¹⁵ See *id.*, §III.1 (a) and (b).

Originally drafted in the context of an FTC investigation into ad network practices, the references to enforcement in the 2000 Principles focused on seal and audit based mechanisms. Concerns about inconsistencies over time with respect to auditing and reporting, which roughly corresponded to changes in membership makeup over the past eight years, have been highlighted. Paramount among these criticisms has been a concern that the NAI has lacked transparency in its supervision of members' practices and that public accountability is limited by the absence of a clear and transparent compliance review process.

The NAI has taken these concerns very seriously, and the proposed draft contemplates a reformed enforcement structure with various attributes designed to systematically reinforce transparency of process.¹⁶

First, the NAI has explicitly reinforced the reality that membership in the NAI implicates increased risk of exposure to FTC Act Section V liability for non-compliance. By making mandatory public representations that a member company's business practices are compliant with each aspect of the Principles that apply to its business model, NAI members are subjected to direct regulatory enforcement.¹⁷

Next, a set of requirements are contemplated that would trigger mandatory compliance reviews of members at various stages of membership: upon application, at least once annually thereafter, and in response to credible unresolved consumer complaints.¹⁸ Further, the elements of a compliance review, and the policies and procedures governing them, would be laid out in an objective document adopted by

¹⁶ See *id.* § IV.

¹⁷ See *id.* §IV.1(b).

¹⁸ See *id.* §IV.1(d).

the Board and made publicly available upon request.¹⁹ This document must also articulate penalties that could be imposed for a finding of non-compliance, including referral of the matter to the Commission.²⁰

In addition, the NAI has decided to codify its requirements relating to consumer communications, mandating provision of a centralized consumer complaint mechanism on the NAI website.²¹ Members must commit to responding to such complaints within a reasonable period of time, and must make reasonable efforts to resolve all such matters raised by consumers.²²

The NAI will seek specific feedback during its 45-day comment period on what verifications should be undertaken for a compliance review, and the extent to which third parties should be involved in this process. Finally, the NAI is proposing that an annual summary relating to consumer complaints received, and any enforcement actions taken, be made publicly available upon request.²³

In the past, some groups have preferred to amass questions about specific members' NAI compliance without sharing these concerns directly with NAI staff members who are in a position to enforce the Principles. Such techniques do not serve consumers and certainly do not protect their privacy. In order for this proposed revised enforcement approach to work, consumers, consumer advocates, business competitors and regulators must share information about perceived compliance concerns with NAI staff as soon as issues are identified, to allow NAI

¹⁹ *See id.* §IV.1(c).

²⁰ *See id.*

²¹ *See id.* §IV.2(a).

²² *See id.* at §IV.2(b).

²³ *See id.* at §IV.1(e).

staff to act upon credible complaints and seek to appropriately resolve compliance problems that could compromise consumers' privacy.

Choice Mechanisms – Cookies, Flash Cookies, Other

Some commentators expressed concerns specific to the implementation of the opt-out on the NAI site. Notwithstanding the fact that the NAI has adopted one common implementation for its members' opt-out that is cookie-based, it is important to note that the 2000 Principles do not mandate cookie-based opt-outs. Instead, the code speaks of "opt-out" without mandating a specific technological response. The NAI believes this approach to its code is still sound. The NAI wants the code to remain flexible enough to allow other non-cookie based opt-outs to be compliant.

However, because traditional cookies provide such high levels of transparency and consumer controls through web browsers, and consumers' ability to manage/delete them is quite well-developed, the NAI feels strongly that any alternatives to traditional cookies emerging in the marketplace as choice mechanisms must afford consumers comparable levels of transparency and user control. The neutrality of the NAI principles with respect to browser-based technology²⁴ is important to encouraging such innovation in this space, but the NAI Board will continue to scrutinize implementations to ensure that appropriate transparency and controls are in place to effectuate the opt-out required by its self-regulatory code.

²⁴ Note also that the draft 2008 NAI Principles explicitly clarify that "online" advertising includes delivery of ads through a web-browser to any appropriately enabled device. *See id.* at §II.1 n.1.

The “fragility” of cookies has been cited as a concern by some commentators, because it requires a consumer to re-effectuate choice if an opt-out cookie is deleted. While this is true, and is a natural consequence of allowing consumers to exercise such a high level of control over their own computers, the NAI urges all parties to respect consumers’ choices once made and to allow that choice to persist until the consumer themselves affirmatively deletes or changes that choice. Third-party anti-spyware programs ought not be deleting NAI opt-out cookies, because such cookie deletion software overrides a consumer’s expressed choice to opt-out of behavioral advertising by NAI members. White-listing of NAI members’ opt-out cookies may be one appropriate response to this problem.

The NAI will seek specific comment during its 45-day comment period on which emerging technology alternatives to traditional cookie-based opt-outs do afford appropriate levels of transparency and user controls such that they should be deemed compliant with the NAI’s code of conduct.

Security

Certain commentators expressed concern that the 2000 NAI Principles lacked any security protections for behavioral advertising data, regardless of whether it is PII or non-PII based. Although a focus on security was not originally contemplated for behavioral advertising data, the NAI does believe that appropriate security standards would contribute to consumer trust in online advertising itself, even if, as stated earlier, the data typically used for behavioral advertising is not inherently risky. The goal of maintaining consumer trust would seem to justify similar

treatment of both non-PII and PII-based behavioral advertising data alike. For that reason, the FTC Proposed Principle of *reasonable* security²⁵ appeared to have enough precedent behind it to make it a meaningful standard for use in self-regulation by companies.

Use Limitations: Sensitive Data & Children

The NAI Principles have recognized the risk of harm to business reputation associated with use of PII and sensitive data in behavioral advertising since 2000. Over time, and many months prior to the FTC's November Town Hall, NAI members began to reflect on the risk to business reputation that could result from behavioral advertising based on sensitive categories at all, even without use of PII. In fact, many NAI members maintained internal policies to avoid such uses of observed interests in these areas, in a non-PII context, for many years. The sense that a third party might compile market segments of cancer patients or HIV status, to name but two examples, seemed particularly precarious given the delicate trust balance that member companies seek to maintain with consumers. In short, creating certain health marketing segments raises different privacy concerns for consumers than creation of a "car buyer" marketing segment would. Even in the absence of either identifiability or harm, therefore, the NAI has developed an expanded proposal for certain categories of data in an effort to reinforce consumers' willingness to trust NAI members to engage in behavioral advertising that benefits them, and appropriately safeguard their privacy in the process.

²⁵ See *id.* §III.8(a) and accompanying note.

First, the NAI contemplates an expansion of its use limitation on sensitive data to specific types of health and personal life information that are to be explicitly prohibited for use in behavioral advertising by members when PII is implicated.²⁶ Second, the NAI goes further by requiring an opt-in even for non-PII based market segments on those same categories.²⁷ Recognizing that this approach is a unique and unprecedented restriction on use of certain narrow categories of non-PII based marketing segments, the NAI refers in its proposed draft to the opt-in requirement for non-PII sensitive categories as “Restricted” segmentation.²⁸ This approach reflects members’ strong need to preserve consumer trust in third-party ad networks’ use of observed behavior in these categories. Its premise is quite unique to third-party non-contextual advertising.

Finally, whether deemed “sensitive” (PII-based) or merely “restricted” (non-PII based), the NAI acknowledges that certain ads targeting various other categories might cause consumers similar concern in light of multiple considerations, including but not limited to the consumer’s jurisdiction, the context where the ad might appear or the nature of the ad itself. In those cases, and for categories that have traditionally been associated with fears about discrimination, or may already be constrained by existing law, the NAI encourages its members to

²⁶ See *id.* §II.6 (describing sensitive consumer segments) and Addendum A (explicitly highlighting HIV/AIDS status, sexually-related conditions, psychiatric conditions, cancer status, abortion-related, sexual behavior/orientation/identity (LGBT), criminal victim status).

²⁷ See *id.* §II.6 and §III.3(a)(iv).

²⁸ See *id.* §II.6.

engage in independent analysis as to whether these marketing segments deserve special heightened scrutiny.²⁹

With respect to marketing to children, the NAI is proposing a prohibition on use of either non-PII or PII to create a behavioral advertising segment specifically targeting children under the age of 13.³⁰ The NAI has suggested this prospective provision based in part on the inability of such children to provide consent to third-party behavioral advertising. The NAI will seek comment during its 45-day comment period on whether provision of a form of verifiable parental consent is feasible in the non-PII context.

These aforementioned approaches to use limitation flow from the NAI's overriding philosophy that opt-out, opt-in and outright prohibitions, as a spectrum, should be assigned to data based on their inherent sensitivity. Historically the NAI's distinction between non-PII (opt-out), prospective use of PII (robust notice and opt-out), retrospective use of PII (opt-in) and PII-based sensitive data (prohibited), reflected the full range of the NAI's application of this principle. In addition to further refining what PII-based sensitive data should mean with respect to its code, the NAI now proposes to add to this list certain restricted categories (corresponding to these same sensitive categories but without PII used) where opt-in is appropriate due to the heightened sensitivity of the marketing segment implicated.

It is clear, however, that marketing in these categories retains tremendous value to consumers. These proposals are in no way intended to call into the

²⁹ See *id* at Addendum A (labeling age/birthdate, addictions, alienage or nationality, criminal history, death, disability, ethnic affiliation, marital status, philosophical beliefs, political affiliation or opinions, pregnancy, race identification, religious affiliation (or lack thereof) and trade union membership as worthy of special care and individualized review, while acknowledging that many consumers will not find most applications of these categories particularly objectionable).

³⁰ See *id.* §III.4(a).

question the inherent value of providing information about products and services of interest in these categories, which are commonly used in marketing. Instead, it suggests that providing advertisements to these categories non-contextually justifies special attention to comport with consumers' privacy expectations.

In response to this effort, the NAI will seek written comment during its 45-day period as to whether these forms of use limitation are meritorious and can serve as a basis for more meaningful self-regulation.

Secondary Uses

Some commentators have expressed concern that either PII or non-PII marketing segments could be used by third parties for credit determinations or insurance underwriting in a manner that is adverse to consumers. Apart from existing legal constraints on such practices, the NAI determined that adding a clarification to the NAI Principles that members shall only use, or allow use of, marketing segments for marketing purposes, could have value to further reinforce consumers' trust in the medium.³¹

Other Provisions

A careful review of the attached proposed draft 2008 NAI Principles will reflect the reality that many of the other original 2000 NAI Principles have survived the redrafting process. For example, the distinction between behavioral advertising

³¹ See *id.* § III.4(c).

and mere ad delivery and reporting has been retained, although both require comparable levels of clear and conspicuous notice on a member's website.³²

The NAI has also codified a definition of "opt-in" that incorporates the requirement that such consent be both "express" and "affirmative," as suggested by the FTC's own proposals.³³ Insofar as the NAI identifies scenarios where opt-in is an appropriate standard, it also clarifies that a consumer opts-in via a single web browser, effectively opting in all users of that same web browser.³⁴ The NAI's opt-out definition, which most often is invoked in the non-PII context, similarly confirms that opt-out applies to the consumer's browser.³⁵

The content of disclosures required of members on their websites,³⁶ as well as the content of those required on the websites where data are collected,³⁷ are retained, as is the requirement that members that know or have reason to know that a publisher is not complying with the notice requirement will make reasonable efforts to enforce it.³⁸ With the addition of modifications to the sensitive data standard, a prohibition on market segments on children, and the creation of a restricted class of marketing segments that require opt-in, the remaining choice levels of the 2000 NAI Principles remain intact.³⁹

Further, maintaining the heightened protections appropriate for use of PII, the draft 2008 NAI Principles retain requirements around the presence of a contract

³² See *id.* §II.2 and §III.2(a)(i).

³³ See *id.* §II.3.

³⁴ See *id.* §II.3 n.2.

³⁵ See *id.* §II.4.

³⁶ See *id.* §III.2(a)(i)-(vi).

³⁷ See *id.* §III.2(b)(i)-(iv).

³⁸ See *id.* §III.2(c).

³⁹ See *id.* §III.3(a)(i)-(iv).

for PII collection,⁴⁰ reliable sourcing of PII data,⁴¹ and the requirement that members provide reasonable access to PII and associated data used in behavioral advertising.⁴²

With respect to opt-in to material changes in a privacy policy, the NAI still believes this is appropriate for PII and merger with non-PII for retroactive application.⁴³ A prohibition on PII merger with non-PII if non-PII was collected pursuant to privacy promise that no such merger would ever occur is also maintained.⁴⁴ However, with respect to the FTC Proposed Principles, imposing opt-in on non-material changes to privacy policies, and for commonplace changes to non-PII, would yield an absurd result whereby every time a change was made to privacy practices, however minor, a new database of opt-in consumers would have to be generated. This seems an unworkable and somewhat unhelpful result.

Finally, provisions passing the NAI requirements on to third-party PII transferees,⁴⁵ as well as non-aggregate non-PII transfers to companies that will merge this non-proprietary data with PII in their possession are also retained.⁴⁶

* * * *

The NAI Board and other companies that participated in this revision process expended literally hundreds of hours discussing and working through the challenging issues implicated in self-regulation for behavioral advertising. Like the

⁴⁰ See *id.* §III.4(d).

⁴¹ See *id.* §III.7.

⁴² See *id.* §III.6.

⁴³ See *id.* §III.4(e).

⁴⁴ See *id.* §III.4(f) (the “never means never” rule).

⁴⁵ See *id.* §III.5(a).

⁴⁶ See *id.* §III.5(b).

FTC's own comment process, the NAI must emphasize that its work and the discussion is far from complete. Accounting for public feedback in the upcoming 45-day comment period, as well as reviewing and responding to input shared by other commentators to the FTC as part of its comment process will also inform ongoing deliberations about the right shape of the 2008 NAI Principles final product.

Thank you once again for the opportunity to both comment on the FTC Proposed Principles and provide detail of the work undertaken by the NAI in its initial review of the 2000 NAI Principles.

Respectfully submitted,



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Attachment: (pdf) Draft 2008 NAI Principles_Submission and Public Comment