

# 2010 ANNUAL COMPLIANCE REPORT



February 18, 2011

## **EXECUTIVE SUMMARY**

The Network Advertising Initiative (“NAI”)<sup>1</sup> has completed its second annual compliance review of its member companies under its 2008 self-regulatory code of conduct (“NAI Code”). This report sets forth the NAI’s findings with regard to the compliance of the evaluated member companies in 2010; details the sharp increase in consumer usage of the NAI’s consumer opt out and educational resources; summarizes the efforts of NAI member companies to enhance transparency and choice with respect to online advertising; and includes NAI staff’s policy recommendations for the NAI’s compliance program going forward.

In 2010, thirty-four member companies went through the NAI’s annual review process.<sup>2</sup> As detailed in this report, evaluated member companies responded to a detailed written questionnaire and participated in multiple interviews that included high-level management and relevant engineering staff. NAI staff reviewed members’ written responses, conducted interviews of member companies, and independently evaluated companies’ business practices as described on their websites, privacy policies, proprietary business materials, terms of service, contracts, and marketing materials. The NAI compliance staff also used technical methods to assess members’ compliance, including testing their opt-out tools. Throughout this process, NAI compliance staff made compliance findings, educated members about NAI requirements, and informally shared best practices suggestions with NAI members.

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<sup>1</sup> The NAI is a coalition of leading online advertising companies committed to developing actionable self-regulatory standards that establish and reward responsible business and data management practices and standards.

<sup>2</sup> The 34 member companies subject to review in 2010 are listed on page 2. These 34 companies are referred to in this document as “evaluated members” or “evaluated member companies.” The NAI experienced rapid growth in 2010, with an additional 27 companies admitted to membership (all of which will be subject to the annual compliance process in 2011). As of December 31, 2010, there were 61 member companies. The NAI’s membership includes the great majority of the marketplace for online behavioral advertising, including all 15 of the largest advertising networks. See [http://www.comscore.com/Press\\_Events/Press\\_Releases/2010/1/comScore\\_Release\\_s\\_December\\_2009\\_Ranking\\_of\\_Top\\_Ad\\_Networks](http://www.comscore.com/Press_Events/Press_Releases/2010/1/comScore_Release_s_December_2009_Ranking_of_Top_Ad_Networks).

The review demonstrated that, on the whole, the evaluated member companies met their compliance obligations with respect to the requirements of the NAI Code. The NAI Code encompasses ten subject areas that include approximately twenty substantive requirements for the NAI and its member companies. The vast majority of evaluated member companies met their compliance obligations with respect to all twenty obligations.

As detailed in this report, however, the compliance review revealed issues with some members' compliance with the requirement to provide fully-functioning opt outs; the application of the NAI's policies with respect to uses of non-cookie technologies for advertising purposes; and in one case, adherence to the NAI's requirements for sensitive health-related information. Drawing on the findings of the compliance review process, as well as recent policy developments and emerging marketplace best practices, NAI staff has made substantive recommendations to enhance best practices and compliance going forward in 2011. These recommendations include:

- *Increasing Transparency for Uses of Health Related Data:* Member companies should be required to publicly disclose any standard segments used for Online Behavioral Advertising (OBA) purposes that are based on health related information.
- *Ensuring Transparency and Control for Non Cookie Technologies:* The NAI should expand its policy to provide that non HTTP cookie tracking technologies, such as Flash cookies, Web browser cache, or similar technologies, should not be used for OBA, Multi Site Advertising, or Ad Delivery and Reporting purposes until they provide the same level of transparency and control as traditional HTTP cookies.
- *Strengthening the Annual Review Process:* The NAI should evaluate the use of random, external assessments of compliance with elements of the NAI Code, such as the functioning of opt outs, to supplement and strengthen the existing review process.

Consistent with the NAI Code's transparency requirement, the NAI continues to host a centralized consumer choice mechanism that educates consumers about OBA and allows consumers to opt out of OBA by some or all of the NAI's member companies. In 2010, the NAI website experienced rapid growth in visitors seeking information about OBA and the ability to exercise choice. Nearly three million unique visitors viewed the NAI main Web page (an increase of nearly 150% over 2009). Moreover, usage of the NAI's OBA choice mechanism has

significantly increased: the number of unique visitors to the NAI's opt out page jumped to nearly 2.3 million unique visitors in 2010 (an increase of 127% over 2009). Of these visitors, approximately 472,000 went through the NAI opt out process (an increase of 58% over 2009).<sup>3</sup>

The educational section of the NAI site, which informs consumers about OBA and explains the choices available to them, showed even greater growth in 2010, with more than a half-million unique visitors (an increase of nearly 400% over 2009).<sup>4</sup> This increased attention is due in large part to NAI members, who have made demonstrable improvements in their efforts to provide consumer education about online behavioral advertising. In 2010, NAI members more than quadrupled their contributions of advertising inventory for consumer education, collectively providing more than one billion ad impressions to the NAI's educational campaign. In addition to these ad impression contributions, NAI member companies have continued to deploy and improve their own tools designed to educate consumers about OBA and to increase the transparency of their OBA practices.

With respect to notice, all the evaluated member companies include notices on their websites that describe their data collection, transfer, and use practices, including descriptions of the online advertising activities undertaken, the types of data collected, and an easy-to-use procedure for opting out of the use of data for OBA, as required by the NAI Code. In an improvement from 2009 findings, all evaluated member companies now publicly disclose their retention periods for OBA data in accordance with the NAI Code. In 2010, many evaluated member companies greatly increased the visibility, readability, and usability of their consumer-facing privacy notices and opt out tools. With respect to the technologies used for the advertising purposes covered by the NAI Code, however, the 2010 compliance review also revealed the need for greater clarity in the NAI policy with respect to the uses of non-cookie technologies in browsers: based on findings with respect to two companies' use of browser cache to store IDs to count unique users, NAI staff has recommended (and the NAI

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<sup>3</sup> See Section III(A)(1) findings, *infra*.

<sup>4</sup> See *infra* at 8-9.

adopted) a broadened policy limiting such use of the Web browser cache for OBA or other advertising-related purposes.<sup>5</sup>

In addition to improving the notice that evaluated member companies provide to consumers on their own websites, in 2010, the NAI and its member companies also significantly increased their efforts to provide consumers with enhanced access to information about OBA and to opt out mechanism for OBA use. In October, the NAI joined other industry associations in launching the Cross-Industry Program for OBA self-regulation.<sup>6</sup> NAI member companies have deployed notice and choice for OBA in and around advertisements or in new Web page short-form disclosures, with some already using the Cross-Industry Program's icon-based approach. Indeed, several member companies alone have produced tens of billions of impressions that included such enhanced notice.<sup>7</sup> The NAI has also worked with the IAB to promote technical standards that would facilitate these enhanced forms of consumer notice.<sup>8</sup>

NAI staff found that member companies also have increased their efforts to ensure that notice and choice for OBA is available to consumers on websites where data are collected and used for OBA purposes, through enforcement of contractual notice requirements with their partner Web sites.<sup>9</sup> In response to the 2009 compliance

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<sup>5</sup> See *infra* at 21.

<sup>6</sup> The associations with which the NAI joined include the AAAA (4A's), the AAF (American Advertising Federation), the ANA (Association of National Advertisers), the DMA (Direct Marketing Association), and the IAB (Interactive Advertising Bureau), with support from the Council for the Better Business Bureaus. Those associations have adopted a set of principles that, like the NAI Code, impose transparency and choice obligations on participating member companies engaged in online behavioral advertising. See <http://www.aboutads.info/principles/>.

<sup>7</sup> See *infra* at 14-15.

<sup>8</sup> In the Spring, the NAI and IAB jointly issued a proposed technical approach that would permit metadata to travel with an ad identifying the companies involved in the ad selection, whether behavioral information was used, and how to exercise choice regarding such advertising. [http://www.networkadvertising.org/pdfs/Clear\\_Ad\\_Notice\\_Tech\\_Specs\\_Release\\_Final.pdf](http://www.networkadvertising.org/pdfs/Clear_Ad_Notice_Tech_Specs_Release_Final.pdf). As part of the Cross-Industry program, the NAI and IAB have also collaborated to develop implementation guidelines for the use of icon-driven notice. See <http://networkadvertising.org/pdfs/Associations104release.pdf>.

<sup>9</sup> In its 2009 Compliance Report, NAI staff found that the evaluated member companies included appropriate provisions in their contracts requiring partners to

report findings, the NAI in 2010 convened a working group with the goal of promoting more ubiquitous notice and choice on websites where data are collected and used for OBA purposes. Among other things, this working group developed educational materials for NAI members to share with their partners explaining the importance of providing consumers notice and choice with respect to OBA. In addition, NAI staff increased efforts to educate NAI members about the importance of requiring their partners to post notice, as well as best practices for enforcing those requirements. These increased enforcement and education efforts by the NAI and its members, as well as increased participation in self-regulatory notice and choice efforts by other industry players, have led to improvements in the availability of notice and choice mechanisms for OBA across the ecosystem. Indeed, NAI staff's analysis shows that notice and choice regarding OBA practices are now present on the vast majority of the most popular websites where data are collected or used for OBA purposes.

With respect to the choice provisions of the NAI Code, NAI staff found that evaluated member companies have appropriate mechanisms in place permitting consumers to exercise the choice to opt out of behavioral advertising, both on their own websites and on the NAI's website. NAI staff's testing of members' opt out tools throughout the year and as part of the annual compliance review demonstrates that, overall, they function as intended. However, as described in the full report, a handful of member companies have experienced problems with their opt-out tools, primarily as a result of systems changes. While these issues were primarily short-term and affected few users, NAI staff is recommending that member companies adopt (or enhance) written procedures explicitly designed to ensure that their offering and honoring of opt-out choices is not disrupted as a result of systems changes. The NAI also plans in 2011 to update its opt out page to include automated reporting tools that will increase the NAI's ability to more rapidly identify any technical issues with the opt out experience.

NAI staff found no compliance deficiencies for the evaluated members with respect to the portions of the NAI Code relating to the

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provide notice and choice, but largely lacked robust programs for enforcing contractual notice requirements.

collection and use of personally-identifiable information (“PII”) for behavioral advertising purposes. All evaluated member companies report that they do not use PII for OBA purposes, and that they have no interest in collecting PII for use in OBA. Evaluated members report having procedures in place to ensure that they do not receive unwanted PII, and, if any PII is transmitted inadvertently, to ensure that it is not and cannot be used for OBA purposes. The vast majority of evaluated companies do not intentionally collect PII from consumers for any purpose, and those that do collect PII for non-OBA purposes report having robust procedures for isolating non-identifiable segments before they can be used for OBA purposes. NAI staff also found no compliance deficiencies with respect to provisions of the Code that prohibit the creation of OBA segments for children under 13 without parental consent and that preclude use of OBA segments other than for marketing purposes.

With respect to the provisions of the NAI Code relating to sensitive information, the compliance review revealed no compliance issues with respect to uses of sensitive financial or location information. However, with respect to sensitive health information, the compliance review revealed that one member company had used certain precise health-related categories to determine ad selection without obtaining opt-in consent.

Although the company immediately agreed to cease the practice, NAI staff believes that a broader policy response should be implemented to help advance appropriate marketplace practices for health-related information. NAI staff believes that greater transparency for health-related categories used for OBA would help promote compliance with the Code’s requirements and would be an efficient means of normalizing best practices throughout the online advertising marketplace. Accordingly, NAI staff is recommending that the NAI adopt a policy that member companies be required to publicly disclose any standard segments used for OBA purposes that are based on health-related information.

Overall, NAI staff believes that its 2010 compliance process provided useful oversight and continued to spread best practices throughout NAI membership. As in 2009, representatives of the evaluated member companies expressed commitment to, and a desire to learn from, the compliance process. In most cases, evaluated member companies promptly implemented suggested changes in privacy policies and practices for collecting and using data for advertising purposes. At the same time, NAI staff believes that

## 2010 NAI Annual Compliance Report

additional improvements to the compliance program would further strengthen the NAI's mission of promoting transparency and choice for OBA. NAI staff therefore recommends that in 2011 the NAI evaluate the utility of implementing separate, random external reviews of key components of the NAI Code, such as the functioning of opt outs. Combined with existing compliance mechanisms, such additional reviews would further consumer confidence in the accountability provided by the NAI's self-regulatory program.<sup>10</sup>

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<sup>10</sup> The NAI also will continue to work with other industry self-regulatory groups to harmonize compliance under the NAI Code with enforcement efforts implemented in 2011 under the self-regulatory principles adopted by leading advertising industry groups.

## **2010 ANNUAL COMPLIANCE REPORT**

### **I. Background**

The NAI's Self-Regulatory Code of Conduct ("NAI Code") imposes transparency, notice, and choice obligations on its members with respect to "Online Behavioral Advertising" (OBA).<sup>11</sup> OBA is defined in the NAI Code as "any process used whereby data are collected across multiple web domains owned or operated by different entities to categorize likely consumer interest segments for use in advertising online." (Code § II.1.) The Code also imposes certain limitations on the use and transfer of information to be used for OBA or Multi-Site Advertising, requires members to provide reasonable access to PII retained for OBA purposes, to protect data used for behavioral advertising, and to obtain such data from reliable sources. Finally, the Code imposes data retention requirements on NAI members and requires them to adhere to applicable law.

The NAI's self-regulatory model includes several mechanisms for ensuring the compliance of its member companies to this common set of principles designed to ensure that consumers are provided transparency and choice with respect to the use of information about them for OBA purposes. First, membership in the NAI requires public representations, subject to enforcement by the Federal Trade Commission under Section V of the FTC Act, that a member company's business practices are compliant with each aspect of the Code that applies to its business model. (Code § IV.1(b).) The NAI also provides mechanisms, including imposing sanctions where appropriate, for accepting and responding to complaints or other credible claims relating to compliance, whether raised by consumers, regulators, the press, advocates, or others.<sup>12</sup>

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<sup>11</sup> The NAI Code and the NAI's compliance procedures did not change in 2010. A full summary of the NAI Code, the requirements it imposes on NAI member companies, and the NAI's compliance procedures, can be found in the NAI's 2009 Annual Compliance report. See [http://www.networkadvertising.org/pdfs/2009\\_NAI\\_Compliance\\_Report\\_12-30-09.pdf](http://www.networkadvertising.org/pdfs/2009_NAI_Compliance_Report_12-30-09.pdf).

<sup>12</sup> See NAI Compliance Program Attestation Review Process, at 3 (Feb. 17, 2009), available at [http://networkadvertising.org/managing/NAI\\_COMPLIANCE\\_AND\\_ENFORCEMENT\\_PROGRAM\\_Attestation\\_Review\\_detail.pdf](http://networkadvertising.org/managing/NAI_COMPLIANCE_AND_ENFORCEMENT_PROGRAM_Attestation_Review_detail.pdf).

## 2010 NAI Annual Compliance Report

As an additional means of ensuring the compliance of its member companies with the NAI Code, member companies are required to undergo an annual compliance review. This review process is designed to proactively examine NAI member companies' attestations of compliance by ensuring that their business practices and public representations are aligned with the requirements of the Code. The review process is also intended to educate and remind member companies of their obligations under the NAI Code and of the sanctions that can result from the failure to honor those obligations, including referral to the NAI Board of Directors, suspension or revocation of NAI membership, publication of revocation by press release, and referral of non-compliance to the FTC or other enforcement bodies.<sup>13</sup> The Code specifies that the results of this review, as well as a summary of customer complaints and the resolution of those complaints, must be published annually. (Code § IV.1(e).) This document is the second annual report to be published under these procedures.

For the 2010 annual compliance review, NAI staff reviewed the 34 companies that were NAI members as of January 1, 2010<sup>14</sup> (up from 23 reviewed companies in 2009): [x + 1], 24/7 Real Media, Aggregate Knowledge, Akamai, AlmondNet, AOL Advertising (including Tacoda), AudienceScience, BlueKai, Burst Media, Buysight (formerly Permuto), Collective Media, Criteo, Datalogix (formerly Nextaction), Dedicated Networks, Exelate, Fetchback, Fox Audience Network, Google, interCLICK, Lotame, Media6Degrees, Microsoft Advertising (including Atlas Solutions), Mindset Media, Quantcast, Rich Relevance, Specific Media, Traffic Marketplace, Tribal Fusion, Tumri, Turn, Undertone Networks, Valueclick (including Mediaplex), Vibrant Media, and Yahoo!.<sup>15</sup> These 34 companies are referred to in this document as "evaluated members" or "evaluated member companies." The member companies that joined the NAI in January 2010 or later were subject to review as part of the new member process, and must attest to

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<sup>13</sup> See *id.*

<sup>14</sup> Per the policies established by the NAI Board, NAI members become eligible for annual reviews in "the year following admission to the NAI as a new member." See *id.*

<sup>15</sup> Safecount, which was reviewed in 2009, has withdrawn from membership in the NAI and thus was not included in the 2010 review. See <http://safecount.net/nai.php>.

compliance with the NAI Code, but were not assessed in the 2010 annual review process.

## II. Methodology

Under the procedures established by the NAI for compliance reviews, NAI staff review the following materials to assess members' compliance with the NAI Code: (1) representations of business practices as set forth in the members' public and non-public materials, including members' (a) public website, (b) privacy policy, (c) terms of service, (d) advertising contracts, and (e) marketing materials; (2) responses to an NAI Questionnaire regarding each provision of the NAI Code; (3) interviews with senior responsible executives who are authorized to bind the company, as well as with relevant engineering staff; and (4) responses to any alleged deficiencies in compliance raised by the press, other member companies, or the NAI's consumer complaint process (if any).<sup>16</sup>

Under these published NAI procedures, NAI staff are required to advise members on what NAI Principles apply and what modifications in business practices may be necessary to bring the company into full compliance with the NAI Code. Members must remedy any compliance deficiencies, or adopt a plan to do so, within 30 business days of identification of the deficiency. NAI staff may extend this deadline, in its discretion, in the event of material technological constraints or unavoidable delays.

The NAI's compliance program for 2010 was based on a multi-stage written evaluation and interview process, as well as through a separate compliance training presentation. NAI companies eligible for review were required to provide written responses to a detailed questionnaire. The questionnaire asked members to describe their practices and policies relative to NAI Code requirements, and to provide supporting documentation. The topics covered by the questionnaire included:

- Descriptions of any business practices involving the collection and use of data for OBA, Multi-Site Advertising, or Ad Delivery and Reporting purposes, including any new lines of business acquired or launched in the previous year;

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<sup>16</sup> See NAI Compliance Program Attestation Review Process, *supra* note 12, at section 2.

## 2010 NAI Annual Compliance Report

- Description of efforts to educate consumers about OBA practices and the choices available to them undertaken in 2010;
- Representative provisions of partner contracts requiring NAI-compliant notice and choice;
- Methods of ensuring that partners engaging in the member's OBA and Multi-Site Advertising practices include NAI-required notice and choice;
- A technical description of the member's OBA opt out mechanism, including its location, functionality, and testing procedures, as well as procedures for responding to a malfunction of the opt out, and any malfunctions in the opt out tool that have occurred;
- Whether the member uses any means other than http cookies to identify or track users;
- Contracts, processes, and controls for any sharing or acquisition of data used for OBA or Multi-Site Advertising;
- For any member companies that acquire PII about consumers, their processes for segregating PII data from OBA data and for isolating interest segments derived from such data prior to use for OBA purposes;
- How data used for OBA, Multi-Site Advertising, or Ad Delivery and Reporting is stored, how long it is retained, and for what purposes it is retained;
- Whether there is any use of sensitive, potentially sensitive, or health-related information for OBA or Multi-Site Advertising, and what policies and processes exist to govern any such use;
- Whether the member has any OBA segments targeted at children under 13;
- Descriptions of the policies and practices designed to provide security for data used for OBA, Multi-Site Advertising, or Ad Delivery and Reporting;
- Descriptions of the mechanisms available to consumers to submit questions or concerns with respect to notice and choice for OBA or NAI compliance, and how any such questions or concerns are handled;

## 2010 NAI Annual Compliance Report

- Representative samples of non-public marketing materials and training materials relating to OBA; and
- Descriptions of any complaints relating to NAI compliance and the resolution of such complaints.

A four-person NAI compliance team, which includes two attorneys with experience in privacy law, corporate compliance, and technology, reviewed these written submissions upon receipt.

In addition to reviewing members' responses to the questionnaire, NAI staff conducted an independent evaluation of member companies' business practices. To do so, NAI staff reviewed members' websites, privacy policies, terms of service, contracts with advertising partners, marketing materials, and press releases. In addition to these publicly-available materials, NAI staff reviewed business proprietary materials supplied by members, including internal policies and procedures and non-public marketing materials, contracts, and terms of service. The compliance team also used independent technical methods to assess compliance, including testing the functionality of members' opt out tools, reviewing the websites of members' partners for notice and choice disclosures, and testing members' mechanisms for receiving and responding to consumer queries. Finally, the compliance team looked for any public allegations of non-compliance, whether raised by consumers, media reports, advocates, or other member companies.

NAI staff's review involved a multi-stage interview process. For these interviews, the compliance team was provided access to high-level management and relevant engineering staff. The compliance team questioned management personnel about business and policy issues such as OBA business practices, policies governing those practices, contractual requirements imposed on OBA business partners, and processes for oversight and enforcement of contractual requirements concerning notice, choice, and protections for data collected and used for OBA purposes. The compliance team questioned technological representatives about relevant data flows, opt out functionality, data retention, and technical measures in place to prevent the use of any PII for OBA purposes. NAI staff used these interviews both to assess members' business practices and technology, and to offer "best practice" improvements to enhance transparency and choice, even where members' practices were already consistent with NAI requirements.

Finally, member companies were required to attest to their ongoing compliance with the NAI Code and the veracity of the information provided in the review process. This certification supplements members' public attestations, made when becoming members of the NAI, that they comply with the NAI Code.

### **III. NAI Compliance Findings**

This section of the report sets forth the findings of NAI staff with respect to the compliance of the evaluated member companies with each substantive provision of the NAI Code, following the order in which the provisions appear in the Code.<sup>17</sup>

#### **A. Transparency/Education**

##### **1. NAI Education**

###### *Standard*

The NAI Code requires members to collectively maintain an NAI website to serve as a centralized portal offering explanations of online behavioral advertising and member companies' compliance with the NAI Principles, including information about and centralized access to consumer choice mechanisms. (Code § III.1(a).)

###### *Findings*

The NAI's website hosts educational materials, an explanation of the NAI Principles, an opt out page, and a mechanism for consumers to register complaints against member companies. In 2010, the NAI site saw a large increase in visitors seeking information about OBA and the ability to exercise choice: traffic to the NAI main web page increased by nearly 150% over 2009, with approximately 2.8 million unique visitors to the NAI main Web page.

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<sup>17</sup> NAI compliance is a continuing obligation, and the annual compliance review's findings may be supplemented as appropriate.

**Visits to NAI Consumer Portal**

<u>Year</u>	<u>Total User Visits</u>	<u>Total Unique User Visits</u>
2007	N/A	N/A
2008	750,784	644,917
2009	1,311,273	1,136,994
2010	3,352,441	2,842,377

**a) NAI Consumer Education**

The NAI’s consumer education efforts grew rapidly in 2010, with vastly increased numbers of banner ads deployed across member companies’ networks. In large part because of these ads, visits to the education section of the NAI website grew more than fivefold in 2010. In total, more than a half-million unique visitors viewed the NAI’s educational page.

In order to help increase consumer understanding of OBA and the choices available to them, the NAI has developed banner ads and asked members to publish those banner ads across their networks. In 2010, the NAI updated this educational campaign with new banner ads intended to draw even more consumers to the NAI education page.

**New NAI Banner Ads**

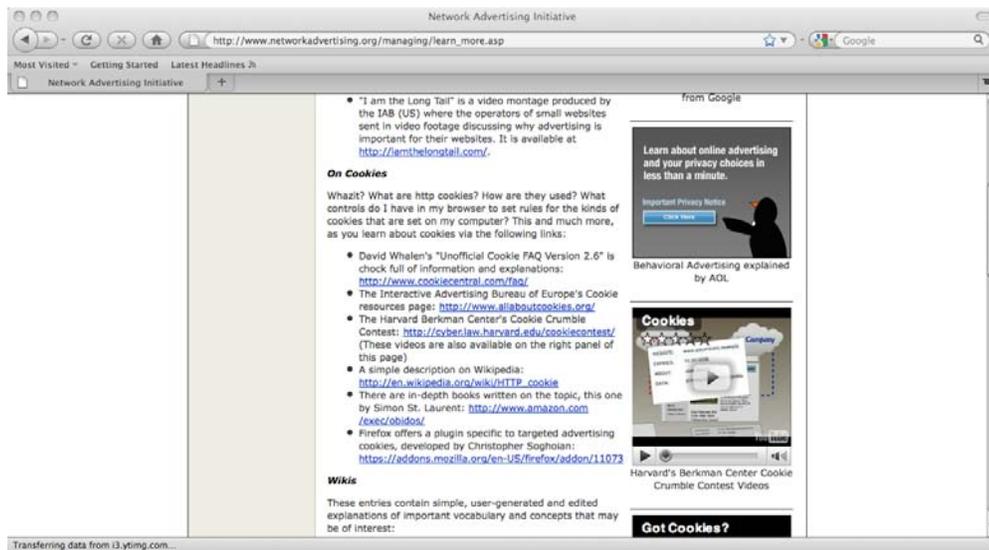


In 2010, NAI members contributed more than four times the number of advertising impressions to the NAI’s consumer education campaign than they did in the previous year, collectively contributing over one billion ad impressions to the NAI’s campaign.

The NAI’s banner ads link to the NAI’s consumer education web page. That page, first launched in June 2009, aggregates video, blog,

and explanatory content, together with information relating to general research and public policy discussion of online behavioral advertising.<sup>18</sup> The videos on the NAI's educational page were developed by NAI members and other independent sources and explain, in plain English, what cookies are, how they work, how they can be used by advertisers to categorize consumers into interest groups, and how users can delete or block them. In addition, the NAI site contains many links to informational articles, blogs, and regulatory materials that also explain, in simple terms, the technology behind behavioral advertising and how consumers may exercise choice with respect to cookies.

### **NAI Consumer Education Web Page**



In large part as a result of members' publishing the NAI's banner ads across their networks, the consumer education section of the NAI's website showed even greater growth than the NAI's homepage in 2010. There were more than a half-million unique page views of the NAI's educational website in 2010, approximately five times the number of unique visits than seen in 2009.

18

[http://networkadvertising.org/managing/learn\\_more.asp](http://networkadvertising.org/managing/learn_more.asp).

**Visits to NAI Consumer Education Page**

<u>Date</u>	<u>Total User Page Views</u>	<u>Unique User Page Views</u>
6/01/09 - 12/31/09	67,353	61,628 (105,648 annualized) <sup>19</sup>
2010	615,883	521,112

***b) NAI Consumer Opt Out Tool***

The opt out section of the NAI website<sup>20</sup> clearly explains how consumers may opt out of online behavioral advertising by one, some, or all NAI members; provides consumers information about which member companies have active OBA cookies on their computers; and is designed to permit consumers to opt out of online behavioral advertising by all NAI member companies in only three clicks.

**NAI Opt-Out Web Page**

The screenshot shows the 'Opt-Out Status' section of the NAI website. It features a table with three columns: 'Member Company', 'Status', and 'Opt-Out'. Each row lists a member company, its status (all are 'Opt-Out Cookie'), and a confirmation message ('You have opted out of this network'). There are 'More Information' links for each company. At the top right of the table, there are three buttons: 'Select all', 'Clear', and 'Submit'.

Member Company	Status	Opt-Out
<b>aCerno</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>
<b>AdBrite</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>
<b>AdChemy</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>
<b>Adconion</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>
<b>Adara Media</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>
<b>Adify Media</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>
<b>Advertising.com</b> <a href="#">More Information</a>	<b>Opt-Out Cookie</b> You have opted out of this network	Opt-Out <input type="checkbox"/>

<sup>19</sup> The NAI’s consumer webpage first launched in June 2009. The 2009 average visits to the NAI’s education page was 8,804 monthly visitors, which implies an annualized rate of approximately 105,000 total unique visitors for that year.

<sup>20</sup> [http://networkadvertising.org/managing/opt\\_out.asp](http://networkadvertising.org/managing/opt_out.asp).

## 2010 NAI Annual Compliance Report

The NAI's opt out page works by accessing URLs hosted on member companies' servers. The URLs call scripts on NAI members' servers, which check for or set opt out cookies on member companies' domains. All NAI members are required to integrate with the NAI opt-out tool as a condition of membership. The NAI website also contains an extensive FAQ section to aid consumers who have any difficulty in opting out, and, as detailed below, the website enables users to contact NAI staff, who can provide support to consumers in the opt out process. As detailed below, the NAI tests its opt out tool on a weekly basis, and as needed to respond to consumer concerns and questions.

As with the NAI's website and educational material, the NAI's opt out tool saw ever-increasing interest and usage in 2010, suggesting that consumers are increasingly aware of OBA practices and interested in the choices available to them. In 2010, more than 2.2 million users visited the NAI opt page, an increase of more than 125% over 2009. Of those visitors, the number going through the opt out process rose by 58%, to approximately 472,000.

### **NAI Consumer Opt Out Usage**

<u>Year</u>	<b>NAI Opt-Out Tool – Page Views</b>		<b>Opt-Out Results Page Views</b>	
	<u>Total</u>	<u>Unique</u>	<u>Total</u>	<u>Unique</u>
2007	1,097,996	798,006	140,661	84,022
2008 <sup>21</sup>	854,842	553,629	227,758	145,156
2009	1,502,068	1,005,017	482,531	299,647
2010	4,556,489	2,277,065	826,350	472,437

The surge in usage of the NAI is generally consistent with the upswing in usage of choice mechanisms generally.<sup>22</sup>

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<sup>21</sup> The drop in traffic between 2007 and 2008 likely reflects the NAI's adoption of new analytic tools.

<sup>22</sup> Other offerings that leverage opt outs provided by NAI members also saw significant increases in usage. Privacychoice.org reported increased usage in 2010, with nearly 400,000 persons using its tool to set online advertising preferences. <http://blog.privacychoice.org/2010/12/16/privacychoice-announcing-tracking-protection-lists-for-ie9/>. Similarly, more than 800,000 users have downloaded the Targeted Advertising Cookie Opt-Out (TACO) tool and nearly two million users have downloaded Ghostery. See <https://addons.mozilla.org/en-US/firefox/addon/11073/>

The NAI continues to make additional improvements to its opt out page. In summer of 2010, translated versions of the principal opt out pages were made available (in Spanish and French). The NAI also intends in 2011 to deploy additional improvements to the opt out interface, including automatic error-logging that will aid the NAI in further improving the reliability of the opt out experience, as well as accessibility features.

**c) *NAI Consumer Inquiry and Complaint Mechanisms***

In addition to the substantial educational materials and FAQs on the NAI website, the NAI also provides contact information for consumers to report problems they have using the opt out, or to report issues related to member companies' compliance with the NAI Code. As discussed in detail in section IV below, in 2010 NAI staff received and manually reviewed nearly 6,000 general consumer communications (concerning both NAI- and non-NAI-related issues).

**2. Member Education**

*Standard*

The NAI Code requires members to individually and collectively educate consumers about behavioral advertising and the choices available to them with respect to behavioral advertising. (Code § III.1(b).)

*Findings*

Many NAI members have engaged in substantial individual efforts to educate consumers about behavioral advertising in

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(last visited January 10, 2011) and <https://addons.mozilla.org/en-US/firefox/addon/9609/>. NAI members have also participated in the launch of the Digital Advertising Alliance's cross-industry principles program and its opt out platform (at [www.aboutads.info](http://www.aboutads.info)). Like the NAI's opt out tool, the [aboutads.info](http://www.aboutads.info) opt out mechanism allows consumers to opt out of online behavioral advertising by some or all participating companies. The [aboutads.info](http://www.aboutads.info) platform is fully interactive with the NAI's opt out tool, allowing preferences set on either platform to be recognized and honored by a consumer's browser. Finally, these options are in addition to native browser controls, which consumers also use to control the collection and use of their information.

accordance with III.1(b) of the Code. As noted above, NAI members have more than quadrupled their ad impression contributions to the NAI's educational efforts by donating more than a billion ad impressions to the NAI's educational campaign.<sup>23</sup> Other members, particularly those who do not buy media and thus do not have impressions to contribute, have instead donated services and content to the NAI website.

NAI members have also developed their own creative video and other multimedia content designed to educate users about OBA and the choices available to them. These educational tools, summarized in the NAI's 2009 Compliance Report,<sup>24</sup> reach consumers in a clear and consumer-friendly manner. In 2010, NAI member companies have continued to develop and improve tools for educating consumers about OBA and the choices available to them.<sup>25</sup>

## **B. Notice**

### **1. Member-Provided Notice**

#### *Standard*

Section III.2(a) of the NAI Code requires members directly engaging in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting to clearly and conspicuously post notice on their websites that describes their data collection, transfer, and use practices. The required notice must include clear descriptions of the following (as applicable): (1) the OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting activities undertaken by the member; (2) what types of data are collected by the member; (3) how such data will be used, including any transfer to a third party; (4) the types of PII and non-PII

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<sup>23</sup> In 2009 and 2010, NAI members likewise contributed substantial numbers of ad impressions and other support to the Interactive Advertising Bureau's (IAB) educational campaign, which also seeks to educate consumers about behavioral advertising and the choices available to them.

<sup>24</sup> See NAI 2009 Annual Compliance Report, *supra* note 11, at 20.

<sup>25</sup> See, e.g., [http://www.bluekai.com/consumers\\_howdoesitwork.php](http://www.bluekai.com/consumers_howdoesitwork.php) (simple description of how OBA works, how it benefits consumers, and how consumers can exercise choice with respect to OBA); <http://www.google.com/privacy.html> (new content in privacy center); <http://choice.live.com/> (new consumer education site, linked to from an icon served next to ads, with new video content explaining personalized advertising).

that may be merged; (5) an easy-to-use procedure for exercising opt in or opt out choice with respect to OBA data use (with the choice provided depending on the type of data); and (6) the approximate length of time that data used for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting will be retained by the member company.

### *Findings*

The NAI Code allows members the flexibility to disclose and explain their collection and use of data for OBA purposes in any manner, so long as the disclosure is clear and conspicuous and conveys all required information. NAI staff found that all evaluated members include notices on their websites that adequately describe their data collection, transfer, and use practices. And unlike in 2009, when NAI staff found that almost half of evaluated member companies lacked the retention disclosure required by the NAI Code, all member companies evaluated in 2010 publicly disclose their retention periods for OBA data.

Some member companies increased the visibility and readability of their OBA disclosures in 2010. For example, NAI member companies have continued to deploy new creative consumer-facing tools to increase the transparency of the OBA data they hold about users and to offer granular controls with respect to that data.<sup>26</sup> In addition, many member companies have recently made information about their OBA practices easier to find by moving them into consumer-focused sections of their websites, labeled with prominent tabs and buttons such as "consumer information," "privacy," and "opt out." These Web pages generally summarize the member companies' collection and use of data for OBA purposes, and provide prominent links to permit consumers to opt out of the use of their data for OBA purposes. Other members have made their OBA-related privacy policies easier to understand by segregating privacy practices governing the collection

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<sup>26</sup> In addition to the NAI members offering preference managers that were mentioned in the 2009 report, newer NAI members Lotame and Exelate also offer similar tools that allow users to view the interest categories associated with their browsers. See <http://tags.bluekai.com/registry> (Bluekai); <http://www.exelate.com/home/consumer-preference-manager-opt-out.html> (Exelate); <http://www.google.com/ads/preferences/> (Google); <http://www.lotame.com/privacy-center/preferences/> (Lotame); [http://info.yahoo.com/privacy/us/yahoo/opt\\_out/targeting/details.html](http://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/details.html) (Yahoo). New member Bizo also offers such transparency tools. See [http://www.bizo.com/businessProfessionals/your\\_bizo\\_cookie](http://www.bizo.com/businessProfessionals/your_bizo_cookie).

and use of non-PII gathered about consumers from privacy practices governing the collection and use of PII provided by their business customers. While member companies have made great strides in increasing the visibility and comprehensibility of their OBA notices, NAI staff used the compliance review to suggest further best practices improvements to members' consumer-facing disclosures.<sup>27</sup>

NAI member companies also have made considerable progress in providing notice to consumers at the point of data use – where consumers see targeted ads. In October, the NAI joined other leading advertising and marketing associations in announcing the launch of a cross-industry program for self-regulation of online behavioral advertising, including a web site ([www.aboutads.info](http://www.aboutads.info)) where companies can register to use an enhanced notice icon to be displayed within or near online ads or on Web pages where data is collected and used for interest-based ads.<sup>28</sup> In addition to these industry-wide efforts, NAI member companies Criteo, Fetchback, Google, Microsoft, and Yahoo!, have already deployed notice in or around ads.<sup>29</sup> Indeed,

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<sup>27</sup> See, e.g., <http://www.xplusone.com/> (prominent "privacy" tab on home page); <http://www.aggregateknowledge.com/> (prominent "Opt Out" Button on home page); <http://www.almondnet.com/> ("privacy center" and "opt out" tabs on home page); <http://www.audiencescience.com/> ("consumers" tab on home page); <http://www.bluekai.com/> ("consumers" button on home page); <http://affiniti.datalogix.com/> ("consumers" button on online targeting home page); <http://www.exelate.com/home/index.html> ("consumer privacy" tab on home page); <http://www.lotame.com/> ("manage your privacy preferences" tab on home page); <http://media6degrees.com/> (prominent "opt out" button in footer of every page on website); <http://www.mindset-media.com/> (opt out link on home page); <http://www.permuto.com/> (opt out link on home page); <http://www.tumri.com/> (opt out button on top of home page); <http://www.turn.com/> (prominent "privacy" tab on home page).

<sup>28</sup> In anticipation of the deployment of icon-based consumer notice, the NAI and IAB in April 2010 released the CLEAR (Control Links for Education and Advertising Responsibly) Ad Notice Technical Specifications. These specifications offer a technical foundation for providing consumers more detailed information about the ads they see that are based on their interests and behaviors, using metadata that can travel with each ad. This approach is expected to give publishers, advertisers, and ad networks flexibility to adopt innovative approaches to enhanced consumer disclosures. See *supra* note 8.

<sup>29</sup> See <http://www.criteo.com/us/retargeting/privacy-matters?0ecea38193df0c9bab184bf1b140820e=2f62937d2606e5eeb2cfc5014ad74330>; [http://www.fetchback.com/press\\_061509.html](http://www.fetchback.com/press_061509.html); <http://googlepublicpolicy.blogspot.com/2009/10/coming-to-online-ad-near-you-more-ads.html>; <http://www.msn.com/>; <http://info.yahoo.com/privacy/us/yahoo/relevantads.html>.

these NAI member companies have already served tens of billions of online advertisements with notice in or around the ad.

## 2. Web Site Partner Notice

### *Standard*

In addition to providing notice and choice on their own websites, NAI members must require websites with which they partner for OBA or Multi-Site Advertising to also post notice and provide consumers a means of exercising choice with regard to OBA. Specifically, section III.2(b) of the NAI Code obligates members to require websites with which they contract for OBA or Multi-Site Advertising services to clearly and conspicuously post notice or ensure that notice is made available on the website where data are collected for OBA or Multi-Site Advertising purposes. Such notice must contain: (1) a statement of fact that OBA and/or Multi-Site Advertising is occurring; (2) a description of the types of data that are collected for OBA or Multi-Site Advertising purposes; (3) an explanation of how and for what purposes that data will be used or transferred to third parties; and (4) a conspicuous link to the OBA choice mechanism provided by the member, and/or the opt out page on the NAI's website.

In the event a member is notified or otherwise becomes aware that a contractee is in breach of these duties, the member is required to make reasonable efforts to enforce the contract. (NAI Code § III.2(c).) Even in the absence of a contractual relationship, members are required to make reasonable efforts to ensure that all companies engaging in their OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting furnish or require notices comparable to those described. (NAI Code § III.2(d).)

### *Findings*

Evaluated member companies submitted provisions from their OBA contracts requiring advertising partners to display NAI-required notice and choice. Members verified that these provisions are included in their standard operating contracts or other standard terms with partner sites. Many members use sample language provided by the NAI, modified as necessary to reflect their business practices. Based on its review of these contractual provisions, NAI staff believes that the evaluated member companies generally included appropriate

provisions in their contracts, consistent with section III.2(b) of the NAI Code.<sup>30</sup>

In its 2009 Compliance Report, NAI staff found that although the evaluated member companies had adequate contractual provisions to require OBA notice and choice on partner websites, the notices required by these contractual provisions were not present on partner websites at a sufficient level of frequency.<sup>31</sup> In that report, NAI staff found that some evaluated members lacked robust programs for enforcing contractual notice requirements (or for otherwise ensuring that notice is present where data are collected or used for their behavioral advertising), and that member companies could take additional steps to help ensure that the websites where they engage in OBA provide consumers notice consistent with the NAI Code. The NAI accordingly committed to developing and implementing a partner notice implementation plan with the goal of expanding OBA notice and choice across the websites that partner with NAI members.

To implement this plan, the NAI convened a working group to examine the barriers to achieving notice on partner sites and to develop tools to address those barriers. As part of this process, NAI staff interviewed NAI member companies about their efforts to require partners to post appropriate notice and the obstacles they had faced. Among other things, member companies reported that some web publishers, particularly smaller publishers, needed additional education about the NAI's self-regulatory program, as well as about the program's objective to provide notice and choice with respect to OBA practices. To address this need, the NAI developed new educational documents to explain to web publishers what the NAI is, its mission, why notice and choice are important, and what web publishers can do to comply with contractual notice requirements. The NAI also increased its training and outreach to member companies about best practices for enforcing contractual notice requirements.

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<sup>30</sup> In some instances, NAI staff found that evaluated member companies' contractual language could more explicitly require notice and a choice mechanism for OBA practices. In such cases, NAI staff suggested improvements to the language, which member companies agreed to implement. NAI staff also advised some member companies to add standard notice and choice requirements to their form contracts even where notice and choice is not required by the NAI Code.

<sup>31</sup> See NAI 2009 Annual Compliance Report, *supra* note 11, at 24-26.

In 2010, NAI staff evaluated members' plans for requiring partners to provide notice and choice as well as their processes for enforcing contractual notice provisions. NAI staff also reviewed members' own findings with regard to whether the websites with which they partner have NAI-required notice and choice in place. NAI staff noted increased efforts by member companies to enforce contractual notice requirements since the 2009 compliance review. Some member companies have adopted more systematic processes for evaluating the notice provided by their partners and following up with those that lack proper notice, while other member companies have augmented their existing processes to enforce notice requirements, such as by checking more partner websites for notice or checking partner websites on a more regular basis.

In addition to these efforts to achieve a greater level of notice in their partners' website privacy policies, the NAI and its member companies have also implemented the NAI's partner notice plan by increasing efforts to deliver notice and choice to consumers more directly through notice in and around the ads they serve.<sup>32</sup> As described above, the NAI and its member companies have actively supported the development and deployment of technical specifications that allow for the placement of a clickable icon for delivering notice to consumers in and around OBA ads. These efforts increasingly permit NAI member companies to deliver notice of OBA data collection and use and opt out mechanisms directly to consumers, regardless of whether they have a direct contractual relationship with the websites where OBA data is collected or used, and regardless of their success in enforcing contractual notice requirements. This "just in time" notice to consumers, moreover, is provided in and around the ads consumers view, providing a means other than through privacy policies for

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<sup>32</sup> The "Associations Principles" were released in July 2009 by leading advertising industry associations to govern the collection, use, and transfer of information for OBA. Section II.B of the Associations Principles requires that when data is collected from or used on a Web site for OBA purposes, the operator of the Web site include a clear, meaningful, and prominent link on the webpage where data is collected or used for such purposes that links to a disclosure that describes the OBA taking place, states the adherence to the Principles, and contains an opt out mechanism. This disclosure is not necessary when enhanced notice is provided by the third party placing the ad. Section II.A(2)(a) provides that this enhanced notice may be provided either in or around the ad, or on the web page where data is collected. See AAAA/ANA/BBB/DMA/IAB Principles, available at <http://www.the-dma.org/government/ven-principles%2007-01-09%20FINAL.pdf>.

consumers to understand OBA data collection practices and to find out how to opt out of use of their data for OBA purposes.

The NAI's pass-on notice efforts, increased enforcement efforts by NAI members, and the concurrent implementation of a cross-industry self-regulatory program by leading advertising and industry associations collectively appear to have improved the availability of notice and choice mechanisms on websites where data are collected for OBA purposes. In order to test the NAI's progress and that of its membership, NAI staff conducted its own analysis of the most popular websites for the presence of notice and choice. NAI staff's independent testing of popular websites demonstrates that the vast majority of websites where data appear to be collected or used for OBA provide notice of the collection of data by third parties for and provide a link to the NAI's opt out page or to an opt-out mechanism provided by an NAI member company (and thus also an indirect link to the NAI). These disclosures appear either in privacy policies, in enhanced notice icons in or around ads, or in stand-alone disclosure links for consumers (such as "About Our Ads").

## **C. Choice**

### **1. Opt-Out Consent for use of Non-PII**

#### *Standard*

As set forth above, members must provide and honor an opt out mechanism for the use of non-PII for OBA purposes. (Code § III.3(a)(i).)<sup>33</sup> This opt out mechanism must be available both on the member's website and on the NAI consumer website. (*Id.*)

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<sup>33</sup> The NAI Code contemplates differing levels of consent for different types of data. Use of non-PII alone requires opt-out consent. Merger of non-PII with PII going forward (prospective merger) requires robust notice and an opt out mechanism. (Code § III.3(a)(ii).) Merger of PII with previously-collected non-PII for OBA purposes (retrospective merger) requires opt in consent. (Code § III.3(a)(iii).) No member companies collect or use PII for OBA purposes, and thus no company was required to obtain opt in consent or to provide robust notice for merger of PII or non-PII in 2010. This report accordingly addresses evaluated member companies' procedures for offering and honoring opt-out requests only.

*Findings*

As described above, consumers can opt out of collection of their data for OBA purposes by any or all NAI member companies on the NAI Web site. In addition, each member must provide an easy-to-use procedure for opting out of the use of data for OBA purposes on its own Web site. NAI staff determined that all evaluated member companies provide appropriate opt out mechanisms on their Web sites. As with notice, member companies have made these opt out mechanisms increasingly easy to locate and to use, such as through prominent “opt out” buttons on their home pages and in their privacy policies. As noted above, NAI members have also continued to deploy more granular approaches to opt out, such as through ad preference managers that allow consumers to edit the interests associated with their browsers.<sup>34</sup> As part of the review process, NAI staff also shared, and members adopted, best practices recommendations for increasing the visibility of opt out tools and enhancing user experience with those tools.

In addition to ensuring that evaluated members *provide* an opt out mechanism, NAI staff sought to ensure that members also *honor* consumers’ opt out choices. To that end, NAI staff reviewed the technical functionality of member companies’ opt out tools, reviewing what effect the presence of an opt out cookie has on collection and use of consumer data, members’ processes for testing their opt out mechanisms, and whether there had been any failures in opt out functionality.<sup>35</sup>

NAI staff found that, on the whole, members have good processes in place for ensuring that they honor consumers’ opt-out choices and do not use OBA data to target ads to consumers who have opted out. NAI staff did find, however, that a handful of evaluated member companies’ opt out tools had occasionally malfunctioned, particularly when companies made back-end configuration changes (for example, new code deployments or domain changes). These changes can result in relatively minor disruptions to the opt-out process, such as the temporary inability to set opt out cookies or display opt out status, or can cause more serious failures such as

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<sup>34</sup> See *supra* note 26.

<sup>35</sup> Staff also specifically reviewed whether the evaluated companies used any mechanisms other than http cookies, as discussed below.

temporary nonrecognition<sup>36</sup> or even permanent loss<sup>37</sup> of existing opt out cookies.

While these issues affected only a handful of member companies and had relatively small impact on users, NAI staff believes that these issues were partly attributable to the member companies involved not having fully anticipated potential risks to opt out cookie mechanisms during systems migrations, and insufficient testing of opt out functionality following those changes. While acknowledging that no systems are perfect, and that technical malfunctions will occasionally occur, NAI staff nevertheless believes that a greater emphasis on preserving existing opt out cookies and the ability of users to opt out during systems migrations would help ensure the reliability of opt out choices. NAI staff accordingly is recommending that all NAI member companies adopt policies and procedures designed to ensure the protection of users' existing opt out cookies and users' continuing ability to opt out following any systems changes or other changes in business practices that may affect opt out cookies. NAI staff will evaluate member companies' implementation of such procedures during annual compliance reviews and in the event of any opt out tool malfunctions.

NAI staff also reviewed member companies' use of any technologies other than HTTP cookies for OBA or other purposes covered by the NAI Code. The NAI's review included not just uses of

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<sup>36</sup> During the compliance review period, a member company inadvertently introduced a coding error that caused its ad serving system to disregard some users' pre-existing opt out choices for a period of approximately one week. The coding error affected approximately 400 users. Once the issue was discovered, the company immediately corrected it and reported it to the NAI. Although the company had quality assurance procedures in place, the procedures did not prevent the coding error. The company has agreed to implement improved quality assurance procedures for its opt out systems that are designed to help ensure that similar incidents do not occur in the future.

<sup>37</sup> A member company, in the course of transitioning away from the opt-out cookie historically used by one of its legacy networks (also an NAI member), inadvertently failed to save and recognize opt out choices for that particular network. However, opt out choices continued to be honored if the user had opted out of both the member company's network and the legacy network (such as by opting out of all member companies on the NAI web site). Upon learning of the incident, the company notified the NAI of the event, and informed users of the need to renew their opt out choices, both in its privacy policy and in connection with its opt out tool on the NAI opt out page. The company has further committed to implement policies and procedures to avoid similar occurrences in the future.

Flash or similar LSO technologies,<sup>38</sup> but also any other new technologies that could be used for OBA purposes. All the evaluated member companies confirmed that they do not use Flash cookies for OBA, Ad Delivery & Reporting, or Multi-Site Advertising. However, two member companies reported using browser cache files for the purpose of storing unique identifiers to count users (but not for creating or storing any interest segments for OBA purposes). NAI staff determined that the NAI's LSO policy did not fully address such usage of the browser cache. NAI staff recommended, and the NAI has now adopted, a broadened policy limiting the use of the Web browser cache for OBA or other related purposes.<sup>39</sup>

In addition to ensuring that member companies properly monitor and test the opt out mechanisms they provide, NAI staff also regularly test members' opt out mechanisms offered through the NAI opt out page. NAI staff performs this testing on a weekly basis, or as needed in response to consumer questions. The testing is done from a user's perspective, replicating users' experiences under various conditions. The testing always includes baseline conditions on current versions of several standard web browsers in both Windows and Mac. NAI staff also occasionally tests other conditions, such as with web browsers set to block third party cookies, or with or without opt out cookies already present.

For the 2010 compliance review, NAI staff conducted further testing of the opt out tools provided by all members undergoing review both on the NAI opt out web page and on the members' own sites. Specifically, NAI staff checked members' opt out tools to ensure that an opt-out cookie with at least a five-year lifespan was set,<sup>40</sup> and that

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<sup>38</sup> In January 2010, the NAI adopted a policy that member companies not use Flash cookies and other LSOs for OBA, Ad Delivery & Reporting, and/or Multi-Site Advertising until such time as web browser tools provide the same level of transparency and control available today for standard HTML cookies.

<sup>39</sup> The NAI's revised policy provides that "[a]s with LSOs, the NAI takes the position that the web browser cache does not currently afford users an appropriate degree of transparency and control, and that such browser-based storage technologies should not be used by NAI members for OBA, Multi-site Advertising, or Ad Delivery & Reporting purposes until such time as these technologies allow for the same level of transparency and control as is available today for standard HTTP cookies." See [http://www.networkadvertising.org/managing/faqs.asp#question\\_19](http://www.networkadvertising.org/managing/faqs.asp#question_19).

<sup>40</sup> NAI policy requires a minimum five-year lifespan for opt-out cookies.

opt out status was conveyed in an understandable fashion.<sup>41</sup> NAI staff further recommended that any non-essential cookies be expired.

While NAI staff conducts extensive external testing that replicates users' experience with opt out tools and the opt out cookies visible in their browsers, NAI staff believes that further independent testing could enhance confidence that users' choices are honored. NAI staff accordingly recommends that the NAI evaluate the utility of separate, random external reviews of key components of the NAI Code, including the technical mechanisms supporting consumer-facing opt out choices.

## **2. Opt-In Consent for Use of Sensitive Consumer Information For OBA**

### *Standard*

If member companies wish to use Sensitive Consumer Information for OBA, the NAI Code requires them to obtain consumers' opt in consent for such use. (Code § III.3(a)(iv).) "Sensitive Consumer Information" is defined to include Social Security Numbers and other government-issued identifiers, insurance plan numbers, financial account numbers, precise real-time geographic location derived through GPS-enabled services, and precise information about past, present, or potential future health or medical conditions or treatments. (Code § II.8.)

### *Findings*

For the evaluated members, NAI staff found that financial account numbers, insurance plan numbers, social security numbers or other government-issued identifiers, or precise real-time geographic location information are not being collected or used for OBA purposes. The compliance process demonstrated that evaluated member companies have a uniformly high awareness of the sensitivity of this data, and have protections in place to ensure that it is not collected or used for OBA without the consumer consent mechanisms specified by the Code.

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<sup>41</sup> NAI staff also looked to see whether evaluated companies continued to use any cookies after the opt out cookie was set. Where NAI staff observed such behavior, NAI staff inquired into the purpose of the cookie(s) to ensure that such cookie(s) were not used for OBA purposes.

With respect to sensitive health information, NAI staff found that evaluated companies have procedures in place for evaluating any potential collection or use of health-related information for OBA purposes or the creation of any health-related interest segments. These policies and procedures are designed to delineate non-sensitive, as opposed to potentially sensitive, types of consumer information consistent with the NAI Code.

However, NAI staff's review revealed that one member company had used certain precise health-related categories to determine ad selection, without obtaining opt-in consent. NAI staff informed the company that this practice did not comply with the NAI Code and the company agreed to cease the practice immediately, thereby satisfying the Code's remediation requirements.<sup>42</sup> The company further agreed to adopt procedures designed to ensure that it will not target users on the basis of precise health-related information in the future.

In light of this issue, NAI staff has concluded that a broader policy response should be implemented to help advance appropriate marketplace practices for health-related information. NAI staff believes that that greater transparency for health-related categories used in online behavioral advertising would help promote compliance with the Code's sensitive consumer information requirements and would be an efficient means of normalizing best practices by all participants in the online advertising marketplace. Accordingly, NAI Staff is proposing that its member companies be required to disclose publicly any standard segments used for OBA purposes that are based on health-related information.<sup>43</sup>

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<sup>42</sup> See NAI Compliance Program Consumer Complaint Process, available at [http://networkadvertising.org/managing/NAI\\_COMPLIANCE\\_AND\\_ENFORCEMENT\\_PROGRAM\\_Consumer\\_Complaint\\_detail.pdf](http://networkadvertising.org/managing/NAI_COMPLIANCE_AND_ENFORCEMENT_PROGRAM_Consumer_Complaint_detail.pdf), at 2 ("If a member either fails to respond to staff notice of non-compliance, fails to provide an action plan to redress the defect within 30-business days, or fails to accomplish its action plan within 30-business days from the date of notice by NAI staff, the matter shall be referred to the NAI Board of Directors for review, with a recommendation by staff for sanctions.").

<sup>43</sup> Such a policy would also complement the adoption of specific implementation guidelines with respect to sensitive health information that reflect emerging regulatory guidance.

**D. Use Limitations**

**1. Children**

*Standard*

The NAI Code prohibits the use of non-PII or PII to create OBA segments specifically targeted at children under 13 without verifiable parental consent. (NAI Code § III.4(a).)

*Findings*

None of the evaluated members were found to create segments specifically targeting children under thirteen, and NAI staff's review revealed no compliance deficiency with respect to this provision of the Code. The member companies have processes and procedures in place to ensure that segments specifically targeted at children under thirteen are not created or used.

**2. Marketing Purposes**

*Standard*

Under the NAI Code, members directly engaged in OBA are prohibited from using, or allowing the use of, OBA segments other than for marketing purposes. (NAI Code § III.4(b).) "Marketing Purposes" is defined as "any activity undertaken to collect, aggregate, analyze, maintain, update, or sell information in order to tailor content or services that allows or induces consumers to take action to purchase, rent, or exchange products, property or services, to solicit a charitable donation, to utilize market research or market surveys, or to provide verification services to marketers." (NAI Code § II.9.)

*Findings*

None of the evaluated members were found to use, or allow the use of, OBA segments for any purposes other than marketing as defined by the NAI Code. Member companies report having contractual provisions and other processes in place to limit the use of their data other than for marketing purposes. NAI staff's review revealed no compliance deficiency with respect to this provision of the Code.

### **3. Collection of PII in Absence of Contract**

#### *Standard*

The NAI Code forbids the collection of PII for OBA purposes in the absence of a contractual relationship with the company. (NAI Code § III.4(c).)

#### *Findings*

None of the evaluated members were found to collect PII for OBA purposes from third parties, and NAI staff's review revealed no compliance deficiency with respect to this provision of the Code.

### **4. Changes of Privacy Policy With Regard to PII**

#### *Standard*

The NAI Code provides that if a member changes its own privacy policy with regard to PII and merger with non-PII for OBA purposes, prior notice must be posted on the member's Web site, and any material change shall only apply to changes collected following the change in policy. (NAI Code § III.4(d).) Further, if data is collected under a privacy policy that states that data would never be merged with PII, such data may not be later merged with PII in the absence of an opt in consent from the consumer. (NAI Code § III.4(e).)

#### *Findings*

None of the evaluated members were found to have changed their privacy policies to allow the merger of PII with non-PII, and NAI staff's review revealed no compliance deficiency with respect to this provision of the Code.

## **E. Transfer & Service Restrictions**

### **1. Sharing of PII**

#### *Standard*

NAI members must contractually require any third parties to which they provide PII for OBA or Multi-Site Advertising to adhere to applicable provisions of the NAI Code. (NAI Code § III.5(a).)

*Findings*

None of the evaluated members were found to share PII for OBA or Multi-Site Advertising purposes with third parties, and NAI staff's review revealed no compliance deficiency with respect to this provision of the Code.

**2. Sharing of Non-Aggregate Non-PII**

*Standard*

When members provide non-aggregate non-PII to third parties to be merged with PII possessed by the third parties for OBA or Multi-Site Advertising services, they must contractually require the third parties to adhere to applicable provisions of the Code. (NAI Code § III.5(b).)

*Findings*

None of the evaluated members were found to be sharing non-aggregate non-PII with the intent of the data being merged with PII possessed by third parties. Those members that do share non-aggregate, non-PII OBA data with other companies include provisions in their contracts governing such sharing to ensure that non-aggregate non-PII is protected appropriately and is not merged with PII. NAI staff's review of those contractual provisions and members' internal policies with regard to any such sharing revealed no compliance deficiency with respect to the requirement that members take appropriate measures to ensure that the non-aggregate non-PII that they share with third parties is protected in accordance with the NAI Code.

**F. Access**

*Standard*

Members are required to provide consumers with reasonable access to PII, and other information associated with that PII, retained by the member for OBA or Multi-Site Advertising purposes. (NAI Code § III.6(a).)

*Findings*

None of the evaluated members were found to be using PII for OBA or Multi-Site Advertising purposes. Accordingly, the requirement

of access to PII and associated non-PII data under section III.6(a) was not implicated.<sup>44</sup>

## **G. Reliable Sources**

### *Standard*

Members are required to make reasonable efforts to ensure that they are obtaining data for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting from reliable sources. (NAI Code § III.7(a).)

### *Findings*

Upon review of members' responses to the NAI questionnaire and supporting materials, NAI staff found no compliance deficiency with respect to the requirement that members make reasonable efforts to ensure that the data they obtain for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting come from reliable sources. Most members report obtaining such data from NAI members that are bound by the NAI Code, or from companies that are applying to become NAI members and are bringing their practices into alignment with the NAI Code. Some members reported obtaining data to be used for OBA purposes from entities that are not NAI members. In those instances, the relevant members report having processes in place to ensure that the companies from which they obtain data have appropriate protections to ensure reliability. Members that obtain OBA data from third parties report conducting due diligence on those sources – including the sources' privacy practices and whether the data was obtained with appropriate disclosure and consents – in order to help verify that it is complete, accurate, and obtained with any required consents.

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<sup>44</sup> Some member companies provide users access to the non-PII interest categories associated with their browsers. Current NAI member companies providing such access include Blue Kai, Exelate, Google, Lotame, and Yahoo!. See <http://tags.bluekai.com/registry>; <http://www.exelate.com/home/consumer-preference-manager-opt-out.html>; <http://www.google.com/ads/preferences/>; <http://www.lotame.com/privacy-center/preferences/>; [http://info.yahoo.com/privacy/us/yahoo/opt\\_out/targeting/details.html](http://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/details.html).

## **H. Security**

### *Standard*

Members that collect, transfer, or store data used in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting are required to provide reasonable security for that data. (NAI Code § III.8(a).)

### *Findings*

NAI staff's review revealed no compliance deficiencies with respect to members' obligation to provide reasonable security for data used for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting. NAI staff reviewed member companies' descriptions of their security policies and protections, in order to establish that the member companies had conducted an appropriate evaluation of the technological, administrative, and physical protections for data subject to the NAI Code.<sup>45</sup>

## **I. Data Retention**

### *Standard*

Members engaged in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting are required to retain data collected only as long as necessary to fulfill a legitimate business need, or as required by law. (NAI Code § III.9(a).)

### *Findings*

NAI staff's evaluation of the periods for which members report retaining data for NAI-related purposes found that member companies articulated legitimate business needs for their retention practices. As in 2009, where companies reported longer-than-average retention periods, NAI staff asked members about the reasons for such retention and reminded members of the need to keep pace with evolving best practices, including minimizing the data retained.

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<sup>45</sup> The NAI's review process under the Code did not function as a formal audit of data security, although any such audits undertaken by member companies were considered as part of the review process.

## **J. Applicable Law**

### *Standard*

Members are required to adhere to all applicable laws. Where the requirements of applicable law exceed or are in conflict with the Code, members must abide by applicable law. Where the requirements of the Code exceed those of applicable law, members must conform to the higher standards of the Code (insofar as compliance with the Code is not contrary to applicable law). (NAI Code § III.10.)

### *Findings*

NAI staff's review revealed no evidence of violations of the "applicable law" provision of the NAI Code.

## **K. Consumer Communications**

### *Standard*

NAI members are required to maintain a centralized mechanism linked to the NAI website to receive consumer questions or complaints relating to members' compliance with the Code. (NAI Code § IV.2(a).) NAI members also are required to respond to and make reasonable efforts to resolve questions implicating their compliance with the NAI Code within a reasonable period of time. (NAI Code § IV.2(b).)

### *Findings*

The NAI website contains a form, phone numbers, postal addresses, and email addresses, all of which permit consumers to submit questions or complaints relating to members' compliance with the Code as required by NAI Code § IV.2(a). As detailed in section IV, the NAI fields thousands of consumer inquiries through these mechanisms.

As in 2009, NAI staff tested members' compliance with section IV.2(b) of the NAI Code by reviewing members' sites to ensure that they provide a mechanism for consumers to submit questions or concerns regarding NAI issues. NAI staff then independently tested member companies' responses to consumer questions regarding their opt out procedures. Most of the evaluated member companies responded promptly and with informative responses.

In some instances, however, NAI staff found that evaluated members' responses to these inquiries were insufficiently responsive

or were not sufficiently prompt. NAI staff reminded such members of the need to have a functioning contact mechanism on their websites, and to respond to any questions or concerns related to NAI compliance in a timely manner. After being notified of these issues, all affected members reported having updated their mechanisms for responding to consumer questions to ensure that consumer questions with respect to OBA practices and compliance with the NAI Code are timely and accurately addressed. NAI staff re-tested affected members' consumer communications mechanisms, and received a timely response from each providing information about OBA practices.

#### **IV. Customer Communications**

The NAI receives queries and complaints from consumers through multiple mechanisms: these include a form on the NAI web site, email, postal mail, and telephonic inquiry. The NAI is required to "produce an annual summary of the nature and number of consumer complaints received, the nature and number of complaints that were escalated to membership and the nature and number of matters referred to the Board, specifying the name of companies, if any, that were sanctioned for failure to remedy compliance defects."<sup>46</sup>

In its 2009 Compliance Report, the NAI stated that it would "continue to work to adopt enhancements to the messaging and functionality of the NAI Web site" and that it would "improve its procedures for logging and tracking consumer complaints and to track the performance of its members throughout the year." In 2010, NAI staff adopted improved procedures for tracking and reviewing consumer queries, with an emphasis on identifying technical issues with the opt out page as quickly as possible.<sup>47</sup> To that end, NAI staff continuously monitored all consumer communications to identify possible technical issues with member companies' opt outs or the NAI opt out page, and to take in credible claims of compliance deficiencies on the part of NAI members.

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<sup>46</sup> See NAI Compliance Program Complaint Process, *supra* note 42, at 2.

<sup>47</sup> These improved tracking methods will be further supplemented by the launch of the improved opt out tool on the NAI website in 2011. As noted above, *see supra at 11*, that tool will include enhanced help and error handling features. Logging facilities built into the page will give the NAI new tools to respond quickly to any opt out issues and to improve the functionality of members' opt out tools.

In total, NAI staff fielded 5,832 consumer communications in 2010. Of these, almost 50% either had no discernible topic, or pertained to issues not within the scope of the NAI's mission, such as requests to opt out of email communications or to remove PII from web sites. Of those that were within scope of the NAI's mission, the remaining communications pertained to use of the NAI opt out web page. These communications served to supplement the NAI's own testing of members' opt out tools, and were occasionally helpful in identifying and solving issues with particular members' opt outs. In such cases, NAI staff worked informally with the member company to correct the issue.

No consumer communications presented complaints of noncompliance with the NAI Code that required escalation to individual member companies or to the NAI Board. NAI staff believes that it has resolved all matters raised in consumer communications it received in 2010 that are related to the NAI and are conducive to resolution.

### **V. CONCLUSION**

As in 2009, the NAI's 2010 compliance review process continued to provide comprehensive insight into the behavioral advertising practices, policies, and procedures of its member companies. Throughout the process, the evaluated companies cooperated with NAI staff and provided extensive information and documentation concerning their marketing practices. The review found that the vast majority of evaluated companies met their compliance obligations with respect to all of the substantive requirements of the NAI Code. With respect to the issues identified in 2010, NAI staff is recommending specific policies designed to establish practice requirements that would improve NAI's member compliance and improve marketplace practices generally. These policies, together with NAI members companies' continuing commitment to the NAI Code and compliance process, will continue to advance the NAI's mission of providing transparency of behavioral advertising practices and honoring users' behavioral advertising choices.