



2011

# ANNUAL COMPLIANCE REPORT



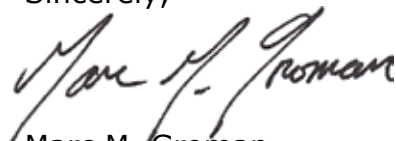
13 February 2012

The Network Advertising Initiative (“NAI”) is a self-regulatory body comprised of leaders in the online advertising industry. I joined the NAI as its Executive Director in December 2011 because I believe that effective self-regulation based upon enforceable standards and ongoing compliance efforts is critical for the success of the dynamic online advertising ecosystem. That is what NAI seeks to provide. Our members are bound by a set of fair information practice principles tailored specifically to today’s rapidly evolving advertising landscape. These flexible principles — NAI’s Self-Regulatory Code of Conduct (“the Code”) — were designed to provide consumers with a transparent and predictable experience consistent with the concepts of notice, choice, use limitations, reliability, access, security, and accountability with respect to online behavioral advertising.

The NAI Code is not just another statement about privacy practices, and we do not permit companies to “sign up” without aligning their policies and practices with the Code’s requirements. Indeed, NAI staff examines a prospective member’s privacy practices, procedures, and policies for consistency with the Code before it is approved for membership. And when companies join the NAI, they agree to submit to annual reviews of their compliance with the Code. This review provides a practical and effective mechanism for not only ensuring Code compliance, but for promoting industry best practices.

The 2011 NAI Compliance Review provided a meaningful assessment of compliance with the Code and demonstrated that member compliance remains high. In 2011, the NAI also demonstrated that it will require prompt corrective measures for non-compliance with the NAI Code and policy. The NAI compliance program illustrates how self-regulatory efforts built around accountability can be an effective compliment to government enforcement. I am proud of our compliance team and of the results of this year’s annual review. I look forward to expanding our compliance program and building on these efforts in the coming year.

Sincerely,



Marc M. Groman  
Executive Director

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## EXECUTIVE SUMMARY

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The Network Advertising Initiative (“NAI”) is a coalition of more than 80 leading online advertising companies committed to complying with self-regulatory standards that establish and reward responsible business and data management practices. The NAI’s Self-Regulatory Code of Conduct (“NAI Code” or “Code”) imposes a host of substantive requirements on member companies’ collection and use of data for online behavioral advertising (“OBA”). The Code requires all companies that have been NAI members for at least one year to undergo an annual review to help assess compliance with the Code. This is the third report published under these procedures.<sup>1</sup> It sets forth NAI staff’s compliance findings for the 60 NAI member companies reviewed in 2011. The 2011 review demonstrated that, on the whole, evaluated member companies fully met their compliance obligations. The review also identified several areas in which the NAI and its members could improve.

Throughout the compliance process, evaluated member companies provided extensive information and otherwise cooperated with NAI staff, resulting in a thorough examination of their OBA-related business practices. The compliance team reviewed members’ responses to a comprehensive questionnaire, independently evaluated member companies’ business practices as described on their websites, privacy policies, and proprietary business materials, and interviewed high-level management and engineering personnel. NAI compliance staff also used independent technical methods to assess members’ compliance, both during the compliance process and throughout the year. Throughout this back-and-forth process, NAI staff not only evaluated members’ compliance with the Code, but continuously educated members about NAI requirements and suggested best practices where appropriate.

In 2011, NAI membership grew rapidly. NAI staff reviewed 60 companies in 2011, up from 34 in 2010 and 23 in 2009. Also during 2011, visits to the NAI website increased at a substantial rate, suggesting heightened consumer awareness of OBA and of the NAI choice mechanism. There were nearly 8.5 million unique visits to the NAI’s website, reflecting a nearly 200% increase over 2010. In addition, there were nearly 6 million unique visits to the NAI’s opt-out page, a 162% increase over the prior year. Of those visitors, 840,000 unique users submitted requests to opt out of OBA by one or more NAI member company. The website’s educational section also showed enormous growth, with more than 2.5 million unique page views last year. This increased attention is due in large part to NAI members, who continued their efforts to educate consumers about OBA by contributing more than 4.1 billion ad impressions to the NAI’s OBA awareness campaign in 2011.

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<sup>1</sup> The 2009 Annual Compliance Report is available at [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), and the 2010 Annual Compliance Report is available at [http://www.networkadvertising.org/pdfs/2010\\_NAI\\_Compliance\\_Report.pdf](http://www.networkadvertising.org/pdfs/2010_NAI_Compliance_Report.pdf).

NAI members in 2011 continued the trend of making their consumer-facing disclosures easier to understand and to use. Most notably, NAI members continued to provide notice to consumers directly in the ads they serve. Many now license and deploy, or support the deployment of, the industry-standard icon developed by the Digital Advertising Alliance ("DAA"). This icon, known as the Advertising Option Icon, provides a standard means of signaling the collection and use of data for OBA, and, when clicked, provides information about who served the ad and how to opt out. The large-scale deployment of the Advertising Option Icon led to a significant rise in traffic to industry opt-out sites, including the NAI's and the DAA's opt out page, [www.aboutads.info](http://www.aboutads.info). In addition to these in-ad notice efforts, NAI members have continued to make their consumer-facing disclosures easier to locate on their websites, using prominent boxes labeled "consumers," "opt out," "privacy," and the like.

In 2011, NAI members also launched efforts to comply with the NAI's new "health transparency policy." This policy was adopted in 2011 on NAI staff's recommendation. It requires members to publicly disclose any standard interest segments used to target users that are related to health even where they do not rise to the level of "precise information about past, present, or potential future health or medical conditions or treatments" for which member companies are required to obtain opt-in consent. NAI staff believes that this policy, once fully implemented and enforced in 2012, will bring increased transparency to the OBA ecosystem and will boost user confidence that sensitive health data is not collected for OBA purposes without their knowledge and consent.

Central to the NAI self-regulatory model is the requirement that all NAI members provide users with a means to opt out of OBA both on their own websites and on the NAI's opt-out page. In 2011, NAI members were required to begin providing their opt-out tools on the DAA's choice page as well. NAI staff found that, overall, evaluated member companies meet these requirements, and that they honor the choices expressed on those sites. NAI staff's testing of members' opt-out tools throughout the year demonstrates that, on the whole, they function as intended.

In 2011, the NAI adopted an "opt out best practices" document to educate members about the importance of ensuring the continuing availability of their opt outs and to provide suggestions for ongoing and systemic testing. This training helped members to improve the reliability and functionality of their opt-out tools. Nevertheless, as in 2010, NAI staff uncovered brief and isolated issues with specific opt-out mechanisms. In each case, member companies immediately resolved the issues. To help prevent similar issues from recurring, NAI staff recommends that the NAI further increase its technical monitoring of member companies. To supplement that testing, NAI staff also recommends that members be required to report on a regular basis any domains they use for OBA purposes. This reporting will aid NAI staff in monitoring the behavior of member companies to help ensure that their opt-out tools operate as intended.

The NAI Code sets up strong disincentives to collect personally identifiable information ("PII") for OBA purposes. In particular, the Code imposes a heightened bar for consent for the use of PII (robust notice for prospective merger of PII and non-PII and opt-in consent for retrospective merger). The Code also imposes restrictions on the collection of PII from third parties and the transfer of PII to third parties. Finally, the Code requires members to provide consumers with access to any PII and related non-PII held by the company for OBA purposes. As in past years, NAI staff found that no member companies

intentionally collect PII for OBA purposes. Moreover, evaluated member companies have strong controls in place to help ensure that PII is not collected for OBA purposes, and that any PII that is inadvertently collected is not stored or used for OBA purposes. Similarly, the few evaluated member companies that do collect PII for non-OBA purposes report having procedures for isolating non-identifiable segments before they are used for OBA purposes.

Likewise, NAI staff found no compliance deficiencies with respect to provisions of the Code that restrict the use of sensitive data for OBA and that prohibit the creation of OBA segments for children under 13 without parental consent. Indeed, NAI staff found that member companies are acutely aware of the sensitivity of health-related data, data related to children, and other sensitive data, and have comprehensive policies in place to prevent the use of such data for OBA purposes. Similarly, no compliance deficiencies were identified under the Code's requirements that member companies take appropriate measures to ensure that the data they acquire for behavioral advertising comes from reliable sources, and that they provide reasonable security for such data.

The NAI Code, similar to the DAA's recently-announced principles for the collection of multi-site data, prohibits members from using, or allowing the use of, OBA segments other than for marketing purposes. NAI staff found no evaluated member company using, or allowing their partners to use, OBA data for purposes other than marketing. To help ensure compliance with this provision, most evaluated member companies that transfer user-level data to third parties explicitly prohibit the use of that data for any purpose other than marketing. NAI staff further found that evaluated member companies take appropriate measures as required by the Code to ensure the integrity of the data they collect, store, and use for online behavioral advertising.

Overall, NAI staff believes that its 2011 compliance process provided useful oversight and continued to spread best practices throughout NAI membership. The review revealed very few potential compliance deficiencies. NAI member companies expressed commitment to, and a desire to learn from, the compliance process. In nearly all cases, evaluated member companies promptly implemented suggested changes in privacy policies and practices for collecting and using data for advertising purposes.

Despite the success of the 2011 compliance review, NAI staff recommends additional steps to strengthen the NAI's compliance process and to make the NAI's website more user friendly. These steps will help the NAI to keep pace with its growing membership and with the increase in visitors to the NAI website. First, as noted above, NAI staff recommends that the NAI increase its technical monitoring of member companies. Second, NAI staff recommends that members be required to report the domains they use for OBA purposes on a regular basis. NAI staff believes that this monitoring and reporting will further strengthen the NAI's mission of promoting transparency and ensuring reliable and effective choice for OBA. In addition, the NAI plans in 2012 to update its website to make it more user-friendly, easier for consumers to opt out, and for users to find relevant information. The NAI also plans in early 2012 to add staff dedicated to compliance to help keep pace with the NAI's growing membership.

## BACKGROUND

The NAI’s self-regulatory model includes: (1) a binding set of rules; (2) procedures for accepting and evaluating credible claims of non-compliance with those rules, whether raised by consumers, advocates, or the press; (3) periodic assessments of compliance; and (4) mechanisms for accountability, including sanctions where appropriate. To assess members’ compliance, NAI staff evaluates members based on their consumer-facing policies and other public representations, as well as their underlying technology infrastructures, business-to-business contracts, and internal practices and procedures.

### **NAI CODE OBLIGATIONS:**

**Transparency/Education**

**Notice**

**Choice**

**Use Limitations**

**Restrictions on Transfer**

**Access**

**Reliable Sources**

**Security**

**Data Retention**

**Accountability**

The NAI’s Self-Regulatory Code of Conduct (“NAI Code” or “Code”)<sup>2</sup> imposes various transparency, notice, and choice obligations on members with respect to the collection and use of data for “Online Behavioral Advertising” (“OBA”),<sup>3</sup> “Multi-Site Advertising,” and “Ad Delivery & Reporting.”<sup>4</sup> The Code imposes strong disincentives to use personally identifiable information (“PII”) for OBA.<sup>5</sup> The Code also imposes limitations on the use and transfer of information to be used for OBA or Multi-Site Advertising, and requires members to protect data used for OBA and to obtain such data from reliable sources. The Code requires member companies to use, or allow the use of, OBA segments only for marketing purposes. Finally, the Code imposes data retention requirements on NAI members and requires them to adhere to applicable law. Membership in the NAI

requires public representations, subject to enforcement by the Federal Trade Commission under Section V of the FTC Act, that a company’s business practices comply with each aspect of the Code that applies to its business model. (Code § IV.1(b).)

<sup>2</sup> See NAI 2008 Principles: The Network Advertising Initiative’s Self Regulatory Code of Conduct, available at <http://networkadvertising.org/principles.pdf>.

<sup>3</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.) OBA is also referred to as “interest-based advertising.”

<sup>4</sup> “Multi-Site Advertising” means “Ad Delivery & Reporting’ across multiple web domains owned or operated by different entities.” (Code § II.2.) “Ad Delivery & Reporting” means “the logging of page views or the collection of other information about a browser for the purpose of delivering ads or providing advertising-related services,” and includes providing an advertisement based on a browser or time of day, statistical reporting, and tracking the number of ads served on a particular day to a particular website. (Code § II.3.)

<sup>5</sup> PII is defined in the NAI Code to include “name, address, telephone number, email address, financial account number, government-issued identifier, and any other data used for or intended to be used to identify, contact or precisely locate a person.” (Code Section II.7.) Data that is not PII as defined in the Code, such as unique cookie identifiers and segment information, is referred to throughout this report as “non-PII.”



Each year, member companies are required to renew their public attestations to comply with the NAI Code and to undergo compliance reviews. The annual review proactively examines companies' OBA business practices and public representations against the requirements of the Code.<sup>6</sup> In addition to helping to ensure compliance, NAI staff uses the review process to educate and remind members of their obligations under the NAI Code and of the sanctions that can result from the failure to honor those obligations. Those sanctions include referral to the NAI Board of Directors, suspension or revocation of NAI membership, publication of revocation by press release, and referral to the FTC or other enforcement bodies.<sup>7</sup> The Code requires the NAI to annually publish the results of this review, as well as a summary of customer complaints and the resolution of those complaints. (Code § IV.1(e).) This document is the third annual report to be published under these procedures.

**NAI Staff reviewed 60 companies in 2011, nearly double the number reviewed in 2010.**

For the 2011 annual compliance review, NAI staff reviewed the 60 companies that were NAI members as of January 1, 2010, and thus eligible for review<sup>8</sup> (nearly double the 34 members reviewed in 2010).<sup>9</sup> The member companies that joined the NAI in January 2011 or later were subject to review as part of the new member process,<sup>10</sup> and must attest to compliance with the NAI Code, but were not assessed in the 2011 annual review process.<sup>11</sup>

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6 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).

7 See *id.*

8 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.*

9 The 60 companies reviewed in 2011 are listed in Appendix A.

10 NAI staff vets companies' business practices and policies before they are admitted to be members of the NAI, but this process is separate from the annual compliance review process.

11 Twenty-four companies, listed in Appendix B, were admitted to the NAI in 2011 and will be subject to an annual compliance review for the first time in 2012. As a result, the NAI expects that more than 80 companies will go through the annual review process in 2012.

## METHODOLOGY

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### ANNUAL REVIEW PROCEDURES

Under NAI compliance procedures, NAI staff reviews the following materials each year to assess members' compliance with the NAI Code:

- Representations of business practices as set forth in the member's public and non-public materials, including the member's (a) public website, (b) privacy policy, (c) terms of service, (d) advertising contracts, and (e) marketing materials;
- Responses to an NAI Questionnaire that addresses each provision of the NAI Code;
- Interviews with senior executives who are authorized to bind the company, as well as with relevant engineering staff; and
- Responses to any alleged deficiencies in compliance raised by the press, other member companies, or the NAI's consumer complaint process.<sup>12</sup>

The NAI's compliance program for 2011, as in previous years, began with a compliance training presentation. Following this training, evaluated member companies were required to engage in a multi-stage written evaluation and interview process. First, evaluated companies 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 and related purposes; education efforts; notice of OBA data collection practices; any means used by the company to identify or track users; technical descriptions of the company's opt-out functionality; processes for data sharing and data acquisition; any use of PII for OBA or related purposes; data retention practices; security procedures; use of sensitive or potentially sensitive data; and mechanisms for responding to consumer complaints.<sup>13</sup>

The NAI compliance team, which includes attorneys with experience in privacy law, corporate compliance, and technology, reviewed these written submissions and supporting documentation. The compliance team also conducted an independent evaluation of member companies' OBA-related business practices. NAI staff's evaluation included reviews of members' websites, privacy policies and other consumer-facing disclosures, 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,

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<sup>12</sup> See NAI Compliance Program Attestation Review Process, *supra* note 6, at section 2.

<sup>13</sup> A detailed description of the topics covered by the written questionnaire is included in Appendix C.

contracts, and terms of service. Finally, the compliance team 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 web browsing intended to determine the behavior of member companies' systems after setting an opt-out cookie.

Following this evaluation, NAI staff interviewed member company representatives, primarily high-level management and engineering staff. The compliance team questioned these representatives about business and policy issues such as the collection and use of data for OBA purposes; policies governing those practices; contractual requirements imposed on business partners concerning notice, choice, and other protections for data collected and used for OBA purposes; and processes for oversight and enforcement of contractual requirements. The compliance team questioned technological representatives about data flows; opt-out functionality; data retention; all technologies used for OBA; and technical measures in place to prevent the use of any PII for OBA purposes. NAI staff used these interviews to assess members' business practices and technology for compliance with the NAI Code. During these interviews, NAI staff also suggested best practice improvements to enhance transparency, choice, and other protections, even where members' practices were consistent with NAI requirements.

After these interviews, NAI staff followed up with all member companies documenting its initial findings and best practice suggestions. Where there were any outstanding questions from the interview process, NAI staff also used further correspondence and calls to ensure that all outstanding issues were addressed and resolved to the satisfaction of NAI staff.

As a final step in the annual compliance review, member companies were required to attest in writing to their ongoing compliance with the NAI Code and the veracity of the information provided in the review process. This certification is intended to supplement members' public attestations, made when becoming members of the NAI, that they comply with the NAI Code.

## ONGOING REVIEW PROCEDURES

In addition to the formal annual compliance review outlined above, NAI staff also evaluates members' compliance with the NAI Code throughout the year. As discussed below, NAI staff regularly monitors the functioning of members' opt-out mechanisms hosted on the NAI opt-out page and on the DAA's opt out site, aboutads.info to ensure that they properly report users' status and set opt-out cookies. In addition, NAI staff conducts automated web crawls to monitor and review the cookies set by members both with opt-out cookies present and without. NAI staff also investigates all public allegations of non-compliance with the NAI Code throughout the year. Such allegations may be raised by consumers, media reports, advocates, or other member companies.<sup>14</sup>

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<sup>14</sup> Although NAI staff investigates all such reports, the NAI only publicly reports its findings where its investigation results in a finding of material non-compliance with the NAI Code.

## NAI COMPLIANCE FINDINGS

This section of the report sets forth NAI staff's findings with respect to evaluated member companies' compliance with each substantive provision of the NAI Code.<sup>15</sup>

### TRANSPARENCY/EDUCATION

#### *Standard*

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

The NAI Code also requires members to individually and collectively educate consumers about OBA and the choices available to them. (Code § III.1(b).)

**In 2011, nearly 8.5 million unique users visited the NAI's website, and nearly 840,000 unique users opted out of OBA.**

#### *Findings*

##### **NAI Website**

The NAI's website hosts educational materials, an explanation of the NAI Code, an opt-out page, and a mechanism for consumers to register complaints against member companies. In 2011, the NAI saw a massive increase in visitors seeking information about OBA and the ability to exercise choice. Traffic to the NAI's web page in 2011 was nearly three times 2010 levels, with nearly 8.5 million unique visitors.

#### GROWTH IN VISITS TO NAI CONSUMER PORTAL

<b>Year</b>	<b>Total User Visits</b>	<b>Percentage Increase over Prior Year</b>	<b>Total Unique User Visits</b>	<b>Percentage Increase over Prior Year</b>
2008	750,784	N/A	644,917	N/A
2009	1,311,273	75%	1,136,994	76%
2010	3,352,441	156%	2,842,377	150%
2011	10,251,764	206%	8,446,665	197%

<sup>15</sup> NAI compliance is a continuing obligation, and the annual compliance review's findings may be supplemented as appropriate.

The opt-out section of the NAI website<sup>16</sup> permits consumers to opt out of OBA by some or all NAI member companies in only three clicks. It explains how consumers may opt out of OBA by one, some, or all NAI members and provides consumers information about which member companies have active OBA cookies on their computers. All NAI members are required to provide their opt-out mechanisms on the NAI opt-out page as a condition of membership.<sup>17</sup>

In 2011, the number of opt-out requests processed on the NAI site nearly doubled over 2010, with more than 800,000 unique opt-out requests processed. This represents a ten-fold increase in opt-out requests processed just four years ago. In addition to the NAI’s opt-out page, consumers can now opt out of targeting by NAI member companies on the DAA choice page, and many NAI member companies and website publishers now refer users to that site instead of, or in addition to, the NAI’s opt-out page. The growth in opt-out requests reflects the increased awareness by consumers of OBA practices and the choices available to them.

**NEAR DOUBLE INCREASE IN NAI CONSUMER OPT-OUT USAGE**

Year	NAI Opt-Out Site Page Views <sup>18</sup>			Opt-Out Results Page Views <sup>19</sup>		
	Total	Unique	Percentage Increase in Unique Visits Over Prior Year	Total	Unique	Percentage Increase in Unique Visits over Prior Year
2007	1,097,996	798,006	N/A	140,661	84,022	N/A
2008	854,842	553,629	-30% <sup>20</sup>	227,758	145,156	73%
2009	1,502,068	1,005,017	82%	482,531	299,647	106%
2010	4,556,489	2,277,065	127%	826,350	472,437	58%
2011	8,672,932	5,982,064	163%	1,443,944	839,098	78%

16 [http://networkadvertising.org/managing/opt\\_out.asp](http://networkadvertising.org/managing/opt_out.asp).

17 In 2011, NAI members were also required to begin providing their opt-outs on the Digital Advertising Alliance (DAA) opt-out page, <http://www.aboutads.info/choices/>. The DAA is a coalition of industry associations, including, in addition to the NAI, 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 DAA Self-Regulatory Principles for Online Behavioral Advertising, available at <http://www.aboutads.info/obaprinciples>. In 2010, the DAA launched a consumer choice page to serve as a cross-industry opt-out page.

18 This column reflects users who have visited the NAI’s opt-out page, [http://www.networkadvertising.org/managing/opt\\_out.asp](http://www.networkadvertising.org/managing/opt_out.asp).

19 This column reflects users who have opted out of one or more companies and, as a result, viewed the results page, [http://www.networkadvertising.org/managing/optout\\_results.asp](http://www.networkadvertising.org/managing/optout_results.asp).

20 The drop in traffic between 2007 and 2008 likely reflects the NAI’s adoption of new analytic tools.

The NAI website last went through a major update in 2005. Because it has been more than six years since that update, and to accommodate the rapidly increasing levels of visitors to the NAI website, the NAI plans in 2012 to revamp its website to make it easier for consumers to find relevant information and to opt out. The redesign will also make it easier for advocates and academics to find information about the NAI, the requirements of the NAI Code, and the NAI's compliance program. Finally, the updates will include improved reporting tools that will supplement and support NAI staff's testing of members' opt-out functionality.

**In 2011, NAI member companies donated more than 4 billion ad impressions to educating consumers about online behavioral advertising and the choices available to them.**

### Consumer Education

In 2011, NAI member companies continued their efforts to educate consumers about OBA and the choices available to them. NAI members can meet the Code educational requirements by contributing advertising impressions to the NAI's consumer education campaign. Indeed, NAI member companies displayed the NAI banner ads more than four billion times in 2011, quadruple the number of impressions donated in 2010.

#### NAI BANNER ADS



The NAI's banner ads link to the NAI's consumer education web page. That page aggregates video, blog content, and articles explaining what OBA is, how it works, and how users can opt out.<sup>21</sup> As a result of members' increased donations of ad impressions in 2011, more than 2.5 million unique users viewed the NAI's education web page, representing a five-fold increase in traffic over the previous year.<sup>22</sup>

<sup>21</sup> [http://networkadvertising.org/managing/learn\\_more.asp](http://networkadvertising.org/managing/learn_more.asp). NAI members and independent sources developed the videos on the NAI's educational page. These materials 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.

<sup>22</sup> During the compliance review, NAI staff encouraged member companies to contribute inventory to the DAA's upcoming advertising campaign, in addition to the NAI's educational campaign. The DAA's advertising campaign has now gone live, and NAI staff will continue to encourage members to donate impressions to it. See <http://www.youradchoices.com/>.

**INCREASE IN VISITS TO NAI CONSUMER EDUCATION PAGE**

<b>Date</b>	<b>Total User Page Views</b>	<b>Percentage Increase over Prior Year</b>	<b>Unique User Page Views</b>	<b>Percentage Increase over Prior Year</b>
6/01/09 - 12/31/09	67,353 (115,462 annualized)	N/A	61,628 (105,648 annualized) <sup>23</sup>	N/A
2010	615,883	433%	521,112	393%
2011	3,130,300	408%	2,614,691	402%

In addition to supporting industry-wide efforts by donating ad impressions, many NAI members continue to undertake individual company efforts to educate consumers about OBA in accordance with section III.1(b) of the Code. For example, many companies have developed creative video and other multimedia content to educate users about OBA and the choices available to them. These videos are designed to reach consumers in a clear and consumer-friendly manner.<sup>24</sup>

**Visits to the NAI educational page were five times higher in 2011 than they were in 2010.**

**NOTICE**

**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):

- the OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting activities undertaken by the member;
- what types of data are collected by the member;
- how such data will be used, including any transfer to a third party;
- the types of PII and non-PII that may be merged;

23 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.

24 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/intl/en/privacy/tools.html> (recently-updated privacy center providing easy-to-understand content and links to privacy tools, including ad preference manager and “keep my opt outs,” and detailed privacy policies); <http://choice.live.com/> (consumer education site, linked to from an icon served next to ads, with new video content explaining personalized advertising).

- an easy-to-use procedure for exercising opt-in or opt-out choice with respect to OBA data use; and
- 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 expressly allows members the flexibility to pursue any disclosure approach so long as it is clear and conspicuous. This approach reflects FTC guidance encouraging such experimentation.<sup>25</sup> There has been significant discussion in recent years about the optimal approach to informing users about the collection and use of information for OBA. Website privacy policies have historically provided NAI members a scalable and consistent means of achieving notice across thousands of websites of varying size and complexity.

**NAI Member companies increasingly provide notice to consumers directly in the ads they serve using the DAA's Advertising Option icon:**



In addition to notice in privacy policies, NAI members are now providing notice with the ads they serve through the DAA's standard "Advertising Options Icon" ("the icon") in an effort to bring greater visibility to their notices. Clicking on the icon brings consumers to an interstitial landing page. That page discloses the companies involved in selecting the ad and most often includes links to websites that explain how those companies collect, use, and protect data collected for OBA purposes. Although in-ad notice is not yet a requirement under the NAI Code, as of the writing of this report, at least 53 NAI member companies

use, or support the use of, the icon.<sup>26</sup> The large-scale deployment of the Advertising Option Icon by NAI members and others led to a significant rise in traffic to the NAI's opt-out site documented above, and to the DAA's opt out page, aboutads.info.

NAI staff found that all evaluated members include notices on their websites that adequately describe their data collection, transfer, and use practices. In 2011, NAI member companies continued to work to make their consumer-facing disclosures easy to find and easy to comprehend. On their own websites, many members use prominent tabs and buttons labeled "consumer information," "privacy," and "opt out."<sup>27</sup> Clicking on such tabs brings users to pages that summarize member companies' collection and use of data for OBA purposes, and provide prominent links to opt-out mechanisms. Although member companies continue to make strides in increasing the visibility and comprehensibility of their OBA notices and choice mechanisms, NAI staff used the compliance review to suggest further best practices improvements to members' consumer-facing disclosures.

25 FTC Staff Report: *Self-Regulatory Principles for Online Behavioral Advertising*, at 36-37, available at <http://www2.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

26 NAI member companies that do not themselves display ads generally have no ability to display the icon. Some member companies can nevertheless support the use of the icon in various ways, such as by configuring their systems so as to permit others to display the icon on ads that are informed by OBA data but served by other parties.

27 Examples of prominent consumer-facing disclosures are listed in Appendix D.



In its 2011 compliance review, NAI staff also assessed member companies' progress in bringing their consumer-facing disclosures into compliance with the NAI's new health transparency policy, adopted in early 2011 at the suggestion of NAI staff.<sup>28</sup> The health transparency policy requires member companies to disclose *any* "standard interest segments" that are based on health-related information. The policy adds a new requirement to disclose all health-related interest segments, even if they do not rise to the level of "precise information about past, present, or potential future health or medical conditions or treatments" for which member companies are required to obtain opt-in consent under the NAI Code.<sup>29</sup> This policy recognizes that even when opt-in consent is not required under the Code, information inferred about interest in health-related topics used for OBA nevertheless may factor into an individual's decision about

**NAI member companies are bringing their consumer-facing disclosures into compliance with the NAI's new health transparency policy.**

whether to opt out of targeting by a particular member company. Thus, for example, member companies may have interest segments associated with general health categories such as headaches, allergies, or diet and fitness that would not require opt-in consent under the NAI Code, but would require disclosure under the transparency policy.

The health transparency policy, as it continues to roll out and be enforced in 2012, will serve important NAI policy goals. First, it will promote compliance with Code requirements by helping to ensure that member companies do not target users on the basis of precise health-related information without obtaining opt-

in consent. Second, it will enhance user confidence that sensitive health-related information is not collected and used without their knowledge and consent. Third, the policy will help consumers to make more educated decisions about whether to opt out of the collection of data for OBA purposes by particular member companies, as the ad preference managers deployed by some member companies have already done.<sup>30</sup>

During the 2011 compliance review, NAI staff reminded member companies of the new policy and ensured that those companies that have "standard interest segments" related to health either already disclose those segments, or are on a commercially reasonable timeline to do so. Many companies are already in compliance with the policy, displaying categories such as "healthy living," "fitness and exercise," "cold and flu," "allergies," "headaches," "vision," "heartburn," and "alternative medicine."

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28 In its 2010 Annual Compliance Report, NAI staff recommended that member companies be required to disclose publicly any standard segments used for OBA purposes that are based on health-related information. See 2010 Annual Compliance Report, *supra* note 1, at 23. In 2011, the NAI Board of Directors agreed with NAI staff's suggestion and adopted the policy.

29 Thus, for example, if an NAI member company were to seek to market users on the basis of sensitive health conditions such as cancer or sexually transmitted diseases, the company would need to clearly explain that intent and to obtain opt-in consent for that use. A health transparency disclosure would not suffice for the collection and use of such data.

30 See, e.g. <http://33across.com/preferences.php> (33Across); <http://advertising.aol.com/advisability> (AOL); <http://tags.bluekai.com/registry> (Bluekai); <http://exelate.com/consumer-opt-out/> (Exelate); <http://www.google.com/ads/preferences/> (Google); <http://www.lotame.com/preference-manager> (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).

## Notice on Partner Websites

### *Standard*

In addition to providing notice and choice on their own websites, NAI members must require websites where they collect data for OBA or Multi-Site Advertising to 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:

- a statement of fact that OBA and/or Multi-Site Advertising is occurring;
- a description of the types of data that are collected for OBA or Multi-Site Advertising purposes;
- an explanation of how and for what purposes that data will be used or transferred to third parties; and
- 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*

In its first annual report in 2009, NAI staff found insufficient levels of the notice required by the NAI Code present on popular websites where OBA appeared to be occurring. As a result, in 2010, the NAI convened a working group that developed a publisher notice implementation guide which helped member companies to explain to their partners what the NAI is, why notice is important, and why NAI member companies impose contractual notice requirements on their website partners. NAI staff conducted training on the notice requirements and asked member companies to do more to ensure that notice and choice are present on sites where they engage in OBA. These efforts complimented the significant work of the Digital Advertising Alliance, who adopted principles that for the first time required website publishers to provide notice of OBA-related data collection occurring on their sites, independent of any contractual requirement to post notice imposed by an NAI member company.<sup>31</sup>

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<sup>31</sup> Section II.B of the DAA Principles, which governs website publishers as well as the third-party entities represented by NAI membership, requires that when data is collected from or used on a website for OBA purposes, the operator of the website 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 Self-Regulatory Principles for Online Behavioral Advertising, *supra* note 17.

NAI staff's analysis of popular websites suggests that these efforts have resulted in significant improvements. The level of notice concerning OBA data collection and links to choice mechanisms present in "about our ads" or similar footer links and privacy policies on the most popular websites has improved dramatically since 2009.

The 2011 compliance review further demonstrated compliance with the NAI Code's partner notice requirements. Evaluated member companies submitted provisions from their OBA contracts requiring advertising partners to display notice and choice.<sup>32</sup> Members verified that these provisions are included in their standard operating contracts with partner sites. Member companies also described, and provided documentation for, their programs for monitoring and enforcing their partners' contractual notice obligations. Such programs include initial vetting of partners to ensure that they

**NAI staff found that the level of notice and choice for online behavioral advertising on popular websites has increased dramatically since 2009.**

provide notice and choice, routine checks of a selection of partner websites for the presence of notice and choice, and standard correspondence to remind partners of their notice obligations and to terminate a relationship if the partner refuses to post notice and choice.

In addition to efforts to require partners to post notice in their privacy policies, NAI member companies have also continued to provide notice directly on the sites where they collect and use data for OBA in the ads they serve. As described in the 2009 and 2010 Compliance Reports, NAI member companies, including Criteo, Fetchback, Google, Microsoft, and Yahoo! were early adopters of in-ad

notice, deploying icons in the ads they served that, when clicked, provided information about who served the ad, and how to opt out.<sup>33</sup> The DAA significantly advanced these efforts to provide clear and consistent messaging to users across the web in 2010, when it developed and adopted the Advertising Option Icon (shown on page 13, above) as a standard industry icon. Throughout 2011, NAI members licensed the DAA's icon and began to deploy it on the ads they served. Today, evaluated NAI member companies overwhelmingly either use, or support the use of, the icon and are increasingly including it in targeted ads.

## CHOICE

### *Standard*

NAI members are required to provide and honor an opt-out mechanism for the use of non-PII for OBA purposes. (Code § III.3(a)(i).)<sup>34</sup> This opt-out mechanism must be

<sup>32</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 notice and choice requirements to their form contracts even where notice and choice is not strictly required by the NAI Code.

<sup>33</sup> See 2009 Annual Compliance Report, *supra* note 1, at 22; 2010 Annual Compliance Report, *supra* note 1, at 14-15.

<sup>34</sup> The NAI Code contemplates differing levels of consent for PII and for non-PII. See footnote 4, *supra*. 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

available both on the member’s website and on the NAI consumer website. (*Id.*) If a member company were to use Sensitive Consumer Information for OBA, the NAI Code would require obtaining 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

### Provision of Opt-Out Mechanisms

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 website. In addition, all evaluated member companies provide opt-out mechanisms on their own websites. Accordingly, each evaluated member company was found to meet its Code obligation to provide an opt-out mechanism on the NAI opt-out site and on its own website. As with notice, member companies have made their 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. Nevertheless, NAI staff used the compliance review to encourage members to make their opt-out mechanisms increasingly prominent and user-friendly.<sup>35</sup>

NAI staff regularly tests members’ opt-out mechanisms offered through the NAI opt-out page and through aboutads.info to ensure that members’ opt-out tools are reliably available. NAI staff vastly increased this testing in 2011, testing both pages multiple times per day, and as needed in response to consumer questions. NAI staff performs this testing from a user’s perspective, in an attempt to replicate the various conditions under which users may visit the opt-out pages and attempt to opt out.

**NAI staff vastly increased its testing of members’ opt-out mechanisms in 2011.**

For the 2011 annual compliance review, NAI staff conducted further testing of evaluated members’ opt outs on the NAI opt-out page and on the members’ own sites.

Specifically, NAI staff checked members’ opt-out tools to ensure that they set an opt-out cookie with at least a five-year lifespan,<sup>36</sup> and that users’ status was conveyed in an understandable fashion. In addition, NAI staff asked members to describe their internal

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non-PII for OBA purposes (retrospective merger) requires opt-in consent. (Code § III.3(a)(iii).) As explained below, *infra* page 21–22, 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 2011. This report accordingly addresses evaluated member companies’ procedures for offering and honoring opt-out requests for the use of non-PII only.

35 In addition, all evaluated members have made their opt outs available on the cross-industry opt-out page, [www.aboutads.info](http://www.aboutads.info).

36 NAI policy requires a minimum five-year lifespan for opt-out cookies. See [http://www.networkadvertising.org/managing/faqs.asp#question\\_11](http://www.networkadvertising.org/managing/faqs.asp#question_11). In some cases, NAI staff found opt-out cookies that failed to account for leap years, and thus were one or two days short of the five-year lifespan required by NAI policy. Where technically feasible, affected members updated their opt-out cookies to last the full five years required by the NAI.

processes for testing their opt-out mechanisms, and whether there had been any failures in opt-out functionality.

NAI staff found, on the whole, that evaluated member companies reliably provide opt-out mechanisms and have good processes in place to support those mechanisms. NAI staff recognizes that no technical system is perfect, but nevertheless believes that members' opt-out systems should have at least the same level of reliability as the systems members use to collect data and serve ads. In its 2010 annual compliance

**In 2011, NAI staff developed and trained members on an "Opt Out Best Practices" document that provides tips for maximizing the reliability of opt-out systems.**

report, NAI staff noted that while members generally have effective processes in place for ensuring the ongoing availability of their opt-out systems, those tools occasionally malfunctioned, particularly as a result of back-end configuration changes.<sup>37</sup> In response to these findings, in 2011, NAI staff drafted an "opt out best practices document" that contains tips for ensuring maximum reliability and functionality of opt-out tools. NAI staff provided this document to all members and conducted training on its recommendations.

As a result of increased testing and follow-up by NAI staff and members' adoption of the recommendations set forth in the opt-out best practices document, NAI staff has

observed an increase in the reliability of members' opt-out cookies. In an effort to help ensure that members' opt outs are even more reliable going forward, NAI staff plans to increase and formalize its testing in 2012. NAI staff will also continue to propagate the opt out best practices document to member companies.

## Honoring Opt-Out Choices

### NAI Testing

The NAI Code requires member companies not only to provide, but also to *honor* users' opt-out choices. To this end, NAI staff regularly conducts automated and manual testing designed to ensure that opt-out choices are honored. This testing is designed to observe the collection and use of data, if any, with opt-out cookies present. NAI staff looks for evidence that unique user data is collected or that targeted ads are served by a company despite the presence of its opt-out cookie. NAI staff also seeks to ensure that opt-out cookies do not inadvertently expire during browsing sessions.<sup>38</sup>

During the annual compliance review, NAI staff did further testing of each company's opt-out functionality to help ensure that data collection for OBA ceased once an opt-out cookie was set. In particular, NAI staff tested each company's opt out to see if any cookies other than the opt-out cookie remained in the browser following an opt out, and if any new cookies were set when an opt-out cookie was present. In some cases,

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<sup>37</sup> See 2010 Annual Compliance Report, *supra* note 1, at 19-20.

<sup>38</sup> In particular, NAI staff conducts automated web crawls of approximately 150 popular websites in order to observe cookies being set by member companies. NAI staff then opts out of member companies and ensures that opt-out cookies are set. NAI staff repeats these web crawls to monitor cookie behavior with opt-out cookies present. Additionally, NAI staff regularly performs manual testing by setting opt-out cookies and then web browsing, looking for evidence of interest-based or retargeted ads despite the presence of an opt-out cookie.

cookies with what appeared to be unique identifiers survived a user’s opt-out request. In other cases, new cookies with unique identifiers were set following an opt out. In every such case, NAI staff asked member company representatives to explain the purpose of those cookies to ensure that they were not used for OBA purposes. NAI staff also sought to ensure that the cookies were necessary for a legitimate non-OBA purpose, such as counting unique users, frequency capping, or attribution. NAI staff recommended expiring all non-session cookies with unique identifiers following an opt out where possible.

NAI staff’s regular testing and compliance review demonstrated that, overall, members’ opt-out mechanisms are reliable and work as intended. However, as in previous years, NAI staff uncovered isolated issues with opt outs.<sup>39</sup> Although each of these issues affected few users and was resolved quickly, NAI staff believes that more should be done to help ensure the constant and uninterrupted provision and honoring of opt-out choices. As noted above, NAI staff has already developed training materials concerning the importance of rigorous testing and quality assurance (“QA”) of opt-out systems. This training, NAI staff believes, will help member companies to catch glitches before they affect users. However, as described below, NAI staff believes that the NAI should also adopt additional programmatic responses to help prevent any opt-out malfunctions from occurring and to detect and correct any malfunctions that do occur as soon as possible.

### Use of Non-Cookie Technologies

NAI policy prohibits the use of locally-stored objects (“LSOs”) like Flash cookies as well as browser cache for OBA, and for related purposes, including Ad Delivery & Reporting, and Multi-Site Advertising.<sup>40</sup> To help ensure compliance with this policy, NAI staff required every evaluated member company to identify and explain the use of any technology other than standard http cookies (including Flash cookies, cache files, e-tags, or history sniffing) for OBA, Ad Delivery and Reporting, or Multi-Site Advertising purposes. All evaluated member companies affirmed that they do not use any technology other than standard http cookies for those purposes.<sup>41</sup>

**All evaluated member companies affirmed that they do not use technologies other than standard http cookies for OBA.**

However, before the NAI initiated its annual compliance review, one instance of non-compliance with NAI Code and policy was brought to the attention of NAI staff through researchers at Stanford’s Center for Internet and Society. Those allegations concerned the use of a history-sniffing script by Epic Marketplace (“Epic”). Within 24 hours of publication of the researchers’ findings, the NAI initiated a review, in which Epic fully cooperated. That investigation

39 First, NAI staff uncovered three instances of member companies inadvertently beginning to conduct OBA on new domains before updating their opt-out mechanisms to cover those domains. In each case, NAI staff became aware of the issue shortly after it occurred, and promptly required the affected company to update its opt out and to disclose to users the need to renew their opt-out choices. Second, NAI staff discovered three instances in which opt-out cookies were accidentally deleted during unique browsing patterns as a result of bugs in the members’ systems. These bugs allowed targeting cookies to be set and used for OBA, though the NAI opt out site and aboutads.info both correctly reflected that the user was no longer opted out.

40 [http://www.networkadvertising.org/managing/faqs.asp#question\\_19](http://www.networkadvertising.org/managing/faqs.asp#question_19).

41 As an additional layer of compliance, NAI staff also regularly checks Flash storage for evidence of LSO use by members or their partners.

ultimately confirmed Epic's use of a history-sniffing script, and also uncovered additional facts. The NAI published the results of its review in October, and summarizes its findings again here.<sup>42</sup>

The NAI found that Epic, through a legacy advertising system acquired from Traffic Marketplace, deployed a history-sniffing script over at least a two-year period prior to July, 2011. On browsers that allowed it, the script used browsing history to assign interest segments for advertising targeting, and also to verify the quality of data provided by third-party data providers. The review found that where users had opted out of OBA by the company, data gathered through the history-sniffing script was not stored or used. However, the company did not adequately disclose its use of the script to consumers, or to the NAI in the course of its annual compliance reviews. The NAI ultimately concluded that "Epic Marketplace's use of a history-sniffing script, and failure to fully disclose this practice to consumers and during its compliance reviews, was inconsistent with the NAI Code and NAI policy."<sup>43</sup> As a result, the NAI is requiring Epic to undergo annual audits performed by an independent third party to help ensure that the technologies it uses for advertising purposes provide users an appropriate degree of transparency and control under the NAI Code; that history sniffing is not occurring and that no history sniffing data is being collected, stored, or used by Epic's systems; and that Epic otherwise is continuing to comply with NAI requirements.

**NAI staff recommends that the NAI adopt additional measures for ensuring that opt out choices are consistently and reliably honored.**

#### **NAI Staff Recommendations for the Provision of Opt-Out Mechanisms and Honoring User Choice**

In light of the isolated opt-out issues described above as well as the Epic matter, NAI staff believes that the NAI should adopt additional programmatic measures to help ensure that user choice is reliably and fully honored. First, NAI staff recommends that the NAI increase its technical monitoring of member companies in 2012. For example, NAI staff believes the NAI could use newly developed tools (similar to those employed by the Stanford researchers) to strengthen the NAI's compliance review process. NAI staff continues to evaluate new options for its technical monitoring toolbox, including technologies developed by independent researchers and other providers in the self-regulatory space. NAI staff believes that enhanced technical monitoring, combined with the annual review processes, will help ensure that users are provided transparency and meaningful choice in a manner consistent with the NAI Code.

NAI staff also recommends that all NAI members be required to report the domains they use for OBA purposes on a regular basis. This will help ensure that NAI staff is aware of all domains used by member companies for OBA and that member companies' opt outs are effective on every such domain. This registry, in conjunction with increased technical monitoring by the NAI, will help ensure that users' choices are consistently and reliably honored.

<sup>42</sup> See <http://naiblog.org/2011/10/an-update-on-nai-compliance/>.

<sup>43</sup> In response to the NAI's review, Epic ceased its use of the script, deleted all data obtained using the script, and acknowledged that its conduct did not meet self-regulatory standards.

## Opt-In Consent for Sensitive Consumer Data

NAI staff found no evaluated members using or seeking to use sensitive consumer data as defined by the NAI Code 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. Accordingly, no NAI member company is currently seeking to obtain opt-in consent to use sensitive consumer information for OBA. As explained above,<sup>44</sup> some member companies do target users on the basis of general interest in health-related subjects, such as “cold and allergies.” Such segments do not require opt-in consent under the NAI Code, but do require disclosure under the NAI’s new health transparency policy.

## PERSONALLY IDENTIFIABLE INFORMATION (PII)

### *Standard*

The NAI Code imposes a host of restrictions designed to ensure that PII is not used for OBA purposes, and that non-PII is not merged with PII for OBA purposes.<sup>45</sup> First, the NAI Code imposes heightened notice requirements for the use of PII: merger of non-PII with PII going forward (prospective merger) requires robust notice and an opt-out mechanism. (Code § III.3(a)(ii)), and merger of PII with previously-collected non-PII for OBA purposes (retrospective merger) requires opt-in consent (Code § III.3(a)(iii)). Second, the Code forbids member companies from collecting PII for OBA purposes in the absence of a contractual relationship with the company. (NAI Code § III.4(c).) Third, 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 website, and any material change shall only apply to data 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 opt-in consent from the consumer. (NAI Code § III.4(e).) Fourth, 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).) Fifth, 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).)

**NAI staff found no evaluated members using or seeking to use PII for OBA purposes.**

### *Findings*

The NAI Code establishes strong disincentives to collecting PII or allowing non-PII to be merged with PII for OBA purposes. As a result, no evaluated member company intentionally collects PII for OBA purposes. NAI members, moreover, set up robust mechanisms for ensuring that they do not collect PII for OBA purposes. First, evaluated member companies contractually forbid data providers and other parties from passing PII to them. Second, NAI members design

<sup>44</sup> See *supra* page 14.

<sup>45</sup> For definitions, see footnote 5.



their systems to ensure that any PII that is inadvertently collected “falls on the floor” and is not stored or used for OBA purposes.

Because no evaluated member company intentionally collects PII and all evaluated member companies have controls in place to prevent the collection and storage of PII for OBA purposes, no evaluated member company currently seeks to obtain opt-in consent to use PII for OBA or is required to provide access to PII and related OBA data. NAI staff’s review revealed no compliance deficiency with respect to any provisions of the Code related to PII.

## USE LIMITATIONS

### 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*

The NAI Code goes beyond the requirements of the existing COPPA Rule to require verifiable parental consent for the use of non-PII, such as unique identifiers stored in cookies, used to create segments targeted at children under 13. None of the evaluated members were found to create segments targeting children under thirteen, and NAI staff’s review accordingly revealed no compliance deficiency with respect to this provision of the Code. Evaluated member companies are aware of the sensitivity of data related to children, and have processes and procedures in place to ensure that segments specifically targeted at children under thirteen are not created or used.

### 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*

Like the DAA’s recently-announced “Self-Regulatory Principles for Multi-Site Data,”<sup>46</sup> the NAI Code has since 2008 forbidden member companies from using, or allowing the use of, data collected for OBA for purposes such as employment, credit, and insurance

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46 See Digital Advertising Alliance, Self-Regulatory Principles for Multi-Site Data, section II, available at <http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf>.

eligibility. None of the evaluated members were found to use, or allow the use of, OBA data 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 to marketing-related purposes only. NAI staff’s review revealed no compliance deficiency with respect to this provision of the Code.

## TRANSFER 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).)

**The NAI Code forbids member companies from using, or allowing the use of, OBA segments for purposes such as employment, credit, and insurance eligibility.**

### *Findings*

This provision of the Code governs data that is not PII, and is not aggregated before being shared with another party, and thus is user-level non-PII. No evaluated members were found to share user-level non-PII with the intent of it being merged with PII. Most member companies do not share user-level data with anyone other than service providers. Those companies that do share user-level data with third parties generally contractually forbid receiving parties from merging the data with PII.<sup>47</sup>

NAI staff’s review of those contractual provisions and members’ internal policies with respect to the sharing of user-level non-PII demonstrate that members seek to ensure that such data is not merged with PII and is protected in accordance with the NAI Code.

## OBTAINING DATA FROM 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

<sup>47</sup> Most member companies involved in sharing or selling user-level non-PII data also contractually require the receiving party to use the data only for marketing purposes, forbid the receiving party from further transferring the data, and require the receiving party to provide adequate protection for the data. Though not strictly required by the Code, NAI staff believes these measures help ensure compliance with the Code, and are consistent with the FTC’s Privacy-By-Design recommendations and the Department of Commerce’s proposed Fair Information Practices Principles.

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 obtain such data only from other NAI members that are bound by the NAI Code, from companies that are applying to become NAI members and are bringing their practices into alignment with the NAI Code, and from companies that are part of the DAA's self-regulatory program. Some members report obtaining OBA data from entities that are not NAI or DAA members. Those members report conducting due diligence on those sources – including review of the sources' privacy practices and whether the data was obtained with appropriate disclosure and consent – in order to help verify that it is complete, accurate, and obtained with any required consent.

## 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>48</sup>

## 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 previous years, where companies reported longer-than-average retention periods or set targeting cookies with long lifespans, 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. In the vast majority of such cases, the member companies agreed to shorten their cookie lifespans or other data retention periods. NAI staff also found isolated instances

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<sup>48</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.

of unclear and potentially inaccurate retention statements. In those cases, NAI staff advised the companies to clarify their written disclosures or to change their practices to fully match their disclosures, and the member companies agreed to make those changes.

**NAI staff found that evaluated NAI member companies take appropriate measures under the Code to protect OBA data.**

## 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).) 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>49</sup>

### *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). In addition, NAI staff ensured that all evaluated member companies also provide mechanisms for consumer complaints or questions on their own websites.

The NAI fields thousands of consumer inquiries each year. The vast majority of these communications have no discernible topic or pertain to issues not within the scope of the NAI's mission. Of those that do pertain to the NAI's mission, most concern consumers requesting assistance in opting out. NAI staff regularly assists consumers with those questions and concerns.

NAI staff continuously monitor all consumer communications for the purpose of identifying possible technical issues with member companies' opt outs or the NAI opt-out page, and to evaluate credible claims of compliance deficiencies on the part of NAI members. Consumer communications accordingly serve to supplement the NAI's own testing of members' opt-out tools. In 2011, the NAI received a total of seven complaints, relating to two issues of potential material non-compliance with the NAI Code. In both cases, NAI staff followed up with the affected member companies, who promptly addressed the issues. No consumer communications presented complaints of noncompliance with the NAI Code that required formal escalation to individual member companies or to the NAI Board.<sup>50</sup> NAI staff believes that all complaints raised by consumers in 2011 that are conducive to resolution have now been resolved.

<sup>49</sup> See NAI Compliance Program Complaint Process, at 2, available at [http://networkadvertising.org/nai\\_cr\\_consumer\\_complaint\\_detail.pdf](http://networkadvertising.org/nai_cr_consumer_complaint_detail.pdf).

<sup>50</sup> The Epic matter was referred to the NAI Board and resulted in sanctions, as discussed above. That matter was brought to the attention of the NAI through a CIS blog post, not a consumer communication.

## CONCLUSION

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NAI staff believes that evaluated member companies are, on the whole, highly committed to the NAI's self-regulatory framework. Representatives of the evaluated members expressed commitment to, and a desire to learn from, the compliance process, and were anxious for further guidance from the NAI on how to best align their business practices with the NAI Code. With very few exceptions, evaluated member companies promptly implemented suggested changes in practice.

NAI staff looks forward to continuing to work with member companies in 2012 to further develop best practices for the collection and use of data for OBA. NAI staff believes that adoption of the recommendations set forth in this report with respect to technical monitoring and required reporting of domains used for OBA will further strengthen the NAI's compliance process and self-regulation as a whole in 2012. To supplement this increased monitoring and to ensure that the NAI can continue to do effective compliance despite its growing membership, the NAI plans to augment its compliance resources in 2012. More than 80 companies will be eligible for the annual compliance review in 2012, an increase of more than one-third over the number of companies reviewed in 2011. By increasing the number of staff dedicated to compliance and adopting monitoring resources, the NAI will continue to provide effective self-regulation of OBA.

## APPENDIX A

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### MEMBER COMPANIES REVIEWED IN 2011:

[x + 1]	Glam Media
24/7 Real Media	Google
33 Across	iBehavior
Adara Media	interCLICK
Adbrite	Invite Media
Adchemy	Lotame
Adconion	Media6Degrees
Cox Digital Solutions (formerly Adify)	Media Math
Admeld	Microsoft Advertising (including Atlas Solutions)
Aggregate Knowledge	Mindset Media
Akamai	Netmining
AOL Advertising	Owner IQ
AudienceScience	Red Aril
Batanga	Rich Relevance
Bizo	Rocket Fuel
BlueKai	Specific Media
Brilig	Traffic Marketplace
Burst Media	Targus
Buysight (formerly Permuto)	Tribal Fusion
Casale	Tumri
Collective Media	Turn
Criteo	Undertone Networks
Datalogix (formerly Nextaction)	Valueclick (including Mediaplex)
Data Xu	Vibrant Media
Datonics (formerly AlmondNet)	Videology (formerly Tidal TV)
Dotomi	Wall Street on Demand (now Markit)
Dedicated Networks	Xgraph
Exelate	Yahoo! (including Dapper)
Fetchback	Yume
Fox Audience Network (now part of Rubicon Project)	

\* Quantcast, which was reviewed in 2010, has withdrawn from membership in the NAI and thus was not included in the 2011 review. See <http://www.quantcast.com/learning-center/faqs/faq/#what>

## APPENDIX B

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### MEMBER COMPANIES ADMITTED TO THE NAI IN 2011:

Adap.tv	Legolas Media
AdBlade	Magnetic
AddThis (Clearspring)	Maxpoint Interactive
Aperture (Datran Media/Pulsepoint)	MediaMind
AppNexus	The Media Innovation Group (MIG)
Brightroll	Mixpo
Chango	Pulse 360
Channel Intelligence	RadiumOne
Cognitive Match	The Rubicon Project
Crosspixel Media	ShareThis
Eyewonder	SteelHouse
EZTarget Media	TruEffect
IDG Tech Network	

## APPENDIX C

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### TOPICS COVERED IN 2011 WRITTEN COMPLIANCE QUESTIONNAIRE

- 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;
- Description of efforts to educate consumers about OBA practices and the choices available to them undertaken in 2011;
- A list of all URLs controlled by the company where the company provides notice of its data collection and use practices;
- Representative provisions of contracts with website publishers and other partners 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 through contract enforcement or otherwise;
- 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;
- The duration of all opt-out cookies set by the company;
- A description of all cookies that the company continues to set following an opt out, the purpose of such cookies, and the nature of the data collected by such cookies;
- Whether the member uses any means other than standard http cookies to identify or track users;
- Whether the company encountered any material opt-out failures in the previous year;
- Contracts, processes, and controls governing any sharing of data used for OBA or Multi-Site Advertising;
- Contracts, processes, and controls governing any acquisition of data used for OBA or Multi-Site Advertising from third parties;
- 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 consumer information as defined by the NAI Code for OBA or Multi-Site Advertising, and what policies and processes exist to obtain opt-in consent and otherwise govern any such use;
- Whether the company uses any health-related interest segments for OBA, regardless of whether they are considered sensitive under the NAI Code;



- 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;
- 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.

## APPENDIX D

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### PRIVACY “CENTERS”

<http://33across.com/preferences.php>  
<http://privacy.aol.com/>  
<http://www.google.com/intl/en/privacy/>  
<http://www.lotame.com/privacy>  
<http://privacy.microsoft.com/en-us/default.mspx>  
<http://info.yahoo.com/privacy/us/yahoo/details.html>

### SITES WITH PROMINENT “PRIVACY” LINKS IN HEADERS

<http://www.xplusone.com/>  
<http://www.aggregateknowledge.com/>  
<http://www.adaramedia.com/>  
<http://www.adconion.com/us/index.html>  
<http://www.admeld.com/>  
<http://www.casalemedia.com/>  
<http://datalogix.com/>  
<http://media6degrees.com/>  
<http://www.redaril.com/>  
<http://www.turn.com/>  
<http://www.undertone.com/>  
<http://www.xgraph.com/>

### SITES WITH STAND-ALONE OPT-OUT BUTTONS

<http://www.247realmedia.com>  
<http://33across.com/>  
<http://www.brilig.com/>  
[www.burstmedia.com](http://www.burstmedia.com)  
<http://www.buysight.com/>

<http://datonics.com/>  
[www.fetchback.com](http://www.fetchback.com)  
<http://www.interclick.com/>  
<http://www.invitemedia.com/>  
<http://media6degrees.com/>  
<http://www.mindset-media.com>  
<http://www.netmining.com/>  
<http://www.owneriq.com/>  
<http://www.richrelevance.com/>  
<http://www.undertone.com/>  
<http://www.videologygroup.com/>  
<http://www.xgraph.com/>

### “CONSUMER” TABS

<http://33across.com/>  
<http://www.audiencescience.com/>  
<http://www.bluekai.com/>  
<http://www.dotomi.com/>  
<http://datonics.com/>  
[exelate.com](http://exelate.com)

### “AD CHOICES”/ “ABOUT OUR ADS” LINKS IN FOOTERS

<http://www.batanganetwork.com/>  
<http://www.bizo.com/home>  
<http://www.epicmarketplace.com/>  
<http://glammedia.com>  
<http://rocketfuel.com/>  
<http://www.valueclickmedia.com>