

*Highlights from the
Federal Trade Commission
Staff Report
“Self-Regulatory Principles for
Online Behavioral Advertising”*

**An NAI Perspective
17 February 2009**

Timeline

- Dec 2007 – FTC staff draft proposed Principles
- Apr 2008
 - Close of FTC public comment period
 - NAI responds to FTC call for comments and issues proposed updated NAI Principles, opening public comment period
- June 2008
 - FTC statement before Senate Commerce Committee
 - Close of NAI public comment period
- Dec 2008
 - NAI publishes final 2008 NAI Principles: Self-Regulatory Code of Conduct; explanatory discussion of public comments received; compliance roadmap
- Feb 2009 – FTC staff report

Issues

- Transparency
- Choice
- Security and Data Retention
- Changes to Privacy Promises

Issue: Transparency

- Consumers should understand that behavioral advertising is occurring online
- How to educate consumers?
- Where should notice appear?
- What should it say?
- How prominent ought that statement be?

Transparency

FTC Staff Principle: p. 46.

- “Every website where data is collected for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement that (1) data about consumers’ activities online is being collected at the site for use in providing advertising about products and services tailored to individual consumers’ interests, and (2) consumers can choose whether or not to have their information collected for such purpose. The website should also provide consumers with a clear, easy-to-use, and accessible method for exercising this option. Where the data collection occurs outside the traditional website context, companies should develop alternative methods of disclosure and consumer choice that meet the standards described above (i.e., clear, prominent, easy-to-use, etc.).”

Transparency

NAI Code Principle: Section III.2(b).

- “Each member directly engaging in OBA and/or Multi-Site Advertising **shall require that a website with which it contracts** for OBA and/or Multi-Site Advertising services **shall clearly and conspicuously post notice**—or ensure that such notice be made available on the website where data are collected for OBA and/or Multi-Site Advertising purposes—that contains:
 - A statement of the fact that OBA and/or Multi-Site Advertising is occurring;
 - A description of types of data that are collected for OBA and/or Multi-Site Advertising purposes;
 - An explanation of how, and for what purpose, that data will be used or transferred to third parties; and
 - A conspicuous link to the OBA choice mechanism (e.g., Opt out link) provided by the NAI member, and/or a conspicuous link to the opt-out page on the NAI’s consumer website.”

Open questions: Transparency

- How prominent must the notice be? Available via a clear and conspicuous privacy policy link or somewhere more prominent?
- If the FTC counsels somewhere more prominent, where?
- What happens to privacy policies?
- The NAI website notice requirement is an obligation imposed by contract with websites. Whatever the NAI writes in its Code, the website partner must be able to do it or ensure that it can be done.

Issue: Choice

- Choice only for PII?
- One choice for all types of data?
- Mechanism – durability, ease of use

Choice only for PII?

- FTC staff position: pp. 31-33.
 - Choice appropriate for any data that “reasonably could be associated with a particular consumer or with a particular computer or device” collected for online behavioral advertising.
- NAI Code position: Section III.3(a)
 - Choice appropriate for all data used for behavioral advertising.

One choice for all types of data?

- FTC Staff Position: p. 32 fn. 63
 - “The proposed Principles do not specify whether this choice would be opt-in or opt-out choice – just that it be clear, easy-to-use, and accessible to consumers. As discussed. . . The Principles do specify affirmative express consent (opt-in) for . . . material changes affecting . . . Previously collected data and the use of **sensitive consumer data**.”
- NAI Code Position: Section III.3(a)
 - “The level of choice that members must provide and honor in order to directly engage in OBA shall depend on the manner in which data is intended to be used. Choice is commensurate with the increased privacy implications of data to be used.
 - Graduated (increased) choice requirements are specified for non-PII, PII merged with non-PII, **sensitive data** and children’s segmentation.

Mechanism – durability, ease of use

- FTC staff position: p. 36
 - “With respect to the concern about using cookies to allow consumers to exercise their control over whether to allow behavioral advertising, staff encourages interested parties to examine this issue and explore potential standards and other tools to assist consumers.”
- NAI position: pp. 14-15,
[response to public comments](#)

Issue: Security & Data Retention

- For all data or only PII?
- How much security is enough?
- Fixed retention period or sliding scale?

Security

- FTC staff position: p. 46-67.
 - “Any company that collects and/or stores **consumer data for behavioral advertising** should provide **reasonable security** for that data . . . such protections should be **based on the sensitivity of the data, the nature of a company’s business operations, the types of risks a company faces, and the reasonable protections available to a company**. Companies should also retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.
- NAI Code position: Section III.8
 - “Members that collect, transfer, or store **data for use in OBA, Multi-Site Advertising and/or Ad Delivery & Reporting** shall provide **reasonable security** for that data. . . . Reasonable security is determined in light of several factors including, but not limited to, **the sensitivity of the data, the nature of a company’s business operations, the types of risks a company faces, and the reasonable protections available to a company**.

Data Retention

- FTC staff position: p. 46-67.
 - “Any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data . . . such protections should be based on the sensitivity of the data, the nature of a company’s business operations, the types of risks a company faces, and the reasonable protections available to a company. **Companies should also retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.**”
- NAI Code position: Section III.9
 - “Members engaged in OBA, Multi-Site Advertising and/or Ad Delivery & Reporting shall retain data collected and used for these activities **only as long as necessary to fulfill a legitimate business need, or as required by law.**”

Issue: Changes to Privacy Promises

- Unilateral vs. Subject to Choice
- Prospective vs. Retrospective

Changes to Privacy Promises

- FTC staff position:
 - Retroactive, material changes require **opt-in**
- NAI Code position: Section III.4(d):
 - “If a member changes its own privacy policy with regard to PII and merger with non-PII for OBA, prior notice shall be posted on its website. **Any such material change in policy shall apply only to information collected following the change in policy**, per § III.3 (a) (ii). **Information collected prior to the material change in policy shall continue to be governed by the policy in effect at the time the information was collected, unless the consumer **opts in** to allow collected information to be governed by the new policy.**”

Next Steps. . .

- Ongoing policy discussions and development of new tools with stakeholders and the FTC
 - Notice* and Choice mechanisms*
- Supportive of self-regulatory efforts that can apply to other market participants
- Enforcement
- Implementation Guidelines
 - Sensitive (health), Retargeting, Platforms, others as new issues are raised for members throughout the year

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