

**PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION**

on

BEHAVIORAL ADVERTISING

Before the

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

**Washington, DC
July 9, 2008**

¹ The views expressed in this statement represent the views of the Commission. My oral presentation and responses to any questions are my own, however, and do not necessarily reflect the views of the Commission or any individual Commissioner.

² See Federal Trade Commission, “Ehavioral Advertising: Tracking, Targeting, & Technology,” *available at* <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.

II. Behavioral Advertising

Many businesses use online behavioral advertising in an attempt to increase the effectiveness of their advertising by targeting advertisements more closely to the interests of their audience. The practice generally involves the use of “cookies” to track consumers’ activities online and associate those activities with a particular computer or device. In many cases, the information collected is not personally identifiable in the traditional sense – that is, the information does not include the consumer’s name, physical address, or similar identifier that could be used to identify the consumer in the offline world. Many of the companies engaged in behavioral advertising are so-called “network advertisers,” companies that serve advertisements across the Internet at websites that participate in their networks.⁴

An example of how behavioral advertising might work is as follows: a consumer visits a travel website and searches for airline flights to New York City. The consumer does not purchase any tickets, but later visits the website of a local newspaper to read about the Washington Nationals baseball team. While on the newspaper’s website, the consumer receives an advertisement from an airline featuring flights to New York City.

In this simple example, the travel website where the consumer conducted his research

actions to challenge law violations in appropriate cases.

⁴ The advertisements are typically based upon data collected about a given consumer as he or she travels across the different websites in the advertising network. A website may belong to multiple networks.

identifiable information such as the web pages the consumer has visited, the advertisements that the consumer has been shown, and how frequently each advertisement has been shown. Because the newspaper's website is also part of the advertising network, when the consumer visits the newspaper website, the network advertiser recognizes the cookie from the travel website as its

⁵ See Larry Ponemon, "FTC Presentation on Cookies and Consumer Permissions," presented at the FTC's Town Hall "Behavioral Advertising: Tracking, Targeting, and Technology" (Nov. 1, 2007), at 7, available at <http://www.ftc.gov/bcp/workshops/behavioral/presentations/3lponemon.pdf> (survey found that 55 percent of respondents believed that an online ad that targeted their individual preferences or interests improved, to some degree, their online experience). See also TRUSTe/TNS Presentation, TRUSTe and TNS Global, "Consumer Attitudes about Behavioral Advertising" at 10 (March 28, 2008) (72 percent of respondents found online advertising annoying when it was not relevant to their interests or needs). *But see infra* note 13 and accompanying text.

potentially unwelcome, advertisements consumers receive online.

More broadly, the revenue model for the Internet is, to a large extent, advertising-based, and using behavioral techniques can increase the cost-effectiveness of online advertising. Thus, behavioral advertising may help subsidize and support a diverse range of free online content and services that otherwise might not be available or that consumers would otherwise have to pay for

⁶ As a result of these concerns, a number of consumer groups and others have asked the Commission to take action in this area. *See, e.g.*, Center for Digital Democracy and U.S. Public Interest Research Group Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices (Nov. 1, 2006), *available at* <http://www.democraticmedia.org/files/pdf/FTCadprivacy.pdf>; Ari Schwartz and Alissa Cooper, Center for Democracy and Technology, “CDT Letter to Commissioner Rosch,” (Jan. 19, 2007), *available at* <http://www.cdt.org/privacy/20070119rosch-behavioral-letter.pdf>; Mindy Bockstein, “Letter to Chairman Majoras Re: DoubleClick, Inc. and Google, Inc. Merger,” New York State Consumer Protection Board (May 1, 2007), *available at* <http://epic.org/privacy/ftc/google/cpb.pdf>.

web services company AOL made public the search records of approximately 658,000 customers.⁷ The search records were not identified by name, and, in fact, the company had taken steps to anonymize the data. By combining the highly particularized and often personal searches,

⁷ See, e.g., Jeremy Kirk, “AOL Search Data Reportedly Released,” *Computerworld* (Aug. 6, 2007), available at <http://computerworld.com/action/article.do?command=viewArticleBasic&taxonomyName=privacy&articleId=9002234&taxonomyId=84>.

⁸ See Michael Barbaro and Tom Zeller, “A Face Is Exposed for AOL Searcher No. 4417749,” *www.nytimes.com*, Aug. 9, 2006, available at <http://www.nytimes.com/2006/08/09/technology/09aol.html>.

⁹ In one now-famous example, a man had bought a ring for his wife as a surprise; the surprise was ruined when his wife read about his purchase on the man’s user profile page. See, e.g., Ellen Nakashima, “Feeling Betrayed, Facebook Users Force Site to Honor Privacy,” *Washingtonpost.com*, (Nov. 30, 2007), available at

30 groups formed on Facebook to protest Beacon, with one of the groups representing over 4,700 members,¹⁰ and over 50,000 Facebook users signed a petition objecting to the new program.¹¹ Within a few weeks, Facebook changed its program by adding more user controls over what

http://www.washingtonpost.com/wp-dyn/content/article/2007/11/29/AR2007112902503_pf.html

¹⁰ See Facebook home page, <http://www.facebook.com>, viewed on March 21, 2008.

¹¹ MoveOn.org Civic Action™ created an online petition for consumers to express their objection to Facebook’s Beacon program. The petition stated, “Sites like Facebook must respect my privacy. They should not tell my friends what I buy on other sites – or let companies use my name to endorse their products – without my explicit permission.” MoveOn.org Civic Action Petition, available at <http://www.civic.moveon.org/facebookprivacy/>, viewed June 9, 2008.

¹² See Reuters News, “Facebook Makes Tweak After Privacy Protest,” RedHerring.com, Nov. 30, 2007, available at <http://www.redherring.com/Home/23224>.

¹³ See Alan Westin, “Online Users, Behavioral Marketing and Privacy: Results of a National Harris/Westin Survey” (March 2008) (almost 60 percent of respondents were “not comfortable” to some degree with online behavioral marketing); TRUSTe/TNS Presentation, “Behavioral Advertising: Privacy, Consumer Attitudes and Best Practices,” at 10 (April 23, 2008) (57 percent of respondents were not comfortable with advertisers using browsing history to serve ads, even if the information is not connected to personally identifiable information).

See Ponemon Presentation,

¹⁸ See, e.g., Federal Trade Commission, “Protecting Personal Information: A Guide for Business,” available at <http://www.ftc.gov/infosecurity/>; see also <http://onguardonline.gov/index.html>.

¹⁹ Since 2001, the Commission has obtained twenty consent orders against companies that allegedly failed to provide reasonable protections for sensitive consumer information. See *In the Matter of The TJX Companies*, FTC File No. 072-3055 (Mar. 27, 2008, settlement accepted for public comment); *In the Matter of Reed Elsevier Inc. and Seisint Inc.*, FTC File No. 052-3094 (Mar. 27, 2008, settlement accepted for public comment); *United States v. ValueClick, Inc.*, No. CV08-01711 (C.D. Cal. Mar. 13, 2008); *In the Matter of Goal Financial, LLC*, FTC Docket No. C-4216 (April 15, 2008); *In the Matter of Life is Good, Inc.*, FTC Docket No. C-4218 (Apr. 18, 2008); *United States v. American United Mortgage*, No. CV07C 7064, (N.D. Ill. Dec. 18, 2007); *In the Matter of Guidance Software, Inc.*, FTC Docket No. C-4187 (Apr. 3, 2007);

raise for consumers.²¹ In early 2006, recognizing the ever-increasing importance of privacy to consumers and to a healthy marketplace, the Commission established the Division of Privacy and Identity Protection, a division devoted exclusively to privacy-related issues.

In developing and implementing its privacy program, the FTC has been mindful of the need for flexibility and balance – that is, the need to address consumer concerns and harms without stifling innovation or imposing needless costs on consumers and businesses.

A. 1999 Workshop on Online Profiling

²¹ See discussion *infra* pp. 9-12.

²² Briefly, the NAI Principles set forth guidelines for online network advertisers and provide a means by which consumers can opt out of behavioral advertising at a centralized website. For more information on the FTC workshop and NAI, see Online Profiling: A Report to Congress (June 2000) at 22 and Online Profiling: A Report Congress Part 2 Recommendations (July 2000), available at <http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf> and <http://www.networkadvertising.org>. As discussed further below, NAI recently proposed for public comment revised NAI Principles.

²³ The purpose of the Tech-ade hearings, held in November 2006, was to examine the technological and consumer protection developments anticipated over the next decade. *See generally* <http://www.ftc.gov/bcp/workshops/techade/index.html>.

²⁴ *See CDD et al.*, Complaint and Request for Inquiry and Injunctive Relief, *supra* note 6. Many of these concerns were amplified by the announcement of the proposed merger between Google and DoubleClick in April 2007. The Commission approved the merger on December 20, 2007, at the same time that it issued FTC staff's proposed self-regulatory guidelines. *See* "Staff Proposes Online Behavioral Advertising Policy Principles," Federal Trade Commission (Dec. 20, 2008), *available at* <http://www.ftc.gov/opa/2007/12/principles.shtm>

From the Town Hall, as well as the meetings preceding it, several key points emerged. First, as discussed above, online behavioral advertising may provide many valuable benefits to consumers in the form of free content, personalization that many consumers value, and a potential reduction in unwanted advertising. Second, the invisibility of the practice to consumers raises privacy concerns, as does the risk that data collected for behavioral advertising – including sensitive data about children, health, or finances – could be misused. Third, business and consumer groups alike expressed support for transparency and consumer control in the online marketplace.

Many participants at the Town Hall also criticized the self-regulatory efforts that had been implemented to date. In particular, these participants stated that the NAI Principles had not been sufficiently effective in addressing the privacy concerns raised by behavioral advertising because of the NAI's limited membership, the limited scope of the NAI Principles (which apply to network advertisers but not to other companies engaged in behavioral advertising), and the NAI Principles' lack of enforcement and cumbersome opt-out system.²⁵ Further, while other industry associations had promulgated online self-regulatory schemes to address privacy issues, these

²⁵ According to critics, the NAI Principles' opt-out mechanism is difficult to locate and use because it is located on the NAI website, where consumers would be unlikely to find it. As noted above, in April of this year, the NAI issued a proposed revised set of self-regulatory principles designed to address criticisms of the original NAI Principles and to respond to the FTC staff's call for stronger self-regulation. The NAI has sought comment on its proposed revised principles, and comments were due June 12, 2008. See "Self-Regulatory Principles for Online Preference Marketing By Network Advertisers," Network Advertising Initiative (issued April 10, 2008), available at http://www.networkadvertising.org/pdfs/NAI_principles.pdf.

schemes had not generally focused on behavioral advertising.²⁶

C. The FTC's Proposed Self-Regulatory Principles

In December 2007, in response to the issues discussed at the Town Hall and in public comments received in connection with that event, Commission staff issued and requested comment on a set of proposed principles titled, "Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles" (the "Principles"). The proposed Principles address the central concerns about online behavioral advertising expressed by interested parties; they also build upon existing "best practices" in the area of privacy, as well as (in some cases) previous FTC guidance and/or law enforcement actions. At the same time, the Principles reflect FTC staff's recognition of the potential benefits provided by online behavioral advertising and the need to maintain vigorous competition in this area.

The purpose of the proposed Principles is to encourage more meaningful and enforceable self-regulation. At this time, the Commission believes that self-regulation may be the preferable

²⁶ Since the Town Hall, some of these industry groups, as well as several online companies and privacy groups, have sought to address the concerns raised about behavioral advertising. *See, e.g.*, Interactive Advertising Bureau, "Privacy Principles," (adopted Feb. 24, 2008), *available at* http://www.iab.net/iab_products_and_industry_services/1421/1443/1464; Comment "Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles," Microsoft Corp. (April 11, 2008), *available at* <http://www.ftc.gov/os/comments/behavioraladprinciples/080411microsoft.pdf>; Comment "FTC Staff Proposed Online Behavioral Advertising Principles: Comments of AOL, LLC," AOL, LLC (April 11, 2008), *available at* <http://www.ftc.gov/os/comments/behavioraladprinciples/080411aol.pdf>; Ari Schwartz, Center for Democracy and Technology, *et al.*, "Consumer Rights and Protections in the Behavioral Advertising Sector," (Oct. 31, 2007) (proposing a "Do Not Track List" designed to increase consumers' control over tracking of their activities online), *available at* <http://www.cdt.org/privacy/20071031consumerprotectionsbehavioral.pdf>.

approach for this dynamic marketplace because it affords the flexibility that is needed as business models continue to evolve.

In brief, the staff proposal identifies four governing principles for behavioral advertising.²⁷ The first is transparency and consumer control: companies that collect information for behavioral advertising should provide meaningful disclosures to consumers about the practices, as well as choice about whether their information is collected for this purpose.²⁸ The second principle is reasonable security: companies should provide reasonable security for behavioral data so that it does not fall into the wrong hands, and should retain data only as long as necessary to fulfill a legitimate business or law enforcement need.²⁹ The third principle governs material changes to privacy policies: before a company uses behavioral data in a manner that is materially different from promises made when the data was collected, it should obtain affirmative express consent from the consumer.³⁰ This principle ensures that consumers can rely

²⁷ Recent news reports have highlighted concerns about behavioral advertising involving Internet Service Providers (“ISPs”). The ISP-based model for delivering behaviorally-targeted advertising may raise heightened privacy concerns because it could involve the tracking of subscribers wherever they go online and the accumulation of vast stores of data about their online activities. Further, information about the subscriber’s activities potentially could be combined with the personally identifiable information that ISPs possess about their subscribers. In issuing the proposed Principles for public comment, FTC staff intended the Principles to apply to ISPs.

²⁸ For more information and guidance on the use of disclosures in online advertising, see *Dot Com Disclosures, Information About Online Advertising*, <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.shtml> (May 2000).

²⁹ The FTC has highlighted the need for reasonable security in numerous educational materials and enforcement actions to date. *See supra* notes 18-19.

³⁰ *See, e.g., Gateway Learning Corp.*, Docket No. C-4120 (Sept. 10, 2004), <http://www.ftc.gov/opa/2004/07/gateway.shtm> (company made material changes to its privacy

on promises made about how their information will be used, and can prevent contrary uses if they so choose. The fourth principle states that companies should obtain affirmative express consent before they use sensitive data – for example, data about children, health, or finances – for behavioral advertising.³¹

IV. Next Steps

In response to the request for public comment, Commission staff received over 60 comments on the Principles, representing many thoughtful and constructive views from diverse business sectors, industry self-regulatory bodies, privacy advocates, technologists, academics, and consumers. The comment period for the Principles has closed, and Commission staff is carefully evaluating the comments received.

Included in the comments were a number of specific proposals for how self-regulation could be implemented, as well as reports regarding steps taken to address privacy concerns since the Town Hall. The FTC is encouraged by the efforts that have already been made by the NAI³² and some other organizations and companies³³ and believes that the self-regulatory process that

policy and allegedly applied such changes to data collected under the old policy; opt-in consent required for future such changes).

³¹ Commission staff also sought comment on the potential uses of tracking data beyond behavioral advertising.

³² Current NAI members include DoubleClick, Yahoo! Inc., TACODA, Inc., Acerno, AlmondNet, BlueLithium, Mindset Media, Revenue Science, Inc., 24/7 Real Media Inc., and Undertone Networks.

³³ See *supra* note 26. Although many organizations and consumer groups have undertaken efforts to address FTC staff's proposed Principles, a few organizations have expressed concern that implementing the Principles would be too costly and would undermine continued

has been initiated is a promising one. Although there is more work to be done in this area, the Commission is cautiously optimistic that the privacy issues raised by online behavioral advertising can be effectively addressed through meaningful, enforceable self-regulation. The dynamic and diverse online environment demands workable and adaptable approaches to privacy that will be responsive to the evolving marketplace. The Commission will continue to monitor closely the marketplace so that it can take appropriate action to protect consumers as the circumstances warrant.

V. Conclusion

The Commission appreciates this opportunity to discuss its work on behavioral advertising. The Commission is committed to addressing new and emerging privacy issues such as online behavioral advertising and looks forward to working further with the Committee on this important consumer issue.

development of the online marketplace. FTC staff is evaluating all of these comments as it considers next steps in this area.