

**Concurring Statement  
of Commissioner Jon Leibowitz**

*FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising*  
(February 2009)

Behavioral marketing is complicated, and determining its appropriate regulatory framework is complicated, too. The FTC staff's commendable Report continues to examine emerging practices, consider public comments and consumer expectations, and fashion an appropriate and flexible approach for industry self-regulation. As the Report points out, targeted advertising can benefit consumers, subsidize free content, and promote a robust online market. Indeed, despite a sp

decade, to date data security has been too lax,<sup>1</sup> privacy policies too incomprehensible,<sup>2</sup> and consumer tools for opting out of targeted advertising too confounding.<sup>3</sup>

Industry needs to do a better job of meaningful, rigorous self-regulation or it will certainly invite legislation by Congress and a more regulatory approach by our Commission.<sup>4</sup> Put simply, this could be the last clear chance to show that self-regulation can – and will – effectively protect consumers' privacy in a dynamic online mar



<sup>2</sup> A study of the privacy policies of Fortune 500 companies found that they were essentially incomprehensible for the majority of Internet users. Only one percent of the privacy policies were understandable for those with a high school education or less (like most teens and many consumers). Thirty percent of the privacy policies required a post-graduate education to be fully understood. Felicia Williams, *Internet Privacy Policies: A Composite Index for Measuring Compliance to the Fair Information Principles* at 17 & Table 2 (Sept. 2006), available at <http://www.ftc.gov/os/comments/behavioraladvertising/071010feliciawilliams.pdf>.

<sup>3</sup> For example, the NAI opt-out tool can be difficult for consumers to find and use and the cookie-based methodology is problematic. Privacy conscious consumers who routinely delete all their cookies or use anti-spyware programs may unintentionally delete the opt-out cookies. E.g., Prof. Peter P. Swire & Prof. Annie I. Anton, *Comments on the FTC Staff Statement, "Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles"* (Apr. 10, 2008), available at <http://www.ftc.gov/os/comments/behavioraladprinciples/080410swireandanton.pdf>.

<sup>4</sup> See, e.g., Saul Hansell, *Senators Weigh Possible Rules for Advertising and Online Privacy*, <http://bits.blogs.nytimes.com/2008/07/09/senators-weigh-possible-rules-for-advertising-and-online-privacy/> (July 9, 2008, 4:15 PM); John Eggerton, *Senate Commerce Committee holds hearing on 'Privacy Implications of Online Advertising,'* *Broad. & Cable* (July 9, 2008), available at <http://www.broadcastin>

conducted so that information from consumers who had opted out was still sent to third parties who were engaged in behavioral targeting. Consumers concerned about this sharing could not avoid it except by switching ISPs.

<sup>10</sup>. See, e.g., Am. Acad. of Child & Adolescent Psychiatry, Am. Acad. of Pediatrics, Am. Psychological Ass'n, Benton Found., Campaign for a Commercial Free Childhood, Ctr. for Digital Democracy, Children Now, and Office of Commc'n, United Church of Christ, Comment at 13 (Apr. 11, 2008), *available at* <http://www.ftc.gov/os/comments/behavioraladprinciples/080411childadvocacy.pdf> (recommending voluntary industry guidelines that define "sensitive data" to include the online activities of all persons under the age of eighteen and prohibit the collection of sensitive information for behavioral advertising purposes); Consumer Fed'n of Am. & Consumers Union, Comment at 4 (Apr. 11, 2008), *available at* <http://www.ftc.gov/os/comments/behavioraladprinciples/080411cfacu.pdf>.

<sup>11</sup>. Compare NAI, *2008 NAI Principles, Draft: For Public Comment* at 8 (Apr. 10, 2008), *available at* [http://www.networkadvertising.org/networks/NAI\\_Principles\\_2008\\_Draft\\_for\\_Public.pdf](http://www.networkadvertising.org/networks/NAI_Principles_2008_Draft_for_Public.pdf) (prohibiting use of information about children under 13 for behavioral advertising) with NAI, *2008 NAI Principles, The Network Advertising Initiative's Self-Regulatory Code of Conduct* at 9 (Dec. 16, 2008), *available at* [http://www.networkadvertising.org/networks/2008%20NAI%20Principles\\_final%20for%20Website.pdf](http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf) (permitting use of information about children under 13 for behavioral targeting with parental consent).