

**THE CENTER**  
**FOR INFORMATION**  
**POLICY LEADERSHIP**  
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April 11, 2008

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
Room 135 (Annex C)  
600 Pennsylvania Avenue  
Washington, DC 20580

**Re: Online Behavioral Advertising Proposed Self-Regulatory Principles**

Dear Secretary Clark:

The Center for Information Policy Leadership (“the Center”) at Hunton & Williams LLP appreciates this opportunity to respond to the Federal Trade Commission’s (“FTC”) request for comments on the proposals set forth in its document “Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles.”

The Center is a business-process oriented think tank and policy development center supported by over forty organizations. The Center develops processes that promote the use of information to create economic and social value while furthering data privacy and security and protecting consumers from harm. The Center’s views are its own, and do not necessarily reflect the views of its members, Hunton & Williams LLP, or any clients of Hunton & Williams LLP.

In responding to the FTC’s request, the Center wishes to state that its comments apply to the activity of behavioral advertising as defined in the FTC’s document. For purposes of the FTC’s request for comments, online “behavioral advertising” means the tracking of a consumer’s activities online -- including the searches the consumer has conducted, the web pages visited, and the content viewed -- in order to deliver advertising targeted to the individual consumer’s interests. The Center’s comments are meant only to apply to activities that fall within the Commission’s definition.

The Center appreciates the FTC’s efforts to raise awareness about issues related to behavioral advertising and to protect the interests of consumers in this context. The Center wishes to highlight its belief that complex technologies, market dynamics and policy questions underlie the principles proposed by the FTC and that arriving at

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workable and effective solutions that do not stifle the online marketplace will require in-depth inquiry that cannot be accomplished through this request for comments.

### ***General Remarks***

#### **The Forum for Resolution of These Issues**

The FTC's proposed principles raise questions and ask for resolution of many issues that are fundamental to privacy governance. Questions related to affirmative consent, security, and data retention, for example, are not specific to behavioral advertising, but reach across the broad spectrum of data collection and use. The breadth of these issues requires that they be addressed in a forum in which they can be more fully explored and where their resolution can be appropriately tested. The Center is concerned that attempting to address these issues in this limited comment process, and in the narrow context of behavioral advertising, may well lead to solutions that not only are not optimal in the area of behavioral advertising but that may also have a negative impact in other areas where these questions are pertinent.

#### **Potential Scope of Application of the Principles**

The Center is further concerned that the proposed principles will extend privacy protection to non-personally identifiable information – a class of information that has traditionally fallen outside the bounds of U.S. privacy law and self regulation. The distinction between PII and non-PII is one that companies have relied upon to guide their decisions about data management and use, and their application of fair information practices. Further, it drives decisions about development of products and services for consumers. Any shift from the traditional manner in which these categories of information have been governed would result in significant consequences for companies.

The Center recognizes that the definition of PII versus non-PII is one that has come under close scrutiny, however, a decision to broaden the scope of privacy protection in the United States requires more in-depth consideration and a more robust process than can be afforded by this request for comment.

#### **Ongoing Efforts of Business to Address These Issues**

Business and online organizations are taking steps to address questions such as those raised by the FTC's proposed principles. The Center urges the FTC to consult with these

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organizations. The Network Advertising Initiative, for example, is developing guidelines to address concerns raised by behavioral advertising.

### *The Principle*

#### **Proposed Principle 1 - Transparency and consumer control**

*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.*

The Center believes that providing transparency in the context of behavioral advertising will require serious reconsideration of traditional notions about how businesses deliver notice.

The Center has long held that transparency and notice about data collection is fundamental to protecting the privacy of individuals. Notice serves several functions: first, it makes available to the consumer information about an organization's data practices; second, it requires that firms undertake the internal assessment necessary to write a notice that accurately and comprehensively reflects the company's practices; third, it makes organizations accountable for meeting the standards they set for their own internal practices. Resolving the question about how best to inform the consumer so that he or she may be aware of benefits and risks of data collection and make an appropriate decision has been a notoriously difficult endeavor. Providing notice in the context of behavioral advertising may prove to be even more challenging than in other environments.

At its essence, notice entails providing consumers with meaningful, clear information about a company's data practices in an effective and efficient manner. Developing principles to govern notice in the context of behavioral advertising requires an understanding that the possibilities for providing notice continue to evolve. Guidance about notice would likely also need to reflect that the manner in which companies engage in behavioral advertising, and the manner in which information is collected to carry out the practice also continues to evolve, affecting the way in which notice is delivered.

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Finally, given the widespread practice of behavioral advertising and, arguably, the essential value of the practice to providing a personalized online experience for the consumer, it may also be necessary to consider whether notice alone is the best way to inform the individual, or whether some element of consumer education is also necessary. This practice may now be the norm rather than one that the consumer does not expect. Online commerce may be at a point where broad education of consumers about data collection for online targeted advertising rather than notice alone is necessary to raise awareness of the collection of data to personalize advertising. Such consumer education would enhance the effectiveness of any notification undertaken by the website.

Providing the consumer with meaningful choice presents similar challenges. While choice is fundamental to the consumer's ability to control the use of data collected about him or her, how that choice is effected in a meaningful way, and how it is made readily available in the complex environment of behavioral advertising, has not been explored. Moreover, consumers may believe that choice is more important in some online interactions related to behavioral advertising than in others. Part of the inquiry about choice may involve determining how to provide choice so that it addresses consumers' most pressing concerns about data use.

**Proposed Principle 2 - Reasonable security, and limited data retention, for consumer data**

*Any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data. Consistent with the data security laws and the FTC's data security enforcement actions, 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 retain data only as long as is necessary to fulfill a legitimate business or law enforcement need. FTC staff commends recent efforts by some industry members to reduce the time period for which they are retaining data. However, FTC staff seeks comment on whether companies can and should reduce their retention periods further.*

Principle 2 raises two longstanding principles of fair information practices: reasonable security, and data retention limitation.

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With respect to security, the Center agrees that companies involved in behavioral advertising should be required to provide reasonable security for the data they collect and maintain. Guidance about security must reflect the reality that solutions are not static and that businesses must be able to adjust their decisions about security in response to changing threats, risks and the availability of security resources. The FTC dealt with this dynamic in promulgating the Safeguards Rule pursuant to the Gramm-Leach-Bliley Act. The Rule does not prescribe specific standards for security. It does, however, establish an obligation on the part of financial services organizations to put in place administrative controls, technical controls, and an implementation strategy. Appropriately, the FTC did not dictate how a business should implement security, but rather imposed on companies the obligation to provide security in a meaningful way.

The FTC has on numerous occasions suggested that this excellent guidance developed for financial institutions is appropriate to general commerce. The Center agrees, and urges the FTC to take this approach in addressing the question of security as it applies in behavioral advertising.

While Principle 2 includes data retention as well as security, it is important to recognize that data retention represents one aspect of security, but does not substitute for it. The Center urges the FTC to bear in mind that companies must examine a wide range of considerations in determining how long it will retain data. Perhaps the most determinative among these is the need to comply with multiple regulatory requirements.

Moreover, the growing demand for information collected by the private sector for law enforcement, counter-terrorism efforts, and e-discovery have a significant impact on the resolution of this question. Increasingly, these requirements play a critical role in determining for how long organizations retain the data collect, complicating a company's decision-making process and often placing huge burdens on companies to keep and relinquish data they otherwise would have disposed of. While the broader issue of data retention and government demands for data are beyond the scope of this FTC inquiry, we urge the Commission to recognize that guidance about data retention policies in the context of behavioral marketing cannot be determined without a thorough vetting of the government access question.

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**Principle 3 - Affirmative express consent for material changes to existing privacy policies**

*As the FTC has made clear in its enforcement and outreach efforts, a company must keep any promises that it makes with respect to how it will handle or protect consumer data, even if it decides to change its policies at a later date. Therefore, before a company can use data in a manner materially different from promises the company made when it collected the data, it should obtain affirmative express consent from affected consumers. This principle would apply in a corporate merger situation to the extent that the merger creates material changes in the way the companies collect, use, and share data.*

The issue of when and whether affirmative express consent is necessary is one that reaches questions beyond those posed in the FTC's request for comments. Behavioral advertising represents a narrow set of data collection and use practices that occur in a specific environment to accomplish specified goals. The question of affirmative consent is one raised across the wide spectrum of data collection in a range of industries, environments and business models. The Center strongly cautions against attempting to resolve this question in this limited context, and believes that this discussion is best deferred to a comprehensive examination of all of the considerations relevant to the question of informed consent.

**Principle 4 - Affirmative express consent to (or prohibition against) using sensitive data for behavioral advertising.**

*Companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising. FTC staff seeks specific input on (1) what classes of information should be considered sensitive, and (2) whether using sensitive data for behavioral targeting should not be permitted, rather than subject to consumer choice.*

Principle 4 raises the difficult and persistent question: What constitutes sensitive information? While Congress has acted in certain circumstances to respond to concerns about specific kinds of data -- financial information, medical information, information collected from children -- policymakers have never reached consensus about what information Americans believe is sensitive. Indeed, privacy experts have long held that what may be considered sensitive by one person may not be deemed sensitive by another. Moreover, as the power of analytic tools continues to grow, what was once traditionally considered non-sensitive may become sensitive when linked with other information.

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Furthermore, sensitivity is also related to the context and manner in which information is used and the reasonable expectations of the consumer. For example, if a consumer visits a website to access information about heart disease and submits questions about controlling high blood pressure, he or she may not be surprised to receive branded information and advertising about the role of diet, exercise and drug therapies in managing that condition. However, the same consumer would likely not expect to see advertising related to blood pressure pharmaceuticals follow as he or she visits non-health care related sites.

The Center is concerned that making decisions about what constitutes sensitive information requires thorough vetting and public discussion. While the solicitation of public comment is a laudable step, it is not a sufficiently robust process upon which to base FTC guidance.

### **Conclusion**

In submitting these comments the Center urges the FTC to recognize that resolving privacy policy issues of this complexity will require thoughtful, in-depth inquiry and consensus building -- an effort that must extend beyond this request for comments. As the FTC well knows, addressing questions related to transparency and notice in the context of Gramm-Leach-Bliley was a multi-year endeavor for financial services regulators -- an indication that these questions do not lend themselves to overnight solutions. We encourage the FTC to be deliberative in its approach, and not to rush to solutions that are not sufficiently considered and tested. The Center looks forward to serving as a resource for the FTC as its efforts in this area continue.

Respectfully submitted,



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