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Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
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Washington, D.C. 20580

Re: "Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles"

Dear Mr. Secretary:

The Online Publishers Association ("**OPA**") appreciates the opportunity to comment on the Online Behavioral Advertising Principles proposed by the Federal Trade Commission ("**FTC**" or "**Commission**"). OPA is a trade organization dedicated to representing trusted online content providers before the advertising community, the press, the government and the public. It is the only trade association focused exclusively on the digital content business and its unique role in the future of media. OPA Members, which include many of the Internet's most respected brands and sources of news and information, hold themselves to the highest standards of editorial quality, integrity and accountability, and believe that they provide an invaluable information service, as well as a source of innovation.

OPA strongly supports the Commission's reliance on self-regulation. Self-regulation offers our Members the opportunity to enhance public trust in the Internet as an increasingly important source of news, information, and entertainment. At the same time, the flexibility of self-regulatory principles will enable OPA Members to adapt their practices quickly to new developments in a dynamic digital publishing environment in which technology and related advertising models can change rapidly. Our Members share and respect their customers' desire for both a meaningful understanding of how their online activities are monitored and meaningful choices regarding the collection of information about such activities. OPA and its Members believe that the Commission can best achieve these goals by encouraging clear and conspicuous disclosures in website privacy policies. Such disclosures should explain both what information is collected about consumers for behavioral advertising purposes and how website visitors can use existing browser tools to effectively manage the collection of that information. OPA and its Members firmly believe that the combination of increased transparency in online privacy policies and increased awareness about how to use

standard browser settings to control and manage how website operators monitor a particular visitor's online activities are the keys to empowering consumers and protecting their privacy online.

Scope and Intended Effect of Proposed Principles

As a threshold matter, OPA urges the Commission to reject the call of some commenters in this proceeding to transform what should operate as flexible self-regulatory principles into *de facto* legal requirements. OPA welcomes the Commission's efforts to promote consumer awareness and strengthen self-regulatory efforts in the area of behavioral advertising. However, it would be imprudent to treat the proposed principles as a statement of the Commission's enforcement intentions or as a new standard of liability for online advertisers and website publishers under Section 5 of the FTC Act. Pursuing such a course could threaten the future vitality of the online media and publishing industries and would be contrary to the interests of consumers for several reasons.

First, the online publishing environment is too fluid and emergent and the record regarding the purported adverse effects of behavioral advertising is too thin and undeveloped to warrant affirmative regulation at this time. Any such efforts would be premature and could undermine the ability of online publishers to innovate and to implement new advertising models and technologies that could be vital to the future of the online publishing industry. Online advertising is the lifeblood of digital publishing. Over 90 percent of the revenue generated by OPA Members is generated by advertising and the ability of OPA Members to continue to sell high-value, targeted advertising will be critical to their future ability to create and distribute high-quality news, information and entertainment content on the Web, free of charge. While OPA Members embrace a variety of business models, OPA believes that the Commission should be particularly mindful that the ability of online publishers to create and distribute valuable content depends on their ability to generate revenue through the sale of online advertising.

Second, overbroad regulation in this area could seriously degrade the quality of consumers' online user experiences. The same data collection practices and technologies that support behavioral advertising are also used by online publishers to create valuable customization and personalization features for their customers and otherwise to optimize the presentation of editorial content on their websites. The Commission should be careful not to create a set of *de facto* regulations that interfere with the ability of website publishers' to provide these valuable features to consumers and improve the quality of their content and online services. Overbroad regulation in this area could seriously degrade the quality of consumers' online experiences and to the extent that such regulation interferes with publishers' decisions regarding the selection and arrangement of content on their sites, it would also raise First Amendment concerns.

Finally, the Commission should carefully weigh the risks of premature and overbroad regulation against the already robust effects of marketplace discipline. The most powerful choice that a consumer can exercise is the choice to stop using a website that has adopted data collection practices that he or she finds unacceptable. One need only recall the outcry by Facebook subscribers after the launch of that site's Beacon program to understand that website operators have powerful market-driven incentives to avoid advertising practices that could alienate their visitors. Facebook's swift and effective reaction to complaints from users who believed that they were not given ample notice or choices concerning the site's use of their personally-identifiable information ("PII") shows that with appropriate transparency, the behavioral advertising marketplace should be largely self-correcting. This example further underscores the importance of enhancing consumer awareness and empowering online users to make well-informed decisions, as opposed to creating a *de facto* regulatory scheme for an industry that is still rapidly evolving.

In addition to these broad considerations regarding the nature and intended effect of this proceeding, OPA and its Members respectfully offer the following specific comments and suggestions regarding the Commission's proposed principles:

Definition of Behavioral Advertising

The definition of "behavioral advertising" suggested by the Commission is broader than necessary under the circumstances. Targeting ads to anonymous consumers based on their perceived interests does not threaten individual privacy interests; rather it benefits advertisers, consumers, and website publishers. As explained below, the Commission's definition of behavioral advertising should reflect the very different policy and privacy implications of collecting anonymous data, as opposed to PII.

By way of background, the only users whose identities are known to a website operator are those who willingly and explicitly provide PII, such as an email address, name, credit card number or other financial information, when they register or engage in transactions with a site. In other words, as a general rule, a website operator will only have access to a user's PII if the user has explicitly volunteered this information. In contrast, all other users typically remain anonymous to a website operator (and to any third-party advertisers and advertising networks that display ads on the operator's site) as the user navigates online. Both known and anonymous users may have a unique identifier or other non-personally-identifiable information placed in a small text file (known as a cookie) assigned to their computer. The cookie ID will be recognized over multiple browsing sessions and can be used by website operators to capture anonymous information, including visits, page views and activities on their sites by the user operating the particular web browser associated with the cookie ID.

Cookies are widely used throughout the online industry for a variety of useful and valuable purposes, many of which are unrelated to behavioral advertising. Cookies enable users to receive personalized webpages and experiences over multiple browsing sessions. With the Internet becoming a more critical source of news and information for individuals,¹ more and more consumers are building customized webpages that update and refresh regularly with specific content they select. A website that is unable to recognize a user through a cookie could not populate the user's (customized) pages with his or her preferred content and the user would have to re-enter a user name and password and/or his or her personal preferences during each visit to the site. Moreover, cookies help ensure that a website is functioning properly. For example, without the ability to (anonymously) recognize a user through a cookie, a website operator has no way of knowing whether 100 page views represent 100 users viewing 1 page or 10 users viewing 10 pages.

In addition, because cookies allow ad serving technologies to track the number of ads served on a particular day to a particular computer, they help limit a user's repeated exposure to a single ad or advertiser. Cookies also facilitate statistical reporting in connection with activity on a website and enable website operators to monitor their audience's level of interest in the content, products and services that they offer through their sites. This monitoring helps website operators understand their users' needs and interests and drives more informed and effective business and editorial decisions.

¹ A recent report found that 44 percent of 18-34 year olds get their daily news from the Internet. Carnegie Corporation reports "Abandoning the News" (2006).

In sum, behavioral information derived from the use of anonymous tracking technology is necessary to facilitate many services unrelated to advertising, to create desirable (and, in many cases, free) content, and to design and refine products and services that provide consumers with the best possible online experience. None of these beneficial uses of anonymous behavioral data raises substantial privacy concerns. Accordingly, to avoid sweeping these practices into the scope of this proceeding, the Commission should clarify that the proposed principles are not intended to apply to website operators' collection and use of behavioral data to support content customization and personalization features, website optimization and other purposes unrelated to behavioral advertising.

OPA also urges the Commission to modify its definition of behavioral advertising to narrow the scope of this proceeding to the collection and use of PII. The use of anonymous behavioral information to target advertising benefits all parties involved in the process. Such use benefits advertisers by delivering an audience of consumers with an interest in their products and services; it benefits consumers by delivering ads for products and services in which they are genuinely interested; and it benefits publishers by letting them sell high-value ads that support their gathering and delivery of news and information, which, in turn, serves the public interest. And it does all of this without disclosing PII either to the publishers or to the advertisers. Yet the FTC's definition of "behavioral advertising" currently appears to lump together the collection of information from both anonymous and identified users: "for purposes of this discussion, online 'behavioral advertising' means the tracking of a consumer's activities online including the searches the consumer has conducted, the webpages visited, and the content viewed in order to deliver advertising targeted to the individual consumer's interests." To avoid imposing restrictions that would undercut the many advantages of anonymous behavioral advertising without benefiting consumers, OPA urges the Commission to modify its working definition of "behavioral advertising" to mean advertising targeted to an individual whose identity is known to the website operator and/or the advertiser.

For similar reasons, OPA would also encourage the Commission to clarify that "behavioral advertising" does not include the selection of advertising based solely on the editorial content of a webpage. For example, an ad for a discounted vacation cruise package may be placed on a webpage devoted to articles about budget travel in the Caribbean because the advertiser assumes that computer users who are interested in articles about budget travel are more likely than the average consumer to be interested in a discounted cruise offer. This calculation is analogous to a golf club manufacturer's decision to purchase a newspaper ad for a revolutionary new putter on a page in the sports section that is devoted to coverage of professional golf tournaments. Although tailored to a user's perceived interests, such advertising is purely contextual in nature and should not fall within the definition of behavioral advertising.

Discussion of Specific Proposed Principles

1. Transparency and Consumer Control

Proposed Principle: 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.

OPA Members have devoted significant time and resources to developing robust privacy policies. They believe that interested consumers have come to understand that the privacy policy is the destination for obtaining a variety of privacy-related information, including information about how their data is collected, used, shared and otherwise managed by a particular website. Although OPA Members already communicate this information in their privacy policies, they share the Commission's desire to strengthen consumers' understanding and awareness about the collection and use of behavioral information for online advertising. Thus, OPA Members are prepared to revisit and, if necessary, enhance their privacy policies in an effort to improve consumer understanding and awareness.

More challenging is the method by which consumers can choose whether or not their anonymous behavioral information may be collected for advertising purposes. As outlined above, many website operators (including OPA Members) collect and use anonymous behavioral information for many purposes other than advertising. Accordingly, any "opt-out" mechanism that may evolve out of this principle should be limited to the narrow "use" of behavioral information for advertising purposes, as opposed to the "collection" of such information. This is a subtle, but somewhat complex distinction that may be difficult for consumers to understand. Even if clear, concise and consumer-friendly disclosures on this subject could be crafted, implementing and honoring a "behavioral advertising opt-out" is fraught with practical and technological challenges, as there is no easy way to segregate the tracking of behavioral information for the purpose of serving ads from the tracking of behavioral information for other purposes. Little or no viable consumer-friendly technology exists today that website operators could effectively and reliably implement to manage behavioral advertising opt-out requests and simultaneously preserve the collection of behavioral information for use in connection with non-advertising purposes. Thus, any solution in this regard would not only present practical and economic hardships for website operators, it may very well lead to consumer frustration as users struggle to operate different opt-out mechanisms employed by different websites across the Internet, resulting in questionable effectiveness.

Under the circumstances, OPA urges the Commission to leverage the wide array of cookie management tools already available to users via their Internet browsers to satisfy the "choice" component of this principle. For example, common browser options include: (i) enabling or disabling cookies completely so that they are always accepted or always blocked; (ii) prompting users for individual cookies and remembering their answers; (iii) distinguishing between first-party and third-party cookies and treating each group accordingly (*i.e.*, to restrict or deny third-party cookies, but allow first-party cookies); (iv) treating cookies based on a white list or black list (*i.e.*, restrict or block cookies from black-listed sites); and (v) capping the duration of cookies. Browsers have emerged as the most effective, sustainable way for consumers to block, limit and otherwise manage the collection of their behavioral information and subsequent use of that information for any and all purposes, including advertising. Given the sweeping control that Internet browsers provide to consumers (as compared to the challenges associated with requiring behavioral advertising opt-out mechanisms to be implemented and managed by individual website operators), OPA believes that Internet browsers are the best, most efficient and most reasonable means by which consumers can choose whether or not to have their behavioral information collected and used for advertising purposes. To this end, OPA supports the goal of educating consumers about how to manage the collection and use of behavioral information through their Internet browsers. OPA believes that such efforts will improve consumer awareness and empower consumers to make informed decisions about how they interact with websites and navigate online.

To the extent that this principle requires OPA Members to place these disclosures at locations on their sites other than their online privacy policies, OPA opposes such a requirement. OPA does not believe

that such a piecemeal approach would further consumers' interests in clear and comprehensive disclosures. Nor does OPA believe that collection and use of behavioral information, particularly anonymous behavioral information, for advertising purposes is an issue of any greater concern to consumers than other issues typically covered in website privacy policies. Moreover, OPA believes that requiring a separate notice may further confuse consumers by adding a layer of disclosure to what should be a centralized, transparent process for accessing privacy information. In sum, OPA believes that information regarding behavioral advertising practices (including disclosures about Internet browser options as discussed above) should be housed within website privacy policies and OPA respectfully proposes the following revision to this principle:

Every website where data is collected for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement in its privacy policy or elsewhere at a location on the site selected in the website operator's reasonable discretion that (1) data about consumers' activities online are 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 by utilizing cookie management tools available to them via Internet browsers. Every website should also make available to consumers clear, concise, and consumer-friendly instructions regarding how to use standard Internet browsers to exercise this option.

2. Reasonable Security and Limited Data Retention for Consumer Data

Proposed Principles:

- *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.*

OPA supports reasonable data security and retention policies that afford its Members a reasonable opportunity to retain and use such information to fulfill legitimate business and law enforcement needs. However, the "reasonableness" of the security precautions employed should be measured in light of the sensitivity of the particular information involved and, in most cases, no special precautions would be required when storing and transmitting data that do not include PII.

3. Affirmative Express Consent for Material Changes to Privacy Policies

Proposed Principle: *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.*

Although the potential reach of this principle extends well beyond behavioral advertising, OPA applauds this principle insofar as it requires companies to keep the promises they make with respect to how they will handle consumer data. However, OPA believes that changes in a company's privacy practices that affect the use of previously collected data should be permissible without affirmative express consent, as long as affected consumers are given notice of such changes and a reasonable opportunity to opt-out of such changes with respect to previously collected data.

OPA notes the Commission's reliance on its *Gateway Learning Corp* enforcement action to support its assertion that affirmative express consent is necessary for material privacy policy changes. However, OPA believes that this assertion is unsupported by *Gateway* by virtue of the unique (and particularly egregious) facts in that case. Specifically, in *Gateway*, the Commission obtained a settlement based on charges that Gateway Learning Corporation ("GLC") collected PII under a privacy policy that stated that GLC would not "sell, rent or loan any [PII] ... unless [it] receive[s] a customer's explicit consent" and that, if there were any material change to its information usage practices affecting a customer's PII, it would notify the customer on its site or by email and the customer would have an opportunity to opt out. GLC then later changed its posted privacy policy to state that "[f]rom time to time, [it] may provide [PII] to [third parties]" and, without providing any additional notice to consumers or an opportunity to opt out, applied this change to data collected under the earlier policy. Thus, without providing any notice to affected consumers or any opportunity to opt-out, GLC adopted a new policy and practice of sharing PII with third parties that directly contradicted the promises it made to consumers when such information was collected, and then retroactively applied that policy and practice to such previously collected information.

OPA does not believe that *Gateway* does or should render impermissible all material privacy policy changes without affirmative opt-in consent. In stark contrast to what happened in *Gateway*, when (consistent with specific amendment procedures outlined in a privacy policy) consumers receive reasonable notice of an amendment, coupled with a reasonable opportunity to opt out of such amendment with respect to previously collected information, no harm to consumers occurs. Moreover, even leaving *Gateway* aside, any principle requiring website operators to obtain affirmative express consent before implementing a privacy policy change would result in a barrage of messages to consumers prompting them to accept amended privacy policy terms. Such a requirement would do little to meaningfully educate consumers regarding the proposed amendment because most consumers will likely find such messages annoying, automatically delete them and/or simply not respond. This result would inevitably lead to more messages being sent (due to non-responses) and ultimately to increased consumer frustration.

For these reasons, OPA urges the Commission to modify this principle to permit material privacy policy changes without opt-in consent, provided that (1) the prior privacy policy advised users that such amendments might be made, (2) the amendment occurs with notice to users, and (3) users are afforded a reasonable opportunity to opt-out of the changes with respect to previously collected data. Accordingly, OPA respectfully offers the following revision: *Should a company decide to make material changes to its privacy policy with respect to the use of previously collected data, it should notify consumers in the manner outlined in its policy; provided that any such notice must afford consumers a reasonable means and opportunity to opt- out of changes affecting use of such data.*

4. Affirmative Express Consent to (or Prohibition Against) Using Sensitive Data for Behavioral Advertising

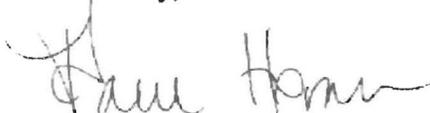
Proposed Principle: *Companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising.*

OPA opposes this principle to the extent that it requires affirmative express consent from anonymous users. Aside from the obvious difficulties associated with obtaining and managing affirmative express consent from a user who is anonymous, OPA doubts that any potential harm that could result to consumers from the anonymous collection and use of sensitive data outweighs the very real benefits of behavioral advertising. With respect to PII, OPA notes that in several contexts the collection and use of information commonly deemed sensitive are already regulated (*e.g.*, Children’s Online Privacy Protection Act, HIPAA, Gramm-Leach-Bliley Act). Thus, OPA questions whether additional layers of regulation are needed. Moreover, where such existing regulations are the products of Congressional mandates or administrative rulemakings by the Commission or its sister agencies, further ad hoc regulation runs a grave risk of interfering with established Congressional intent and carefully considered administrative policies. To the extent that the Commission concludes that there is sufficient risk of harm to justify more stringent regulation in this area, OPA urges the Commission to provide a clear, reasonable definition of “sensitive data.”

Regarding the Commission’s request for input on the use of sensitive data for targeting, to the extent that the Commission is proposing an outright prohibition against the use of anonymous sensitive data for targeting, OPA believes that such a proposal runs counter to the interests of consumers and could restrict the availability of valuable information, *e.g.*, educational materials regarding medical conditions, treatment options, etc. Anonymous behavioral advertising benefits consumers by providing enhanced access to such information, and many consumers have come to expect such access as part of their Internet experience.

OPA applauds the Commission for taking the time to study behavioral advertising and looks forward to working collaboratively with the Commission to answer any questions it may have regarding the online publishing industry.

Sincerely,



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