

PMA's Comments on the Federal Trade Commission's Proposed Online
Behavioral Advertising Self-Regulatory Principles

Filed April 11, 2008

PROMOTION MARKETING ASSOCIATION, INC.

By its attorneys,

Edward M. Kabak, Esq.
Director of Legal Affairs
PROMOTION MARKETING
ASSOCIATION, INC.
257 Park Avenue South, Ste
1102
New York, New York 10010
(212) 420-1100

Charulata B. Pagar, Esq.
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
(310) 312-4000

Liisa M. Thomas, Esq.
Jason W. Gordon, Esq.
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

The Promotion Marketing Association, Inc. ("PMA"), through its attorneys, hereby submits these comments in response to the Federal Trade Commission's Proposed Online Behavioral Advertising Self-Regulatory Principles issued on December 20, 2007.

I. Introduction

The Promotion Marketing Association, Inc. is the premier trade association representing the more than one trillion dollar integrated marketing industry. Our association has over six hundred members comprised of the nation's leading consumer goods and services companies worldwide as well as advertising, sales promotion and integrated marketing agencies, retailers, and many providers of mobile marketing campaigns and promotions. Our members include many Fortune 100 and Fortune 500 Companies who look to the PMA to serve as their voice with respect to their marketing and promotions activities.

Our members engage in marketing and promotions activities such as sweepstakes, contests, games, event sponsorships, coupons, rebates, and other marketing and advertising efforts to help inform consumers of the products and services that they or their clients provide. In doing so, they endeavor to to sponsor content that is meaningful and relevant to consumers. One major challenge they face, however, is an increasingly fragmented media marketplace. As consumers change the ways in which they use media and the media marketplace changes, our members must adapt their promotional activities accordingly. In recent years, our members have found themselves adapting to these changes by expending progressively more resources in the online marketing space.

Within that online marketing space, targeted advertising has significant potential to enable our members to counteract the effects of the fragmented media marketplace by allowing them to sponsor content that is likely to be more meaningful to the specific groups of consumers whose attention they seek. In this rapidly-changing and still-developing segment of the market, we strongly support the Commission's acknowledgment that self-regulation is the most important and effective means of providing choices and protection to consumers and flexibility for businesses. We believe that self-regulation is likely to allow continued innovation in this area to benefit businesses, consumers, and the efficiency of the marketplace. To that end, we are in the process of evaluating the Commission's proposed principles in connection with PMA's existing self-regulatory standards.

While we support the Commission's approach, we do have some concerns about the specific principles proposed by the Commission. Our detailed comments are presented below, but our general view is that it would be useful if the relationship between each principle and existing legal standards under Section 5 of the FTC Act, 15 U.S.C. § 45a, were more clearly described. More specifically, we suggest that the commentary identify the ways in which the Commission believes non-compliant practices would be either deceptive or unfair. We believe that regulation – including self-regulation -- of business activities must be informed and guided by the harms that the regulation seeks to prevent. An explanation of the Commission's perspective on those harms and their relationship to the principles would help promote the Commission's goal of meaningful self-regulation in this area.

II. Scope

Our members are extremely concerned that the definition of behavioral advertising set forth in the Commission's draft Principles is exceptionally broad. We therefore strongly recommend that the proposed definition be modified in several ways to be more consistent with both consumer and business expectations.

First, we believe that the term "online targeted advertising" describes the conduct at issue more accurately than the term "behavioral advertising." Indeed, the Commission's proposed definition recognizes this fact by noting that the purpose of the online tracking at issue is "to deliver advertising targeted to the individual consumer's interests." We also believe that the term "online targeted advertising" is clear, simple, and more likely to be understood by consumers than the term "behavioral advertising."

Second, we believe that a specific definition of online targeted advertising would be more appropriate than the non-exhaustive definition currently proposed by the Commission. For self-regulatory principles in fast-moving markets to be truly useful to industry members, the terms used must be finite. Otherwise, as practices evolve, there could be considerable -- and potentially unresolvable -- debate as to whether or not a particular practice is covered. Where, as here, new self-regulatory principles are proposed in a rapidly moving business landscape, our experience is that narrow, tailored approaches are more likely to achieve success.

Third, we recommend that the definition incorporate the concept that online tracking is a practice conducted across unaffiliated websites rather than a practice conducted on one website or on one set of websites that consumers would expect to be affiliated with one another. Many websites currently track consumers' clickstreams within the website and/or within networks of affiliated company websites (e.g., ABCDE

Motors, ABCDE Motor Parts, ABCDE Motor Servicing). We have no reason to believe that consumers are unaware of or confused by such practices. Indeed, website operators have used these techniques since the commercial inception of the Internet to determine which website pages are most relevant to site visitors and to improve their websites, among other things.

Fourth, we recommend that the definition make clear that online advertisements which are displayed as a result of the content on the webpage itself are not considered “targeted advertising” for purposes of the principles. In other words, if a webpage with editorial content involving the housing market includes ads related to the housing market, and such housing market ads are displayed to any webpage visitor, such ads should not be considered online targeted ads for purposes of the principles. We believe such an approach makes sense because those types of ads are not tied to any information about the webpage visitor other than his or her decision to visit the webpage in question.

Fifth, the definition should be clear that online advertising will not be considered online targeted advertising for purposes of the principles unless online tracking data is used to derive inferences about the ads. If no such inferences are drawn, the ads should not be treated as online targeted advertising because the ads shown are not based on any tracking data.

Sixth, the definition should apply to information collected over time in multiple sessions rather than information collected in a single session. The Commission’s concerns appear to revolve largely around the collection and use of data over time, and thus the collection of data for use in delivering targeted ads during a single session should not be covered.

Seventh, the definition should not include “search.” That term currently includes a broad variety of online activities, and the range of activities covered is likely to grow as the market evolves. The regulation of those activities, even through self-regulation, at this stage is likely to hinder the development of that segment of the marketplace. To the extent that growth moves in directions that the Commission perceives to be unfavorable to consumers, the agency will continue to have the ability to use its enforcement and regulatory tools to respond.

III. Proposed Principle One: Notice and Choice

The first proposed principle addresses consumer notice and choice with respect to online targeted advertising. With respect to the notice principle, we are committed to working with appropriate industry groups to improve the transparency of online targeted advertising. We are also committed to working to educate consumers about the use of information for online targeted advertising as well as the benefits such uses provide to consumers.

With respect to the choice principle, we believe it must be modified so that choice is not required for all collection and use of data for online targeted advertising. Many websites would face significant operational challenges if choice were required in every instance. For example, many website publishers participate in third party online advertising networks, and many online marketers place ads through such networks. Mechanisms allowing computer users to opt out of online tracking on such websites are currently provided by either the user’s Internet browser and/or by the third party online ad network, but neither the website publisher nor the advertiser directly controls those mechanisms. Moreover, a single webpage may involve multiple embedded applications

that provide useful services to site visitors, each of which could potentially collect data and/or serve advertisements. Application of the Commission’s proposed choice principle in these scenarios would substantially limit, and possibly prohibit, website operators from providing these types of beneficial features to computer users.

For all of these reasons, we do not believe a choice mechanism should be mandated at this time. We would, however, be willing to evaluate industry practices and self-regulatory choice provisions going forward to determine if changes in technologies and practices warrant the development of self-regulatory standards in this area in the future.

Generally, we would support the revision of the Commission’s current proposed notice and choice principle as follows:

“Every website where behavioral advertising occurs should provide a clear, concise, consumer-friendly, and prominent statement that (1) describes such practices, and (2) the options consumers have with respect to behavioral advertising. Where choice is available, the website should provide consumers with a clear, easy-to-use, and accessible method for exercising this option.”

IV. Proposed Principle Two: Data Security and Retention

In addressing data security, the Commission’s proposal states that companies that collect or store consumer data for behavioral advertising should provide reasonable security for that data. While we agree that reasonable security measures should be taken, we submit that non-identifiable data and marketing data do not necessitate the same level of security as would be needed for sensitive identifiable data, and companies should not

be expected to provide the same levels of protection for non-identifiable data and marketing data as companies would be expected to provide for sensitive data.

In its proposed principles, the Commission also includes a separate proposed principle with respect to data retention, stating that companies should retain personal data only for the time frame necessary to fulfill a legitimate business or law enforcement need. The Commission seeks comment regarding whether companies can or should reduce retention times. We submit that if companies have sufficient data security measures in place, data retention concerns should not be an issue. We further submit that companies have varied needs for data, depending on their industry, their internal needs, and their internal infrastructure. We would therefore suggest that, rather than creating a separate principle for data retention, this concept should be subsumed within the data security principle. For example, companies could be required to retain sufficient security measures for as long as they retain data.

V. Proposed Principle Three: Use of Data and Changes to Policies

The Commission's third proposed principle states that a company must keep the promises it makes with consumers as to how it will protect, modify, distribute, or use personal consumer data. Further, if a company changes such policies, the Commission proposes in this principle that the company obtain affirmative express consent from the consumer before using the consumer's data in a materially different manner. We note that the language of this principle goes well beyond online targeted advertising issues, and we recommend that any issues addressed in these guidelines be limited to online

targeted advertising. For that reason, we recommend that the “change” concept be removed from these proposed guidelines.

We also respectfully submit that the current legal standard does not require affirmative express consent for all material changes to a company's data practices. Instead, many companies operate under an "opt out" regime under which the company promises to give notice and the ability to opt out prior to the implementation of any material changes. For this reason, if (contrary to our recommendation) any “change” concept is adopted as part of these guidelines, that concept should be limited to online targeted advertising and should also allow for "opt out" regimes as well as the "opt in" regime that is currently contemplated.

VI. Proposed Principle Four: Sensitive Personal Data

The Commission’s proposed fourth principle would require affirmative express consent for the use of sensitive personal data in online targeted advertising or would prohibit such use altogether. We cannot support this principle at this time, partly because imposition of such a requirement would create a significant additional burden on websites that does not currently exist. We are also concerned that a prohibition standard could frustrate computer users who might otherwise expect and consent to such use, including those seeking healthcare-related information.

Although we do not believe a specific guideline for sensitive information is generally necessary at this time, we are willing to commit to evaluating whether there are unique issues in online targeted advertising directed to (1) children not already addressed in the Children’s Online Privacy Protection Act or guidelines supplied by the Direct

Marketing Association or the National Advertising Division; (2) healthcare information not covered by existing laws or regulations; and (3) financial information not covered by existing laws or regulations.

VII. Conclusion

For the foregoing reasons, the PMA respectfully requests that the Commission amend the Principles to reflect the concerns raised in these comments.

Respectfully submitted,

PROMOTION MARKETING ASSOCIATION, INC.

By its attorneys,

Edward M. Kabak, Esq.
Director of Legal Affairs
PROMOTION MARKETING
ASSOCIATION, INC.
257 Park Avenue South, Ste
1102
New York, New York 10010
(212) 420-1100

Charulata B. Pagar, Esq.
Manatt, Phelps & Phillips,
LLP
11355 West Olympic
Boulevard
Los Angeles, CA 90064
(310) 312-4000

Liisa M. Thomas, Esq.
Jason W. Gordon, Esq.
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600