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April 11, 2008

Via E-Mail: BehavioralMarketingPrinciples@ftc.gov

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

Re: Online Behavioral Advertising Privacy Principles

Dear Secretary Clark:

I write to respectfully submit the following comments regarding the Federal Trade Commission's (FTC or Commission) Online Behavioral Advertising Proposed Principles (Principles). As a co-signer to the comments already filed by a coalition of leading trade associations from the advertising, marketing, financial services, retail, and Internet industries, we support those comments, and also offer the below additional observations from the retail industry's perspective.

The Retail Industry Leaders Association (RILA) serves to promote consumer choice and economic freedom through industry operational excellence. Its members include the largest and fastest growing companies in the retail industry -- retailers, product manufacturers, and service suppliers -- which together account for more than \$1.5 trillion in annual sales. RILA companies provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

Our companies have the ability to collect information about consumers in a variety of contexts and purposes. Some companies offer websites where consumers can make purchases with electronic payment systems. Other retailers offer loyalty and discount cards where customers provide a home or e-mail address. Still other companies sell merchandise where personally identifiable information must be collected to fulfill the transaction, such as the sale of contracted cell phone services, or as legally required for the sale of cold medication containing the key ingredient for methamphetamine production pursuant to the Combat Meth Act of 2005 (Public Law 109-177). However, there is one thing that all of our companies have in common - we serve millions of Americans every day. Our industry is built on the business-to-consumer model. We aim to serve our customers well, including by protecting the information they provide us.

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There are a few key points from the Coalition's response that we would like to emphasize. These points include the need for clarity in any privacy principles put forth by the FTC and a strong desire to better understand the motivation for them.

First, we are concerned about how the published Principles relate to prior FTC privacy guidance. RILA is supportive of the Fair Information Practices (FIPs) issued in 2000, and our industry closely followed the FTC's examination of online profiling issues in its 2000 Online Profiling Report to Congress. In its report that year, the FTC carefully considered how online profiling should be analyzed and used the familiar FIPs as the framework, including how to evaluate the Network Advertising Initiative's (NAI) self-regulatory guidelines. Today, the FIPs provide a clear and comprehensive method for the retail industry to use in examining how consumer's personal information should be treated, and how the Principles of notice, choice, access, security and redress for personal information should be applied.

We do not believe that the self-regulating Principles put forth by the Commission today are as clearly defined as those issued in 2000. The proposed Principles do not explain how they relate to or have evolved from the FIPs, nor do they fully explain the specific harms to consumers that would spur such action. As examples, prior FTC guidance examined personal information versus non-personal information, and applied the principle of choice to data use or information sharing, not to collection, both of which could have an undetermined impact to online retailers.

We understand and embrace the fact that as business and technology evolve, so do privacy practices and doctrine. However, such evolution should be explained and discussed thoroughly; involving both industry and consumers, so that all parties understand how guidelines apply in various contexts and ways they can be made dynamic to evolve with the marketplace. We are troubled that the Principles put forth today deviate from existing FIPs in such a way that will not only impact online advertising, but could also impact other business functions that consumers have come to rely upon and expect. Without a clear sense of motivation for change or underlying principles, it is extremely difficult to craft policies to achieve the principles and prevent underlying consumer harms, explain privacy provisions to the public or aid internal company training and compliance communications.

Second, a major concern is the extent to which the Commission's proposed Principles are meant to cover first-party relationships (how a company understands and relates to its own customers), versus third-party relationships (which enables consumer behavior to be tracked across various websites). We believe the definition of behavioral advertising should be clarified and narrowed before the FTC proceeds. In its 2000 review, the FTC noted the consumer benefits of first-party relationships because of the ability to offer recommendations about new products or sales of interest to consumers, the ability for small companies to break into markets and the ability of retailers of all sizes to offer customized local content. As the coalition points out, the proposed definition of behavioral advertising would inadvertently impact the direct relationship that retailers have cultivated with their customers. As an example, it arguably limits the use of direct marketing based on personal information a customer provides to an online retail store. Other examples of services that could be impacted include personalized websites, relevant site merchandising and product recommendations based on prior purchasing and browsing behavior,

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reminders of items left in online shopping carts, and other activities that consumers have enjoyed since their inception and are already governed by existing privacy policies. Many of these benefits, such as merchants suggesting products to their own customers based on past purchases, predate the internet and are the foundation of loyal relationships in brick-and-mortar stores. If the goal of the FTC is to focus on how online advertisements can be served based on consumer behavior across different websites hosted by separate companies, then the guidelines should be tailored for that activity.

Third, we offer the following remarks with regard to the proposed principle relating to privacy policy changes. We urge the Commission to consider that not all changes, even if they look the same conceptually, will have the same impact on consumers and thus merit the same treatment. RILA supports heightened notice and choice requirements based on the level of impact to the consumer, but we believe they should be explored beyond what was offered in the proposed Principles. Solutions may need to be examined that go beyond the typical notice and choice environment, where notice is a small link on a website, and choice is a pre- or unchecked box co-located with other actions or choices a consumer may make, usually related to a transaction. For policy changes, there is no equivalent mechanism for interacting with consumers, so that a variety of methods need examination to avoid consumer confusion. As described by the Coalition, consumers will best be served by Principles which encourage companies not to draft policies that promote legal flexibility, but rather ones that describe, in language clear and comprehensible to the consumer, the appropriate data practices of the merchant and relationship with the consumer.

Finally, we understand the intent of the guidelines is to encourage industry to self-regulate in this complex area of online advertising. Existing self-regulation has prompted companies to innovate and to engage in understanding their customers' needs. We wholeheartedly support the intent behind the FTC's actions today, but do not believe that the any guidelines issued by the FTC are truly "self-regulatory". Further, it appears that industry is heeding the call. We note that the NAI has recently updated its guidelines and we expect others to follow suit. We urge the FTC to examine the NAI and other industry guidelines closely to see if they address the harms and issues the FTC is seeking to address.

We appreciate the opportunity to submit these remarks and look forward to further dialogue about how to develop and provide privacy Principles that protect both consumers and our retail economy. Should you have additional questions about these comments or the retail industry, please do not hesitate to contact me at katherine.lugar@rila.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine Lugar". The signature is fluid and cursive, written in a professional style.

Katherine Lugar
Senior Vice President, Government Affairs