

October 19, 2007

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

**Re: *Network Advertising Initiative (NAI) Written Comments for the
FTC's Behavioral Advertising Town Hall Forum***

Dear Mr. Secretary,

On behalf of the NAI, I thank you for this opportunity to comment on the online advertising, behavioral targeting, and self regulatory initiatives to be discussed at the Commission's upcoming Behavioral Advertising Town Hall. We look forward to a broad-ranging event that will examine both the consumer benefits of online advertising – including unprecedented access to enormous amounts of free content and services – and the important protections that currently exist to ensure that consumer privacy is maintained. More specifically, our comments and participation will describe the role the NAI Principles have played in providing and promoting consumer safeguards in specific areas of the online advertising industry and beyond.

About the NAI

The Network Advertising Initiative (NAI) is a cooperative group of online advertising companies engaged in the practice of online preference marketing (OPM). NAI members currently include Acerno, Advertising.com (an AOL company), AlmondNet, Atlas (a Microsoft company), DoubleClick, Revenue Science, Safecount, Specific Media, Tacoda (an AOL company), 24/7 RealMedia, and [x+1]. In addition, we are currently processing membership applications for Google, Microsoft, and Yahoo.

The NAI functions as a self-regulatory body for OPM practices in the online marketplace. NAI members commit to adhere to a series of requirements (the NAI Principles) and, perhaps most notably, agree to provide notice of OPM practices across thousands of websites, and of the availability to opt-out of non-personally identifiable OPM via the NAI consumer website. The NAI Principles also require a number of other consumer protections from NAI members. This is particularly the case when personally identifiable information (PII) is involved with OPM. At the present time, NAI members are only engaged in non-personally identifiable OPM.

The NAI Principles Have Had a Strong Impact on Online Advertising

The NAI announced its online advertising self-regulatory Principles in July of 2000, based on input from both the Federal Trade Commission and the Department of Commerce. The resulting NAI Principles framework¹ was drafted so as to require notice and choice with respect to “online preference marketing” (“OPM”). The term OPM is defined rather specifically: OPM corresponds to the use of data collected over time and across websites to determine or predict consumer characteristics or preferences for ad delivery on the Web. The enforceability of the NAI Principles demanded that the program be built upon rather objective elements, and critical to that success was a concrete set of definitions, including that for OPM.

Within the definition of OPM, the NAI Principles contemplate three categories of practices: (1) OPM involving non-PII clickstream data; (2) OPM involving clickstream data to be collected and merged with PII prospectively; and (3) OPM involving clickstream data previously gathered and then merged with PII. All three of these categories require the provision of notice and choice. However, the requirements detailing the location, prominence, and levels of notice and choice increase in step with each increase in use of clickstream data.

¹ A copy of the full NAI Principles document is available at <http://networkadvertising.org/networks/principles.asp>.

The standards for the three categories of OPM practices are notable:

- (1) **OPM involving non-PII only.** For this category, NAI members must work to ensure that their network customers (websites within their networks where OPM clickstream data is collected) post a privacy policy that includes notice of the site's use of OPM and a link back to the global opt out page on the NAI website. On the NAI site, the NAI member must make available an opt out from OPM practices. This is universally accomplished through the delivery of an opt out cookie by the NAI member.
- (2) **OPM involving clickstream data to be collected and merged with PII prospectively.** NAI members cannot merge PII with Non-PII collected on a going forward basis (i.e., after the user provides PII) for OPM unless the consumer has been afforded *robust notice and choice* about such merger before it occurs. Robust notice must occur at the time and place of collection of the PII and must disclose: (a) that the PII is shared with a network advertiser for purposes of OPM; (b) the type of information that may be collected and linked by the network advertiser; (c) the consequent or partial loss of anonymity of a consumer's future web usage; and (d) the ability of the consumer to choose not to participate by opting-out. If using PII for OPM at all, network advertisers must provide consumers with reasonable access to that PII and other information that is associated with such PII retained by the network advertiser for OPM purposes.
- (3) **OPM involving clickstream data previously gathered and then merged with PII.** Network advertisers and organizations acting on their behalf may not merge previously collected clickstream data with PII for OPM without the consumer's prior affirmative consent ("opt-in") to any such merger. Network advertisers may collect PII for OPM purposes *only* from the sites of publisher customers with which they have contractual relationships.

These protections are significant, and NAI members recognize the importance of their continued vitality in the marketplace. As should be clear, the conditions and constraints placed on use of PII for OPM purposes by the NAI Principles result in a *strong disincentive for use of personally identifiable information in OPM at all*. This point is reinforced by the fact that current NAI members engage only in non-PII OPM practices.

And the NAI Principles go even further than notice and choice to provide important consumer protections online. Specifically, by agreeing to abide by the NAI Principles, members commit to not use personally identifiable information (PII) about sensitive medical or financial data, sexual behavior or orientation, or social security numbers for OPM at all.

These kinds of restrictions have influenced the online advertising industry more broadly, even among those engaging in behavioral advertising practices that do not strictly fit the definition of OPM. The impact of the NAI Principles on the posting of privacy policies and avoidance of PII use in behavioral advertising generally has had a strong self-regulatory effect that has served consumers well since the inception of the program seven years ago.

Consumers Have Been Empowered and Engaged by the NAI Principles

The number of user-visits to the NAI's consumer education and opt-out site emphasizes the ongoing importance of the NAI Principles to consumers. As reported in 2001 in the program's infancy, the website was visited 30,000 times during its first week of operation.² More recent website usage statistics confirm continued robust engagement with the NAI site's functions. For example, in 2006 we estimate that our opt out page³ was visited 1,003,750 times. By the close of 2007 we project

² See <http://republicans.energycommerce.house.gov/107/Hearings/06212001hearing292/Hughes463.htm>.

³ See http://networkadvertising.org/managing/opt_out.asp.

this number to increase by 29%, totaling 1,292,319 visits. While it is possible to track the number of visits to the NAI opt out page, it is not possible to track the number of NAI members that receive an actual opt out request from a single visit. Every NAI member has an opt out cookie available on the NAI opt out page. As a result, the total number of opt out requests processed on the NAI website is reasonably extrapolated as being much larger – perhaps by a factor of 11 (representing all NAI members). Consumers are most certainly finding and using the NAI opt-out functionality.

Responding to consumers' inquiries makes up a significant part of the NAI's day-to-day operations. An NAI staff member fields questions and concerns from consumers that are transmitted via the "contact us" portion of the website. The single most common issue raised by consumers about the NAI Principles program relates to the functionality of the opt-out. It is rather common for consumers to request assistance to ensure that their opt-out cookie is functioning properly (browser compatibility concerns). The vast majority of these concerns are successfully addressed by having a staff member work directly with the consumer to resolve the problem they had been experiencing. Where this does not resolve the problem, NAI staff escalates the issue by involving the specific ad network whose opt-out cookie is associated with a user's question.

To our knowledge, these escalations have universally been resolved favorably. In the history of the NAI, only one company – MatchLogic – has been expelled from the program for failure to comply with the NAI's membership requirements. Because MatchLogic was also failing as a company, it subsequently went out of business.

It is also notable that there are literally thousands of links to the NAI opt out page in privacy policies around the web. From major sites to the smallest of niche publishers, the disclosure of OPM practices and link to the NAI opt out is a common feature on the web.

These observations, drawn from our day-to-day operations, suggest that significant numbers of consumers are continuing to rely on the opt-out tool made available via the NAI website, and are further using this “gateway” site to address questions about browser functionality, cookies and online advertising practices in general. The NAI continues to operate successfully to protect consumers in the manner originally envisioned.

Behavioral Advertising Provides Important Consumer Benefits

Behavioral advertising (as a category of online advertising that is broader than OPM alone) has emerged as an increasing portion of the online advertising marketplace. Analogous to the ad-supported free television programming model, online advertising directly subsidizes forums for more content, services, and information online. Online advertising programs fund an endless range of useful Internet websites, most of which are consequently able to provide their services and materials free of charge to consumers.

The power of the ad-supported free content model has been recognized of late by the New York Times, which recently made a determination to switch from a fee-based service to a free content ad-supported model. This decision, like countless other websites', results in a larger number of consumers finding access to content they previously may never have been able to afford (or might have chosen to avoid because of mere cost), and simultaneously disperses content far wider than it ever would have traveled under a fee-based model. Additionally, this free content is more widely and readily accessible via the web than in the offline context. Such ease of access to free content online supports enhanced worker productivity, because content that may have taken workers 10 hours to find using traditional research methods several years ago is now findable in minutes. Taken together, these are clearly strong consumer and economic benefits that flow from robust online advertising activity in the marketplace.

Further, to invoke the “long-tail” principle, ad networks enable small businesses to use advertising affordably, efficiently, and effectively. In this sense, the Internet’s ability to enable small commercial sites’ access to a distributed network of consumers that may be interested in their product has already exceeded the value of ad-supported content facilitated by advertising in the television medium. Unlike television advertising, where costs are often too prohibitive to allow small businesses to enter the television advertising marketplace, the business models of online ad networks enable small businesses to enter the marketplace of products, services and ideas as never before. In sum, online advertising has promoted the democratization of voices online.

Important Privacy Issues Are Addressed with Powerful Tools

The growth and power of the online advertising model – indeed the growth and power of the web itself – is predicated on the use of data. It is important to note that an enormous amount of the data used online today is not personally identifiable. In other words, many online services and features *can be provided without the need to gather personally identifiable information from consumers*. The use of non-PII online inherently provides consumers with a strong level of protection from harm, as non-PII does not carry with it high levels of threat from fraud and identity theft.

Of course, there are many examples of PII being used robustly online. In many ways, online channels are similar to other marketing and communications channels – such as direct mail, telephone, or email – in that PII is used to power a sophisticated set of tools and services that provide a foundation for much of our economy.

Whether using personally identifiable information or not, consumers always benefit from high levels of transparency with respect to online advertising practices

and the use of data by the various actors in the online advertising market. Over the past 10 years, consumers have been well served by a deep set of defenses against fraud and abuse, and through strong transparency and accountability online. By any assessment, the protections available to consumers online today are at least equal to, if not greater than, those available in other communication channels.

The various layers of consumer privacy protections online are notable:

- (1) **Privacy Policies.** Over the past five years, the use of online privacy policies has become nearly ubiquitous on consumer-facing websites. The Federal Trade Commission, advocates, and industry trade associations – such as the Online Privacy Alliance -- have all worked aggressively to encourage online businesses to post privacy policies. Through these efforts, consumers have been provided with notice into the many uses of data online. In no other channel or marketplace has the availability of privacy policies been easier or more complete. And while criticisms of consumer notice being provided through privacy policies persist, it is incontrovertible that privacy policies have encouraged many businesses to carefully examine and then document their data practices. This is surely a good thing for consumers.
- (2) **Self Regulation.** As stated above, the NAI Principles have provided a strong foundation for the appropriate use of OPM in online advertising. Consumers are engaged with the Principles through the proliferation of notice on thousands of websites and through the availability of an opt out from NAI members' OPM practices. Additionally, NAI members participate in the TRUSTe program, which audits each company's compliance with its privacy policy.⁴ But there are additional protections that have emerged in the online advertising industry. Notably, the NAI

⁴ See www.truste.org.

has issued best practices for the use of web beacons, email marketing, and email authentication. Further protections have been provided through initiatives like the Platform for Privacy Preferences (P3P), a program that has been made nearly universal through adoption within the Internet Explorer browser.

- (3) **Regulation and Enforcement.** It must be noted that online advertising lives within a compliance regime that effectively regulates marketplace practices. The Commission has had numerous successful enforcement actions against companies that have engaged in deceptive practices online. In addition, important standards have emerged to protect highly sensitive children's data through the Children's Online Privacy Protection Act (COPPA). Further, European regulators have imposed requirements for notice on the use of cookies online – specifically requiring that the use of cookies be accompanied by notice within a privacy policy and the availability of information on how to manage cookies.
- (4) **Technology.** Perhaps more than any other effort – whether self regulatory, regulatory, or otherwise – the availability of strong consumer protection technologies has confined the use of data in online advertising within acceptable boundaries. Behavioral advertising (in its most traditional, banner-driven, form) is fundamentally based on the use of one single, pivotal technology: the cookie. As an online tool, cookies allow a browser to be recognized within a single site, or (if in a third party context), across a network of sites. Put simply: cookies enable the vast majority of behavioral advertising practices today. Given this pivotal nature, many consumer privacy and protection controls have been placed on the cookie. Every major web browser provides consumers with the ability to block or manage cookies on their systems. And the dominant browser, Microsoft's Internet Explorer (IE6 and IE7), distinguishes cookies by the privacy statements associated with the cookie. This includes a

default setting which **blocks third party cookies** (the predominant type of cookie used in behavioral targeting) that do not include a privacy statement. The prevalence and power of consumer control in the online advertising channel cannot be overstated: consumers have more control over the collection and use of their data in online advertising than any other communications or marketing channel.

Taken as a whole, the online advertising industry currently affords more consumer privacy safeguards through, among other things, privacy policy disclosures, ability to opt-out, ability to manage cookies in the web browser and use of P3P, than any other marketing channel. The Internet has afforded a unique set of easily accessible tools to allow consumers to make granular decisions that simply are not available in an offline context.

Looking Ahead

In the current environment, the focus on online advertising is at an all time high, and this is good for industry and for consumers. This channel will only grow in significance and many topics of interest will continue to inspire debate. Within the NAI, membership has furthered public policy dialogue of related regulatory topics like use of web beacons by advertisers online;⁵ email best practices, email authentication and deliverability best practices.⁶ As new advertising practices develop and as familiar advertising practices evolve, the NAI membership is committed to monitoring the self-regulatory landscape and working with academics, advocates and regulators to address the need for new privacy protections where they emerge.

The members of the NAI view the NAI Principles as a strong set of consumer protections guiding the use of OPM in today's online marketplace. NAI members

⁵ See www.networkadvertising.org/networks/initiatives.asp.

⁶ See www.espcalition.org (first launched in 2002 as a division of the Network Advertising Initiative).

further recognize the value of the existing NAI program as a ready infrastructure for future self-regulatory efforts.

* * * *

We thank you once again for this opportunity to share a perspective that we believe should inform the FTC's upcoming Town Hall. As always, we are at your disposal for further discussions, and would be most happy to speak with you about any of the above commentary.

Respectfully submitted,

J. Trevor Hughes
Executive Director
Network Advertising Initiative
170 Cider Hill Road
York, Maine 03909

Ph. 207-351-1500
Fax. 207-351-1501

thughes@networkadvertising.org