



NATIONAL CONSUMERS LEAGUE

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November 16, 2007

Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
600 Pennsylvania Avenue, NW
Washington, DC 20006

Re: behavioral advertising comments

Dear Secretary Clark:

The National Consumers League (NCL) shares the concerns expressed by the Center for Democracy and Technology, Consumer Action, Consumer Federation of America, Electronic Frontier Foundation, Privacy Activism, Public Information Research, Privacy Journal, Privacy Rights Clearinghouse, and the World Privacy Forum in the joint comments they filed with the Federal Trade Commission (FTC) on October 31, 2007 in advance of the FTC Town Hall entitled “Behavioral Advertising: Tracking, Targeting and Technology” held on November 1 and 2, 2007.¹ NCL also endorses the recommendations that the consumer and privacy groups made in those comments, including the proposal for a national “Do Not Track List.” Founded in 1899, NCL is America’s oldest nonprofit consumer advocacy organization.

While some consumers may welcome targeted marketing based on their behavior, profiling for advertising purposes raises serious concerns about privacy, security, discrimination, and use for secondary purposes such as law enforcement. Nothing in the presentations and discussions at the Town Hall gave NCL confidence that those concerns are being adequately addressed by the advertising industry or the FTC. Indeed, the World Privacy Forum report about the National Advertising Initiative (NAI) details the inadequacy of the industry approach thus far and of any self-regulation that is not properly promoted, operated, audited and enforced.²

¹ Joint comments by the Center for Democracy and Technology, Consumer Action, Consumer Federation of America, Electronic Frontier Foundation, Privacy Activism, Public Information Research, Privacy Journal, Privacy Rights Clearinghouse, and the World Privacy Forum at http://www.worldprivacyforum.org/pdf/ConsumerProtections_FTC_ConsensusDoc_Final_s.pdf

² The National Advertising Initiative: Failing at Consumer Protection and at Self-Regulation, November 2, 2007, http://www.worldprivacyforum.org/pdf/WPF_NAI_report_Nov2_2007fs.pdf.

At the root of the problem is the fact that there is no comprehensive legal framework for data protection in the United States that provides individuals with basic privacy rights, such as the right to control one's personal information, the right to be left alone, and the right to be evaluated on the basis of accurate information, as there is in other countries such as Finland.³ The existence of such a framework would propel the advertising industry to develop technologies, policies and practices that are designed to respect consumers' rights. To bolster consumer confidence, companies could voluntarily offer even greater protection for privacy and security, in the same way that credit card companies provide greater protection for unauthorized use, and could compete on the basis of providing the best, easiest-to-use controls.

In the absence of such a framework, industry privacy initiatives often seem to be spurred by FTC events, Congressional hearings, or the enactment of state laws. There are no minimum requirements that consumers can rely on at the federal level, leaving them at the mercy of incomprehensible privacy policies and non-transparent company policies on issues such as what constitutes "sensitive" personal information.

At the Town Hall, even members of the advertising industry acknowledged that most consumers are probably unaware of the techniques used in behavioral marketing or that it is even occurring. Research shows that when consumers do see privacy policies, many assume that this means their information is not shared with others, or combined with other information that they did not provide for the transaction.⁴

The solution is not to improve privacy policies, though companies should certainly strive to do so, but to improve privacy practices and give consumers more effective means of controlling their personal information. Research presented at the Town Hall clearly demonstrates that consumers want control, that there is a strong correlation between control and trust, and that many simply do not want to be tracked online.⁵ A national "Do Not Track List" similar to the national "Do Not Call Registry" would provide an easy control mechanism for consumers to use. It is puzzling to hear complaints from industry that this would be a "technological nightmare" at the same time that it is developing ever-more sophisticated technology for collecting, analyzing, disseminating, and using consumers' personal data.

The FTC erred in 2000 when it accepted the NAI as a solution to the concerns about behavioral tracking and targeting without ensuring that the program was effective initially and on an ongoing basis, and without pursuing a parallel effort to enact legislation. The focus now should be on what steps the FTC should take to protect consumers in an era of increasingly intrusive marketing techniques.

³ See presentation by Reijo Aarnio, Finnish Data Protection Ombudsman, <http://www.ftc.gov/bcp/workshops/ehavioral/presentations/8raarnio.pdf>

⁴ See Research Report: Consumers Fundamentally Misunderstand the Online Advertising Marketplace, Joseph Turow, Deidre K. Mulligan, Chris Jay Hoofnagle, University of Pennsylvania Annenberg School for Communications and UC Berkeley Law's Samuelson Law, Technology & Public Policy Clinic, October 2007, http://www.law.berkeley.edu/clinics/samuelson/annenberg_samuelson_advertising-11.pdf.

⁵ See FTC Presentation on Cookies & Consumer Permissions, Dr. Larry Ponemon, Ponemon Institute LLC, November 1, 2007, <http://www.ftc.gov/bcp/workshops/ehavioral/presentations/3lponemon.pdf>.

These steps are outlined in the joint consumer and privacy group comments previously cited:

- Create a national “Do Not Track List;”
- Ensure that when behavioral tracking is used, consumers are provided with timely, robust and contextual notice and consent mechanisms;
- Ensure that consumers have meaningful access to the data collected about them that is used for behavioral tracking and targeting;
- Require transparent reporting of industry compliance with privacy standards based on independent audits;
- Urge Congress to establish a national “Online Consumer Protection Advisory Committee” as a means for consumer and privacy representatives to evaluate changes in the advertising and marketing and their impacts on consumers, review industry compliance, and suggest solutions to problems;
- Define the terms to be used in the context of behavioral targeting.

Of course, vigorous FTC enforcement is also essential. This cannot be based on consumer complaints alone, since consumers are often unaware that their personal information has been collected or that it has been used or shared in ways that they did not expect. The FTC must monitor the use of behavioral tracking and targeting closely and take meaningful action to protect consumers and preserve trust in the online marketplace.

Sincerely yours,

Susan Grant
Vice President for Public Policy