

April 9, 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 Proposed Self-Regulatory Principles

Dear Secretary Clark:

This coalition of associations (“Associations”) represents a wide array of industries and companies that have come together to evaluate and respond to the Federal Trade Commission’s proposed self-regulatory principles for online behavioral advertising.¹ Included in this coalition are leading trade associations from the advertising, marketing, financial services, retail, and Internet industries. These associations are the American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers, Consumer Bankers Association, Direct Marketing Association, Electronic Retailing Association, Interactive Advertising Bureau, Magazine Publishers of America, National Retail Federation, Retail Industry Leaders Association, Shop.org, and U.S. Chamber of Commerce.

The diversity of these associations demonstrates the wide variety of industry sectors that could be impacted by the FTC’s proposal. All of these industries have an important stake in the development of any standards in this area.

The Associations strongly believe that self-regulation and leading business practices comprise the most effective framework to protect consumers and further innovation in the area of privacy and behavioral advertising. We believe that the Commission’s proposed principles have three significant shortcomings. First, by its nature, “self-regulation,” should be developed by the businesses to which the standards would apply, rather than imposed by the government. To determine whether additional self-regulation is necessary in this area, entities that maintain self-regulatory standards must first evaluate and articulate consumer harm and concerns that self-regulation would address. In issuing its principles, the Commission skipped this important step and issued its proposal without demonstrating any harm or articulating specific concerns in detail. We believe that any additional principles or guidelines should be issued only after the Commission specifically identifies harms and concerns so that business is in a position to

¹ Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles, Statement of the Bureau of Consumer Protection Proposing Governing Principles For Online Behavioral Advertising and Requesting Comment, Federal Trade Commission, Dec. 20, 2007.

consider and address them. The Associations are already engaged in such an evaluation. We welcome a further dialogue on this matter.

Second, as part of the harm evaluation and analysis, any self-regulatory framework should carefully balance restrictions on the use of information with the significant benefits that these uses of information provide to consumers. We are concerned that the proposed principles do not strike this balance. For example, we believe that the new choice requirements proposed by the Commission in some situations could have the effect of eliminating the collection and use of information that is essential for the economic viability of many Internet offerings, including free content, e-mail, and other communications services, as well as protection against fraud. Similarly, these choices could undercut the provision of significantly more relevant and tailored advertisements preferred by consumers.

The Associations believe that effective self-regulation and leading business practices are the best method to respond to changes in markets, business practices, technological advances and, importantly, consumer expectations. Similarly, self-regulation is particularly effective in the Internet medium where innovation is exceptionally rapid and consumer response swift, and business continues to demonstrate an ability and willingness to adapt self-regulatory frameworks to issues as they emerge.

Third, the Commission does not examine how its proposed self-regulatory principles relate to, or have evolved from, prior guidance in related areas, including the Fair Information Practices and the Commission's Online Profiling Report to Congress. There are several ways in which these proposed principles suggest important and different concepts than previously recommended or issued. For example, prior Commission guidance examined the distinctions between personally identifiable information and non-personally identifiable information.

We believe that the following points, which are described in detail below, are critical to evaluating the Commission's proposed principles:

- Any self-regulatory principles in this area should be careful not to unnecessarily limit the tremendous benefits that behavioral advertising provides to consumers.
- The scope of activities should be limited to true "behavioral advertising" where information is collected across websites in order to predict consumer characteristics or preferences for purposes of online advertising.
- The principles should not require choice in all instances for the collection of information, particularly non-personally identifiable information.
- Data retention should be one component within the "reasonable security" principle.
- A principle that allows flexibility based on circumstances in considering how notice and choice are best provided for changes in privacy practices should be adopted.

- Existing legal and self-regulatory regimes with respect to sensitive information should apply to behavioral advertising.

Behavioral Advertising Provides Significant Benefits to Consumers and Businesses

Behavioral advertising provides significant benefit to consumers and businesses. It is a critical component of the successful business models that are underwriting the Internet revolution. It supports cost-free Internet content, services, and products that shape today's popular Internet experience. Behavioral advertising is particularly effective in creating cost efficiencies that directly result in new entrants to the marketplace that otherwise would not be economically viable.² It provides consumers with information regarding products and services most likely to be of interest to them. The same information that is used for behavioral advertising also provides commercial content to users in which they are likely to be interested, including news, weather, sports, and other commercial content. Similarly, behavioral advertising provides businesses with a more efficient and effective means of reaching consumers likely to be interested in their offerings. This efficient and effective marketing enables new businesses to reach customers, thereby reducing costs to both businesses and consumers and improving competition. Competition, in turn, results in significant corresponding consumer benefits in reduced prices and improved products.

Behavioral advertising subsidizes the cost of providing products to consumers online. For example, such advertising supports online versions of newspapers and magazines available to consumers for free from anywhere in the world with an Internet connection. Behavioral advertising also subsidizes services that allow a consumer to upload, share, and store videos and photographs at no cost. Similarly, it supports online offerings such as free e-mail, chat, video conferencing, and telephone service. Behavioral advertising also supports tools that permit consumers to manage their online preferences by customizing websites and receiving relevant content, including the availability of products or services in a user's area, local news, classifieds, traffic reports, or weather. Consumers appreciate these offerings, as evidenced by the amazing growth in both Internet usage and e-commerce in the past decade.

Recent studies show that nearly 75 percent of adults in the U.S. use the Internet. The numbers are higher among teenagers; 90 percent of U.S. teenagers are Internet users.³ Consumers use the Internet for a variety of reasons, including consumption of goods and services. For instance, nearly 93 percent of Internet users have done some e-commerce-related activity, such as researching a product, making a purchase, or participating in an online auction.⁴ This widespread participation resulted in \$136.4 billion in total e-commerce sales for 2007, a

² See generally Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* (2006).

³ Susannah Fox, *Privacy Implications of Fast, Mobile Internet Access*, Pew Internet & American Life Project, Feb. 13, 2008.

⁴ John B. Horrigan, *Online Shopping: Internet Users Like the Convenience but Worry about the Security of Their Financial Information*, Pew Internet & American Life Project, Feb. 13, 2008.

19 percent increase over 2006.⁵ The Internet economy is strong, and interactive advertising is a major contributor to its growth. In 2007, revenues from interactive advertising grossed more than \$21.7 billion.⁶ Internet advertising is expected to grow 24 percent annually through 2011.⁷

The behavioral advertising model is applied throughout the Internet, supporting unparalleled access to communications and other online services such as comparison shopping tools, search engines that at no cost link individuals with content they are looking for online, product reviews, and online libraries. Behavioral advertising also supports free blog platforms used by more than 112 million Internet users to express their opinions.⁸ It also supports online forums including resume services, job banks, and social and professional network communities. Moreover, behavioral advertising subsidizes the offering of online safety tools, anti-spam tools, and anti-virus protection software. The ability of businesses to enter new markets at minimal cost creates competitive offerings previously unavailable. Furthering such continued competition should be of particular importance to the Commission's competition mission.

Behavioral advertising also has shaped consumers' online experience by improving the relevance of particular advertisements. Through behavioral advertising, consumers receive advertisements for products and services likely to be of interest to them. Consumers have overwhelmingly indicated that they would prefer to receive advertisements for products and services in which they are likely to be interested. In addition, behavioral advertising exposes consumers to information relevant to their interests, at the particular point in time when it is most useful to them, so that consumers can make more informed buying decisions. Behavioral advertising can, for example, deliver an advertisement for a sale on a particular new automobile when a consumer has frequented a number of automobile web pages, rather than an advertisement for a product in which the consumer likely has no interest.

Behavioral advertising has a positive impact on businesses, particularly improving a marketer's ability to communicate with consumers. A business can efficiently market its goods and services to consumers through targeted interactive advertising, thereby lowering its costs and prices. Behavioral advertising also has opened larger markets to small business by lowering the barriers to entry, and has created national markets out of local, regional, or niche markets. This increased competition encourages innovation of product and services, and leads to lower prices, all to the direct benefit of consumers. Contrasting this measurable and significant benefit against the lack of articulated harm accompanying behavioral marketing demonstrates the immense value of constructively directing behavioral advertising, not limiting it.

⁵ U. S. Census Bureau News, *Quarterly Retail E-Commerce Sales, 4th Quarter 2007*, Feb. 15, 2008, available at <http://www.census.gov/mrts/www/data/html/07Q4.html>

⁶ Mark Walsh, *Study: Internet Ads Will More Than Double By 2011*, MediaPost Communications, Online Media Daily, Jan. 21, 2008, available at <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=74685&Nid=38464&p=472752>.

⁷ *Id.*

⁸ See <http://technorati.com/about/>

Existing Self-Regulation and Leading Business Practices Provides Effective Choices to Consumers

Leading business practices widely adopted by the members of the Associations are the most effective means of providing a variety of effective choices to consumers. These practices also have been embodied in numerous self-regulatory frameworks. Among the successful examples of effective self-regulation are guidelines and standards of organizations such as the Direct Marketing Association (“DMA”), the Interactive Advertising Bureau (“IAB”), the Network Advertising Initiative (“NAI”), TRUSTe, the AICPA’s WebTrust, BBBOnLine, and the Online Privacy Alliance. These organizations and programs have many years of experience in developing best practices and standards to protect consumers’ privacy online, and their efforts offer the most flexible and effective means to do so.

In addition to these programs, which provide significant parameters for companies, as well as transparency and choices, technology also provides choices to consumers. For example, there are a number of ways for consumers to use existing technology to limit the use of cookies on their browsers, as well as to anonymously browse the Internet. A simple web search by any consumer reveals dozens of products, many available at no cost, that allow those consumers to surf the Internet entirely anonymously. Therefore, consumers have broad privacy protections available to them.

The Scope of “Behavioral Advertising” in the Draft Principles Is Too Broad

The Commission’s proposed principles would define “behavioral advertising” as:

[t]he tracking of a consumer’s activities online including the searches the consumer has conducted, the web pages visited, and the content viewed in order to deliver advertising targeted to the individual consumer’s interests.

This definition would go far beyond the type of self-regulation that is appropriate or beneficial to consumers. The Commission has indicated that the proposed guidelines are a continuation of its “online profiling” efforts that took place in 2000. At that time, online profiling was described as “data collected over time and across Web pages to determine or predict consumer characteristics or preferences for use in ad delivery on the Web.”⁹ The definition of “behavioral advertising” in the new proposed principles extends far beyond this definition without any basis for such an expansion.

We believe that the types of activities identified and evaluated by the Commission in its current efforts regarding behavioral advertising are the same as those that were discussed in 2000 when the Commission hosted Online Profiling workshops and issued its corresponding reports. Commission staff indicated in the November 2007 Behavioral Advertising Workshop its belief

⁹ See NAI Self-Regulatory Principles for Online Preference Marketing by Network Advertisers, available at <http://www.ftc.gov/os/2000/07/NAI%207-10%20Final.pdf>

that the entities engaged in behavioral advertising have changed, thus potentially raising new concerns that should be further addressed through self-regulation. If this is in fact true, we believe that the focus should be on specific entities engaged in these practices. The focus should not be on an expansion of the prior definition of online profiling to include all information practices of companies, as is the case given the broad proposed definition of “behavioral advertising” under the Commission’s current proposal. In addition, if there are more entities that are engaged in the “online profiling” types of practices, the Commission should evaluate whether there are concerns similar to those articulated in 2000 to justify an extension of the existing regimes or other additional self-regulation to these additional entities.

The definition of behavioral advertising should be limited in scope.

As discussed below, there are a number of specific concerns that we have identified that we would like to set forth in response to the Commission’s proposed definition of “behavioral advertising.”

First, we believe that the definition is too broad in its coverage. Specifically, the word “including” in the current definition is unbounded and, as a result, could comprise any type of information collected online and used to deliver advertising. Given the broad and diverse range of advertising models and information used, such a sweeping approach is inappropriate and could unnecessarily interfere with critical business practices.

Transaction or other information affirmatively provided by a consumer should be outside the scope of “behavioral advertising.”

Second, any information that is provided by the consumer and not passively collected should fall outside the scope of the definition of behavioral advertising. Transactional and other similarly collected information entered by the consumer is already effectively governed by the privacy notices of websites, where consumers are told how the information will be used and provided choices for such use. These notices have been widely adopted. If a consumer purchases a television from an online retailer, for example, and enters his name, shipping address, and other personal information at the site, the privacy policy for that website will disclose the choices available with respect to the use or transfer of that information to a third party. Clearly, when consumers input information at a website, they are aware of this fact and are provided with information so that they can understand the choices with respect to such information. The widely accepted practice is to notify the consumer of the business’s information practices and provide the consumer with the ability to choose whether such information is transferred to third parties for marketing purposes.

The Commission has regularly taken enforcement actions against companies that fail to follow the practices posted in their privacy notices. We are unaware of any further need for self-

regulatory proposals in this area where there already are widely adopted self-regulatory practices backed by strong Commission enforcement.¹⁰

The behavioral advertising definition should not apply to information practices within a website or family of websites under common ownership or control.

Third, we believe that the definition should apply only to information collected over time and across third-party websites, and not to information collected at an individual site or within a family of sites owned or under common control of the same corporate entity. This is particularly the case because the type of information collected and used for advertising within an individual website is not an area where the record indicates harm or consumer concern. In fact, we believe that consumers are aware of, and significantly benefit from, use of information from first-party websites. This also is true where information is collected from third-party sites linked to a particular site where such sites collectively compose a consumer's account online, such as occurs for many financial services companies. Such information is not the type of "invisible tracking" where consumers are unaware of the entity that is collecting the information.

There are many retailers and financial institutions, for example, that provide personalized websites, or deliver products and services when consumers return to a website based on the consumer's prior interaction with the business. This is a well-known practice that consumers have broadly adopted and from which they have benefitted. Similarly, as described above, website privacy policies have proven to be a very effective means for consumers to understand their interactions within a website. This is an example of a concern about the scope of the guidelines—the difference between a first-party company that uses information to "know its customers" both online and in a traditional brick-and-mortar setting, and third-party entities that can track consumer behavior across multiple websites. Under the proposal, first-party companies may be prohibited from legitimately understanding and serving their own customers—where no data sharing is involved in any fashion—or, at the least, may be uncertain of appropriate rules of engagement.

"Context"-based ads should fall outside the scope of the definition of "behavioral advertising."

Fourth, "behavioral advertising" should not encompass practices where information from the website—but not the consumer—is being used to "deliver" advertising. If there are no inferences being made about a particular consumer's *behavior* online regarding "web pages visited" or "content viewed" in order to deliver the advertisement, then this should fall outside the definition of "*behavioral* advertising." Thus, if the advertisement would be delivered irrespective of the consumer based on content or the website, it should not be treated as "behavioral."

¹⁰ See http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html

Thus, the scope of behavioral advertising should not include contextual advertising—those situations where the context of the website is used to determine the types of advertisements to be delivered or displayed. For example, if a website is aimed at golf enthusiasts and it advertises golf resort vacations, this should not fall within the scope of behavioral advertising merely because “advertising is delivered” based on the web page visited by all consumers. This is well within consumers’ reasonable expectations of the type of marketing that would occur. If the advertisement is placed based on the content in the web page being viewed or the type of web page, the advertisement would be delivered irrespective of what individual is viewing the web and the individual’s web-surfing habits.

Such context-based advertising is no different than advertising in magazines, television shows, or newspapers, all of which are time-tested, successful models that have provided great benefit to consumers and businesses for decades. Websites should not be required to provide “choice” to consumers with respect to this advertising. The marketplace provides such choice, and consumers can determine whether to do business with sites that advertise or sites that do not. Consumers have made this choice repeatedly in the online world in recent years, regularly opting for websites that do not charge a subscription or fee over those that charge a fee.

Context-based search ads should not fall within the definition of “behavioral advertising.”

Similarly, the concept of “search” included in the proposed definition in a number of instances would extend beyond the scope of what we understand to be the area of concern articulated at the November workshop. The vast majority of search engine functionality provided by Google, Yahoo!, and others deliver advertisements based on the words entered by the consumer to perform the search. This, too, is “contextual,” and should not fall within the Commission’s definition of behavioral advertising. Application of notice and choice requirements to such advertising appears to be entirely misplaced. These free search engines exist directly as a result of such contextual advertising. There can be no question that consumers have overwhelmingly embraced this concept with respect to search engines, and benefit from it. A requirement that such search engines or advertisers provide choice with respect to the use of this information for “behavioral advertising” could undercut the business model with no corresponding benefit to consumers. Issues related to search may be different than other types of behavioral advertising. Leading search providers have made recent announcements with respect to practices that address these issues.

Principle 1—Transparency and Consumer Control

As described above, there have been significant developments in self-regulation in the online privacy arena since the advent of the commercial Internet. Any assessment of the need for additional self-regulation should carefully examine existing frameworks and determine whether they are sufficient and, if not, in what areas additional practices should be adopted. Current self-regulatory practices for notice and choice are robust with respect to uses of personally identifiable information and non-identifiable information online. The first principle

set forth by the Commission addresses transparency and consumer control. We discuss each of these items below.

The Associations support transparency, and are committed to public education.

The transparency portion of the Commission's proposed principle states:

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 Associations support transparency regarding the information practices of websites, and are committed to increased public education demonstrating the significant benefits that result to consumers from behavioral advertising. A mainstay of self-regulation for online privacy is that notice be provided to consumers of the information collected from a website, the uses of the information, whether such information will be transferred to third parties, and the choices to users with respect to such transfers. The Associations and member companies provide in privacy notices statements describing when data is being collected at the site and the uses of such information.

DMA's online marketing guidelines, for example, require detailed notices of information collection practices online, including whether cookies or other passive means of data collection occur and whether such data collected are for internal or third-party marketing purposes. Similarly, the Interactive Advertising Bureau recently announced interactive advertising privacy principles that require that consumers visiting a website be provided meaningful notice of the types of advertising-related information collected, the technologies employed to collect such information, and how such information is used, including the other companies that operate on the site and may collect such information. Additionally, in the area of the collection and use of information that does not identify a specific user, the Network Advertising Initiative standards set forth choices regarding the merger of non-identifying and identifying information.

The Associations are evaluating the current types of notification that exist regarding behavioral advertising to determine whether there may be standardized or similar general descriptions of behavioral advertising practices that can be developed and suggested for use by websites. We also are evaluating the development of a website(s) to which companies can direct consumers that would further describe the benefits and choices regarding behavioral advertising.

The consumer control principle should provide flexibility for different collections and uses of information.

The consumer control portion of the Commission's proposed principle states:

The website should also provide consumers with a clear, easy-to-use, and accessible method for exercising this option.

Under long-standing privacy self-regulation policies, users are provided choices when personally identifiable information about them will be transferred to third parties, including when such transfers will be made for advertising and marketing purposes. Such choices exist in the DMA Guidelines, IAB Principles, NAI, TRUSTe, Better Business Bureau, and other frameworks.

The proposed FTC principle would go far beyond these existing approaches and require choice for *collection* of all information—both personally identifiable and non-personally identifiable—for behavioral advertising purposes. This proposed provision could result in the need in some instances to entirely redesign the current architecture of the Internet. This is because the information is being collected in a seamless manner that does not interrupt the consumer's Internet surfing with notices or choices at the time of collection. The impact of this proposal likely would be to create significant costs and force unworkable choices that undercut critical business models driving free Internet content, while ultimately not addressing any demonstrated harm or concern for consumers.

This impact could occur for two primary reasons. First, in many instances, information is collected for multiple purposes, not just advertising. If a consumer can choose not to have information collected, then the non-advertising uses would also be limited, e.g., in instances where a website collects non-identifiable information to deliver weather forecasts, local news, or other content likely to be of interest to the user. Such information also is used in order to display content based on the particular browser or device used to access the Internet. Second, it is operationally impractical for the provision of choice for much third-party collection of non-identifiable information prior to or at the point of collection.

We do not believe that there has been any indication in the Commission's prior evaluation of online profiling or at the November behavioral advertising workshop that has identified any need for self-regulation or regulation regarding such collection practices. Absent a compelling public interest that choices regarding such collection and use of information be required, we believe that there should not be any interference with such practices. Rather, the marketplace is a sufficient driver of responsible business practices in this area.

The types of choice in a self-regulatory scheme should take into consideration whether information is personally identifiable.

Conspicuously absent from the Commission's proposal is any distinction between the treatment of information that is "personally identifiable" and information that is "non-identifiable." The Commission's principles apply to "data" and, thus, would appear to encompass both information that is personally identifiable and information that is not personally identifiable. While there may be reasons for self-regulation surrounding non-identifying information, we believe that the identifying and non-identifying classification remains a critical distinction in any privacy framework and do not believe that there is a demonstrated "privacy" interest in non-identifiable information. This distinction was recognized and central to the Commission's prior consideration of "online profiling" and the corresponding Network Advertising Initiative Principles that were adopted at that time.

Consumer choice concerning the transfer of personally identifiable information to third parties for marketing purposes remains a cornerstone of self-regulation in marketing and advertising and is incorporated into a number of existing self-regulatory frameworks including those of DMA, TRUSTe, BBBOnLine, the Online Privacy Alliance, and others. Such choices are clear to consumers and provide a very effective means for consumers to limit transfers of personally identifiable information to third parties for marketing purposes. Providing choice regarding the *collection* of non-identifiable information in many instances is not practical and would significantly disrupt business functionality. Often non-identifiable information is collected from sites, with advertising being just one of many purposes. Demanding consumer choice for such collection would interfere with, for example, the content on a web page, the determination of how a web browser views content, and numerous other practices that "strike at" the core functionality of Internet operations.

Technology also is effective for addressing collection of non-identifying information. For example, the platform for privacy preferences (P3P) provides choices that allow limitations on the collection of information that will be provided to third parties. In addition, industry has been experimenting with other methods for ensuring the preservation of opt-out preferences even where consumers delete their cookies. We expect the types of privacy choices available to consumers to continue to proliferate.

The Associations are evaluating existing business practices as they impact the existing self-regulatory framework to determine whether there are any areas that would warrant additional self-regulation. Absent a showing of harm, any changes that would interrupt existing business practices should be taken only after such a critical analysis, given the importance of advertising and marketing to the continued remarkable development of the Internet.

Principle 2—Reasonable Security, and Limited Data Retention, for Consumer Data

The Commission's proposed reasonable security principle states:

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 the company's business operations, the types of risks that a company faces, and the reasonable protections available to the company.

The proposed data retention principle states:

Companies should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.

The Associations generally support the FTC's reaffirmation of the law regarding data security practices. We believe that any company that maintains information for purposes of online behavioral advertising should provide reasonable security for that data. The Associations believe, however, that it would be difficult to justify imposing such obligations in connection with non-personally identifiable information in all situations. The cost of securing purely non-identifiable information in some instances may not make sense given the non-existence of any consumer harm.

The Associations also believe that, unlike the FTC's proposal, the data security principle does not need to separate out data retention. As the Commission has itself indicated, data retention and destruction is part of a reasonable data security program for personally identifiable information. Data security programs routinely balance data retention and destruction considerations. The issue should not be the legitimacy of a company's data retention policy standing alone. Rather, as the FTC explored in *In re BJ's Wholesale Club* and *In re Life is Good*, the reasonableness of the data retention policy must be analyzed in light of the totality of the measures deployed to protect personally identifiable consumer information against unreasonable access. Thus, data retention issues should be considered under a reasonableness standard, rather than measured by legitimate business or law enforcement needs as proposed. Legitimate business and law enforcement needs are important characteristics of reasonableness, but there also are other factors that may be relevant.

Principle 3—Affirmative Express Consent for Material Changes to Existing Privacy Promises

The Commission's proposed principle states:

[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 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.

As an initial matter, this third principle is broadly phrased and appears to address all handling or protection of consumer data in connection with notification of changes to privacy policies. All of the proposed principles, including this one, should be limited to addressing online behavioral advertising.

The Associations agree that affording consumers with notice and, where appropriate, choice regarding material changes to privacy policies is important to ensuring that consumers are able to make informed decisions regarding how information about them is collected, used, and shared with third parties.

However, as the benefit of experience with this issue over many years has demonstrated, adoption of an “appropriate” principle regarding notification of privacy policy changes is the best approach to protecting consumers and ensuring that they receive relevant information. Such an approach should take into account the type of notice and/or choice needed depending upon the circumstances involved. Flexibility in the adoption of principles would simultaneously promote efficiency and the continued growth and availability of new content, products, and services online, which may require material changes to prior promises.

This type of approach is consistent with current self-regulatory best practices and consumer protection precedent in this area. DMA’s online marketing guidelines, for example, provide that if an “organization’s policy changes materially with respect to the sharing of personally identifiable information with third parties for marketing purposes,” it should provide consumers with conspicuous notice to that effect, offering an opportunity to opt out. Similarly, affording different levels of notice and/or choice, depending on the circumstances has been effective and consistent with consumer protection standards. As an example, a change from opt-out to opt-in may have different impacts on consumers for different practices and types of data. A change in notice regarding the use of non-sensitive, non-identifiable data is very different than a change in use of, for example, sensitive identifiable health information. These different scenarios have different impacts and potential risks of harms to consumers. The choices that correspond may, therefore, be different. In addition, recognizing the importance of consumer trust and brand reputation, companies have strong incentives to ensure that the mechanisms they choose for notice and/or choice are meaningful.

Indeed, the approach in the principle suggested by the Commission could undercut the development of useful and effective privacy policies. This unintended result of this level of specificity in policy changes will flow from efforts to draft policies to respond to legal exposure rather than for consumer education and information. This would be unfortunate, as we share the Commission’s goals of increased consumer education and transparency.

Principle 4—Potential Harm From Use of Sensitive Data for Behavioral Advertising Should Be Identified and Evaluated Against Existing Frameworks Prior to the Adoption of “Express Consent” or Prohibiting Use of Such Data

The Commission’s proposed principle states:

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

The Commission’s principle sets forth affirmative express consent as a standard. This is a difficult standard to evaluate as a principle with broad applicability when the Commission does not specifically define “sensitive data.” As with the other principles set forth by the Commission, prior to additional self-regulation, we believe that first the existing legal and self-regulatory framework should be evaluated to determine whether there are gaps in that framework that have surfaced given technological and marketplace developments. Only with such knowledge can an evaluation of how to address such gaps be undertaken.

We believe that there are significant legal and self-regulatory standards that regulate sensitive personally identifiable information, and that these are the appropriate standards in this area. For example, an evaluation of existing law and self-regulation in the children’s arena indicates that there are existing mechanisms in place that should first be evaluated prior to leaping to a new standard requiring consent or prohibiting such practices. Strong and effective legal and self-regulatory standards in the area of both children’s online privacy and children’s advertising already are in place. First, the Children’s Online Privacy Protection Act (“COPPA”) prohibits the use of personally identifiable information for advertising purposes absent parental consent. One of the primary policy goals behind this law was to prevent children from providing personally identifying contact information that could be used by individuals in a harmful manner. Second, the Children’s Advertising Review Unit (“CARU”) restricts the advertising of inappropriate content to children. This framework is primarily driven by limiting exposure to content that should not be viewed by minors.

At the Commission’s November workshop, concerns were raised about inappropriate advertising to children resulting from behavioral advertising. Any inappropriate content viewed on a website directed at children or with a significant children’s audience is covered by the CARU guidelines. Similarly, personally identifying information of children under 13 is prohibited without consent under both the CARU guidelines and COPPA. This prohibition would include data that was collected as non-identifying that is subsequently combined with identifying information. The Associations are evaluating whether there are further principles that could be developed to limit inappropriate content on websites directed at children that are not already limited by the existing framework.

Similarly, other areas with potential sensitive information also need to be evaluated against existing legal and self-regulatory frameworks to determine whether such standards are sufficient in this environment prior to any additional standards. We believe, for example, that the Gramm-Leach-Bliley Act, as well as other guidelines such as those of DMA, sets forth the standards for financial institutions that should apply to information in this area. We do not believe that there are additional privacy standards that should apply to information collected or used in this area. Similarly, health information is subject to the Health Insurance Portability and Accountability Act and other self-regulatory privacy regimes. The content of advertising also already is the subject of significant legal and self-regulatory regimes.

* * *

The Associations are committed to continued leading business practices and strong and effective self-regulation in the areas relating to online behavioral advertising. The Internet revolution is still in its early stages, and we believe that self-regulation is the best means of providing protections and choices to consumers. Self-regulation also will further innovation with respect to products and services to the benefit of consumers.

Please contact Stu Ingis, Venable LLP, at 202/344-4613 with any questions.

Sincerely,

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers
Consumer Bankers Association
Direct Marketing Association
Electronic Retailing Association
Interactive Advertising Bureau
Magazine Publishers of America
National Retail Federation
Retail Industry Leaders Association
Shop.org
U.S. Chamber of Commerce