

ADVERTISING, MARKETING & PROMOTIONS

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FTC UPDATES ONLINE BEHAVIORAL ADVERTISING PRINCIPLES

Last month, the Federal Trade Commission issued a long-awaited update (titled “FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising”) to its online behavioral advertising principles originally issued in December 2007.

A description of the original principles can be read in, “Federal Trade Commission Proposes Principles Regarding Privacy in Online Behavioral Advertising,” Privacy & Data Security Law Journal, www.dglaw.com/images_user/newsalerts/gkibel408.pdf.

The FTC defines online behavioral advertising as “tracking consumers’ online activities in order to deliver advertising that is targeted to the individual consumers’ interests.” Behavioral advertising has the ability to be a very effective and successful form of advertising by using data collected from consumers to deliver advertisements targeted directly to that consumer’s interests and characteristics. As noted by the FTC and industry members alike, the key is to balance the benefits of behavioral advertising with the legitimate privacy concerns for consumers when their data is collected and used in this manner. The FTC principles do not amount to new rule making by the Commission, but rather give industry members a tool for further self-regulation in this area.

The FTC Staff Report set forth revised principles that generally reaffirm the prior draft of the principles. However, the FTC did clarify some issues, make certain changes and exclude certain forms of advertising from the principles in response to comments received from over 60 different companies, trade associations, public advocates and consumers.

Perhaps the most significant changes as a result of the Staff Report are (1) the recognition that there is no longer a bright line between personally identifiable information (“PII”) and non-personally identifiable information (“non-PII”) and (2) the exclusion of “first party” and “contextual” advertising from the principles.

The types of data collected online have become so rich and detailed in recent years that data once believed to be non-PII could possibly be used to

identify a specific individual. For example, data including a person’s age, educational background, geographic area, profession, purchasing history and other data, when combined, could be used to identify a specific individual even though it may not include an actual name or email address. For this reason, the FTC stated that “in the context of online behavioral advertising, the traditional notion of what constitutes PII versus non-PII is becoming less and less meaningful and should not, by itself, determine the protections provided for consumer data.” This is quite a departure from prior policies, which did seem to recognize a difference between the two types of data. It remains to be seen if this change will find its way into other topics and policies.

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The FTC also excluded first party and contextual online behavioral advertising from the principles. First party (or “intra-site”) online behavioral advertising occurs when the data collection and use of such data for online behavioral advertising occurs on a single website. This is to be contrasted with the collection of data to be shared across a network of websites. The FTC believes that advertising on a single website in this manner is consistent with a consumer’s expectations and therefore does not require any additional disclosures. A consumer who purchases one product on Company X’s website should expect that Company X will try and promote complimentary products to them in the future. An exclusion was also provided for contextual advertising where an advertisement is displayed on a website based upon the content of the text on the page. Again, the FTC believed that consumers would expect, for instance, if they were reading an article on fishing to see ads for fishing gear. It should be noted that these exclusions from the online behavioral advertising principles do not mean that existing laws and policies do not apply to such practices.

Other comments and revisions are discussed after the heading of each of the following principles.

>> Principle 1

Transparency and Consumer

Control – This principle continues to focus on the need for companies to provide “clear, concise, consumer-friendly and prominent” disclosures to consumers so that they can decide whether or not to use a particular service if their data will be used for behavioral advertising. The FTC recognized that advertising has evolved beyond simple websites to include social networking, mobile phones and other wireless devices. Therefore, the FTC has put it to the industry to be creative in developing methods to make sufficient disclosures to consumers in these new mediums.

>> Principle 2

Reasonable Security, and Limited Data Retention, for Consumer

Data – Data security is a theme that is applicable to all areas of data collection in any industry and in any medium. The FTC clarified this principle by including the guidance given by many in the past regarding the retention of data, specifically, “[c]ompanies should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.”

>> Principle 3

Affirmative Express Consent for Material Changes to Existing

Privacy Promises – It has been the FTC’s position for years that data collected under one set of privacy promises may not be used for a different purpose without providing notice to the consumers of such changed practices. The FTC has clearly stated in this principle that affirmative consent is needed before previously collected data can be used in a manner which is materially different from the prior privacy promises. The key issue for businesses is trying to determine what constitutes a “material” change.

>> Principle 4

Affirmative Express Consent to (or Prohibition Against) Using

Sensitive Data for Behavioral Advertising – When this principle was originally issued in December 2007, the Commission stated that sensitive data could include financial, children’s and health information. Given the potential breadth of those categories, many pleaded with the FTC for a more

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succinct definition of “sensitive data”. However, the FTC did not provide one, so companies are unfortunately left to consider whether their data falls within this principle.

In general, the Staff Report and revised principles did clarify the Commission’s thinking on a number of important topics. However, as is often the case in the online world, business is moving faster than the regulators. As a result, there are now numerous, and potentially conflicting, standards for behavioral advertising. Guidance and principles have already been issued by the Networking Advertising Initiative (“NAI”) and TRUSTe. In addition, a

collection of prominent advertising trade associations is considering self-regulatory principles and some individual states have begun to consider legislation to address this issue.

With a new administration in Washington and a new chairman taking the helm at the FTC, this FTC Staff Report may be the last attempt by the FTC to encourage the industry to coalesce around effective and comprehensive self-regulatory guidelines. Should the industry fail to do so, or should there be incidents involving behavioral advertising with a negative impact on consumers, it is quite possible that new federal laws could emerge.

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