



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

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Mr. Alan L. Cohen
Vice President and General Counsel
Council of Better Business Bureaus, Inc.
4200 Wilson Boulevard, Suite 800
Arlington, VA 22203-1838

Dear Mr. Cohen:

This letter responds to the Council of Better Business Bureaus' request for a Federal Trade Commission staff advisory opinion concerning the Council's proposed "accountability program." Under this program, the Council of Better Business Bureaus (the "CBBB") will hold companies engaged in online behavioral advertising ("OBA") accountable for compliance with the "Self-Regulatory Principles for Online Behavioral Advertising" (the "Principles"), released in July 2009 by a coalition of industry associations and administered by the Digital Advertising Alliance ("DAA").¹ The CBBB wishes to know whether Federal Trade Commission ("FTC" or "Commission") staff is likely to recommend that the Commission bring an enforcement action challenging as an anticompetitive restraint of trade "any element of the proposed accountability program," if the CBBB proceeds to implement it.

Based on the information provided in your letter of April 19, 2011 and in subsequent telephone conversations between FTC staff and CBBB representatives and DAA representatives, FTC staff has no present intention of recommending that the Commission bring any such enforcement action.² In brief, the proposed accountability program is intended to increase

¹ Letter from Alan L. Cohen to Donald S. Clark, Secretary, Fed. Trade Comm'n (April 19, 2011) ("April 19 Letter"). The DAA is a "business league" established to govern an industry self-regulatory program based on the Principles. The DAA was formed through funding and the cooperation of the American Association of Advertising Agencies, the American Advertising Federation, the Association of National Advertisers, the Direct Marketing Association, and the Interactive Advertising Bureau. These associations and the DAA are described in footnote one of the April 19 Letter. Representatives of these organizations, or some of them, are referred to herein as "Trade Association Representatives."

² We have determined that issuance of an FTC staff advisory opinion letter in this matter is appropriate under Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). FTC Staff has issued advisory opinions under similar circumstances, including

transparency and consumer control of OBA, which has the potential to increase consumer welfare, and there appears to be little or no potential for competitive harm associated with the proposed accountability program.

Significantly, our conclusions are entirely dependent on the completeness and accuracy of the information provided to us concerning the proposed accountability program and its likely effects, and on our understanding of the pertinent facts, as described below.³

Statement of the Pertinent Facts

The CBBB is the national headquarters of the Better Business Bureau (“BBB”) system. In your April 19 Letter, you explained that the BBB system seeks to promote ethical business and advertising practices. Among its operations, the CBBB, in partnership with the National Advertising Review Council, administers advertising industry self-regulation programs, including the National Advertising Division and the Children’s Advertising Review Unit.

In February 2009, the Commission issued a Staff Report discussing principles for the regulation of OBA and calling on the advertising industry to adopt an appropriate self regulatory program.⁴ Your April 19 letter states that in response to that call, a coalition of advertising industry associations adopted the Principles described in “Self-Regulatory Principles for Online Behavioral Advertising”⁵ in July 2009. The Principles are administered by the DAA, and their implementation is ongoing.

Under the Principles, online behavioral advertising is defined as the practice of collecting “data from a particular computer or device regarding web viewing behaviors over time and across non-affiliate Web sites for the purpose of using such data to predict user preferences or

regarding proposed programs of the CBBB and the Direct Marketing Association, also a participant in the DAA. See Letter from Michael D. McNeely to Robert L. Sherman (Sept. 9, 2011) (regarding Direct Marketing Association proposal pertaining to its Mail and Telephone Preference Services and related matters); Letter from Alden F. Abbott to Steven M. Mister (Dec. 19, 2006) (regarding Council for Responsible Nutrition/CBBB proposal pertaining to monitoring and review of dietary supplement advertisements for truthfulness).

³ Staff’s opinion in this matter is limited to the competition law analysis requested by the CBBB. FTC staff did not review the Principles or their administration in any other respect. Nothing contained herein should be construed as stating or implying any FTC staff opinion on the extent to which the Principles and their administration are adequate or appropriate.

⁴ FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising (Feb. 2009) (“2009 FTC Staff Report”), available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

⁵ A copy of the Principles was appended to your April 19 Letter.

interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors.”⁶

As described in your April 19 Letter, the Principles require companies engaging in OBA to provide:

- Transparency about data collection and use practices associated with OBA, providing consumers with clear, meaningful and prominent notice through multiple mechanisms.
- Consumer Control over whether data is collected and used or transferred for OBA purposes, provided through easy-to-use consumer choice mechanisms.
- Appropriate Data Security for, and limited retention of, data collected and used for OBA purposes.
- Consent to Material Changes in an entity’s OBA data collection and use policies for previously collected OBA information unless that change will result in less collection or use of the consumer’s data.
- Limitations on the collection of specified categories of Sensitive Data for OBA purposes.⁷

The Principles also provide for the education of consumers and businesses about OBA and how consumer choice and control may be exercised. Finally, the Principles provide for the establishment of accountability programs to monitor and seek compliance with the Principles by all companies engaged in OBA. The CBBB’s April 19 Letter requesting an FTC staff advisory opinion relates to an accountability program that the CBBB proposes to implement.

According to the April 19 Letter, the Principles require all “third party” OBA data collectors and advertising networks to use the DAA’s Advertising Option icon to indicate compliance with the Principles and to timely inform consumers of and link them to a required web site notice and mechanism by which consumers can exercise choice concerning receipt of OBA.⁸ Third party collectors and advertising networks are encouraged to use the consumer choice mechanism operated by the DAA, but may use an equally accessible alternative choice mechanism. If a third party does not provide the required notice and choice on a web site, the web site operator must do so.

⁶ April 19 Letter at 3.

⁷ As defined in the Principles, “Sensitive Data” includes personal information gathered from people known to be under the age of 13, and certain financial and health data.

⁸ A third party is defined under the Principles as “an entity . . . to the extent that it engages in Online Behavioral Advertising on a non-affiliate’s web site.” It is distinguished from a “first party,” which owns or controls the web site with which the consumer interacts.

As explained in the April 19 Letter, the DAA licenses use of the Advertising Option icon/link to assist companies in providing greater transparency to consumers for a fee of \$5,000 per year, or free of charge to publishers whose revenues from online advertising are less than \$2 million per year. In addition, for a fee of \$10,000 per year, third party OBA data collectors and advertising networks can be listed in the consumer choice system on the DAA web site AboutAds.info, <http://www.aboutads.info>, thereby providing a consumer choice mechanism as required by the Principles; or they can adopt an alternative consumer choice mechanism. Trade Association Representatives informed FTC staff that other costs of implementation of the Principles are expected to be modest and a function of the size of a given third party collector or advertising network. In their view implementation costs should not affect the ability of companies to compete effectively in their markets.

The CBBB program will focus primarily on compliance with the Principles' provisions seeking to ensure transparency and consumer control. Through a contracted vendor, the CBBB will monitor companies reasonably believed to be engaged in OBA. When appropriate based on that monitoring and other sources of information, the CBBB will make confidential inquiries into a company's possible areas of non-compliance with the Principles.⁹

When initiating an inquiry, the CBBB will notify the company whose practices are under review and seek its response, including information demonstrating its compliance with the Principles. If the CBBB finds that a company is not in compliance, the CBBB will recommend steps to bring it into compliance, and will ask the company to agree to implement those steps.

The CBBB will publicly report incidents of non-compliance only if they go uncorrected,¹⁰ and these incidents "will be referred to the appropriate regulatory authorities."¹¹ Failure of a company to participate in a CBBB compliance inquiry or to provide the CBBB with requested information similarly may result in public reporting and referral to regulatory authorities. A finding of uncorrected non-compliance also may result in the company's loss of membership in one or more of the trade associations that cooperated through the DAA to establish and implement the Principles.

Trade Association Representatives indicated in conversation with FTC staff that public disclosure that a company has declined to comply with the Principles could injure that

⁹ According to the April 19 Letter, other sources of information may include consumer complaints and information from competitors, government agencies, and academic studies.

¹⁰ Public disclosure will be made through periodic reports published by the CBBB and on web sites of some participating trade associations.

¹¹ The April 19 Letter specifies that instances of non-compliance "will" be referred to "the appropriate regulatory authorities," but does not specify the authorities in question. We note that non-compliance with the Principles will not necessarily equate to a violation of a law or rule enforced by a regulatory authority or result in any regulatory agency action.

company's business reputation – and perhaps its business – to the extent that other companies and consumers believe that non-compliance with the Principles reflects a failing of note. Neither public disclosure of non-compliance nor expulsion from a trade association would otherwise impair that company's ability to compete effectively. In important part, the benefits of trade association membership – such as access to training and networking opportunities – would remain available, though perhaps at somewhat greater non-member prices.

CBBB representatives have indicated in conversation with FTC staff that neither the Principles nor the CBBB's proposed accountability program would impair the ability of companies to use alternative systems, including for example browser-based systems with “do not track” features,¹² to provide consumer protections with respect to OBA, provided that the companies also satisfy the notice and choice provisions of the Principles. For example, according to the CBBB, some companies have begun to provide consumers with more detailed “preference” choices than are required under the Principles.

Analysis of the Proposed OBA Accountability Program

The proposed CBBB accountability program appears similar to industry self-regulation to establish and seek industry-member compliance with an ethical code. The antitrust laws do not prohibit professional or trade associations from adopting reasonable ethical codes to protect consumers. As the Commission has stated, “[s]uch self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare.”¹³ In some instances, however, particular ethical restrictions or compliance mechanisms can unreasonably restrain competition and harm consumers, thereby violating the antitrust laws. Accordingly, we consider the purpose and effects of the proposed accountability program.

The CBBB has explained that the purpose of the proposed accountability program is to enhance consumer understanding of OBA and to provide consumers with meaningful notice and control of OBA. We rely on that representation, which finds support in the structure of the program itself, and turn to consideration of the program's likely competitive effects.

As a general matter, industry self-regulation to provide consumers with more useful information and increased choice promotes consumer welfare with little or no risk of diminishing competition among complying businesses. But industry self-regulatory programs can be designed or misused by competitors to limit competition among them, resulting in

¹² Some browsers currently have “do not track” settings, by which the browser can alert web sites visited that the consumer does not want his or her browsing monitored by companies engaged in OBA.

¹³ *Am. Academy of Ophthalmology*, 101 F.T.C 1018 (1983) (advisory opinion); *see also Am. Med. Ass'n*, 117 F.T.C. 1091 (1994) (advisory opinion); *Am. Med. Ass'n*, 94 F.T.C. 701, 1029 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

increased prices, reduced consumer choice, lesser innovation, and other consumer harms.¹⁴ In addition, industry self-regulatory programs can operate as agreements to exclude non-compliant products or companies from the market.¹⁵ Thus, an agreement among competitors to impose on non-complying companies sanctions that limit their ability to compete effectively would be of concern to antitrust enforcement authorities.¹⁶ In the context of OBA, for example, an agreement among competitors to deny advertising space to companies that do not comply with the Principles would be troubling.

Because industry self-regulation to increase transparency and consumer control has the potential to enhance consumer welfare, staff would analyze these and other potential concerns using the “rule of reason.”¹⁷ Under the rule of reason, FTC staff weighs the potential for competitive harm arising from an agreement among competitors against any procompetitive benefits arising from that agreement. If FTC staff concludes that the procompetitive benefits more than offset the potential for competitive harm, staff will not recommend an enforcement action.

Given the pertinent facts relating to the CBBB’s proposed accountability program as we understand them, FTC staff concludes that the program has little potential for competitive harm. We base this conclusion on five points.

First, the accountability program is intended to enhance consumers’ understanding and control of OBA. All other things being equal, the enhancement of consumer understanding and control has the potential to increase consumer welfare.

Second, information provided by the CBBB and Trade Association Representatives

¹⁴ *E.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (manufacturers of steel electrical conduit that attempted to influence association's promulgation of electrical systems product standards to exclude plastic conduit by agreeing to “pack” standard-setting meeting and vote as a bloc held not immune from federal antitrust liability); *Accrediting Comm’n on Career Schs. and Colls. of Tech.*, 119 F.T.C. 977 (1995) (advisory opinion) (Commission declined to approve proposed accreditation standard that would define acceptable tuition levels, reasoning that adoption of standard would in effect be an agreement among members of accrediting body to charge no more than standard would permit).

¹⁵ *Id.*

¹⁶ *See, e.g., Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Am. Soc’y of Sanitary Eng’rs*, 106 F.T.C. 324 (1985) (consent order).

¹⁷ See the analytical framework set out in the Federal Trade Commission/ Department of Justice Guidelines for Collaborations Among Competitors, available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. See also the Commission’s recent application of the rule of reason in *In the Matter of Realcomp II Ltd.*, Docket No. 9320 (Oct. 30, 2009), available at <http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf>.

indicates that the accountability program will impose only relatively minor burdens on companies participating in OBA. These consist principally of use of the Advertising Option icon/link to signal compliance with the Principles and provide consumers with a notice about OBA that will, in turn, link to and explain a consumer choice mechanism. Compliance does not impose significant technical burdens or costs that would advantage some companies over others. A license to use the Advertising Option icon/link and the DAA's choice mechanism is available at a modest cost – one that it appears will not limit consumer choice of goods and services or exclude companies or prevent them from competing effectively.

Third, the sanctions for non-compliance with the Principles contemplated under and in conjunction with the accountability program do not appear unreasonable. Those sanctions include public disclosure of non-compliance, referral of non-compliance to government regulatory authorities, and suspension of non-compliant companies from certain trade associations. Based on the information available to us at this time, it does not appear likely that imposition of these sanctions would limit the ability of companies to compete effectively.

Companies may compete based on reputation, including reputation for ethical dealing. We cannot assess the extent to which some companies or consumers may decide to limit or avoid business dealings with companies that choose not to comply with the Principles. But if some companies and consumers were to make *unilateral* decisions to limit or avoid business dealings with companies that do not comply with the Principles, the resulting effects would not flow from anticompetitive conduct, but from competition itself – competition based on reputation for protecting consumer privacy.¹⁸ Such unilateral conduct is entirely consistent with the antitrust laws. Further, referral of matters to governmental authorities may, in some instances, aid those authorities in carrying out their responsibilities, and may, as well, be a lawful exercise of the right to petition the government for redress.¹⁹

The last sanction contemplated by the CBBB for non-compliance with the Principles, expulsion from certain trade associations, might be characterized as a group boycott of some kind. However, expulsion from a trade association does not always result in predominantly anticompetitive effects.²⁰ Here, loss of trade association membership would result in the

¹⁸ That would contrast markedly with any agreement among companies to refuse to deal with non-compliant companies, which would raise substantial antitrust concerns. *See, e.g., Fashion Originators' Guild v. FTC*, 312 U.S. 668 (1941).

¹⁹ *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (exempting from antitrust challenge concerted effort to influence administrative processes); *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (exempting from antitrust challenge concerted effort to influence adjudicatory processes).

²⁰ *See, e.g., NW Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 286 (1985) (expulsion of retailer from purchasing cooperative by vote of membership held not unlawful absent a showing that the cooperative had market power or unique access to an element of business necessary for effective competition).

limitation or loss of certain trade association benefits such as access to certain training and networking opportunities at association member prices. Information provided to us by the CBBB and the Trade Association Representatives indicates that the loss of these benefits is not likely to impair companies' ability to compete effectively.

Accordingly, we conclude based on the information provided to us by the CBBB and the Trade Association Representatives that the contemplated sanctions for non-compliance with the Principles are unlikely to adversely affect competition.

The fourth basis for our conclusion that the accountability program has little potential for competitive harm is this: the self-regulatory system envisioned by the Principles and the accountability program is broadly applicable across product categories, advertisers, and web site operators. Accordingly, its impacts are not focused on any specific market for goods or services. As a result, the potential for adverse competitive impact in any specific market for goods or services is further attenuated.

Finally, adoption of the CBBB's proposed accountability program to foster compliance with the Principles does not preclude adoption of, and poses little risk of "crowding out," other systems for protecting consumers with respect to OBA. According to the CBBB and Trade Association Representatives, neither the Principles nor the accountability program preclude companies' use of other systems, including browser-based "do not track" systems, for providing consumers with transparency and control. Should it later appear, however, that collective adoption and enforcement of the Principles operates as an impediment to adoption of complementary or superior consumer protections, we might then reconsider this opinion.

Conclusion

For the reasons stated above, FTC staff believes that the CBBB's proposed OBA accountability program is unlikely unreasonably to restrain trade. Accordingly, we have no present intention to recommend a challenge to the program.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff advisory opinion and reserves the right to rescind it at a later time. In addition, FTC staff retains the right to reconsider this opinion, and, with notice to the requesting party, to rescind or revoke it if implementation of the proposed accountability program appears to result in significant anticompetitive effects, if the program is used for improper purposes, if pertinent facts (or our understanding thereof) change significantly, or if it would be in the public interest to do so.

Sincerely yours,



Michael Bloom

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