

**Before the
FEDERAL TRADE COMMISSION
Washington DC 20580**

Re:)
)
ONLINE BEHAVIORIAL ADVERTISING)
SELF-REGULATORY PRINCIPLES)

**COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits these comments in response to the Federal Trade Commission’s (FTC or Commission) request for comments on its proposed Online Behavioral Advertising Principles (Principles).¹ ITTA is a trade association that represents the interests of mid-sized telephone companies. ITTA members collectively provide a broad range of high-quality wireline and wireless voice, data, Internet, and video services to more than 26 million customers in 44 states.

ITTA commends the FTC for convening this important discussion concerning self-regulatory principles for online behavioral advertising. Self-regulation has been effective in the development of innovative and advanced services on the Internet, and ITTA trusts that self-regulation will continue to evolve as a mechanism for protecting consumer interests. Self-regulation is a particularly effective tool in technologically-oriented environments, where rapid evolution of applications and services can outpace regulators’ ability to address changing situations. Businesses attuned to the need to protect consumers, and fluent with existing regulations and legal standards, are in a good position to self-regulate as emerging technologies evolve to meet new consumer demands. By contrast, ITTA cautions that overly

¹ The Principles define Behavioral Advertising as “the 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.”

prescriptive or restrictive “self-regulatory” principles imposed by regulatory fiat may thwart innovation and create unnecessary consumer “make work” or confusion. With this in mind, ITTA provides these limited comments on those specific Principles that may most directly, and adversely, affect ITTA members and consumer choice.

Principle 1: Transparency and Consumer Control

ITTA supports the idea behind this Principle, as a general matter. Accurate information concerning notice, choice, access, and security should be available to consumers. Fairness with respect to those elements is necessary, as well. ITTA member companies value consumer choice and control, and recognize that such control is a critical element to consumers judging their online experience. Businesses that do not permit consumers sufficient control over that experience, or that fail to properly inform consumers of how information generated from their online experience may be used, risk losing subscribers in a very competitive market.

ITTA is concerned, however, that the FTC’s proposed Principle governing transparency and consumer control is overly broad, and could unfairly – and inappropriately – encompass almost all online activities, imposing burdens on existing industry practices that do not raise the specter of consumer harm. Consumers, in fact, benefit in many ways from customer preference marketing, or behavioral advertising, including tailored ads for specific goods that consumers want and free access to a wide variety of content that is supported in part by online advertising.

The Principle addressing transparency and consumer control also appears to contemplate that consumer notices be on the particular website where information is being used to tailor advertising. ITTA questions whether this particular model is the only one that can achieve the FTC’s objective of providing meaningful “clear, consumer-friendly, concise, and prominent” information. Consumer notice and choice can be presented and exercised in

a variety of ways and through a variety of media. The FTC should take into account the many alternative mechanisms by which disclosures might be made to consumers. For instance, consumers already know that information about notice, choice, access, and security can be found in company privacy policies. By now, many consumers know that the most common place to locate a company's privacy policy is at the bottom of the first page of the company's website. In fact, requiring notice, choice, access, and/or security information in some other format, or on some other portion of a website, likely would only confuse consumers who have grown accustomed to existing practices.

Requiring all businesses to adhere to a single-defined paradigm for providing consumer notice would also render a profound disservice to companies that commonly communicate with their customers in ways other than website-related. Those communications can be equally, if not more, effective given the particular circumstances of the communication, which would include the audience to be reached and the message to be conveyed. Communication mechanisms such as customer contracts, letters, e-mails, or other periodic communications all play a role in providing meaningful consumer notice and choice.

Moreover, were the FTC to contemplate that only a series of pop-up screens or interstitial pages could fairly satisfy a "prominent" notice requirement, such repeated notifications would slow online communications and commerce, be a nuisance to consumers, and eventually would be ignored. Contrary to the initial objective, *i.e.*, to meaningfully communicate information, a prescriptive, monocular approach to consumer notice could end up providing no real or effective notice to consumers at all.

Self-regulation, with clear industry-specific guidelines, is a better vehicle for increasing transparency and consumer control in the online environment. Adopting a broad definition of "behavioral advertising" while simultaneously imposing a one-size-fits-all approach to disclosures at each website visited would certainly be counterproductive.

Principle 3: Affirmative Express Consent For Material Changes To Existing Privacy Promises

In its discussion of Principle 3, the Notice indicates that it is settled FTC regulatory precedent that affirmative express consent is the current legal standard for changing a privacy “promise,” which is the general commitment to privacy that a company articulates in its privacy policy. ITTA respectfully questions that notion and believes it overstates the existing state of the law. The *Gateway* case² cited in the Principles involved a situation where Gateway changed its privacy practices without sufficient notice to its customers. While the *Gateway* case demonstrates the challenges businesses face when changing their privacy policies, and the regulatory response when the challenge is not managed well, it remains true that there is no current FTC rule requiring express affirmative consent for all changes to privacy policies. While ITTA supports fair information practices associated with changes in privacy policies, it opposes express consent government mandates; current applicable law is sufficient. Express consent requirements as a predicate for the use of consumer information stifle communications as well as innovation and prevent industry practices from evolving alongside the fast-changing world of online activity.³

Contrary to an express consent prescription, the FTC should allow industry the opportunity to continue to develop self-regulation mechanisms for use with behavioral advertising. Only through an industry-based approach can the various factors that companies must consider be addressed in a manner that does not unnecessarily harm online communications and communities, as well as electronic commerce.

² *Gateway Learning Corp.: Decision and Order*, Docket No. C-4120, Federal Trade Commission (Sep. 10, 2004).

³ Additionally, some ITTA members are subject to – and have adopted – additional notification measures associated with laws such as the Communications’ Act Customer Proprietary Network Information (CPNI) laws and the Cable Privacy Act. Imposing yet another notification requirement on these businesses simply acts to complicate their communications with their customers without providing any added protection or benefit.

Principle 4: Affirmative Express Consent to Using Sensitive Data for Behavioral Advertising

The Commission is right to be concerned about the use of “sensitive” data, but must balance this concern with the fact that consumers increasingly create and share personal information, as indicated by the increased use of blogs. Given the rapid pace of change and the level of competition, self-regulation is the most effective means of achieving limitations on the use of sensitive data. The protection of children’s privacy should continue to be supported by compliance with the Children’s Online Privacy Protection Act (COPPA) and education to parents and children about online privacy and security risks.

In conclusion, ITTA submits that self-regulation is an effective mechanism in rapidly-evolving technologically-oriented environments to protect consumer interests.

Respectfully submitted,

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