



February 18, 2011

Via Electronic Filing

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington DC 20580

Re: Protecting Consumer Privacy in an Era of Rapid Change – Comments

Dear Secretary Clark:

BlueKai is pleased to submit these Comments to the Federal Trade Commission on the preliminary staff report on “Protecting Consumer Privacy in an Era of Rapid Change.” We appreciated the opportunity to participate in the Commission’s outreach efforts leading up to the release of the Report, including participation on the online behavioral advertising panel at the Commission’s first privacy roundtable held on December 7, 2009, and comment submission in connection with the privacy roundtable series. During this next phase of the Commission’s exploration of how best to address consumer privacy in an era of technological change, BlueKai continues to encourage the Commission to focus on the importance of transparency. We also suggest that any framework that the Commission ultimately embraces should provide companies with flexibility to provide such transparency in a manner that is tailored to their businesses. With such flexibility, BlueKai has been able to develop innovative offerings that incorporate transparency. BlueKai has seen first hand how such transparency and choice provide value to both consumers and businesses, and unlike other areas of the economy, has led to job creation. We urge the Commission not to impose any restrictions on such practices that could place a damper on this one bright spot in the economy.

I. BlueKai Is a Company Designed with Privacy in Mind

The Report highlights the concept of “privacy by design,” and encourages companies to promote consumer privacy throughout their businesses and in the development of their products and services. BlueKai (www.bluekai.com) adheres to this school of thought, and indeed is the first online data exchange designed with consumer transparency and control in mind. We promote polite-marketing on the Internet. BlueKai provides innovative services that help websites efficiently gain access to the vital advertising revenue on which they rely to offer services and content to consumers at a low cost. BlueKai partners with websites to collect “preference data,” which is anonymous information about visitors’ behaviors and interests. BlueKai also offers tools designed to enable consumers to see and change the preference data stored for a specific

computer, or to opt out of the system entirely. For those computers where consumers have not opted out, BlueKai acts as an intermediary between the websites and advertisers (and ad networks) by providing pricing, standardization, and quality control for disclosing this anonymous preference data for advertising purposes. In this role, BlueKai contracts with websites to help them decide which advertising partners may target data gathered from websites and consumers, and also works with ad networks to help them locate trusted and high-quality data sources. BlueKai also controls the scope of information collected so that sites can protect themselves from unwanted data capture. Additionally, BlueKai sets terms and conditions and limits on how that data may be used. These features all underscore BlueKai's commitment to privacy by design.

II. BlueKai Provides Enhanced Transparency and Access to Consumer Data

As part of the Commission's examination of how best to provide privacy protections to consumers, the Report recommends that companies increase the transparency of their data practices and provide reasonable access to consumer data they maintain. The Report takes a particular interest in information brokers and third parties who are typically unknown to consumers that collect information about them and sell the data to third parties. Such practices, the Report notes, can lead to the creation of individual consumer profiles that raise privacy concerns because the consumers are unaware of the creation of such profiles and have no control over the dossiers. The Commission specifically seeks comment on access to these profiles and suggests that if done properly, access could provide increased transparency to consumers without imposing an undue burden on businesses.

In the Internet ecosystem, BlueKai is one of those businesses that, while not well-known to consumers, plays a key role in maximizing consumer preference data for the delivery of relevant advertisements on publisher sites. In response to the Commission's concerns about consumer access to such preference data, we note that BlueKai proudly already offers an effective preference manager tool for consumers—the BlueKai Registry (<http://tags.bluekai.com/registry>). The BlueKai Registry gives consumers complete access to the anonymous preferences associated with their computers that we store. Consumers can change the interest categories of preferences we record or remove preferences that do not interest them, thus declining to have their preferences used for advertising purposes. This Registry provides consumers with one place to impact many creators of data and many users of data as BlueKai works with several key data creators. We only share preference data pertaining to shopping or reading interests and do not collect data that consumers may consider to be sensitive, such as data on health, political interests, or adult behavior. BlueKai returns value to each consumer who participates in the BlueKai Registry by donating a percentage of the data revenue associated with that consumer's computer to a charity of their choice.

To help others provide the transparency that BlueKai has incorporated into our offerings, BlueKai launched a free white-label version of our BlueKai Registry in June 2010. This out-of-the-box tool for publishers and marketers gives consumers the same

transparency and access to profiles through registries on their own websites at no charge to the companies.

It has been BlueKai's experience that consumers who visit our BlueKai Registry typically interact with the Registry and either adjust their preferences profiles or make no changes, and infrequently decide to opt out entirely. For example, of the consumers who interact with the Consumer Registry section of the BlueKai website, approximately 1% of them ultimately opt-out from BlueKai. This experience with the BlueKai Registry supports our belief that consumers value the transparency provided by such tools and the ability to affect data practices pertaining to them, and are more comfortable with online targeted advertising when these transparency and control features are provided to them.

III. BlueKai Honors Consumers' Decisions with Durable Choice Mechanisms

The Report recommends that companies simplify consumer choice. Additionally, the Report states that consumers' decisions not to have their information collected and shared should be "durable and not subject to repeated additional requests" from a particular business. In addition to the BlueKai Registry discussed above, which provides consumers with a simple means of exercising choice with respect to the collection and use of their preference data, BlueKai has developed an open-source solution to help make consumer opt-out choices more persistent—the NAI Opt-Out Protector for Firefox (www.bluekai.com/AHlioptoutprotector.php). BlueKai is presently working with our partners in the industry to promote the adoption of the NAI Opt-Out Protector. At the moment, consumers may exercise this durable opt-out from BlueKai services at our website or through the Network Advertising Initiative consumer opt-out page (www.networkadvertising.org/managing/opt_out.asp#) and through the Digital Advertising Alliance's consumer opt-out page (www.aboutads.info/choices/). We are encouraged to see that other companies have also begun to adopt similar technologies, such as Google's recent announcement unveiling the Chrome opt-out protector, and will continue to promote durable choice mechanisms that honor consumers' decisions.

IV. The Commission Should Be Cognizant of Unintended Consequences Derived from Delineating Certain Practices as Commonly Accepted that Do Not Require Choice

In the Report, the Commission introduces the concept of a bifurcated system, in which practices deemed to be "commonly accepted" would not be subject to choice, while all others would require companies to give consumers the ability to make "informed and meaningful" choices for commercial data collection and use. For example, the Report identifies first-party marketing as a "commonly accepted practice" but qualifies that collection of data by affiliates would not be a practice exempt from the choice requirement unless the relationship is made clear to customers through means such as common branding. The Report explains that data collection through deep packet inspection would require choice because consumers would not expect ISP monitoring of their online activities for marketing purposes.

BlueKai urges the Commission to exercise caution when delineating what constitutes a commonly accepted practice and to be aware of unanticipated consequences that could result in the unintended favoring and promotion of certain business models over others. For instance, in 2010 the IAB conducted a poll of advertising agencies working in the online advertising marketplace. The poll concluded that 80% of the display advertising spent involved the use of third-party cookies for frequency capping, conversion tracking, fraud prevention, and other functions that are considered essential to companies that advertise online. If third party cookie use were limited because their use fell outside the Commission's interpretation of commonly accepted practices, many online advertisers would certainly devote less of their advertising budget to the online ecosystem – which would have a disastrous impact upon job creation in an otherwise vibrant online advertising ecosystem.

Another unintended consequence of regulation is that advertising has always had two directions: interruptive or relevant. TV advertising is interruptive (it forces you to watch the ad and not the content through a commercial break) while search advertising is relevant (you are not forced to view the ad and the ad is so useful it is considered content). Data targeting is the fundamental technique by which online advertising becomes relevant and therefore – a publisher can show fewer ads to achieve the same revenue. Without data targeting – publishers can either force users to pay – or force them to see the ad before the content or both. Polls of users such as that done by MarketingSherpa, have show that overwhelmingly users (even the ones that don't like ads) prefer to receive free content sponsored by targeting OVER having to pay for the content. We caution the Commission that aggressive legislation or regulation will force users to pay for content they currently don't have to pay for.

Moreover, in the world of marketing, many entities within the Internet ecosystem contribute to the delivery of ads on publisher sites. Such entities include first parties, or ad networks, or data exchanges to name a few. The Report suggests that service providers acting at the direction of first parties would be treated as entities not required to provide choice, but is unclear as to whether entities such as ad networks and ad exchanges would fall into this category.

The uncertainty created by categorizing particular practices as “commonly accepted practices” could calcify current practices, stagnate innovation, and encourage entities to migrate towards practices found by the Commission not to require choice and to abandon other practices that also provide consumers with services of value (*e.g.*, targeted advertising provided by third-party entities as opposed to first parties that deliver relevant and interesting advertising). We encourage the Commission to shy away from drawing lines that could unintentionally treat entities that serve the same function (*e.g.*, delivering relevant ads on websites) differently. Rather, we welcome steps taken by the Commission to encourage businesses to innovate to provide new and improved offerings to consumers while respecting their privacy.

V. The Commission Should Provide Flexibility for Entities to Develop Innovative Means of Providing Transparency and Choice to Consumers

The Commission has proposed the establishment of a Do Not Track mechanism that could provide a more uniform and comprehensive tool to consumers to exercise choice. The Report suggests that the Commission has not determined whether it favors legislation or self-regulation to implement such a mechanism. BlueKai's ability to develop offerings that embrace transparency and choice, including the BlueKai Registry and our open-source durable opt-out protector, have been made possible by the current environment that thus far has encouraged industry to take the lead in providing such protections to consumers. BlueKai believes that this approach has been ideal, as it has allowed companies to innovate and move more swiftly than would otherwise be possible if restricted by legislation to adapt in the wake of technological advancements and develop such offerings. BlueKai encourages the Commission to continue its support for transparency and choice mechanisms that can be developed and enforced through self-regulation.

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BlueKai appreciates the opportunity to submit these comments to the Federal Trade Commission on the important topic of protecting consumer privacy in an era of rapid change. Please contact me at 425-452-9200 with any questions.

Sincerely,

Omar Tawakol
Chief Executive Officer
BlueKai