



The Association of Magazine Media

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Via electronic filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Secretary Clark:

On behalf of the Magazine Publishers of America (“MPA”), the premier trade association for the consumer magazine industry, we appreciate the opportunity to comment on the latest Federal Trade Commission (“Commission” or “FTC”) preliminary staff report on privacy: *Protecting Consumer Privacy in an Era of Rapid Change*. Established in 1919, MPA represents approximately 225 domestic publishing companies offering more than 1,000 titles that span an enormous range of genres across the full spectrum of media from print to digital.

We appreciate the FTC’s interest in seeking industry input on the Commission’s proposed new framework for protecting consumer privacy, a topic we have commented on before. We also appreciate the Commission’s long-standing willingness to entertain industry proposals for self-regulatory programs, its understanding of the need for business flexibility, and its willingness to reserve judgment on potential legislative or regulatory actions during periods of rapid technological change.

The issue of consumer privacy and data collection and use is not a new one and MPA has commented and testified before the FTC in past years with regard to offline data collection and use. We share the Commission’s overarching interest in ensuring that our customers and prospective customers are comfortable with the levels of privacy protection provided by magazine publishers, and businesses more broadly. Integral to any conversation on privacy is trust, and MPA members are very proud of the level of trust our universally recognized brands have built with our readers over the course of many years; a satisfied subscriber is likely to be a long-term subscriber. Maintaining our bond with our readers and protecting their trust is of paramount importance to our members.

As you move forward, we encourage you to remain mindful of the diverse ways in which data is used in today's internet economy as well as the speed with which technology – and with it data collection and use – continues to change. In numerous ways, the Commission report acknowledges the inappropriateness of a “one size fits all” approach. In much the same way that the Commission report suggests companywide implementation of “privacy by design” can be scaled to each company's operations, so too should any national effort to implement broad privacy protections be scaled to best match consumer and business needs in various contexts.

In our comments below, we discuss several aspects of the proposed framework. We support the Commission's recognition of consumer understanding and expectations with respect to first party marketing and agree with the Commission that such marketing is “commonly accepted” and need not be subject to a choice mechanism. We believe this should extend across marketing media and can and should be extended to affiliates of first parties, with adequate transparency. We also discuss the timing of choice with regard to third party transfers of data and explain some practical impediments to offering choice at the instant of data collection in both offline and online situations. We believe that current business practices with regard to timing of choice mechanisms are well understood and accepted by consumers – particularly with regard to traditional third party marketing in the magazine industry– and that changing established policies and procedures could have negative impacts for both consumers and businesses.

First-Party Marketing Practices

We agree with the Commission that choice need not be provided before collecting and using consumers' data for commonly accepted practices. As the Commission notes, requiring consumer choice for such data collection and use “would impose significantly more burden than benefit on both consumer and businesses.” Moreover, requiring choice for first-party data collection and use has the potential to cause concern where none may actually exist, and lead to consumer confusion, as consumers are currently used to thinking about notice and choice only with regard to third party transfers of data.

Further, not requiring choice for these types of activities will advance the Commission's goal of shortening and streamlining privacy notices and allowing clearer, more simplified choice. As has been discussed during FTC workshops in recent years, when it comes to notices, less is often more; eliminating excessive information and creating shorter notices with the most important information leads to greater clarity and understanding.

The Commission asks several questions with regard to the scope of first-party marketing¹. First, the Commission asks if consumers should be given a choice before

¹ The report reiterates staff's belief – with which we concur – that online contextual advertising should fall into the “commonly accepted practices” category, but makes no mention of “first party” behavioral advertising, which was considered to be outside the scope of the principles in the FTC's Staff Report: *Self-Regulatory Principles for Online*

sensitive data is used for first-party marketing. The Commission does not offer a precise definition of sensitive information, but mentions information about children, financial and medical information, and precise geolocation data. We would note that legislative proposals in recent years have contained a very broad definition of sensitive information, including race or ethnicity, religious beliefs, and sexual orientation. Although data of a potentially sensitive nature rarely plays a role in marketing offers in the magazine industry, the Commission should ensure that the nature of our subscriber lists not be perceived as implying sensitive data about our readers; for example, readers of a Spanish language magazine, or a magazine predominately subscribed to by a particular race or religion.

Second, the Commission asks about marketing in different contexts or media, e.g., when an offline retailer sends offers via postal mail, email, or text message. We suggest that consumer acceptance and understanding of first party marketing absolutely extends across media. Magazines are a perfect example of an industry that reaches its audience across multiple media platforms. Millions of Americans read magazines in print: 186 million adults read magazines and 93 percent of all Americans². But millions also visit our websites and increasing numbers download magazine apps to their mobile devices. Some readers access their magazine content in only one of these ways, but more and more readers are accessing their favorite magazines in multiple formats, engaging with the content and advertising at home, at work, and everywhere in between. Readers expect and welcome offers that combine and cross media.

Third, the Commission asks whether marketing to consumers by commonly-branded affiliates should be considered first-party marketing. We strongly suggest that the definition of first-party marketing should extend to affiliates. This is the common standard that has evolved in the privacy arena, even with regard to sensitive financial information under the Gramm-Leach-Bliley law that governs notice and choice for financial institutions. It would be incongruous to have a stricter standard of notice and choice for what is unquestionably less sensitive data.

Further, in the magazine industry, it is possible to define commonly-branded in several ways. We believe that consumers generally know that magazine publishers often publish multiple magazines – in fact, one of our most common uses of first party marketing is to offer readers of one magazine a subscription to another magazine from the same company with complementary content. Nevertheless, there may be instances in which the reader of a magazine is not aware of the publisher’s other titles.

We believe the best way to handle such first-party marketing is through transparent notification. Our publishers often have a joint privacy policy for their magazines which can include a list of the titles published by that company and governed by the joint privacy policy, though this is just one example. This notification mechanism could also be used more broadly, in other industries, and for a wide range of affiliates. Such

Behavioral Advertising (p. 27) and should be included as a commonly accepted practice here as well.

² MRI, Spring 2010

treatment would be consistent with the FTC's position on affiliates in its report on online behavioral advertising, where the Commission stated that "data sharing among affiliated companies should be considered "first party," and thus outside the scope of the Principles ...[if] the relationship among the sites – and the possibility that they may share data – is sufficiently transparent and consistent with reasonable consumer expectations."³

We suggest the FTC also consider the situation in which two companies not under common ownership engage in a jointly-branded marketing initiative. In the magazine industry, publishers often engage in such joint marketing with advertisers. For example, a publisher may partner with an advertiser for a "microsite" on a magazine's website. The microsite may contain both editorial and advertising content relevant to the magazines' readers. In this situation, there are effectively two first parties – and website visitors would likely expect and welcome marketing offers from both first parties. With adequate transparency as to the identification of the co-sponsors, this situation should also fall within the first-party commonly accepted category.

Finally, the Commission asks whether a first party should have to provide choice with regard to data enhancement, when a company obtains data about its customers from other sources, both offline and online, to enrich its databases. We suggest that this practice, which allows fine-tuning of first party marketing offers, does not change consumer expectations or comfort with respect to first party marketing. Further, to the extent that the sources of the enhanced data are third parties, the data they are transferring was in all likelihood subject to consumer choice when collected.

Timing and Context of Choice

We agree with the Commission that, when companies need to provide choice with respect to third party transfers of data, consumer choices should be described clearly and concisely, and the choice mechanisms should be easy to use. The Commission goes on to suggest that companies should provide the choice mechanism at a time and in a context in which the consumer is making a decision about his or her data and presents two examples, one online and one offline. We suggest that data collection may be different in online and offline contexts and that the timing of choice should not be treated in a "one-size fits all" manner.

The example in the Commission report for timing of choice offline involves a "bricks and mortar" retailer. The Commission suggests that choice should occur at the point of sale, "by for example, having the cashier ask the customer whether he would like to receive marketing offers from other companies." For the magazine industry, providing notice at "point of sale" is not realistic for print – i.e., offline – subscriptions. Many initial magazine subscriptions are entered into through the use of blow-in cards that are contained in a retail copy of a magazine. Such cards are designed to be mailed back to magazine fulfillment centers, and have very limited "real estate". Because one side of the card contains the magazine's mailing address and the other side must have room for the consumer's name and address, requiring lengthy disclosures about future transfers of data

³ FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising*, pg. 28

to third parties could render the cards unreadable and useless. A description of potential third party uses of consumer information (mainly name and address for print subscriptions) and how to opt out can be provided with more clarity in a subsequent communication with a subscriber.

In addition to the impracticality of providing choice at the “point of sale” offline, the Commission’s reasoning about consumer expectations and commonly accepted practices should inform the discussion of the timing of choice. Especially in the offline context, not only are the traditional transfers of data to third parties well understood and accepted, but choice mechanisms are well established and functioning. Changing the timing of choice mechanisms for traditional data uses not only runs the risk of disrupting consumer transactions – to the detriment of both consumers and businesses – but also could diminish consumer comfort levels and their ability to compare privacy practices across companies.

In the magazine industry, a long-standing use of consumer data involving third parties is rental of subscription lists – either to other publishing companies or to marketers of products likely to be of interest to a particular magazine’s subscribers. List rental is a time worn practice familiar to magazine readers – as is the method of choice that magazines have used for years. For print magazines, clearly written opt-out information is very often included in a prominent location in each publication, backed by a selection of ways to connect with each publisher (mail, phone, email, etc). Our readers and subscribers know where to look in our magazines and how to contact us and they understand how their data is going to be used.

The online equivalent of print magazines opt-out information is the privacy policies on publishers’ websites. We do not disagree with the Commission that privacy policies could be “clearer, shorter, and more standardized, to enable better comprehension and comparison of privacy practices.” But that does not mean that a clear and concise privacy policy is not the right place for choice information for traditional third-party uses of data. Just like the ubiquitous notices in print magazines, the ubiquitous privacy policies online are recognizable for consumers – and they can be made easy for consumers to navigate. They also allow easy comparison of privacy practices across companies.

Behavioral Advertising

Unlike the traditional offline and online third party uses of data described above, behavioral advertising represents a much newer way in which businesses may benefit from third party data relationships, and publishers are no exception. Some publishers use ad networks to sell some portion of their advertising space while others may control their own ad networks.

In contrast to the long standing and well known uses of third party data outlined above, we recognize that consumers may be unfamiliar with the practice of behavioral advertising, the multiple third parties that may be involved, and the existing choice

mechanisms. As such, we agree with the Commission that a different notice and choice standard for behavioral advertising may be appropriate, at least in the near term.

We would note that the behavioral advertising self-regulatory system currently being implemented by a consortium of advertising trade groups and the Better Business Bureau is designed to provide just the kind of consumer-first notice and choice the Commission considers in its report. Through the use of a prominent universal icon, consumers are provided with ready notice and easy access to choice at the time of data collection and from the party actually collecting the data – the appropriate entity to provide notice and choice. To aid in consumer understanding with regard to behavioral advertising, the self-regulatory system is being coupled with a consumer education campaign to help consumers understand the nature of behavioral advertising, the parties involved, and how to effect choice. A notice and choice approach of this nature can evolve and adapt as new technologies arise.

Data Access and Retention

We support the Commission’s effort to increase transparency, and believe that the suggestion of a sliding scale for data access is a reasonable and workable approach to “increasing transparency without imposing undue burdens.”

As customer facing publishers, we have a vested interest in keeping our data accurate – without a correct postal or electronic mail address we are unable to deliver our product and service our subscriber accounts. We use both subscriber provided data and Postal Service databases to keep our mailing lists current and to provide seamless services. Consumers who need to make changes to their account information can reach us in multiple ways, including toll-free telephone numbers and online registration. On the other hand, for marketing data where there is no significant threat of consumer harm, we agree with the Commission suggestion that access need not be provided where a suppression right for third party offers is available.

The sliding scale should also apply to data retention. The FTC asks whether there is a way to prescribe a reasonable retention period, and we do not believe there is. Given the duration of the relationship we share with our consumers –a year or more in length with many long time subscribers on our rolls – the data we collect needs to be retained for an extended period of time; mandating an arbitrary cutoff would be unworkable. We would note that even when a subscriber has terminated a relationship, we consider the consumer to still have an established business relationship with us for some period of time, a concept also supported by the FTC’s own telemarketing sales rule which considers an established business relationship to last for 18 months after the last transaction has occurred. In addition, we suggest the Commission consider that retaining data could be privacy enhancing (as opposed to an opportunity for identity theft) as it allows a publisher to ensure that a consumers profile is not used without their knowledge or against their wishes.

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We thank you for the opportunity to submit these comments, and look forward to continuing to work closely with the Commission on these important issues.