



November 6, 2009

Federal Trade Commission  
Office of the Secretary, Room H-135 (Annex P)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

RE: Comments of the Network Advertising Initiative  
Privacy Roundtables – Comment Project No. P09541

The Network Advertising Initiative (“NAI”) appreciates the opportunity to provide comments in connection with the Federal Trade Commission’s Town Hall process. The NAI is a coalition of 35 leading online advertising companies committed to developing actionable self-regulatory standards that establish and reward responsible business and data management practices and standards.<sup>1</sup> The NAI maintains a centralized choice mechanism that allows consumers to opt out of online behavioral advertising by some or all of the NAI’s member companies, across the many different Web sites on which NAI members provide such targeting (at [www.networkadvertising.org](http://www.networkadvertising.org)).

The NAI’s comments will address the FTC’s preliminary questions as applied in the context of online behavioral advertising.

(1) Benefits and concerns arising from online behavioral advertising

The business models of the NAI’s members are based on the common goal of enabling Web content and services providers to enhance the relevancy of the online display advertising provided to consumers. More relevant advertising generates a variety of economic benefits, the most important of which is increased revenue to support consumers’ continued access to Web content and services without charge. At the same time, consumers have expressed concern relating to the level of transparency provided in connection with the cookie technologies used for online behavioral advertising. For that reason, the NAI has established self-regulatory standards to promote an appropriate framework of consumer notice and choice.

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<sup>1</sup> The NAI’s members include significant online advertising companies such as AOL’s Platform-A division, Akamai, Microsoft’s Atlas Technology division, Google, Yahoo!, AlmondNet, Audience Science, BlueKai, Media6Degrees, SpecificMEDIA and 24/7 Real Media. The NAI’s membership now incorporates not just the ten largest advertising networks as measured by audience reach, but also leading data exchange and marketing analytics services providers. See comScore Media Metrix, *comScore Releases April 2009 U.S. Ranking of Top 25 Ad Networks*, available at <http://ir.comscore.com/releasedetail.cfm?releaseid=385312>.

*(a) Consumer benefits of increased advertising revenue for Web content and services providers*

Over the past 15 years, the World Wide Web has provided consumers access to an incredible variety of new services, ranging from online news, blogs, and other content to e-mail, search, social networking, video, and other Web-based services. The explosion in Web services and their ease-of-use have transformed consumers' ability to access public information and entertainment, and created entirely new platforms for community and collaboration. Web-based technologies have also radically enhanced the ability of small businesses and specialty content providers to establish and connect with new audiences, creating new jobs and substantially increasing the diversity of public discourse. Consumer consumption of such Web services has continued to grow rapidly.<sup>2</sup>

The great majority of these Web sites and services are provided to consumers free of charge. Instead of requiring visitors to register and pay a subscription fee, the operators of Web content and services subsidize their offerings with various types of advertising. These advertising revenues provide the creators of free Web content and services – site publishers, bloggers, and software developers – with the income they need to pay their staffs and build and expand their online offerings.

Display advertisements – sometimes called “banner” ads – are an important means by which many Web content and services providers (also called “Web publishers”) generate such advertising revenue. For every Web page that is viewed by a user, the site or service has an opportunity to serve one or more display advertisements. Web publishers use ad serving technologies to manage this “inventory” of potential banner ad placements: the publisher must estimate the overall number of potential ad “impressions” that are available for different advertisers to purchase, and must then also deliver the advertiser’s campaign and report on its effectiveness.

Display-related ads are a very significant source of income to Web content and services providers, generating approximately \$7.6 billion in advertising revenue in

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<sup>2</sup> See generally Center for the Digital Future, USC Annenberg School for Communication, *Highlights from the 2009 Digital Future Report* (April 2009), available at [http://www.digitalcenter.org/pdf/2009\\_Digital\\_Future\\_Project\\_Release\\_Highlights.pdf](http://www.digitalcenter.org/pdf/2009_Digital_Future_Project_Release_Highlights.pdf) (noting that 51% of consumers prefer ad-supported online content); The Nielsen Company, *Television, Internet and Mobile Usage in the U.S. – A2 M2 Three Screen Report* (1<sup>st</sup> Quarter, May 2009), available at [http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/05/nielsen\\_threescreenreport\\_q109.pdf](http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/05/nielsen_threescreenreport_q109.pdf) (noting continued growth in monthly Internet usage generally by over 160 million U.S. users, and of online video in particular). Cisco expects Internet traffic to grow fivefold by 2013. See Cisco, *Cisco® Visual Networking Index (VNI) Forecast and Methodology, 2008-2013* (Summary, June 2009), available at [http://newsroom.cisco.com/dlls/2009/prod\\_060909.html](http://newsroom.cisco.com/dlls/2009/prod_060909.html). See also IAB/Hamilton Consultants Inc., Drs. John Deighton and John Quelch, *Economic Value of the Advertising-Supported Internet Ecosystem* at 4 (June 10, 2009), available at <http://www.iab.net/economicvalue> (estimating that the advertising-supported Internet accounts for \$300 billion of economic activity).

2008.<sup>3</sup> Among other things, display ads serve a vital role in online commerce by enhancing consumer brand awareness and Web traffic to retailers.<sup>4</sup> The Web sites that publish banner ads have a dual incentive to ensure that they serve their users with the most relevant ads possible: not only do more relevant advertisements generate greater user response and revenue for the publisher; greater ad relevance enhances the user experience and avoids the potential nuisance effect to users from less customized marketing.<sup>5</sup>

Web publishers have a variety of potential approaches to ensuring such relevance. The most direct approach is to match the subject matter of banner advertisements to the content or subject matter of the page on which it is displayed: for example, an ad for ocean cruise on a Web page devoted to Caribbean travel. However, such “contextually” targeted advertisements are not always feasible for every type of Web content: for example, an online photo sharing service, or a online newspaper’s section devoted to international affairs coverage, are not as readily suited to contextual advertisements. Web publishers must rely on other potential attributes of their Web site visitors to help ensure ad relevance, such as registration information reflecting their gender, age, or zip code; or, alternatively, other potential interests of their users inferred from prior Web activity, either on the publisher’s site or elsewhere on the Web. And even for large Web sites or services providers, there is no assurance that they will be able to sell their entire potential advertising inventory at rates sufficient to support their operating costs.

Smaller-scale Web publishers – such as blogs and specialty interest content sites – face an additional challenge. The monthly audiences of these sites vary in size from hundreds of thousands to millions of visitors.<sup>6</sup> Such small Web publishers cannot

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<sup>3</sup> See Interactive Advertising Bureau, *2008 IAB/PricewaterhouseCoopers Internet Advertising Revenue Report* (March 2009), available at [http://www.iab.net/media/file/IAB\\_PwC\\_2008\\_full\\_year.pdf](http://www.iab.net/media/file/IAB_PwC_2008_full_year.pdf). The report notes that display-related advertising includes display banner ads (21% of 2008 full year revenues or \$4.9 billion), rich media (7% or \$1.6 billion), digital video (3% or \$734 million), and sponsorship (2% or \$387 million). *Id.* at 9. Moreover, e-commerce providers separately provide a substantial amount of proprietary advertising, encouraging commerce. IAB/Hamilton Consultants Inc., Deighton and Quelch, *Economic Value of the Advertising-Supported Internet Ecosystem*, *supra* note 2 at 3. Of the amount spent on display advertising in 2008, it is also estimated that online behavioral advertising generated \$775 million in revenue. See eMarketer, “Behavioral Targeting: Marketing Trends” (June 2008), available at [http://www.emarketer.com/Reports/All/Emarketer\\_2000487.aspx](http://www.emarketer.com/Reports/All/Emarketer_2000487.aspx).

<sup>4</sup> See AdAge, “Why Search May Not Click for Retailers: Consumers Going Directly To Retailers’ Sites for Six Out of Ten Visits” (Nov. 3, 2009) (summarizing Nielsen Online survey results that less than 10% of online retailers’ Web traffic comes from search engines, and that 61% results from consumers choosing to visit retailers’ sites directly), available at [http://adage.com/digital/article?article\\_id=140089](http://adage.com/digital/article?article_id=140089).

<sup>5</sup> A TRUSTe study found that when online advertising for products and services is not relevant to consumers’ wants and needs, 72% of consumers find the experience intrusive or annoying. See TRUSTe, *2008 Study: Consumer Attitudes about Behavioral Targeting* (March 28, 2008).

<sup>6</sup> The statistical diversity of smaller Web sites outside the large-traffic Web sites is sometimes referred to as the Web’s “Long Tail.” See, e.g., Interactive Advertising Bureau, *I Am the Long Tail*

employ their own dedicated sales force to sell their banner inventory to potential advertisers. More importantly, the smaller audiences of such sites do not easily lend themselves to the execution of large-scale brand advertising campaigns preferred by major companies.

The advertising networks, exchanges, and other business models represented in the NAI are vital partners for Web publishers – both large and small – in finding advertisers for their audiences, helping to enhance the relevance of the advertisements served to their users, and thereby generating the revenue needed for these publishers to serve consumers. The important functions NAI members provide include:

- Acting as intermediaries for Web publishers and advertisers, by acquiring unsold impressions from both large and smaller Web content sites, and aggregating them into broad potential audiences for advertisers (for example, generating a multi-site campaign for a movie’s opening weekend);
- Supporting a variety of more flexible pricing models for advertisers, including cost-per-impression (CPM) pricing preferred by brand awareness advertisers; or cost-per-action or click (CPA or CPC) pricing favored by advertisers looking to generate direct online sales (for example, banner ads for online universities);
- Offering niche-based approaches for particular types of publishers (ad networks focused on auto or women’s interest publisher sites); and
- Using online advertising technologies to aggregate insights from single or multiple Web publishers to enhance the relevance and quality of user advertisements

Over the past decade, NAI member companies have been at the forefront of technological innovation designed to bring more efficient and scalable approaches to online advertising, enhancing the potential revenue opportunities for both large and small Web publishers.

The online advertising technologies deployed by NAI members provide considerable economic benefits across the entire online ecosystem. From the perspective of the consumer, these online advertising technologies produce very significant economic (and non-economic) benefits:

- As previously discussed, the increased revenues associated with relevant advertising are vital to supporting the continued growth in free-of-charge Web content and services (the business model for which consumers have

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(2009) available at <http://iamthelongtail.com/> (offering video examples of the extraordinary diversity in subject matter and business types of small Web publishers).

expressed strong preference as compared to fee/subscription-based content and services);<sup>7</sup>

- Online advertising makes useful information available to consumers, including information about product availability and comparative pricing;<sup>8</sup>
- Online advertising models using targeted information is of particular importance for smaller Web publishers, helping them generate the revenue needed to sustain a greater diversity of content offerings and viewpoints; and
- Ad-supported business models continue to remain the principal source of venture and investment capital for innovation in Web services that have enjoyed rapid consumer adoption (social networks, e.g.).

From the Web publisher perspective, online advertising technologies enable and preserve their ability to operate their sites free of charge, without adopting subscription requirements that might significantly limit the size of their audience:

- Large Web sites derive incremental revenue for the sale of ad impressions that they themselves cannot sell, and that would otherwise generate no income;
- Smaller Web sites in particular – for example, specialty interest sites or regional online newspapers – can have their available advertising impressions aggregated into combined audiences attractive to larger-scale advertisers who may pay higher rates and thereby provide them the revenue they need to continue to operate; and
- Both types of Web sites gain access to online advertising technologies, such as re-targeting or behavioral advertising, that enable them to serve more relevant and profitable ads on portions of their sites that do not lend themselves to contextual advertising approaches.

Finally, from the perspective of advertisers, the principal benefits of these technologies lies in their adaptability to the challenges of an increasingly fragmented Web audience, as online usage continues to diversify across an ever-broader array of content and services:

- Through more relevant ads served to a more focused audience, the advertiser eliminates wasteful spending on irrelevant ads (for example, automotive advertisers can significantly reduce their advertising expenditures by serving ads for a new car model only to users who have actually expressed interest in that model by researching it, rather than blanketing a wider audience with such ads);

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<sup>7</sup> In 2007 the New York Times abandoned an online-subscription based model in favor of an advertising-supported model available to all readers. See Richard Pérez-Pena, *Times To Stop Charging for Parts of Its Site*, N.Y. Times (Sept. 18, 2007), available at <http://www.nytimes.com/2007/09/18/business/media/18times.html>.

<sup>8</sup> See generally Lenard & Rubin, “In Defense of Data: Information and the Costs of Privacy” (Technology Policy Institute, May 2009), at <http://www.techpolicyinstitute.org/files/in%20defense%20of%20data.pdf>.

- Larger advertisers gain access to audiences that may be distributed across a great variety of small Web sites, and avoid the otherwise prohibitive costs of attempting to negotiate their ad campaigns on a site-by-site basis;
- Smaller-scale advertisers gain new opportunities to reach focused audiences online that would not have been available to them in the offline world;
- Technologies like re-targeting allow an advertiser to offer an improved price offer to a prior visitor to the advertiser's Web site;
- Behavioral advertising technologies result in a several fold increase in user response;<sup>9</sup>
- Compared to other forms of advertising, online ads continue to offer far greater insight into the effectiveness of advertisers' spending, as well as greater flexibility for advertisers to pay only for ads that actually produce a result (performance-based ads that may be particularly important for industries with limited ad budgets).

*(b) Self-regulation addressing consumer concerns about online behavioral advertising*

NAI member companies primarily rely on Web browser cookies and similar technologies to manage their ad serving functions.<sup>10</sup> In the advertising context, cookies help advertising networks to remember an individual user's browser over time and to make decisions about which ad may be most relevant to serve to that user. Among other things, cookies enable advertising networks to carry out the following functions:

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<sup>9</sup> Recent empirical research indicates a possible uplift of 670% in user click through rates when behavioral targeting segments are used. See Jun Yan, Gang Wang, Yun Jiang et. al., *How Much Can Behavioral Targeting Help Online Advertising?* at 261 (*WWW 2009 Madrid* April 20–24, 2009), available at <http://www2009.eprints.org/27/1/p261.pdf>.

<sup>10</sup> HTTP cookies are small text files that are stored inside a user's browser, and that usually contain a random string of numbers intended to serve as a unique identifier for the user's browser. Such cookies help address the problem that Web browsers cannot otherwise easily "remember" the same user from Web page to Web page. When a Web publisher contracts with an advertising network to help serve ads on its Web site, it authorizes the ad network to serve ads from its own servers onto the Web publisher's site. It may also allow the ad network to place its cookies in the browser of visitors to the Web site. From the user perspective, cookies placed by advertising networks appear to have different Web domain addresses than the Web domain of the publisher. If the domain serving the cookie is different than that of the Web site the user is visiting, browsers classify them as "third party" cookies. The placement of such advertising cookies on multiple partner Web sites creates the "network" of sites for which the ad network has the ability to recognize users: and that "network" is only as broad as the number of participating Web publisher sites that have chosen to allow the ad network to serve ads on their sites.

While advertising networks vary considerably in scale and number of partner Web sites, they do not have the ability to record information relating to the entirety of a user's Web browsing activity. The browser and cookie-related advertising model deployed by ad networks are also technologically distinct from advertising models that rely on Web browsing information derived through the user's Internet service connection.

- Limiting the number of times a user sees the same ad, or serving ads in particular sequence;
- Determining on an aggregate basis how well particular ads perform to broad audiences (and adjusting ad delivery to serve less of unpopular ads);
- Allowing a user who visited a particular Web site to subsequently receive an ad related to that Web site while visiting a different site (e.g., a visitor who shops for prices at an online travel site receives an air fare promotion banner ad the next day when visiting their online mail box);
- Improving ad relevancy through behavioral information gathered over time and across multiple Web sites in order predict a user's possible interests (e.g. that a user visits many sport-related sites and is therefore likely to be interested in sports-related advertisements); or
- Remembering a user's opt-out preference for behaviorally-related advertising.

In an FTC workshop held ten years ago, concerns were raised about advertising networks' use of cookies for the collection of Web browsing information for behaviorally-related ad serving.<sup>11</sup> Although recognizing that these technologies usually involved non-personally identifiable data, critics of online behavioral advertising focused on a perceived lack of transparency and the absence of consumer choice mechanisms. In reviewing these practices, the Federal Trade Commission specifically criticized the sufficiency of Web publishers' disclosure of advertising networks' data collection practices, as well as the absence of a consumer choice mechanism to preclude the use of data gathered across a network of Web sites for advertising purposes.<sup>12</sup>

The NAI was established for the express purpose of addressing these concerns. The NAI's founding companies worked with the Federal Trade Commission to establish a principled self-regulatory framework that applied fair information practices to the complex business-to-business data collection and sharing practices between Web publishers and advertising networks. From the outset, the fundamental challenge in applying traditional fair information practice principles for personally-identifiable information – such as notice, choice, access and security – lay in the fact that the online behavioral advertising practices at issue involved non-personally identifiable information. The NAI's 2000 Principles<sup>13</sup> chartered the following key self-regulatory principles for online behavioral advertising:

1. Notice: Recognizing that consumers overwhelmingly interact on the Web via consumer-facing websites, the NAI Principles required that notice about

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<sup>11</sup> See Federal Trade Commission, "Online Profiling: Public Workshop" (November 8, 1999), *materials available at* <http://www.ftc.gov/bcp/workshops/profiling/index.shtm>.

<sup>12</sup> See generally Federal Trade Commission, *Online Profiling: A Report to Congress (Part 2, Recommendations)* (July 2000), available at <http://www.ftc.gov/os/2000/07/onlineprofiling.htm>.

<sup>13</sup> See Network Advertising Initiative, *Self-Regulatory Principles for Online Preference Marketing by Network Advertisers* (2000), available at [http://www.networkadvertising.org/pdfs/NAI\\_principles.pdf](http://www.networkadvertising.org/pdfs/NAI_principles.pdf).

behavioral advertising practices must appear not only on NAI member companies' own business websites, but also clearly and conspicuously on the Websites where data are collected and behaviorally-related advertising occurs.<sup>14</sup>

2. Choice: The Principles mandated that notices provided to consumers include a consumer choice method commensurate with the type of data used for behavioral advertising:

- Clear and conspicuous notice and opt-out choice would be required for use of non-personally identifiable information for online behavioral advertising;
- On sites where multiple network advertising companies collect information (generally non-personally identifiable information), consumers would be able to opt out of behavioral advertising by any or all of the network advertisers on a single page accessible from the host Web site's privacy policy;
- Additional protections would be required for any merger of personally identifiable information about consumers with non-personally identifiable information about Web activity separately gathered by ad networks for behavioral advertising purposes:
  - "Robust notice" and opt-out choice by the consumer (appearing at the time and place of information collection and before data is entered) would be required for any merger occurring on a prospective basis;
  - Affirmative (opt-in) consent of the consumer would be required for any merger occurring retroactively for Web activity data already gathered by the ad network
- Material changes in the information practices of a network advertising company could not be applied to information collected prior to the changes in the absence of affirmative (opt-in) consent of the consumer.

3. Other protections: The 2000 NAI Principles prohibited the use of sensitive personally identifiable information (such as medical or financial data, sexual behavior or sexual orientation, or social security numbers) for online behavioral advertising.

Commended by the FTC,<sup>15</sup> the 2000 NAI Principles were the first online advertising framework for self-regulation that explicitly addressed the online uses of non-

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<sup>14</sup> Notice would be implemented through contractual requirements for website partners that their privacy policies contain clear and conspicuous notices and a link to consumer choice about the practice of online behavioral advertising. *Id.* at Section II.D.1.

<sup>15</sup> *Online Profiling: A Report to Congress*, *supra* note 11 at Section III ("The Commission commends the NAI companies for the innovative aspects of their proposal and for their willingness to adopt and follow these self-regulatory principles.").

personally identifiable data for advertising. Moreover, at a time when privacy policies had not universally been adopted by Web publishers as a consumer-facing tool, the NAI 2000 Principles' requirement that ad networks require such disclosure in their thousands of contracts served as an important driver for the widespread adoption of consumer-facing notice and opt-out link disclosures for online advertising.

In 2007 the FTC convened a Town Hall Forum to revisit industry self-regulatory practices for online behavioral advertising. In an ensuing draft proposal for behavioral advertising principles, FTC staff placed new emphasis on issues relating to data security and retention, as well as secondary use of such data. Recognizing these concerns, the NAI in December 2008 issued an updated Self-Regulatory Code of Conduct that contained the following enhancements to its pre-existing self-regulatory model.<sup>16</sup>

- The 2008 Self-Regulatory Code preserves the core commitment to transparency and choice for online behavioral advertising. NAI members must (a) require that web publishers clearly and conspicuously disclose NAI members' data collection and use practices; and (b) provide Web users with access to a consumer opt-out mechanism (through a conspicuous link to the opt out provided by the NAI member and/or a link to the NAI website consumer opt out).
- Although consumer notice through the privacy policies of Web sites remains the primary expected means for NAI members to comply with their notice requirement, the 2008 Self-Regulatory Code anticipates further improvements to the technological underpinnings of the ad serving process that would allow for enhanced consumer notice.<sup>17</sup>
- The 2008 Self-Regulatory Code retains the commitment to require consumer opt-in for the merger of personally identifiable information with non-personally identifiable data about a consumer's past Web browsing activity.
- Consumer opt-in is required for uses of sensitive information in connection with behavioral advertising. In addition to established categories of sensitive information (such as precise information relating to past, present or future health conditions or treatment), this provision now incorporates new forms of potentially sensitive information, such as information describing precise real-time geographic location.
- The Children's Online Privacy Protection Act is extended to the realm of non-personally identifiable information: verifiable parental consent is now

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<sup>16</sup> See the Network Advertising Initiative's 2008 Self-Regulatory Code of Conduct, *available at* [http://www.networkadvertising.org/networks/principles\\_comments.asp](http://www.networkadvertising.org/networks/principles_comments.asp). The NAI's revision process included the opportunity for public comment.

<sup>17</sup> *Id.* at Section III (2) (b) (members shall require that Web sites "clearly and conspicuously post notice – or ensure that such notice be made available on the web site where data are collected . . ."). Although Web site privacy policies today are the most widely-adopted and hence the most scalable and consistent means of achieving notice across thousands of Web sites of varying size and complexity, the Code anticipates expected innovation in the delivery of consumer notice.

- required for any use of non-PII or PII to create an interest segment for behavioral advertising that is specifically targeted to children under 13.
- The 2008 Self-Regulatory Code expands the commitment of NAI members to provide reasonable security for all types of data used for behavioral advertising (including non-personally identifiable information), and establishes a baseline for retention of such data.
  - Finally, the 2008 Code establishes a commitment to an in-house compliance review, as well as to a consumer complaint process to regularly review questions about members' compliance. The results of the in-house compliance review and a summary of consumer complaints are to be published annually.

The current Self-Regulatory Code continues to leverage the principle of public attestation and regulatory accountability for deceptive practices, now expanded to a far larger group of NAI member companies. The NAI's reliance on such an attestation model mirrors that of other initiatives for the protection of user data, notably including the Department of Commerce's Safe Harbor Framework for the transfer of the personal data of European citizens.<sup>18</sup>

## (2) Consumer expectations relating to the collection and use of information for online behavioral advertising

Consumers who use Internet-based content and services are likely to have a variety of expectations concerning information collection: these expectations include not only privacy-related preferences, but also economic expectations relating to continued access to ad-supported, rather than subscription-based, Internet services. Additionally, consumers' expectations are likely to vary depending on the nature and scope of the technology used to collect information online.

When privacy-related expectations for behavioral advertising are the focus of inquiry, different methodologies and approaches have led to considerable variation in survey results. For example, while a recent Annenberg/Berkeley survey indicated strong consumer disfavor of behavioral advertising (84%),<sup>19</sup> a Harris survey in 2008 found that a majority of consumers (55%) would be comfortable with Web browsing data being used to serve customized ads when consumer privacy protections are put in place.<sup>20</sup> Similar variety exists with respect to the data relating to consumer awareness: while a 2008 TrustE survey in the US found broad

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<sup>18</sup> See, e.g., the U.S. Safe Harbor Framework's Annual Reaffirmation Requirement, *available at* [http://www.export.gov/safeharbor/eg\\_main\\_018243.asp](http://www.export.gov/safeharbor/eg_main_018243.asp).

<sup>19</sup> Turow, King, Hoofnagle, Bleakely and Hennessy, "Americans Reject Tailored Advertising and Three Activities That Enable It" (Sept. 30, 2009) *available at* <http://www.asc.upenn.edu/news/NewsDetail.aspx?nid=612>

<sup>20</sup> Harris Interactive/Westin Survey, *How Online Users Feel About Behavioral Marketing and How Adoption of Privacy and Security Policies Could Affect Their Feelings* (March 27, 2008)

awareness of third party data collection for advertising (71%),<sup>21</sup> a recent IAB/UK survey found a general lack of awareness of behavioral advertising (72%).<sup>22</sup> Additionally, some survey data have highlighted potential variations in core consumer attitudes towards privacy issues, distinguishing between a majority of “privacy pragmatists” and portions of the general population with more significant privacy concerns.<sup>23</sup>

Similarly, when consumers’ economic expectations are the focus of inquiry – and specifically, the question of an advertising-supported as opposed to subscription model for online content – variation in survey responses also exist. For example, a 2009 PriceWaterhouse Coopers global study found that 62% of consumers expressed a willingness to pay for general news content.<sup>24</sup> By contrast, a more recent UK survey found that only 5% of consumers would pay for online news.<sup>25</sup> Such variation underscores the significance of survey methodology, as well as the potential distinction between expressed preferences and actual marketplace behavior.<sup>26</sup>

The variety in these data underscores the continued importance of consumer education in addressing both the economic and privacy aspects of online behavioral advertising.<sup>27</sup> For this reason the NAI this summer launched a new consumer education web page ([http://networkadvertising.org/managing/learn\\_more.asp](http://networkadvertising.org/managing/learn_more.asp)), that aggregates video, blog and explanatory content, together with information relating to general research and public policy discussion. Banner ads linking to this

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<sup>21</sup> See TRUSTe, *2008 Study: Consumer Attitudes about Behavioral Targeting* (March 28, 2008) (71% of respondents are aware that their browsing information may be collected by a third party for advertising purposes) available at <http://www.marketwire.com/press-release/Truste-837437.html>.

<sup>22</sup> See IABUK/Olswang “Survey Reveals Need for OBA Education” (Oct. 28, 2009), available at <http://www.iabuk.net/en/1/surveyrevealsneedforobaeducation281009.mxs>. The IABUK/Olswang survey also found improved acceptance of OBA (74%) when consumers are given further information about what information is collected and how it can be controlled.

<sup>23</sup> See Humphrey Taylor, *Most People Are “Privacy Pragmatists” Who, While Concerned about Privacy, Will Sometimes Trade It Off for Other Benefits*, The Harris Poll No 17 (Mar 19, 2003), available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=365](http://www.harrisinteractive.com/harris_poll/index.asp?PID=365) (finding 64% of respondents to be “privacy pragmatists;” 26% as “privacy fundamentalists;” and 10% as “privacy unconcerned”).

<sup>24</sup> PriceWaterhouse Coopers, “Moving Into Multiple Business Models: Outlook for Newspaper Publishing in the Digital Age” (May 2009) available at <http://www.pwc.com/gx/en/entertainment-media/publications/outlook-newspaper-publishing-in-digital.jhtml>.

<sup>25</sup> PaidContent UK, “PCUK Harris Poll: Only Five Percent of Readers Would Pay for Online News” (Sept. 20 2009), available at <http://paidcontent.co.uk/article/419-pcukharris-poll-only-five-percent-of-readers-would-pay-for-online-news>.

<sup>26</sup> From the industry (rather than the consumer) perspective, the data is also equivocal. See Alan Mutter, *Reflections of a Newsosaur*, “Only 51% of Pubs Think Pay Walls Will Fly” (Sept. 14, 2009) available at <http://newsosaur.blogspot.com/2009/09/only-51-of-pubs-think-pay-walls-will.html> (summarizing findings from American Press Institute industry survey, including that only 10% of newspaper publishers presently charge for any portion of their online content).

<sup>27</sup> See Consumer Policy Solutions/Hart Survey (January 29, 2009) (available at <http://www.reuters.com/article/pressRelease/idUS183492+27-Jan-2009+PRN20090127>) (noting that while 70% of Internet users say they are very or fairly knowledgeable about how to protect their personal privacy online, 42% are unsure whether their online activity is tracked and recorded).

educational page have been deployed across participating NAI member companies' networks. Additionally, the NAI is supporting the technological initiatives for enhanced consumer notice and control over behavioral advertising that are described in the following section.

(3) The role of self-regulation and technological innovation in online behavioral advertising.

*(a) Self-regulation's adaptability to technologic solutions for privacy challenges*

The NAI and its member companies believe that self-regulatory approaches have provided for a flexible and dynamic approach in addressing consumers' core concerns relating to behavioral advertising. Input from consumers, policy makers, and industry is invaluable in identifying areas for the evolution of best practices. Given their significant role as infrastructure providers for Web-based ad serving and data management across a broad cross-section of Web publishers and services, NAI members are well positioned to evaluate the technological challenges and opportunities to enhance consumer transparency and choice for cookie-based online advertising. Additionally, the NAI believes that its members' technological expertise can be invaluable to more rapid and consistent implementation of self-regulation of cookie-based advertising across the Internet ecosystem.

The NAI has actively participated in the formulation of industry-wide self-regulatory principles for online behavioral advertising, across a broad spectrum of associations representing thousands of advertisers, publishers, and marketers.<sup>28</sup> The Associations Principles represent a significant widening of the self-regulatory approach to behavioral advertising. The NAI and its members are committed to supporting this initiative, and in particular the Principles' commitment to the deployment of enhanced notice mechanisms.

Industry's efforts to implement novel technological approaches to enhanced notice offer an excellent demonstration of the advantages of flexible self-regulation. Regulators and other thought leaders in the online advertising industry have suggested that consumer notice for online behavioral advertising might be enhanced through the provision of additional mechanisms that provide notice through the advertisement itself (i.e. by providing disclosures directly within, or immediately adjacent to, the ad). Several NAI members have deployed a variety of potential implementations of consumer notice in direct proximity to banner ads, which can inform potentially wider adoption by industry:

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<sup>28</sup> See DMA/IAB/ANA/AAAA/BBBB: Key Trade Groups Release Comprehensive Privacy Principles for Use and Collection of Behavioral Data in Online Advertising (July 2, 2009), available at [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-070209](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-070209).

- Yahoo! has extensively tested a variety of implementations of notice “in or around” display ads, including significant Web publishers such as eBay;<sup>29</sup>
- FetchBack, a retargeting company, in June also deployed direct links to its Privacy Center (a single location incorporating consumer information and its opt-out link) within the ads it serves;<sup>30</sup> and
- In October 2009, Google deployed clickable “Information”-icon links directly within the display advertisements it serves.<sup>31</sup>

Adoption of a common approach to implementing such alternative approaches for notice of behavioral advertising presents a considerable challenge, both in terms of the technological complexity of the infrastructure and the great diversity of publishers and advertisers involved. Large Web publishers may prefer to develop customized site links for disclosure adjacent to banner advertisements, while smaller Web publishers may prefer ad serving companies to provide for disclosure within the ad banner itself. The NAI and its member companies believe that technologies should be developed and built to allow for enhanced notice by any entity engaged in online behavioral advertising, and are now actively engaged in technical discussion with industry of the infrastructure approach that would best facilitate such enhanced notice.<sup>32</sup> With the active participation of the broader group of industry associations, considerable progress is being made towards implementation of enhanced notice.

Another area in which the advantages of a flexible self-regulatory approach is evident is improved durability for cookie-based opt outs. The NAI’s opt-out tool presently allows consumers the choice whether to receive behaviorally-targeted advertising from some or all NAI members, and to have that choice apply across the many Web sites served by each of NAI member companies. The opt-out mechanisms implemented by the NAI and its members generally use industry standard Web browser cookies to help ad networks “remember” consumers’ opt-out preferences by recognizing them on the browser of the user’s computer.

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<sup>29</sup> An example of eBay’s implementation is available at <http://cgi6.ebay.com/ws/eBayISAPI.dll?DisplayAdChoice&w=1&y=3FwEhZwEEKTEEUcxpAAAsPQE EKVgCVC1RU1YtDlcCeA0AV3k%3D> (accessed June 15, 2009).

<sup>30</sup> See Press Release, *FetchBack to Provide Enhanced Notice in Behavioral Ads* (June 15, 2009), available at [http://www.fetchback.com/press\\_061509.html](http://www.fetchback.com/press_061509.html). Additionally, it worth noting that AlmondNet offered a direct “Powered by Almondnet” hyperlink within behaviorally targeted banner advertisements for one of its product lines from 2004-2006, enabling consumers to access AlmondNet’s opt-out choice more directly.

<sup>31</sup> See Pablo Chavez, Google Public Policy Blog, *Coming to an Online Ad Near You: More “Ads By Google” labels* (Oct. 15, 2009), available at <http://googlepublicpolicy.blogspot.com/2009/10/coming-to-online-ad-near-you-more-ads.html>.

<sup>32</sup> A working group of NAI member technologists has been established to promote compatible approaches to the delivery of such enhanced notice; to identify and refine possible infrastructure standards to support flexible consumer disclosure formats; and to consult with other interested providers and associations on the best way to ensure technological compatibility.

However, the use of cookies either for advertising or for opt-out purposes has a common potential technological limitation: if a user deletes such cookies from the Web browser cache on the user's computer, or deploys computer software that automatically deletes such cookies, user preference data previously connected to the particular browser though the cookie is lost. Recent work by NAI member companies and other technologists demonstrated the potential of enhancing the durability of consumer opt-out preferences through the deployment of browser plug-ins. Such browser plug-ins attempt to solve the problem of opt-out cookie deletion by automatically reinstating such cookies each time the browser cookie cache is emptied, or the opt-out cookie is otherwise deleted (*e.g.*, by antispyware programs that do not distinguish between the various purposes for third party cookies).

This November the NAI deployed a beta version of a Firefox browser Add On that helps enhance users' ability to preserve the opt-out preferences stored in their browsers.<sup>33</sup> The NAI Consumer Opt Out Protector helps prevent cookie deletion by invoking a recognized list of opt-out cookies from NAI members. The Add On leverages extensible software developed by BlueKai that allows consumers to select multiple trusted lists of opt out cookies (i.e. not just the NAI's). This approach affords users a more convenient means for having their Web browsers remember their opt-out preferences. The NAI intends to make the opt-out protector, or a comparable tool, available to the users of other browsers, including Internet Explorer.

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The NAI appreciates the chance to comment on the preliminary questions, and looks forward to working with the FTC and its staff as they evaluate the appropriate frameworks for consumer privacy online.

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<sup>33</sup> The beta Add-On is available for download at [http://networkadvertising.org/staging/pre/managing/protector\\_license.asp](http://networkadvertising.org/staging/pre/managing/protector_license.asp).