



David A. Paterson
Governor

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
CONSUMER PROTECTION BOARD

Mindy A. Bockstein
Chairperson and Executive Director

November 6, 2009

BY E-MAIL AND U.S. MAIL

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex P)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Privacy Roundtables-Comment, Privacy No. P095416

Dear Commissioners:

As New York State's top consumer watchdog and think tank in the Executive Branch, the New York State Consumer Protection Board ("CPB") is involved in a wide array of consumer issues. The CPB conducts consumer investigations, research and analysis; develops legislation, consumer education programs and materials; responds to individual complaints by working with the parties to settle disputes through voluntary agreements; and, represents the interests of consumers before the Public Service Commission and other State and federal agencies.

In 2008 and through the first ten months of 2009, the CPB handled nearly 1,100 Internet-related complaints. Since January 2009, the Agency has significantly expanded its portfolio of responsibility with the introduction of its Identity Theft Prevention and Mitigation Program. Under Governor David A. Paterson, information privacy and data security, consumer understanding and control over the online collection and use of personal information, and the maintenance of consumer trust in their online transactions have become critical issues for the Agency. Through various outreach opportunities, the CPB informs the public about these issues and learns of consumer concerns and insights with respect to information privacy.

Therefore, we appreciate the opportunity to participate in the Federal Trade Commission's (FTC) Exploring Privacy Initiative and to inform on this important discussion. At this time, the CPB will focus its comment on Question No. 1 of the suggested questions with regard to behavioral advertising (<http://www.ftc.gov/bcp/workshops/privacyroundtables>), specifically, what risks, concerns and benefits arise from the collection, sharing and use of consumer information in connection with behavioral advertising? Our comment will also discuss consumers' current expectations, and how such expectations are conditioned by what consumers know and understand about behavioral advertising and how they compare behavioral advertising to other online privacy contexts.



Discussion

Many consumers are not aware that information related to their personal shopping and browsing behavior is being collected, profiled, shared and used by companies they do not know for the purpose of marketing to their individual profiles. Some may be aware that companies whose sites they visit are engaging in this practice because they see the results of such profiling in the shopping and browsing suggestions they receive while on the site. However, consumers generally do not understand the broader picture of how behavioral advertising operates across sites and among various different types of companies. They may not even know third party profiling is occurring, or they may believe that it is not happening to them because of a mistaken belief that the law prevents such profiling in the absence of an express consent. Consumers sense that there may be more to behavioral advertising than they know and understand, and this concern encourages skepticism about the process and the industry. More effective consumer education may reduce this fear of the unknown but that is just the start. Education by itself will not convert skepticism into acceptance by informed consumers if their needs and concerns for greater transparency, more accountability and stronger privacy protections are not met.

When consumers are informed about how behavioral advertising in its current form actually works, their reaction is strongly negative, especially when the tracking involves following the consumer across websites and/or offline. In a recent survey conducted jointly by the Annenberg School for Communication and the Berkeley Center for Law & Technology, two-thirds of consumers, who received an explanation of how behavioral advertising currently works, said that they did not want to receive ads based on current processes (see, “Americans Reject Tailored Advertising” at http://graphics8.nytimes.com/packages/pdf/business/20090929-Tailored_Advertising.pdf). The deep concern expressed by consumers for the current behavioral advertising business model represents another serious hurdle for the industry to overcome if it is ever to achieve consumer acceptance.

Consumers who understand behavioral advertising resist its current form because its “behind the curtain” operation does not provide the level of transparency they want and need. In this regard, we applaud the recent introduction of the Google Dashboard which helps enhance transparency for certain site services. We hope that this device can serve as a template for more robust consumer disclosures about and controls over behavioral advertising as well.

Consumers also resist the current form of behavioral advertising because they see fundamental weaknesses in privacy protection especially in relation to groups which are particularly impressionable and/or vulnerable to marketing pressure. These concerns are confirmed by a close reading of the FTC Staff Report of February 2009 and the Behavioral Advertising Industry Response of July 2009¹, both entitled “Self-

¹ This report is a joint effort of the American Association of Advertising Agencies (AAAA), the Association

Regulatory Principles for Online Behavioral Advertising,” in their discussions of the collection and use of sensitive data and data collected from children. In its February 2009 Staff Report, the FTC proposed that companies obtain express affirmative consent from consumers before using their sensitive data for behavioral advertising. The FTC deferred to the behavioral advertising industry on how to define “sensitive data” and whether there would be some categories of data that are so sensitive they should never be used for behavioral advertising.

In its July 2009 Response, the behavioral advertising industry endorsed the principle of affirmative express consent as a prerequisite to the use of sensitive data for behavioral advertising, but chose to define “sensitive data” very narrowly, and chose not to classify any data as too sensitive for behavioral advertising use. The industry defined “sensitive data” as the “personal information” of a child, financial account numbers, Social Security numbers, pharmaceutical prescriptions and medical records, and nothing more. Moreover, a child’s personal information can be collected and used with a parent’s consent, and all other specified categories of individual sensitive data can be used with the consent of the individual. No data was absolutely prohibited from use. We strongly disagree with this approach as certain data such as the online activities of highly vulnerable groups including children should be not be collected and used for behavioral advertising purposes. We are heartened by the recent statement of David Vladeck, the FTC’s new Director of the Bureau of Consumer Protection, who has indicated he will take a “hard look” at the effect of behavioral advertising on vulnerable consumer groups such as children. We urge the industry to take full advantage of these roundtables to begin this re-evaluation.

Under the industry’s proposal, a child’s personal information may be collected and used to target ads in two ways. First, the child’s personal information may be used explicitly for this purpose if the company has received the parent’s consent. We are concerned that a robust disclosure standard and strict enforcement of that standard are needed here to ensure that parental consent will be fully informed. Second, we note the statements in the Industry Response that de-identifying a child’s data avoids the parental consent requirement, and we assert that this may permit an implicit form of behavioral advertising which does not involve the child’s personally identifiable information, i.e., targeting the computer or device associated with the child’s particular interest. Finally, we are also concerned that behavioral advertisers can still collect aggregate age and interest information about children not tied to a specific child from child-oriented sites and can target ads to visitors of those sites. We invite the FTC to explore how to best protect children from inappropriate marketing efforts under the industry’s proposal. The FTC has previously addressed this issue with regard to the inappropriate marketing of video games to children, and we are confident that an effective solution can be developed in this area as well.

of National Advertisers (ANA), the Better Business Bureau (BBB), the Direct Marketing Association (DMA) and the Interactive Advertising Bureau (IAB).

We also disagree with the industry's view of the overall scope of "sensitive data" as being limited to the personal information of children, financial account numbers, Social Security numbers, pharmaceutical prescriptions and medical records. Missing from the industry's analysis is an acknowledgement of a broad range of private behaviors and potential vulnerabilities that consumers do not want used for behavioral advertising without their consent. These include information related to race, religion, sexual orientation, personal credit and debt, medical conditions (not limited to information identified in pharmaceutical prescriptions and medical records), inquiries about domestic violence assistance services and personal counseling, use of alcohol and tobacco, and other private information and behaviors. Consumers should be entitled to choose whether these types of information and behaviors may be used for targeted advertising.

Finally, we disagree with the industry's reluctance to absolutely exclude any data for use in behavioral advertising. At a minimum, as discussed above, the data of children should be considered for absolute exclusion. We call on the industry to seek out the opinions of consumer and privacy advocates as well as industry stakeholders on the risks inherent in the collection and use of sensitive data, especially the data of children, and we encourage a robust discussion of these issues at the roundtables.

Conclusion

Behavioral advertising is a dynamic new business model whose long-term success will depend in large part on how effectively it addresses current risks and wins consumer trust. Significant work remains. The CPB calls on the behavioral advertising industry and government to work more closely especially on the risk issues we have discussed to build into this business model greater transparency, more accountability and stronger privacy protections. The FTC's Roundtables provide an important and timely opportunity to tackle this collaborative effort.

Thank you for your consideration of this comment.

Sincerely,

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Mindy A. Bockstein
Chairperson and Executive Director

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