

**ROBERT GELLMAN**  
**Privacy and Information Policy Consultant**

January 27, 2010

Federal Trade Commission  
600 New Jersey Ave. NW  
Washington, DC 20001

Re: Privacy Roundtables – Comment, Project No. P095416

To the Commission:

I offer for consideration the outline of a proposal for addressing the collection of identifiable personal information through behavioral targeting on Internet websites and through other digital technologies. These ideas could be useful in a variety of ways, including for assessing self-regulation,<sup>1</sup> developing regulations, or proposing legislation.

The core idea is to tie the degree of regulation to the time that personal information is maintained or used for the behavioral targeting function. I suggest four tiers.

1. Those engaged in behavioral targeting who keep information for 24 hours or less would not be regulated for privacy. Presumably, those who engage in contextual advertising would qualify for tier 1.

2. Those engaged in behavioral targeting who keep information for more than 24 hours and up to six months must, at a minimum, give consumers a copy of their data upon request. Other consumer rights may also be required.

3. Those engaged in behavioral targeting who keep information for six months to a year must, at a minimum, give consumers the ability to delete all of their compiled data at any time, plus the rights of the previous tier. Other consumer rights may also be required.

4. Those engaged in behavioral targeting who keep information for more than a year must, at a minimum, affirmatively give consumers a copy of the information that has been compiled about them, plus the rights of the previous tiers. I would also require full compliance with Fair Information Practices (roughly comparable to Fair Credit Reporting Act requirements adapted for this purpose) for anyone in this tier. Further, anyone engaged in behavioral targeting

---

<sup>1</sup> I do not support self-regulation for privacy because of the persistent failure of self-regulatory activities to provide consistent, balanced, or meaningful protections for consumers. Failed self-regulatory schemes include the Individual Reference Services Group, Online Privacy Alliance, Privacy Leadership Initiative, Better Business Bureau Online, and the National Advertising Initiative. On the latter, see World Privacy Forum, *The NAI: Failing at Consumer Protection and at Self-Regulation*, [http://www.worldprivacyforum.org/pdf/WPF\\_NAI\\_report\\_Nov2\\_2007fs.pdf](http://www.worldprivacyforum.org/pdf/WPF_NAI_report_Nov2_2007fs.pdf). Self-regulation for privacy will not succeed unless consumers play a role in the process.

who provides individually identifiable data to government agencies, employers, insurers, and perhaps others for any non-advertising purpose is automatically in tier four regardless of the length of information storage.

Everyone who qualifies as a behavioral targeter begins in Tier 4. Those who have an independent audit of their activities can qualify for other tiers based on the findings of the audit, which must be available to regulators and the public. For new entrants, self-identification could be used to determine status during a start-up period.

I described this proposal as an outline because there are many issues and questions that I have not attempted to address at this stage. This includes the definitions of terms, always a crucial part of a formal plan. Also not addressed is the problem of identifying consumers. However, if a consumer can be consistently identified for advertising purposes, then the same consumer can be identified for privacy purposes. The details will require more work. The proposed structure is also independent of collection limits, which could and should be determined otherwise and added as additional requirements. For example, restrictions on the collection of sensitive information would be appropriate.

The advantage of the tiered approach is that it allows those who strictly limit data retention to operate without any regulation. If companies keep for a very short time, the imposition on consumer privacy is limited, and the companies are rewarded without any regulation at all. If data is kept for longer periods, privacy requirements increase. Those who compile long-term dossiers on consumers must meet stricter requirements and give consumers greater rights. This is appropriate because threats to consumer privacy increase arithmetically (or perhaps geometrically) with the length of data retention.

Another advantage of the tiered structure is that it does not require any involvement by consumers. Consumers whose information is held by companies in tiers 2, 3, and 4 would have the ability to exercise rights, but consent would not be sought or presumed. I believe that there is increasing awareness of the limited value of consumer consent in many online activities, especially behavioral tracking. Little is lost by moving away from the fiction that online consumers consent to the terms of service and privacy policies of websites or of advertisers. Those policies still have a value in establishing and disclosing rules for data controllers, but the role of the policies in consumer consent has no significant meaning.

Sincerely,

Robert Gellman