

**Remarks of Commissioner Maureen K. Ohlhausen**  
**Digital Advertising Alliance Summit**  
**Washington, D.C.**  
**June 5, 2013**

Thank you for that kind introduction. It is an honor to be the opening keynote speaker at the Digital Advertising Alliance's First Annual Summit and to speak with you today about important issues affecting the online advertising industry. Marketing and advertising issues are central to the Federal Trade Commission's consumer protection mission, with online behavioral advertising (OBA) being a particularly timely topic. The Commission has a long history of partnership with the online advertising industry in developing principles and guidelines for this sector, including on privacy. A key supplement to this work is self-regulation, and I appreciate the approach of the Digital Advertising Alliance (DAA), which brings together all sectors of the highly complex digital advertising ecosystem to provide consumers privacy options across the industry.

We are in the midst of a critical policy debate that will determine, in large part, the future of not just online behavioral advertising but also the direction of the business model for supporting free web content through interest-based advertising. It is vital that policymakers and industry work cooperatively to make sure that we get these issues right.

My comments today will focus on the history of FTC interest in the area of OBA and the continuing importance of self-regulation to protect consumers on the Internet. My remarks are my own, however, and do not necessarily reflect the views of my colleagues on the Commission.

### **Background**

Since the emergence of e-commerce in the mid-1990s, the online marketplace has grown with remarkable speed. Low barriers to entry and the technical advantages of IP communications have enabled unprecedented experimentation in online business models. Ad-supported content or services have become ubiquitous in the online marketplace, providing many benefits to consumers, from free access to rich sources of information to the convenience of home shopping. At the same time, the ease with which companies can collect and combine information from consumers online has raised questions and concerns about consumer privacy. The FTC has responded to these developments through enforcement, as well as extensive policy work and guidance.

The FTC's basic authority, Section 5 of the FTC Act, prohibits unfair or deceptive acts or practices in or affecting commerce.<sup>1</sup> The FTC has been very active in enforcing the prohibition against unfair and deceptive trade practices in the areas of privacy and data security and has brought over 100 spam and spyware cases<sup>2</sup> and over 40 data security cases.<sup>3</sup>

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<sup>1</sup> 15 U.S.C. § 45 (2012).

<sup>2</sup> Press Release, Fed. Trade Comm'n, *FTC Testifies on Protecting Consumers' Privacy* (Jul. 14, 2011), available at <http://www.ftc.gov/opa/2011/07/privacy.shtm>.

<sup>3</sup> See, e.g., Fed. Trade Comm'n, Bureau of Consumer Protection, *Business Center Legal Resources*, <http://business.ftc.gov/legal-resources/29/35> (describing data security cases).

The Commission uses its deception authority in cases where a company makes a representation to consumers about the collection and/or use of their personal data but it fails to keep that promise. By contrast, the Commission's unfairness authority does not require a representation to consumers but instead focuses on the consumer harm that an act or practice may cause. The unfairness statement requires that for the Commission to find an act or practice unfair, the harm it causes must be substantial, it must not be outweighed by any offsetting consumer or competitive benefits, and the consumer could not have reasonably avoided the harm.<sup>4</sup> The statement specifically identifies financial, health, and safety harms as varieties of harm that the Commission should consider substantial and further states that emotional impact and more subjective types of harm are not intended to make an injury unfair.

The Commission's deception and unfairness standards are effective and flexible complements. Unfairness provides a strong baseline of protection for consumers who suffer a substantial harm from the misuse of their personal information, regardless of whether the entity using the information made a promise to the consumer. Consumers who wish for a higher standard of protection for their information or wish to share less information can seek out businesses that promise a higher standard of care that matches the consumers' preferences. This allows consumers to express their varying preferences and encourages companies to compete on the basis of the privacy protections they offer. If a company does not live up to its promises, the FTC can bring a case on deception grounds.

One of the reasons the FTC is such an effective agency is that we use all of our tools to address issues within our jurisdiction, and privacy is no exception. Although law enforcement is at the core of the FTC's mission, we augment this work with extensive educational outreach to consumers and businesses, and we regularly undertake research and study initiatives. By bringing cases, educating businesses on compliance, holding public workshops, releasing reports on best practices, and informing consumers on how to protect themselves, the FTC can maximize its effectiveness and reach.

For almost two decades, the Commission has worked to stay up to date about the online marketplace and the privacy issues it raises for consumers. We have hosted numerous public workshops, issued reports on online data collection practices, monitored industry self-regulatory efforts, and closely followed technological developments affecting consumer privacy. Regarding OBA in particular, in 2009 the FTC staff issued "Self-Regulatory Principles for Online Behavioral Advertising," a report prepared in response to comments and developments in the areas of data collection and privacy practices.<sup>5</sup> Specifically, the principles provide for transparency and consumer control and reasonable security for consumer data. They also call on companies to obtain affirmative express consent from consumers before they use data in a manner that is materially different than was promised at the time of collection and before they collect and use "sensitive" consumer data for behavioral advertising.

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<sup>4</sup> FED. TRADE COMM'N, FTC POLICY STATEMENT ON UNFAIRNESS (1980), *available at* <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

<sup>5</sup> FED. TRADE COMM'N, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (Feb. 2009), *available at* <http://www.ftc.gov/os/2009/02/P085400behavareport.pdf>.

In March 2012, just before I started as a Commissioner, the Commission released, “Protecting Consumer Privacy in an Era of Rapid Change,” a comprehensive report that included recommendations for companies handling consumer data.<sup>6</sup> Although I do not agree with everything in the report—especially the call for additional, baseline privacy legislation—I do support as best practices many of the recommendations for protecting privacy, including:

- **Privacy by Design** – companies should build in consumer privacy protections at every stage in developing their products. These protections include reasonable security for consumer data, limited collection and retention of such data, and reasonable procedures to promote data accuracy;
- **Simplified Choice for Businesses and Consumers** – recognizing that there is no single best way to offer notice and choice in all circumstances, companies should adopt notice and choice options that appropriately reflect the context of the transaction and/or the relationship the company has with the consumer.
- **Greater Transparency** – companies should disclose details about their collection and use of consumers' information and provide consumers access to the data collected about them.

### **Asking the Right Questions about OBA and Consumer Privacy**

Turning to OBA and consumer privacy, I am both amused and frustrated by some of the voices in the debate. The FTC is charged with protecting one constituency: consumers. But not all consumers have the same preferences, and the privacy debate is a great example of an issue on which there are differing views on the right level of privacy for consumers.

I saw the results of your recent Zogby Analytics poll in which only four percent of respondents listed behavioral targeting as their biggest online privacy concern.<sup>7</sup> For the remaining respondents, they ranked issues like identity theft, viruses, and malware as more important. According to the poll, forty percent preferred that all of their ads be targeted, and seventy percent said that they prefer at least some of their ads be tailored directly to their interests.<sup>8</sup> Many consumers place great value on the availability of online advertising, and seventy five percent of the poll's respondents said they prefer free content, supported by ads, compared to ten percent who stated they would rather pay for ad-free content.<sup>9</sup>

Other polls reveal different consumer views about privacy. For instance, TRUSTe's 2013 consumer confidence index reveals that eighty nine percent of U.S. adults worry about their privacy online, seventy two percent of smartphone users are more concerned about their privacy

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<sup>6</sup> FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

<sup>7</sup> Zogby Analytics, *Interactive Survey of US Adults* at 9 (Apr. 2013), available at [http://www.aboutads.info/resource/image/Poll/Zogby\\_DAA\\_Poll.pdf](http://www.aboutads.info/resource/image/Poll/Zogby_DAA_Poll.pdf).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 2.

than a year ago, and eighty one percent of smartphone users avoid using apps that they do not believe protect their online privacy.<sup>10</sup>

My position is that consumers should have options that comport with their privacy preferences. Thus, the first question for a policymaker should be whether those options are available to consumers through products or services in the marketplace or through industry self-regulation.

Many companies are now developing products that cater directly to consumers with heightened privacy preferences. For example, the extensibility of the modern browser allows developers to incorporate privacy protections into consumers' everyday browsing. A wide range of privacy and security protection add-ons are available for all of the major Internet browsers. One such add-on, Ghostery, helps users easily detect tools that behavioral advertisers often use to track individuals across sites. Identifying these tools promotes transparency by giving consumers more information on the advertising practice of the sites they regularly visit. For those interested in near complete privacy on the web, Torbutton provides one-click access to the Tor network for true online anonymity.

### **The Role of Self-Regulation**

Self-regulation can also offer consumers more privacy choices. The best self-regulatory programs are nimble, keeping pace with rapid changes in technology and business practices in ways legislation and regulation cannot. The Commission has long supported industry self-regulation as an efficient way of securing consumer benefits and promoting a robust and competitive marketplace. Voluntary codes of conduct and industry-led enforcement are particularly appropriate in dynamic sectors of the economy where traditional regulation may stifle innovation and slow growth.

The DAA's self-regulatory efforts to create robust, enforceable codes of conduct for your members have been one of the success stories in this space. Although some influential standards and great ideas have come from meetings hosted by the Commission, your member organizations represent the boots on the ground in the advertising arena. Your self-regulatory system is able to respond quickly to changing market dynamics in ways that government processes are not. While policymakers debate basic privacy principles, rules, and legislative baselines, DAA has established programs that give choice to consumers and substantive guidance to the businesses in this sector. For example, in response to the FTC's call for self-regulation in OBA, in 2009 the DAA adopted its online behavioral advertising principles.<sup>11</sup> Most notably DAA implemented the Advertising Option Icon to enhance consumer notice and choice. I understand this icon is served via more than one trillion ad impressions per month and that consumers are becoming familiar with its meaning in growing numbers.<sup>12</sup> The FTC has long been concerned about simplifying the

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<sup>10</sup> See 2013 TRUSTe U.S. Consumer Confidence Index, TRUSTe, <http://www.truste.com/us-consumer-confidenceindex-2013/> (last visited May 31, 2013).

<sup>11</sup> DIGITAL ADVERTISING ALLIANCE, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (July 2009), available at <http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf>.

<sup>12</sup> Lou Mastria, *DAA Responds to Microsoft Column on "Do Not Track" Plans*, ADWEEK (Sep. 21, 2012), <http://www.adweek.com/news/advertising-branding/daa-responds-microsoft-column-do-not-track-plans-143728>.

approach to privacy notices and the Advertising Option Icon is an innovative way to reach consumers about their privacy options. DAA's opt-out page is also a one-stop-shop for consumers looking to fine tune their relationships with online advertisers. Your Code of Conduct and educational materials are also useful resources for companies looking to improve their privacy practices.

I am looking forward to the release of your Mobile Guidance in the near future. Not surprisingly, it is creating a lot of buzz in the room today. I understand that the general contours of the mobile guidance which will cover cross-app advertising, location information, and access to personal directories, and will be presented and discussed as part of today's event. This new initiative will be an important step forward in developing privacy technology on the mobile platform.

Together with NAI's recently updated Code of Conduct,<sup>13</sup> the self-regulatory landscape for OBA is becoming one of the most robust in the online marketplace. The partnership between ad servers, suppliers, and consumer interest organizations that your association represents is the kind of program we want to encourage.

Self-regulation works best when it is backed up by serious compliance efforts and tough enforcement. Through the Better Business Bureau and the Direct Marketing Association's efforts, the DAA is making enforceability a reality. I am especially pleased that DAA has not only adopted broadly applicable Principles that apply across sectors and to a wide variety of companies but also, building on the success of the advertising industry's approach to self-regulation, has provided for strong, objective oversight by the Council of Better Business Bureaus (CBBB) and the Direct Marketing Association. These programs provide for prompt follow up on complaints and, in the case of the CBBB, active monitoring of all members of the digital advertising system. Indeed anyone who has met with the CBBB Accountability Program's Director, Genie Barton, understands the seriousness with which she approaches this process. Already the CBBB's Accountability program has publicly reported on nineteen cases and, in all of these cases, the companies have agreed to voluntarily implement the program's recommendations.

This approach can build public confidence in self-regulation by providing a public, transparent record of real efforts to ensure compliance more quickly and with less burden than is sometimes the case with government enforcement. Though time consuming and arduous, regular compliance work improves the overall health of the online advertising industry by ensuring that companies live up to the promises they make. It also helps nip minor issues in the bud, correcting them before they become serious problems for consumers. This frees up Commission resources to focus on truly bad actors. In a time of limited government resources, this approach is both efficient and sensible.

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<sup>13</sup> Network Advertising Initiative, *Network Advertising Initiative Releases Final 2013 Code of Conduct for Interest-Based Advertising* (May 16, 2013), available at [http://www.networkadvertising.org/sites/default/files/2013\\_nai\\_code\\_pr.pdf](http://www.networkadvertising.org/sites/default/files/2013_nai_code_pr.pdf).

## **Do Not Track**

Other self-regulatory efforts are also underway. Like many of you, I've watched with great interest the current effort of the World Wide Web Consortium ("W3C") to create an international, industry-wide standard for Do Not Track, working to make a system that would operate in both desktop and mobile settings. The W3C's recent meeting in San Francisco seems to have made some progress. I am closely monitoring the situation while also evaluating the ramifications of different outcomes for consumers and competition if that process fails to reach agreement. I do remain hopeful that the stakeholders can reach a consensus and I urge the participants to seek a resolution that will provide the best outcome for consumers while maintaining incentives for innovation.

But my involvement is limited to external monitoring. I believe that a voluntary, self-regulatory process should operate without undue government involvement. Otherwise, industry may lose the incentive to participate and instead take a wait and see attitude about whether Congress would ever impose such requirements through legislation.

## **Intersection of Competition and Consumer Protection**

I am also concerned that too often privacy is viewed solely as a consumer protection issue. I believe that privacy, like most issues under FTC jurisdiction, must also be viewed through a competition lens if we are to reach the best outcome for consumers. As I mentioned above, many companies are designing and marketing products with privacy as an important feature. Additional protections for personal information can be a competitive advantage in securing business from privacy-conscious consumers.

Conversely, new restrictions on the ability of companies to collect or disseminate information could erect barriers to entry in what has historically been a very open sector of the information economy. Instituting new privacy restrictions may preclude new entrants from obtaining valuable consumer information that incumbent competitors already possess. If the need for consumer information were great enough and the rules restrictive enough, competition may be stifled by inefficient industry consolidation and foregone entrepreneurial opportunities. As a competition agency, the FTC should be sensitive to these concerns as well.

The Commission has consistently recognized the crucial role that truthful non-misleading advertising plays in fostering competition between current participants in the market and lowering entry barriers for new competitors. However, in its Privacy Report, the Commission did not address the possible competitive effects or economic effects of its recommendations, including potentially reducing the flow of information in the marketplace, which may be an unintended effect caused by compliance with new requirements.<sup>14</sup>

However, consumers who choose not to allow the collection or sharing of broad categories of information may no longer be exposed to offers by competitors selling products or

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<sup>14</sup> See generally FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

services that provide better value, pricing, or quality.<sup>15</sup> In turn, these changes could have negative consequences not just for individual consumers exercising their choice over how their information is used following a particular transaction, but also on the market economy in general.

As the Supreme Court has recognized,

“Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”<sup>16</sup>

A policy that limits the ability of advertisers to access and use information to reach target audiences may have unintended effects on consumers and the marketplace that any policymaker, particularly one with responsibility for consumer protection and competition, must consider.

### **Conclusion**

I want to thank you for your attention and commend each of you for your hard work and dedication to DAA’s self-regulatory framework. DAA has long been an important forum for all participants in the online advertising industry to come together and solve consumer issues with real accountability. I am very pleased to have had the opportunity to speak with you, and I am happy to take questions.

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<sup>15</sup> See Comments of the American Bar Association, Section of Antitrust Law, *A Preliminary FTC Staff Report on “Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers”* (Feb. 1, 2011), available at <http://ftc.gov/os/comments/privacyreportframework/00272-57555.pdf>.

<sup>16</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).