



February 26, 2010

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. P095416

The Network Advertising Initiative (“NAI”) appreciates the opportunity to comment further as part of the FTC’s Town Hall process.¹ In comments filed prior to the first privacy roundtable, the NAI addressed the Commission’s questions as applied in the context of online behavioral advertising, including the benefits of such advertising, the NAI’s approach to protecting privacy, consumer expectations relating to the collection and use of their information, and the general role of self-regulation.²

In connection with the third privacy roundtable, the FTC now seeks additional comments that bear on the role of self-regulation in protecting consumer privacy, including (1) how best to achieve accountability for best practices or standards for commercial handling of data, and (2) the efficacy of specific accountability or enforcement regimes.

In these comments, the NAI discusses how the elements of its robust self-regulatory program are designed to ensure compliance by companies who have pledged to abide by the NAI Code when they engage in online behavioral advertising. We review how the NAI’s compliance process serves as an effective “first line” of accountability that helps preserve government enforcement resources for the most material matters affecting consumer privacy. We also discuss how NAI members account for an estimated 85% of OBA-related activity on major Web sites – and how such a broadly based self-regulatory program promotes continued technological innovation for consumer privacy protection and the adoption of best practices for consumer transparency and choice.

¹ The NAI is a coalition of 40 leading online advertising companies committed to developing actionable self-regulatory standards that establish and reward responsible business and data management practices and standards. 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 (at www.networkadvertising.org). In 2009, more than a million unique visitors visited the NAI’s main Web page, and nearly 300,000 unique visitors went through the NAI’s opt-out process. See *infra* notes 11 and 13.

² See <http://www.ftc.gov/os/comments/privacyroundtable/544506-00019.htm>. These comments also address the NAI’s consumer opt-in requirement with respect to uses of sensitive data.

I. The Primary Role of the NAI's Self-Regulatory Program in Helping Ensure Accountability for Representations Regarding Online Behavioral Advertising

Robust self-regulatory regimes like the NAI's play an important role in ensuring that companies that handle consumers' information are accountable for the commitments they make. Indeed, the Commission has long recognized the role of self-regulation in "allow[ing] industry to craft effective alternatives to Commission enforcement."³ The NAI employs a variety of means to help ensure that its members adhere to the privacy commitments embodied in the NAI Code, including: (1) public attestations of compliance with its Code of Conduct; (2) annual reviews of member companies; and (3) a mechanism for consumer questions and complaints relating to NAI compliance. In the event of a compliance deficiency identified by any of these means that remains unaddressed by a member, the NAI also retains the power to impose a range of sanctions, further bolstering its enforcement powers. Together, these tools compose an effective accountability regime that complements governmental enforcement mechanisms, and that provides for meaningful assessment of participating companies' policies and practices with respect to the handling of consumer data.

A. Public Attestation

The NAI is grounded upon a binding set of rules concerning the collection and use of data for online behavioral advertising to which all members must publicly attest their commitment. Membership in the NAI requires each company to make a public representation that its business practices are compliant with each aspect of the Code that applies to its business model. *See* NAI Code § IV.1(b). These attestations of compliance, required upon application for membership and recertified annually thereafter, remain subject to enforcement by the Federal Trade Commission under Section V of the FTC Act.⁴

The public attestations required by the NAI facilitate a culture of compliance among its member companies. Such attestations help institutionalize privacy commitments by making member companies' management aware of their obligations with respect to the handling of consumer data used for online behavioral advertising. Management and compliance staff can leverage the public nature of the NAI Code commitment in order to drive employee awareness and training. More importantly, public commitment to specific data practices – for example, the use of non-personally identifiable information – helps ensure the allocation of appropriate engineering resources for the systems used to collect and use consumer data for

³ Children's Online Privacy Protection Final Rule, 16 C.F.R. Part 312, at 59907, n.302.

⁴ The NAI's public attestation model mirrors that of other frameworks for the protection of consumer data, such as the Department of Commerce's Safe Harbor Framework for the transfer of the personal data of European citizens. *See* http://www.export.gov/safeharbor/eg_main_018243.asp (U.S. Safe Harbor Framework's Annual Reaffirmation Requirement).

online behavioral advertising. Additionally, public attestation to provisions of the Code relating to the practices of member companies' business partners – such as the provisions of the NAI Code pertaining to consumer notice of OBA by Web sites – also serves to exponentially increase the potential “footprint” of self-regulation.

Although public attestations establish a mechanism for regulatory redress, the NAI's annual review process and consumer complaint mechanisms provide the primary means of verifying that member companies not only “say what they do” under the NAI Code, but “do what they say.” As discussed in further detail below, these mechanisms help ensure that the NAI's member companies continue to invest the effort and resources to substantiate their public attestations.

B. Annual Review

The 2008 NAI Code requires members to undergo annual compliance reviews and to cooperate with NAI designees engaged in the compliance review. *See* NAI Code § IV.1(c) – (d). This review process is designed to proactively examine NAI member companies' attestations of compliance by ensuring that their business practices and public representations are aligned with the requirements of the Code. The review process is also intended to educate and remind member companies of their obligations under the NAI Code and of the sanctions that can result from the failure to honor those obligations. The Code specifies that the results of this review must be published annually. NAI Code § IV.1(e).

The NAI's model for its annual review process mirrors the safe harbor self-regulatory model adopted by the Commission in its COPPA rule: self-assessments by participating companies, supplemented by external oversight.⁵ Significantly, this approach to oversight places primary emphasis on the strength of the underlying principles and quality of the external review process, rather than distinctions in corporate form between the entity conducting the review and the body promulgating the self-regulatory standards.⁶ The NAI has also taken appropriate procedural steps to enhance the independence of its external review process.⁷

⁵ The NAI employs “[a]n effective, mandatory mechanism for the independent assessment of subject operators' compliance with the guidelines[,] . . . satisfied by . . . periodic reviews of all subject operators' information practices, conducted either by the industry group promulgating the guidelines or by an independent entity.” Children's Online Privacy Protection Final Rule, *supra* note 3, at 59907.

⁶ In the COPPA rulemaking process, the FTC rejected calls to limit eligibility to participate in the safe harbor program solely to “non-profit self-regulatory programs or for profit groups whose self-regulatory decisions are insulated from owner or investor control. . . . The Commission believes it is unnecessary to so limit eligibility for safe harbor status and further believes that the test for eligibility should be the substance of self-regulatory guidelines, rather than the corporate structure of their promulgators.” *See id.* at n. 308.

⁷ *See* NAI 2009 Annual Compliance Report (December 30, 2009), at n. 17 (noting the independence of NAI Staff with respect to the substance of compliance findings), *available at* http://www.networkadvertising.org/pdfs/2009_NAI_Compliance_Report_12-30-09.pdf.

The NAI annual review process is intensive. Under the procedures established by the NAI, the compliance review is based on: (1) representations of business practices as set forth in the members' public and non-public materials, including the (a) public Web site, (b) privacy policy, (c) terms of service, (d) advertising contracts, and (e) marketing materials; (2) responses to an NAI Questionnaire regarding each provision of the NAI Code; (3) interviews with senior responsible executives who are authorized to bind the company, as well as with relevant engineering staff; and (4) responses to any alleged deficiencies in compliance raised by the press, other member companies, or the NAI's consumer complaint process (if any).⁸

In conducting its first compliance review under these procedures in 2009, the NAI employed a multi-stage written evaluation and interview process. NAI companies eligible for review were required to provide responses to a detailed questionnaire that asked members to describe their practices and policies relative to the principal NAI Code requirements, and to provide supporting documentation. The NAI compliance team, consisting of three NAI attorneys with experience in privacy law, corporate compliance, and technology, reviewed members' responses and conducted the interviews. The NAI compliance team also independently reviewed member companies' business practices as described on their Web sites, privacy policies, terms of service, as well as proprietary contracts and marketing materials. The compliance team used independent technical methods to assess compliance, including testing the functionality of members' opt out tools, reviewing the Web sites of members' partners for notice and choice disclosures, and investigating members' processes for handling consumer complaints. NAI Staff then engaged in a multi-stage interview process that included high-level management and relevant engineering staff.

The results of the NAI's 2009 annual report reflected its members' overall commitment to the compliance process.⁹ The 2009 Annual Compliance Report found that the evaluated member companies met their compliance obligations with respect to the great majority of the NAI Code requirements.¹⁰ Moreover, in the

⁸ See NAI Compliance Program Attestation Review Process, at p. 3 (Feb. 17, 2009), available at http://www.networkadvertising.org/managing/NAI_COMPLIANCE_AND_ENFORCEMENT_PROGRAM_Attestation_Review_detail.pdf. NAI Staff are required to advise members on what NAI Principles apply and what modifications in business practices may be necessary to bring the company into full compliance with the NAI Code. Members must remedy any compliance deficiencies, or adopt a plan to do so, within 30 business days of identification of the deficiency, unless NAI Staff extends the deadline to accommodate material technological constraints or unavoidable delays. *Id.*

⁹ Under NAI procedures, members are eligible for review "the year following admission to the NAI as a new member." See *id.* at section 2.

¹⁰ See NAI 2009 Annual Compliance Report, *supra* note 7, at p. 7. No compliance deficiencies were noted for eighteen of the twenty Code requirements, although the review noted that improvements needed to be made with respect to the publication of specific retention periods and in members'

areas in which areas of deficiency existed, the Compliance Review detailed a proposed remediation approach.

The in-depth scope of the NAI's annual review process is intended to prevent member companies from merely "signing up" for compliance without actually aligning policies and practices with the requirements of the NAI Code. Moreover, the NAI's self-regulatory review process provides a practical and expeditious means for securing the implementation of industry best practices that benefit consumers. For example, the NAI Code requires that member companies disclose the approximate length of time that data used for advertising purposes is retained. The annual compliance review revealed that ten companies under review failed to disclose their retention periods. NAI Staff discussed this issue with the affected companies. By the time NAI Staff released its compliance report at the end of 2009, six of the ten companies had already updated their privacy policies to reflect their retention periods, while the other four promised to do so shortly.

The NAI's annual review process is a keystone of an accountability process that provides an external oversight mechanism, and that at the same time places the primary responsibility for the day-to-day supervision and costs of compliance on a self-regulatory body. By providing this oversight function, the NAI and other effective self-regulatory bodies relieve regulators of the obligation to routinely monitor the behavior of marketplace participants, thereby freeing up regulatory resources to focus on emergent threats to privacy and true "bad actors."

C. Consumer Questions and Complaints

An effective consumer redress mechanism is another critical element of the NAI's self-regulatory program. Under the NAI Code as revised in 2008, the NAI is required to provide a centralized mechanism on the NAI website to receive consumer questions or complaints relating to compliance with the NAI Code. *See* NAI Code § IV.2. The NAI provides a means for consumers to contact NAI Staff via an online form, email, phone, or postal mail with questions or complaints. The NAI Code also provides transparency into the consumer complaint process by requiring the NAI to annually publish a summary of customer complaints and the resolution of those complaints. *See* NAI Code § IV.1(e).

The NAI's 2009 Annual Compliance Report summarizes the 1,621 consumer communications the NAI received in 2009 and how those communications were resolved. Such consumer inquiries were a comparatively small number relative to the number of visitors to the NAI's consumer Web site in 2009.¹¹ Of the 788 "NAI-

efforts to enforce contractual requirements that their Web site partners implement notice and choice disclosures about behavioral advertising. *See id.* at pp. 3-7.

¹¹ *Id.* at pp. 15-19 (noting nearly one million unique page views of the NAI's opt out tool, and nearly 300,000 unique users who went through the NAI opt out process).

related” inquiries, the great majority related to the functioning of NAI opt out tool, and were handled by NAI Staff through direct communication with consumers. NAI Staff helped consumers address conflicts between their pre-existing software or computer settings and the operation of the NAI’s opt out tool (for example, browsers preconfigured to reject all third party cookies, including opt out cookies from NAI members).

Significantly, almost half of the consumer communications in 2009 were or appeared to be unrelated to NAI compliance, such as consumers seeking to opt out of email marketing. Only 113 consumer communications related to problems with NAI members’ adherence to the Code, and all 113 of these related to a limited number of functionality issues with certain members’ opt out tools. In each of those situations, NAI Staff was able to leverage its direct relationship with its member companies to promptly resolve the issue.

The NAI’s experience demonstrates the utility of a self-regulatory organization to serve as the point of first response to consumer questions and complaints. Organizations like the NAI serve a significant role in addressing consumer questions and complaints that can be readily resolved, providing timely resolution of issues that might not otherwise be susceptible to resolution through complaint mechanisms provided by regulators. Self-regulatory bodies like the NAI also play a potentially important role in identifying emerging trends in consumer concern: the availability of such data can help to determine the appropriate direction for industry best practices.

D. Sanctions

As the discussion of the 2009 annual review process indicates, the NAI’s member companies have shown a high level of commitment to the NAI Code. Nevertheless, sanctions for non-compliance are a necessary component of an effective self-regulatory program. Accordingly, the NAI Code expressly provides for penalties for a finding of non-compliance. *See* NAI Code § IV.1(e). Moreover, NAI staff may refer unresolved compliance issues to the NAI Board, which retains the power to suspend or revoke the company’s NAI membership, to publicly announce revocation of membership by press release, or to refer the issue of non-compliance to the Commission or other regulatory body.¹² Thus, in the event the NAI were to face a compliance issue that it could not resolve with a member, it has a broad range of potential responses.

¹² *See* NAI Compliance Program Attestation Review Process, *supra* note 8, at 3 (Feb. 17, 2009). In its COPPA self-regulatory safe harbor, the Commission recognized effective incentives for subject operators’ compliance with self-regulatory guidelines may be satisfied by mechanisms similar to those used by the NAI, including public reporting of disciplinary action taken against subject operators by the industry group promulgating the guidelines, and referral to the Commission of operators who engage in a pattern or practice of violating the guidelines. Children’s Online Privacy Protection Final Rule, *supra* note 3, at 59907.

II. Additional Consumer Benefits of A Broadly-Based Self-Regulatory Program for Online Behavioral Advertising

In addition to its ability to ensure compliance with the formal requirements of industry principles, a self-regulatory program's efficacy can also be measured by the degree to which it helps facilitate the widespread adoption of best practices that benefit consumers. The NAI believes that the breadth of participation in its self-regulatory program allows it to help develop and deploy industry-wide technological and policy solutions that address consumer concerns relating to online behavioral advertising. Such a broad-based approach can help more rapidly and flexibly address issues of consumer transparency and control than legislative or regulatory approaches.

A. The NAI's program now includes the great majority of companies in the online behavioral advertising marketplace.

In the past 18 months, the NAI has more than doubled in size, growing from 15 to 40 member companies.¹³ Recent comScore data indicates the ten largest ad networks, and 14 of the 15 largest ad networks, currently belong to the NAI.¹⁴ These large networks all have a user audience reach of more than 125 million unique U.S. Internet users – and in the case of the largest eight networks (all NAI members), reach at least 75% of the entire U.S. online population. The fact that the largest ad networks that engage in online behavioral advertising have committed to abide by the NAI's Code demonstrates that self-regulation of online behavioral advertising is firmly established in the marketplace.

Additionally, the NAI recently conducted a review of the 100 most-visited U.S. Web sites in order to attempt to assess the prevalence of self-regulatory participation by companies in the online behavioral advertising (OBA) marketplace.¹⁵ The review focused on cookie-related activity originating from companies engaging in OBA, and excluded other cookie activity resulting from non-

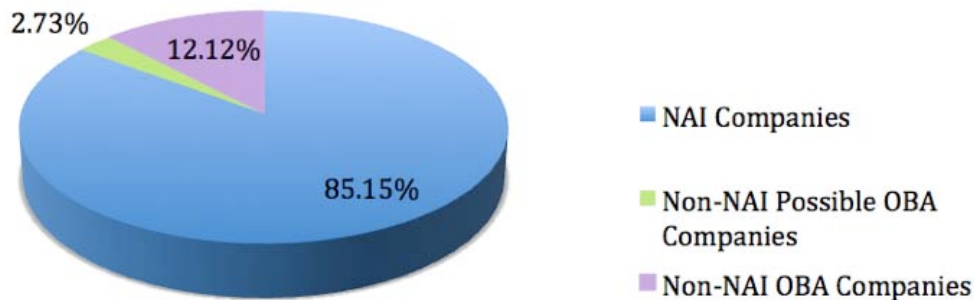
¹³ The NAI's Web site currently lists 36 member companies and 39 distinct company opt outs. An additional four companies have been approved for membership and are implementing membership criteria.

¹⁴ See comScore Media Metrix, *comScore Releases December 2009 Ranking of Top 15 Ad Networks*, at [http://www.comscore.com/Press Events/Press Releases/2010/1/comScore Releases December 2009 Ranking of Top Ad Networks](http://www.comscore.com/Press%20Events/Press%20Releases/2010/1/comScore%20Releases%20December%202009%20Ranking%20of%20Top%20Ad%20Networks); comScore Media Metrix, *comScore Releases April 2009 U.S. Ranking of Top 25 Ad Networks*, at <http://ir.comscore.com/releasedetail.cfm?releaseid=385312>.

¹⁵ The NAI's review was based on the top 100 U.S. Internet destinations as determined by Alexa (www.alexa.com) on December 3rd, 2009. A modified version Mozilla Corporation's Firefox web browser equipped with multiple cookie monitoring add-ons (for both HTML and LSOs) was used to examine each Web site during five-to-ten minute browsing sessions between December 4th and 10th, 2009. The resulting data relating to cookie activity was subsequently analyzed by frequency; by the identity of the company setting the cookie; and whether the company's stated practices include OBA.

OBA companies (such as Web analytics and research companies).¹⁶ The review found that NAI members account for an estimated 85% of OBA-related activity on major Web sites:

**NAI Members As A Percentage of OBA-Related Activity on Top 100 U.S. Web Sites
(Dec. 2009)**



These results, when considered in conjunction with comScore’s data showing the broad market reach of NAI member ad networks, help demonstrate that self-regulation currently reaches the great majority of companies in the OBA marketplace. Moreover, such data is underinclusive of efforts by organizations other than the NAI – such as the recently-adopted Self-Regulatory Principles – that will only serve to further broaden the scope of self-regulation.¹⁷

B. The NAI’s broadly-based self-regulation program helps promote the adoption of best practices and privacy-related innovation

Self-regulatory programs like the NAI’s do not limit their focus to compliance, but also emphasize consumer education and seek to foster the development of new best practices. While the NAI’s compliance role is distinct from its policy-making function, the compliance process furnishes important information about emerging best practices for policy and technology that can usefully be shared among members. Moreover, by offering its members a forum to exchange insights about

¹⁶ Recent analysis by PrivacyChoice has usefully highlighted the importance of Web site transparency in connection with third party data collection. See <http://privacychoice.wordpress.com/2009/12/05/the-critical-role-of-websites-in-ad-targeting-disclosure-privacychoices-submission-for-the-ftp-roundtables/>. However, PrivacyChoice’s analysis of “ad targeting” companies includes a significant number of companies that do not represent that they engage in online behavioral advertising (such as Web analytics and consumer research companies). Privacy Choice’s technological approach to providing consumers with information relating to data collection and use practices nonetheless remains very innovative.

¹⁷ See AAAA/ANA/BBB/DMA/IAB, “Self-Regulatory Principles for Online Behavioral Advertising” (July 2009), available at http://www.iab.net/insights_research/public_policy/behavioral-advertisingprinciples. Additionally, TrustE has announced a program to similarly facilitate OBA-related self-regulation, in conjunction with PrivacyChoice. See http://www.truste.com/about_TRUSTe/press-room/news_truste_oba_pilot_announcement.html.

new approaches to privacy protection, the NAI can help speed their marketplace adoption.

With respect to technological innovation to protect privacy, the NAI serves as a catalyst for broad-based industry initiatives. For example, technologists from an NAI working group are playing a leading role in helping industry-wide efforts to develop a data protocol to support the deployment of enhanced notice of online behavioral advertising (leveraging a common consumer notice icon). Additionally, the NAI has introduced a beta version of a Firefox browser Add On to protect user opt outs stored in browser cookies.¹⁸ Leveraging extensible software developed by BlueKai that allows consumers to select multiple lists of opt out cookies (not just the NAI's), the NAI secured the participation of its entire membership to provide Web users with a more durable tool to protect user choices. These initiatives underscore the importance of technology to the NAI's overall mission.¹⁹

Additionally, the NAI's policy-making role extends not only to the development and revision of its Code of Conduct, but also to the determination of specific policy responses to emerging issues of consumer concern. For example, researchers have recently focused attention on the question of whether Local Shared Objects (LSOs), such as Flash cookies, are being used to undermine consumer preferences for online advertising.²⁰ After consulting with its membership on both the technological and policy issues involved, the NAI adopted a policy broadly limiting the use of LSOs like Flash cookies until such time as web browser tools provide the same level of transparency and control available today for standard HTML cookies.²¹ Given the breadth of its membership, the NAI's willingness to establish such policies should help to reassure consumers that self-regulation of online behavioral advertising remains comprehensive for all relevant technologies.

¹⁸ The beta Add-On is available for download at:

http://networkadvertising.org/staging/pre/managing/protector_license.asp.

¹⁹ Technological best practices -- such as the implementation of ad preference management tools -- can also emerge organically through the individual initiative of NAI member companies. Preference tools are already in use by six NAI member companies, and under development by several more:

- BlueKai consumer preferences registry (<http://tags.bluekai.com/registry/>);
- eXelate preference manager (<http://www.exelate.com/new/consumers-optoutpreferencemanager.html>);
- Google ad preference manager (www.google.com/ads/preferences);
- Lotame preferences manager (<http://www.lotame.com/preferences.html>);
- Safecount (<http://www.safecount.net/yourdata.php>);
- Yahoo! ad interest manager (http://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/).

The rapid adoption of preference managers illustrates how marketplace competition among participants in self-regulatory programs can also facilitate privacy-related innovation.

²⁰ See, e.g., Mediapost 1/14/10 "Flash Cookies Could Become Hot-Button Privacy Issue," http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=120673.

²¹ See http://networkadvertising.org/managing/faqs.asp#question_19.

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The NAI appreciates the chance to comment on the Commission's questions, and looks forward to continuing to work with the FTC and its staff as they evaluate the appropriate frameworks for online consumer privacy.