

THOMPSON COBURN LLP

ONE US BANK PLAZA
ST. LOUIS, MISSOURI 63101

TELEPHONE 314-552-6000
FACSIMILE 314-552-7000

1909 K STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006-1167

TELEPHONE 202-585-6900
FACSIMILE 202-585-6969

WWW.THOMPSONCOBURN.COM

Memorandum

To: American Business Media members

From: Mark Sableman and David Straus

Date: February 16, 2009

Re: FTC Behavioral Advertising report

The Federal Trade Commission last week (Feb. 12, 2009) issued its long-awaited staff report on behavioral advertising, following up on the agency's initial foray into the area last fall. The 48-page report on "Self-Regulatory Principles for Online Behavioral Advertising" contains some welcome provisions for internet publishers like ABM members. First, the report does not, as some feared, recommend direct federal regulation of behavioral advertising; it continues to advocate voluntary industry self-regulation under four basic principles. Second, the report recognizes that a single website's tailoring of content and advertising based on consumer activity on that website should be exempt from the proposed self-regulatory principles.

The most important aspect of the report for ABM members is that the FTC staff accepted arguments made by ABM and other publishers that its behavioral advertising principles should not apply to "first party" or "intra-site" practices. That is, when an ABM member tailors editorial content, ads, and other website features to its customers' activity on its website, that activity should be exempt from the FTC's suggested rules. However, if a website "collects and then sells or shares data with third parties for purposes of behavioral advertising, or participates in a network that collects data at the site for purposes of behavioral advertising" those practices remain within the scope of the FTC self-regulatory principles.

The staff noted, as ABM urged, the trusted relationship between consumers and the websites they regularly view, and the fact that consumers could deal directly with the website operator if they have any concerns. Finally, the report recognized that the same arguments may apply to use of consumer data across related websites (those under common ownership and control), at least where the relationships between different websites are apparent to consumers. The report cautioned that such practices would remain subject to any existing privacy laws that might cover them.

Similarly, the FTC agreed that “contextual advertising”—targeting of ads based solely on the content of a particular website or search query, without the collection and retention of data about the consumer’s online activities over time—should be excluded from its principles, because consumers were likely to expect and understand such ads. However, “where a practice involves the collection and retention of consumer data for future purposes beyond the immediate delivery of an ad or search result,” those practices remain within the scope of the FTC self-regulatory principles.

Advertising networks—those entities that collect and use consumer browsing data across various different and unrelated websites—will be primarily responsible for complying with the FTC’s suggested behavioral advertising principles in regard to notice and choice for consumers. It is still unclear how first-party publishers may be pulled into this, perhaps through a need to disclose, or facilitate disclosures of, the practices of the ad networks that they utilize. Other non-first-party uses of browsing data, such as use of “deep packet inspection” under which Internet service providers mine data from consumers’ Internet traffic streams for targeted advertising, will also be covered by the proposed principles.

As to what kind of information collection should be covered by its principles, the FTC staff rejected the distinction that many industry commentators advocated between collection of personally identifiable information (“PII”) and non-PII. The agency reasoned that even collection of non-PII implicates some privacy concerns, and, moreover, developing technologies are making it easier to link information to specific individuals. Thus, in the FTC’s view, its behavioral advertising principles should apply to all data collected through behavioral advertising “that reasonably could be associated with a particular consumer or with a particular computer or device.” Examples of such information, from the report, include:

- “clickstream data that, through reasonable efforts, could be combined with the consumer’s website registration information”;
- individual pieces of anonymous data combined into a profile sufficiently detailed that it could become identified with a particular person; and
- behavioral profiles that, while not associated with a particular consumer, are stored and used to deliver personalized advertising and content to a particular device”.

The FTC explained that its key theme was the need to balance the potential benefits of behavioral advertising against the privacy concerns those practices raise. This overt recognition of the benefits of behavioral advertising is helpful, suggesting that the FTC staff is disinclined to impose “opt-in” requirements that, as a practical matter, would lead many users to miss those benefits.

The report technically is a report of the staff, not the commissioners, but the commissioners voted 4-0 to approve it. Two commissioners in concurring opinions indicated they favored more aggressive regulation of behavioral advertising, with Commissioner Pamela Jones Harbour warning that unless industry does “a better job of meaningful, rigorous self-regulation,” the FTC and/or Congress may intervene with mandatory legal regulation. Similarly, Commissioner Jon Leibowitz noted that “this could be the last clear chance to show that self-regulation can—and will—effectively protect consumers’ privacy in a dynamic online marketplace.” Commissioner Harbour also expressed a preference for a broader inquiry into privacy on the Internet, looking at other ways that consumer data is collected and used—for

example, through web mail, blogs, mapping and location-based services and desktop organization software.

The agency stated in a news release that its staff “will continue the public dialogue regarding the privacy issues raised by behavioral advertising” and in the coming year “will evaluate self-regulatory programs and will conduct investigations, where appropriate, to determine whether practices in this industry violate section 5 of the FTC Act [regulating unfair trade practices].”

The basic principles for behavioral advertising proposed in the report are quite similar to those proposed last year, although, with the welcome exclusion of first-party publisher websites and contextual advertising, they now apply to a significantly narrower segment of website activity. Those principles (designed as “guidelines for self-regulation”) follow (with the text of the FTC principles quoted verbatim, followed by some notes from us).

1. Transparency and consumer control. “Every website where data is collected for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement that (1) data about consumers’ activities online is being collected at the site for use in providing advertising about products and services tailored to individual consumers’ interests, and (2) consumers can choose whether or not to have their information collected for such purpose. The website should also provide consumers with a clear, easy-to-use, and accessible method for exercising this option. Where the data collection occurs outside the traditional website context, companies should develop alternative methods of disclosure and consumer choice that meet the standards described above (i.e., clear, prominent, easy-to-use, etc.).” The report encourages consideration of “creative and effective” disclosures such as a “Why did I get this ad?” disclosure located next to an ad placed by an ad network, and similar “just in time” disclosures that tell consumers what is happening at the point where covered data is collected.

2. Reasonable security for and limited data retention of consumer data. “Any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data. Consistent with data security laws and the FTC’s data security enforcement actions, such protections should be based on the sensitivity of the data, the nature of a company’s business operations, the types of risks a company faces, and the reasonable protections available to a company. Companies should also retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.” In response to industry comments, the report acknowledged that data retention needs can vary significantly in different situations.

3. Affirmative express consent for material retroactive changes to privacy policies. “As the FTC has made clear in its enforcement and outreach efforts, a company must keep any promises that it makes with respect to how it will handle or protect consumer data, even if it decides to change its policies at a later date. Therefore, before a company can use previously collected data in a manner materially different from promises the company made when it collected the data, it should obtain affirmative express consent from affected consumers. This principle would apply in a corporate merger situation to the extent that the merger creates material changes in the way the companies collect, use, and share data.” Significantly, this consent requirement applies only to *material* and *retroactive* changes in policies.

4. Affirmative express consent to (or prohibition against) use of sensitive data.
“Companies should collect sensitive data for behavioral advertising only after they obtain affirmative express consent from the consumer to receive such advertising.”
This principle relates primarily to collection and use of data relating to medical conditions, children, and similar specially sensitive subjects.

Even for practices that fall outside of these principles, like advertising to your own customers on your own website, the report warns that website operators still need to implement reasonable measures to address privacy or security risks to customers’ information. (In this regard, ABM members may wish to consult for guidance ABM’s Customer Privacy Guidelines, available at http://www.americanbusinessmedia.com/abm/Washington_Update.asp?SnID=24027750.)

The FTC report recognizes (as ABM’s comments last year urged) that final policy decisions need to be informed by more insights into consumer conduct and needs, and the evolving direction of the marketplace.

The full FTC staff report is available at <http://www.ftc.gov/opa/2009/02/behavad.shtm>.

A number of industry groups are already working to address the FTC report and its self-regulatory proposals. ABM is working with the Online Publishers Association, Software and Information Industry Association, Magazine Publishers of America, and a broad coalition of first-party publishers organized by McGraw-Hill. Additionally, a coalition of four key advertising industry trade associations, which represent the ad networks that now seem to be the focus of the FTC’s inquiry, announced immediately after the FTC release that it would continue to work to develop “a cohesive and far-reaching self-regulatory effort for interactive advertising.”

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