

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
DATE: July 6, 2009
SUBJECT: Advertising industry behavioral advertising proposal

A long-awaited self-regulatory proposal for online behavioral advertising was revealed on Thursday, July 2, 2009. The proposal, sponsored by four advertising trade associations and the Council of Better Business Bureaus, seeks to address public concerns about behavioral targeting in internet advertising in a manner that will make federal regulation of the field unnecessary.

Significance of the Proposal

The proposal promises to affect ABM members both as publishers and as advertisers. Because of this, and the possibility of direct government regulation in this field, ABM has been following this issue for several years, and has been actively monitoring and participating in both government and industry inquiries.

Most importantly for ABM members, this proposal would rework publisher relationships with third-party advertisers, by involving publishers in providing consumer notices from third party advertisers. Specifically, website owners that use third party advertisers would most likely have to begin using Web Icon Notices (as explained below) on their websites to alert consumers to the privacy practices of third party advertisers.

Details of the Proposal

The groups' full proposal is set forth in a 48-page document that is available at <http://www.iab.net/media/file/ven-principles-07-01-09.pdf>. The proposal presents seven principles relating to Education, Transparency, Consumer Control, Data Security, Material

Changes (i.e., notice for material changes to behavioral advertising policies), Sensitive Data and Accountability. Some of these principles incorporate and apply existing laws and practices.

The proposal relates to the use of online behavioral advertising, which it defines as “the collection of data from a particular computer or device regarding Web viewing behaviors over time and across non-affiliate Web sites for the purpose of using such data to predict user preferences or interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors” – in short, online ads that are keyed to web viewing behavior and that are posted by third parties, including ad networks. It does not address so-called “first party” ads that are posted on a website by the website’s owner—for example, ads that an ABM member serves on its own website in response to its users’ viewing behavior on that site without sharing such behavioral data with any third parties. Nor does it address contextual advertising—*i.e.*, ads based on the content of the web page being viewed. The Federal Trade Commission (FTC) recognized earlier this year that consumers expect both first party ads and contextual ads, and they need no special disclosures from first party advertisers because they have trusted relationships with them.

The FTC’s report left “third party” ads—*i.e.*, ads posted by ad networks and others on websites that they do not operate, based on browsing data collected on that website or across many sites—as its primary concern, and some members of Congress have suggested that they believe Congress should expressly regulate such ads. The “online behavioral advertising” debate thus focuses on these third party practices. This week’s proposal from the advertising industry trade groups is designed to address the expressed concerns of the FTC and some members of Congress, and allow industry self-regulation to control the field, hoping to preempt congressional legislation.

A new scheme for notifying consumers about third party online behavioral advertising, and for giving them the opportunity to choose whether to continue to receive such ads, lies at the heart of the new proposal. Currently, consumers cannot distinguish third party online behavioral ads from first party ads or from contextual ads where no data is collected or shared, so they don’t know where the ads are coming from, or how to opt out of them. Under the proposal’s “enhanced notice” provisions, consumers would be given clear notice of the origin of the ads, the fact that those ads are served based on behavioral data collected, and clear direction regarding how to exercise choice regarding the collection and use of their behavioral data.

The key “enhanced notice” to consumers may occur through two optional methods—one of which involves cooperation from website publishers.

Under the first option, the third party that placed the ad may embed a link or icon, together with certain disclosure wording, in each of its ads. (We’ll call this “In-Ad Notice.”) When consumers click on the link or icon, they will get a disclosure from the ad network, either as an expanded text scroll, a disclosure window, or a separate web page. This notice will provide the third party’s online behavioral advertising practices, and it will provide a mechanism for exercising choice regarding those practices, either directly in that disclosure or through a link to an industry-developed webpage where consumers could opt out of the practices of many advertisers.

The second option requires participation by the website operator. Under this option, a disclosure in the form of a link or icon and certain disclosure wording would appear on the web page where the data is collected for use in online behavioral advertising. (We'll call this "Web Icon Notice.") When consumers click on the link or icon, they will be sent to the website's disclosure regarding online behavioral advertising, either in the relevant section of an existing privacy policy or in a separate disclosure. This website will either list all of the entities that collect data on that website for online behavioral advertising purposes, with links to each such entity's notice and choice policies, or it will link to an industry-developed website that will allow consumers to determine how their behavioral activity may be used by the various participating third parties, presumably including most ad networks. Each third party advertiser is responsible for getting listed on the industry-developed website.

While the word "opt-out" is never used in the proposal, the proposal clearly follows an opt-out methodology. It is presumed that advertisers can use behavioral advertising until and unless a consumer specifically registers a preference not to receive behavioral advertising from a specific advertiser, a specific ad network, or all advertising networks via the appropriate choice mechanism.

The last principle, the "Accountability Principle," calls for the establishment of self-regulatory mechanisms to police compliance with the self-regulatory guidelines. The proposal notes that the Council of Better Business Bureaus (CBBB) is "developing a new [enforcement] program around these Principles" similar to the existing National Advertising Review Council model, and that the Direct Marketing Association (DMA) also will be working on accountability mechanisms. It gives no further details on these enforcement mechanisms.

Potential Impact on ABM Members

For most website publishers, the proposal's Transparency and Consumer Control principles will be of the greatest interest and importance. And that necessarily focuses on the alternative notice mechanisms—In-Ad Notices, and Web Icon Notices.

While Google and Yahoo have indicated that they may rely on In-Ad Notices, it seems likely that many ad networks will prefer to rely on Web Icon Notices. That will mean that publisher websites carrying third party behavioral ads, like those of many ABM members, will need to use part of their website real estate to accommodate a Web Icon Notice.

The proposal provides only a general description of the proposed In-Ad Notices and Web Icon Notices. It states that the links "will be clear, prominent, and conveniently located." These initial links apparently will include both "common wording and a link/icon that consumers will come to recognize." Any Web Icon Notice, moreover, must be "distinct from" the website's own privacy policy link—meaning that ABM members could not use their existing privacy policy links for this purpose. Although these initial icons and links will lead to further links, the page where consumers will register their choices "will never be more than a few clicks away from such standardized wording and link/icon," according to the proposal.

Many questions remain about the Web Icon Notices, and how they will work and be understood in practice. It is possible that consumers will view the conspicuous Web Icon Notice as an indication that the website contains lots of online behavioral advertising, even if

that website uses very little third party behavioral advertising. Additionally, the prescribed Web Icon Notice will only apply to U.S. operations, and thus possibly other Web Notice Icons directed at different jurisdictions could eventually be required on websites directed to many different countries.

Many details regarding the implementation and enforcement of the principles remain to be worked out as well.

ABM's Role

ABM, its Information Policy Committee (IPC) and its Government Affairs Committee have long been involved with the behavioral advertising issue. ABM made comments to the Federal Trade Commission in response to its 2007 report that first suggested the need for industry self-regulation, and those comments, along with comments from many other groups, led to the FTC's February 2009 report that, among other things, recognized that first party behavioral advertising was permissible and needed no further disclosures or regulation. Additionally, ABM has participated with other publishing associations in an Online Publishers Privacy Coalition, which has monitored and discussed the development of the advertising industry plan.

ABM's board of directors adopted Policy Principles on behavioral targeting in 2008. Among other things, those principles provide that its members should, to the extent possible, provide a mechanism by which users can locate third-party advertisers to obtain their privacy guidelines. They further provide that any new policy or framework on this subject must recognize the responsibility of those third party advertisers for providing disclosures and offering choice to consumers.

Request for Member Feedback

ABM and its IPC welcome and encourage comments and advice from members regarding the advertising industry proposal, and whether it meets ABM's Policy Principles and its members' needs.

In particular, ABM welcomes feedback from members on the following issues (as well as any others that are important to you). ABM expects to have all member feedback evaluated by its IPC in mid-July, so that ABM can take appropriate action, in coordination with other publishing trade associations and coalitions, in response to the proposal.

1. Do you currently conduct online behavioral advertising (as defined in this memo)? If so, what percentage of your total online advertising is behaviorally targeted? Do you expect that you will use behavioral advertising more in the future?
2. Are you willing to include a Web Icon Notice (as defined in this memo) on your website whenever your website carries behaviorally targeted ads? Do you have any concerns or problems with this approach to alerting consumers to behaviorally targeted ads? For example, are you concerned that the icon or link would displace other content on your website? Or that the icon or link would discourage

consumers from using your website? Or that it would be confusing in conjunction with your existing privacy policies? Or do you have any other concerns?

3. Do you have any concerns or problems with the option of having third party ads include in-ad disclosures? More specifically, do you think ad networks should be required to use this method of providing consumers with notice and choice?
4. Do you approve of making the self-regulatory system enforceable through the CBBB and/or the DMA? If not, what concerns do you have with such an approach?
5. In what ways, if any, do you believe this proposal would affect your business as a publisher generally? Do you see any special effects on you as a business-to-business publisher? How does it affect you as an advertiser or operator of an advertising network?

4963544.5