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**Before the United States House of Representatives
Committee on Energy and Commerce
Subcommittees on
Commerce, Trade and Consumer Protection and
Communications, Technology and the Internet**

**Behavioral Advertising:
Industry Practices and Consumers' Expectations
June 18, 2009**

Chairman Rush, Chairman Boucher and Members of the Subcommittees: The Network Advertising Initiative ("NAI") appreciates the opportunity to testify about online advertising generally and behaviorally-related advertising in particular. The NAI is a coalition of 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, across the many different Web sites on which NAI members provide such targeting (via www.networkadvertising.org).

The NAI's testimony today will focus on the business models and technologies deployed by its members to enhance the relevancy of online advertising, including behavioral advertising; the economic benefits to Web content providers and consumers that result from these advertising technologies; and the steps taken by NAI members to enhance corresponding consumer confidence through a self-regulatory Code of Conduct designed to promote transparency and choice for online behavioral advertising.

I. The Role of NAI Member Advertising Technologies in the Internet Marketplace, and their Economic Benefits

The Network Advertising Initiative's members include significant online advertising companies such as AOL's Platform-A division, Akamai, Microsoft's aQuantive division, Google, Yahoo!, AlmondNet, Audience Science, BlueKai, Media6Degrees, SpecificMEDIA and 24/7 Real Media. The NAI's membership now incorporates not just the ten largest advertising networks, but also leading data exchange and marketing

analytics services providers.¹ The business models of the NAI's members are based on the common goal of enabling Web content and services providers to enhance the relevancy (and efficiency) of their online display advertising, and to generate increased revenue to subsidize consumers' use of such services.

A. How NAI Members help Web content and services providers enhance their advertising revenue

Over the past 15 years, the World Wide Web has provided consumers access to an incredible variety of new services, ranging from online news, blogs, and other content to e-mail, search, social networking, video, and other Web-based services. The explosion in Web services and their ease-of-use have transformed consumers' ability to access public information and entertainment, and created entirely new platforms for community and collaboration. Web-based technologies have also radically enhanced the ability of small businesses and specialty content providers to establish and connect with new audiences, creating new jobs and substantially increasing the diversity of public discourse. Consumer consumption of such Web services has continued to grow rapidly.²

The great majority of these Web sites and services are currently provided to consumers free of charge. Instead of requiring visitors to register and pay a subscription fee, the operators of Web content and services subsidize their offerings with various types of advertising. These advertising revenues provide the creators of free Web content and services – site publishers, bloggers, and software developers – with the income they need to pay their staffs and build and expand their online offerings.

Display advertisements – sometimes called “banner” ads – are an important means by which many Web content and services providers (also called “Web publishers”) generate such advertising revenue. For every Web page that is viewed by a user, the site or service has an opportunity to serve one or more display advertisements. Web publishers use ad serving technologies to manage this “inventory” of potential banner ad

¹ In the past year, the NAI's membership has nearly doubled in size, growing from 15 to 29 members, with an additional three companies (including ValueClick) implementing NAI membership. The ten largest advertising networks, as measured by audience reach, are NAI members. *See comScore Media Metrix, comScore Releases April 2009 U.S. Ranking of Top 25 Ad Networks, available at <http://ir.comscore.com/releasedetail.cfm?releaseid=385312>.*

² *See generally* Center for the Digital Future, USC Annenberg School for Communication, *Highlights from the 2009 Digital Future Report* (April 2009), available at http://www.digitalcenter.org/pdf/2009_Digital_Future_Project_Release_Highlights.pdf (noting that 51% of consumers prefer ad-supported online content); The Nielsen Company, *Television, Internet and Mobile Usage in the U.S. – A2 M2 Three Screen Report* (1st Quarter, May 2009), available at http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/05/nielsen_threescreenreport_q109.pdf (noting continued growth in monthly Internet usage generally by over 160 million U.S. users, and of online video in particular). Cisco expects Internet traffic to grow fivefold by 2013. *See* Cisco, *Cisco® Visual Networking Index (VNI) Forecast and Methodology, 2008-2013* (Summary, June 2009), available at http://newsroom.cisco.com/dlls/2009/prod_060909.html. *See also* IAB/Hamilton Consultants Inc., Drs. John Deighton and John Quelch, *Economic Value of the Advertising-Supported Internet Ecosystem* at 4 (June 10, 2009), available at <http://www.iab.net/economicvalue> (estimating that the advertising-supported Internet accounts for \$300 billion of economic activity).

placements: the publisher must estimate the overall number of potential ad “impressions” that are available for different advertisers to purchase, and must then also deliver the advertiser’s campaign and report on its effectiveness.

Display-related ads are a very significant source of income to Web content and services providers, generating approximately \$7.6 billion in advertising revenue in 2008.³ These Web publishers have a dual incentive to ensure that they serve their users with the most relevant banner ads possible: not only do more relevant advertisements generate greater user response and revenue for the publisher; greater ad relevance enhances the user experience and avoids the potential nuisance effect to users from less customized marketing.⁴

Web publishers have a variety of potential approaches to ensuring such relevance. The most direct approach is to match the subject matter of banner advertisements to the content or subject matter of the page on which it is displayed: for example, an ad for ocean cruise on a Web page devoted to Caribbean travel. However, such “contextually” targeted advertisements are not always feasible for every type of Web content: for example, an online photo sharing service, or an online newspaper’s section devoted to international affairs coverage, are not as readily suited to contextual advertisements. Web publishers must rely on other potential attributes of their Web site visitors to help ensure ad relevance, such as registration information reflecting their gender, age, or zip code; or, alternatively, other potential interests of their users inferred from prior Web activity, either on the publisher’s site or elsewhere on the Web. And even for large Web sites or services providers, there is no assurance that they will be able to sell their entire potential advertising inventory at rates sufficient to support their operating costs.

Smaller-scale Web publishers – such as blogs and specialty interest content sites – face an additional challenge. The monthly audiences of these sites vary in size from hundreds of thousands to millions of visitors.⁵ Such small Web publishers cannot employ their own dedicated sales force to sell their banner inventory to potential advertisers. More

³ See Interactive Advertising Bureau, *2008 IAB/PricewaterhouseCoopers Internet Advertising Revenue Report* (March 2009), available at http://www.iab.net/media/file/IAB_PwC_2008_full_year.pdf. The report notes that display-related advertising includes display banner ads (21% of 2008 full year revenues or \$4.9 billion), rich media (7% or \$1.6 billion), digital video (3% or \$734 million), and sponsorship (2% or \$387 million). *Id.* at 9. Moreover, e-commerce providers separately provide a substantial amount of proprietary advertising, encouraging commerce. IAB/Hamilton Consultants Inc., Deighton and Quelch, *Economic Value of the Advertising-Supported Internet Ecosystem*, *supra* note 2 at 3.

⁴ One TRUSTe study found that when online advertising for products and services is not relevant to consumers’ wants and needs, 72% of consumers find the experience intrusive or annoying. See TRUSTe, *2008 Study: Consumer Attitudes about Behavioral Targeting* (March 28, 2008), available at http://www.truste.com/pdf/TRUSTe_TNS_2008_BT%20_Study_Summary.pdf.

⁵ The statistical diversity of smaller Web sites outside the large-traffic Web sites is sometimes referred to as the Web’s “Long Tail.” See, e.g., Interactive Advertising Bureau, *I Am the Long Tail* (2009) available at <http://iamthelongtail.com/> (offering video examples of the extraordinary diversity in subject matter and business types of small Web publishers). See also Mark Penn, *America’s Newest Profession: Bloggers for Hire*, Wall St. J. (April 21, 2009) (estimating that there are 20 million bloggers, with 1.7 million profiting from their work, and more than 450,000 using blogging as their primary source of income).

importantly, the smaller audiences of such sites do not easily lend themselves to the execution of large-scale brand advertising campaigns preferred by major companies.

The advertising networks, exchanges, and other business models represented in the NAI are vital partners for Web publishers – both large and small – in finding advertisers for their audiences, helping to enhance the relevance of the advertisements served to their users, and thereby generating the revenue needed for these publishers to serve consumers. The important functions NAI members provide include:

- Acting as intermediaries for Web publishers and advertisers, by acquiring unsold impressions from both large and smaller Web content sites, and aggregating them into potential audiences for advertisers (for example, generating a multi-site campaign for a movie’s opening weekend);
- Supporting a variety of pricing models for advertisers, including cost-per-impression (CPM) pricing preferred by brand awareness advertisers; or cost-per-action or click (CPA or CPC) pricing favored by advertisements looking to generate direct online sales (for example, banner ads for online universities);
- Offering niche-based approaches for particular types of publishers (ad networks focused on auto or women’s interest publisher sites); and
- Using online advertising technologies to aggregate insights from single or multiple Web publishers to enhance the relevance and quality of user advertisements

Over the past decade, NAI member companies have been at the forefront of technological innovation designed to bring more efficient and scalable approaches to online advertising, enhancing the potential revenue opportunities for both large and small Web publishers.

B. The use of cookie technology to help increase the relevancy of advertisements

NAI member companies primarily rely on Web browser (HTTP) cookies and similar technologies to manage their ad serving functions. HTTP cookies are small text files that are stored inside a user’s browser, and that usually contain a random string of numbers intended to serve as a unique identifier for the user’s browser.⁶ Such cookies help address the problem that Web browsers cannot otherwise easily “remember” the same user from Web page to Web page, and are employed for a variety of purposes other than advertising. For example, cookies allow a browser to continue to recognize a user across multiple Web pages; to maintain authentication; and to maintain an online shopping cart.

In the advertising context, HTTP cookies help advertising networks to remember an individual user’s browser over time and to make decisions about which ad may be most relevant to serve back to that user. Among other things, cookies enable advertising networks to carry out the following functions:

⁶ See, e.g., Wikipedia, HTTP cookie, available at http://en.wikipedia.org/wiki/Http_cookie (last accessed June 15, 2009).

- Limiting the number of times a user sees the same ad, or serving ads in particular sequence;
- Determining on an aggregate basis how well particular ads perform to broad audiences (and adjusting ad delivery to serve fewer of unpopular ads);
- Allowing a user who visited a particular Web site to subsequently receive an ad related to that Web site while visiting a different site (e.g., a visitor who shops for prices at an online travel site receives an air fare promotion banner ad the next day when visiting their online mail box);
- Improving ad relevancy through behavioral information gathered over time and across multiple Web sites in order predict a user’s possible interests (e.g. that a user visits many sport-related sites and is therefore likely to be interested in sports-related advertisements); or
- Remembering a user’s opt-out preference for behaviorally-related advertising, or any other user preference.

When a Web publisher contracts with an advertising network to help serve ads on its Web site, it authorizes the ad network to serve ads from its own servers onto the Web publisher’s site. It may also allow the ad network to place its cookies in the browser of visitors to the Web site. From the user perspective, cookies placed by advertising networks appear to have different Web domain addresses than the Web domain of the publisher (for example, a visitor to www.washingtonpost.com receiving a cookie from an ad network such as Advertising.com). If the domains are different than that of the Web site, browsers classify them as “third party” cookies (i.e. because the server for the advertising network’s domain is located outside of the domain of the site which the user is visiting). A visitor to a particular Web site may still receive a variety of cookies served by the site operator (for example, a “first party” authentication cookie remembering that the user previously logged in to the site), as well as from third party advertising networks engaged by the Web site operator for ad serving purposes.

The placement of such advertising cookies on multiple partner Web sites creates the “network” of sites for which the ad network has the ability to recognize users: and that “network” is only as broad as the number of participating Web publisher sites that have chosen to allow the ad network to serve ads on their sites. Advertising networks vary considerably in scale and in the number of their partner Web sites: they do not have the ability to record information relating to the entirety of a user’s Web browsing activity. The browser and HTTP cookie-based approach to online advertising is different from other technological approaches to online advertising, such as advertising targeting that relies on interactive software stored on the user’s computer that can collect information about the totality of a user’s Web behavior.⁷

An important feature of such third party cookies is their ability to allow ad networks to recognize users on a non-personally identifiable basis. A Web site visitor may, or may not, log in on the particular Web site that they visit. When an ad network serves a third

⁷ The browser and cookie-related advertising model deployed by ad networks are also technologically distinct from advertising models that rely on Web browsing information derived through the user’s Internet service connection.

party cookie on a user's browser with the Web site operator's permission, the site operator is not obliged to share information about the user's identity: indeed, for the ad network, the user's actual identity may be entirely unnecessary in order to carry out advertising-related functions. As a result, when information is gathered by an ad network over time using third party cookies, the ad network need not combine information about the user's actual identity with user interest or preference information that is associated with the unique identifier in the browser cookie.

Because cookie-related advertising technologies have been in use for well over a decade, Web browser software has evolved to provide users with robust control mechanisms. The major Web browsers offer users the ability to refuse to accept third party cookies of any type (including from ad networks), as well as to erase all third party cookies on request. Additionally, many security software products offer additional features allowing users to manage or limit third party cookies within their browsers.

C. The economic benefits of NAI Members' online advertising technologies

The advertising technologies deployed by NAI members provide considerable economic benefits across the entire online ecosystem, including for publishers, advertisers, and consumers.

From the Web publisher perspective, such advertising technologies enable and preserve their ability to operate their sites free of charge, without adopting subscription requirements (which would also significantly limit the size of their audience):

- Large Web sites derive incremental revenue for the sale of ad impressions that they themselves cannot sell, and that would otherwise generate no income;
- Smaller Web sites in particular -- for example, specialty interest sites or regional online newspapers -- can have their available advertising impressions aggregated into combined audiences attractive to larger-scale advertisers who may pay higher rates and thereby provide them the revenue they need to continue to operate; and
- Both types of Web sites gain access to online advertising technologies, such as re-targeting or behavioral advertising, that enable them to serve more relevant and profitable ads on portions of their sites that do not lend themselves to contextual advertising approaches.

From the perspective of advertisers, the principal benefits of these technologies lies in their adaptability to the challenges of an increasingly fragmented Web audience, as online usage continues to diversify across an ever-broader array of content and services:

- Through more relevant ads served to a more focused audience, the advertiser eliminates wasteful spending on irrelevant ads (for example, automotive advertisers can significantly reduce their advertising expenditures by serving ads for a new car model only to users who have actually expressed interest in that model by researching it, rather than blanketing a wider audience with such ads);

- Larger advertisers gain access to audiences that may be distributed across a great variety of small Web sites, and avoid the otherwise prohibitive costs of attempting to negotiate their ad campaigns on a site-by-site basis;
- Smaller-scale advertisers gain new opportunities to reach focused audiences online that would not have been available to them in the offline world;
- Technologies like re-targeting allow an advertiser to offer an improved price offer to a prior visitor to the advertiser's Web site;
- Behavioral advertising technologies result in a several fold increase in user response;⁸ and
- Compared to other forms of advertising, online ads continue to offer far greater insight into the effectiveness of advertisers' spending, as well as greater flexibility for advertisers to pay only for ads that actually produce a result (performance-based ads that may be particularly important for industries with limited ad budgets).

Finally, from the perspective of the consumer, these online advertising technologies produce very significant economic (and non-economic) benefits:

- As previously discussed, the increased revenues associated with relevant advertising are vital to supporting the continued growth in free-of charge Web content and services (the business model for which consumers have expressed strong preference as compared to fee/subscription-based content and services);⁹
- The particular advantages of these advertising models for smaller Web publishers helps generate the revenue to sustain a greater diversity of content offerings and viewpoints;
- More relevant ads help reduce the potential nuisance effect of non-relevant advertising; and
- Ad-supported business models continue to remain the principal source of venture and investment capital for innovation in Web services that have enjoyed rapid consumer adoption (e.g., social networks).

II. The NAI's Self-Regulatory Approach to Consumer Transparency and Choice for Online Behavioral Advertising

Consumers' confidence in the online medium generally, and in online advertising specifically, is a critical component to the continued growth in Web content and services. It is also a clear prerequisite to the economic benefits of ad-supported business models

⁸ The potential effectiveness of behaviorally targeted advertising is evident not only in the marketplace (where firms offering such technologies have achieved rapid growth); recent empirical research indicates a possible uplift of 670% in user click through rates when behavioral targeting segments are used. See Jun Yan, Gang Wang, Yun Jiang et. al., *How Much Can Behavioral Targeting Help Online Advertising?* at 261 (*WWW 2009 Madrid* April 20–24, 2009), available at <http://www2009.eprints.org/27/1/p261.pdf>.

⁹ For example, in 2007 the New York Times abandoned an online-subscription based model in favor of an advertising-supported model available to all readers. See Richard Pérez-Pena, *Times to Stop Charging for Parts of Its Site*, N.Y. Times (Sept. 18, 2007), available at <http://www.nytimes.com/2007/09/18/business/media/18times.html>.

for publishers, advertisers and consumers alike. The NAI has a long-standing commitment to consumer notice and choice, among other fair information practices, as a means of promoting trust in the online advertising practices of its member companies.¹⁰

A. The NAI's introduction of privacy principles for third party advertising

The NAI was established in 2000 in response to concerns about advertising networks' use of HTTP cookies for the collection of Web browsing information for behaviorally-related ad serving, and the perceived lack of transparency and consumer choice mechanisms for this practice. In reviewing these practices, the Federal Trade Commission specifically criticized the sufficiency of Web publishers' disclosure of advertising networks' data collection practices, as well as the absence of a consumer choice mechanism to preclude the use of data gathered across a network of Web sites for advertising purposes.¹¹

The NAI's founding companies¹² worked with the Federal Trade Commission to establish a principled self-regulatory framework that applied fair information practices to the complex business-to-business data collection and sharing practices between Web publishers and advertising networks. From the outset, the fundamental challenge in applying traditional fair information practice principles for personally-identifiable information – such as notice, choice, access and security – lay in the fact that the online behavioral advertising practices at issue involved non-personally identifiable information. Additionally, the goal of enhanced transparency to promote awareness of the advertising practices necessitated a new level of cooperation between Web publishers and their partner ad networks.

The NAI's 2000 Principles¹³ chartered the following key self-regulatory principles for online behavioral advertising:

1. Notice: Recognizing that consumers overwhelmingly interact on the Web via consumer-facing websites, the NAI Principles required that notice about behavioral advertising practices must appear not only on NAI member

¹⁰ Consumer awareness of third party advertising practices has increased over time. See TRUSTe, *supra* note 4 (noting that 71% are aware that their browsing information may be collected by a third party for advertising purposes). Consumer attitudes to online behavioral advertising remain, however, mixed. Compare, e.g., Harris Interactive/Westin Survey, *How Online Users Feel About Behavioral Marketing and How Adoption of Privacy and Security Policies Could Affect Their Feelings* (March 27, 2008) (finding that a majority (55%) of consumers are comfortable with Web browsing data being used to serve customized ads when consumer privacy protections are put in place), with TRUSTe, *supra* note 4 (57% of consumers say they are not comfortable with advertisers using that browsing history to serve relevant ads, even when that information cannot be tied to their names or any other personal information).

¹¹ See generally Federal Trade Commission, *Online Profiling: A Report to Congress (Part 2, Recommendations)* (July 2000), available at <http://www.ftc.gov/os/2000/07/onlineprofiling.htm>.

¹²24/7 Media, AdForce, AdKnowledge, Avenue A, Burst! Media, DoubleClick, Engage, and MatchLogic.

¹³See Network Advertising Initiative, *Self-Regulatory Principles for Online Preference Marketing by Network Advertisers* (2000), available at http://www.networkadvertising.org/pdfs/NAI_principles.pdf.

companies' own business websites, but also clearly and conspicuously on the Websites where data are collected and behaviorally-related advertising occurs. Notice would be implemented through contractual requirements for website partners that their privacy policies contain clear and conspicuous notices and a link to consumer choice about the practice of online behavioral advertising.¹⁴

2. Choice: The Principles mandated that notices provided to consumers include a consumer choice method commensurate with the type of data used for behavioral advertising:

- Clear and conspicuous notice and opt-out choice (appearing in the publishers' privacy policy with a link to the network advertiser or an NAI opt-out Web page) would be required for use of non-personally identifiable information for online behavioral advertising;
- On sites where multiple network advertising companies collect information (generally non-personally identifiable information), consumers would be able to opt out of behavioral advertising by any or all of the network advertisers on a single page accessible from the host Web site's privacy policy;
- Additional protections would be required for any merger of personally identifiable information about consumers with non-personally identifiable information about Web activity separately gathered by ad networks for behavioral advertising purposes:
 - “Robust notice” and opt-out choice by the consumer (appearing at the time and place of information collection and before PII is entered) would be required for any merger occurring on a prospective basis;
 - Affirmative (opt-in) consent of the consumer would be required for any merger occurring retroactively for Web activity data already gathered by the ad network
- Material changes in the information practices of a network advertising company could not be applied to information collected prior to the changes in the absence of affirmative (opt-in) consent of the consumer.

3. Other protections: Consistent with its goal of incorporating fair information practices, the 2000 NAI Principles prohibited the use of sensitive personally identifiable information (such as medical or financial data, sexual behavior or sexual orientation, or social security numbers) for online behavioral advertising. The Principles also required that if personally identifiable information was to be used for online behavioral advertising, additional protections relating to consumer access, reasonable security, and reliable sourcing should apply.

¹⁴ *Id.* at Section II.D.1.

Commended by the FTC,¹⁵ the 2000 NAI Principles were the first online advertising framework for self-regulation that explicitly addressed the online uses of non-personally identifiable data for advertising. Moreover, at a time when privacy policies had not universally been adopted by Web publishers as a consumer-facing tool, the NAI 2000 Principles' requirement that ad networks require such disclosure in their thousands of contracts served as an important driver to the widespread adoption of consumer-facing notice and opt-out link disclosures for online advertising. Most importantly, the voluntary adoption of these principles by ad networks in their capacity as business-to-business service providers – and the concurrent assumption of liability for deceptive practices – contributed substantially to the principle of online accountability for behavioral advertising.

B. The evolution of the NAI's self-regulatory initiatives for online advertising

Since 2000, the NAI and its member companies have continued to leverage their technological expertise by contributing to self-regulatory schemes that go beyond cookie-related online behavioral advertising. In 2003, the NAI established a division to represent legitimate email marketing companies working to fight the emerging threat of SPAM email practices, and to establish consensus-driven best practices for the email marketing industry.¹⁶ In 2004, the NAI published guidelines for appropriate privacy, transparency and choice controls for use of web beacons (a pixel technology that can be used for data collection on Web pages to help enable online advertising collection and reporting).¹⁷ In 2005, the NAI convened the “eCommerce in the Age of Spyware” forum, publishing papers from a broad spectrum of e-commerce companies, portals, network advertisers, behavioral marketers, anti-spyware vendors, and regulators.¹⁸ These NAI-led policy efforts have contributed to the development of appropriate public policy responses to consumer concerns about online advertising technologies.

With the rapid growth and diversification of online advertising, coupled with related industry mergers and acquisitions, the FTC in 2007 convened a Town Hall Forum to revisit industry self-regulatory practices for online behavioral advertising.¹⁹ In response to the FTC's ensuing staff proposals for behavioral advertising principles, the NAI and its

¹⁵ *Online Profiling: A Report to Congress*, *supra* note 11 at Section III (“The Commission commends the NAI companies for the innovative aspects of their proposal and for their willingness to adopt and follow these self-regulatory principles.”).

¹⁶ Now an independent organization, the Email Sender & Provider Coalition (ESPC) currently represents 67 leading email marketing companies. *See generally* <http://www.espcalition.org>.

¹⁷ Network Advertising Initiative, *Web Beacons – NAI Guidelines for Notice and Choice*, available at http://networkadvertising.org/networks/Web_Beacons_rev_11-1-04.pdf.

¹⁸ Network Advertising Initiative, *eCommerce in the Age of Spyware*, available at <http://www.networkadvertising.org/spyware-forum/>.

¹⁹ *See* Comments by the Network Advertising Initiative for Federal Trade Commission Town Hall, *eBehavioral Advertising: Tracking, Targeting and Technology* (November 2007), available at <http://www.ftc.gov/os/comments/behavioraladvertising/071019nai.pdf>.

members began a comprehensive process to revise its 2000 Principles. In April 2008, the NAI published for public comment a draft update to the Principles. Following this public comment period, the NAI in December 2008 issued its final updated Principles.²⁰

The NAI's 2008 Self-Regulatory Code of Conduct contains the following key enhancements:

- The 2008 Self-Regulatory Code preserves the core commitment to transparency and choice for online behavioral advertising. NAI members must (a) require that web publishers clearly and conspicuously disclose NAI members' data collection and use practices; and (b) provide Web users with access to a consumer opt-out mechanism (through a conspicuous link to the opt out provided by the NAI member and/or a link to the NAI website consumer opt out).
- Although consumer notice through the privacy policies of Web sites remains the primary expected means for NAI members to comply with their notice requirement, the 2008 Self-Regulatory Code anticipates further enhancements to the technological underpinnings of the ad serving process that would allow for alternative means of consumer notice.²¹
- The 2008 Self-Regulatory Code retains the commitment to require consumer opt-in for the merger of personally identifiable information with non-personally identifiable data about their past Web browsing activity.
- Consumer opt-in is required for uses of sensitive information in connection with behavioral advertising. In addition to established categories of sensitive information (such as precise information relating to past, present or future health conditions or treatment) this provision now incorporates new forms of potentially sensitive information, such as information describing precise real-time geographic location.
- The Children's Online Privacy Protection Act is extended to the realm of non-personally identifiable information, whereby verifiable parental consent is now required for any use of non-PII or PII to create an interest segment for behavioral advertising that is specifically targeted to children under 13.
- The 2008 Self-Regulatory Code expands the commitment of NAI members to provide reasonable security for all types of data used for behavioral advertising (including non-personally identifiable information), and establishes a baseline for retention of such data.
- Finally, the 2008 Code establishes a commitment to an in-house compliance review to be published annually, as well as to a consumer complaint process to regularly review questions about members' compliance.

²⁰ See the Network Advertising Initiative's 2008 Self-Regulatory Code of Conduct, *available at* http://www.networkadvertising.org/networks/principles_comments.asp.

²¹ *Id.* at Section III (2) (b) (members shall require that Web sites "clearly and conspicuously post notice – or ensure that such notice be made available on the web site where data are collected . . ."). Although Web site privacy policies today are the most widely-adopted and hence the most scalable and consistent means of achieving notice across thousands of Web sites of varying size and complexity, the Code is intended to anticipate possible innovation.

The current Self-Regulatory Code continues to leverage the principle of public attestation and potential regulatory accountability for deceptive practices – for a far larger group of NAI member companies. The NAI’s reliance on such an attestation model mirrors that of other initiatives for the protection of user data, notably including the Department of Commerce’s Safe Harbor Framework for the transfer of the personal data of European citizens.²²

III. The NAI’s Continued Commitment to Effective and Flexible Self-Regulation

The NAI and its members believe that self-regulatory approaches to online advertising should be as dynamic as the marketplace in which they operate. Input from consumers, policy makers, and industry is invaluable in identifying areas for the evolution of best practices for online behavioral advertising. Given their significant role as infrastructure providers for Web-based ad serving and data management across a broad cross-section of Web publishers and services, NAI members are well positioned to evaluate the technological challenges and opportunities to enhance consumer transparency and choice for HTTP cookie-based online advertising. Additionally, the NAI believes that its members’ technological expertise can be invaluable to more rapid and consistent implementation of self-regulation of cookie-based advertising across the Internet ecosystem.

In February 2009, the FTC issued its Staff Report detailing “Self-Regulatory Principles for Online Behavioral Advertising.” The NAI and its members have focused their recent efforts around several of its key recommendations:

A. Enhancing consumer notice mechanisms

The NAI 2008 Self-Regulatory Code requires its members to secure notice and choice for consumers on the Web sites on which their behaviorally-related advertisements appear. While as a practical matter such notice and choice is usually provided within a Web site’s privacy policy (or a layered summary of the policy), the Code allows NAI members the flexibility to pursue any disclosure approach so long as companies ensure that clear and conspicuous notices are available to consumers on the websites where online behavioral advertising occurs.

Regulators and other thought leaders in the online advertising industry have suggested that consumer notice for online behavioral advertising might be enhanced through the provision of additional mechanisms that provide notice through the advertisement itself (i.e. by providing disclosures directly within, or immediately adjacent to, the ad).

Several NAI members have now either tested or actually deployed a variety of possible implementations of consumer notice in direct proximity to banner ads, which can inform potentially wider adoption by industry:

²² See, e.g., the U.S. Safe Harbor Framework’s Annual Reaffirmation Requirement, *available at* http://www.export.gov/safeharbor/eg_main_018243.asp.

- AlmondNet offered a direct “Powered by Almondnet” hyperlink within behaviorally targeted banner advertisements for one of its product lines from 2004-2006, enabling consumers to access AlmondNet’s opt-out choice more directly;
- Over the past 18 months Yahoo! has extensively tested a variety of implementations of notice “in or around” display advertisements, including with significant Web publishers such as eBay;²³
- In March 2009, Google deployed clickable links to a consumer choice page directly within the display advertisements it serves;²⁴ and
- FetchBack, a retargeting company, last week also deployed direct links to its Privacy Center (a single location incorporating consumer information and its opt-out link) within the ads it serves.²⁵

Adoption of a common approach to implementing such alternatives for notice of behavioral advertising presents a considerable challenge, both in terms of the technological complexity of the infrastructure and the great diversity of publishers and advertisers involved. Large Web publishers may prefer to develop customized site links for disclosure adjacent to banner advertisements, while smaller Web publishers may prefer ad serving companies to provide for disclosure within the ad banner itself. In seeking to implement notice options that supplement well-established mechanisms like privacy policies, the NAI also recognizes that considerable testing, research, and consumer feedback will be needed.

Notwithstanding these challenges, the NAI and its member companies believe that technologies should be developed and built to allow for enhanced notice by any entity engaged in online behavioral advertising. The NAI and its member companies are now actively engaged in technical discussion of the infrastructure approach that would best facilitate such enhanced notice. A working group of NAI member technologists has been established to promote compatible approaches to the delivery of such enhanced notice; to identify and refine possible infrastructure standards to support flexible consumer disclosure formats; and to consult with other interested providers and associations on the best way to ensure technological compatibility.

Additionally, the NAI has been actively engaged in a cross-industry associations process involving advertisers, publishers, and marketers to develop industry-wide self-regulatory

²³ An example of eBay’s implementation is available at <http://cgi6.ebay.com/ws/eBayISAPI.dll?DisplayAdChoice&w=1&y=3FwEhZwEEKTEEUcxpAAAsPQEEKVgCVC1RU1YtDlcCeA0AV3k%3D> (accessed June 15, 2009).

²⁴ See Nicole Wong, Google Public Policy Blog, *Giving Consumers Control over Ads* (March 11, 2009), available at <http://googlepublicpolicy.blogspot.com/2009/03/giving-consumers-control-over-ads.html>.

²⁵ See Press Release, *FetchBack to Provide Enhanced Notice in Behavioral Ads* (June 15, 2009), available at http://www.fetchback.com/press_061509.html.

principles for online behavioral advertising.²⁶ The participation in this process of representatives of thousands of companies within the Internet ecosystem represents a potentially significant widening of the self-regulatory approach to behavioral advertising issues long supported by the NAI. The NAI and its members are committed to supporting this initiative, as well as to promoting the deployment of enhanced notice mechanisms.

B. Improving the durability of cookie-based opt outs

The NAI's opt-out tool presently allows consumers the choice whether to receive behaviorally-related advertising from some or all NAI members, and have that choice apply across the many Web sites served by each of NAI member companies.

The opt-out mechanisms implemented by the NAI and its members generally use industry standard Web browser cookies to record these preferences. The cookie helps ad networks "remember" the opt-out preference by storing it on the browser of the user's computer. The use of cookies either for advertising or for opt-out purposes share a common potential technological limitation: if a user deletes such cookies from the Web browser cache on the user's computer, or deploys computer software that automatically deletes such cookies, user preference data previously connected to the particular browser though the cookie is lost. Recent work by NAI member companies and other technologists have demonstrated the potential of enhancing the durability of consumer opt-out preferences through the deployment of browser plug-ins. Such browser plug-ins attempt to solve the problem of opt-out cookie deletion by automatically reinstating such cookies each time the browser cookie cache is emptied, or the opt-out cookie is otherwise deleted (*e.g.*, by antispyware programs that do not distinguish between the various purposes for third party cookies).

The NAI believes that technology should be deployed in connection with NAI members' existing commitments to offer opt-out choice to consumers, so as to enhance users' ability to preserve the opt-out preferences stored in their browsers. This summer the NAI intends to make available through its opt-out Web page additional technology that would protect opt-out cookies from deletion, and that would leverage a recognized list of opt-out cookies from NAI members. This approach would afford users a more convenient means for having their Web browsers remember their opt-out preferences.

C. Continued education to improve consumer awareness

User education about advertising technologies and their choices remains a vital foundation for the continued viability of online behavioral advertising. NAI members have a demonstrated commitment to consumer education about online advertising. Several NAI member companies have already experimented with education initiatives in video, banner, and text form to help bolster public understanding of the benefits of online

²⁶ See Press Release, *Key Advertising Groups to Develop Privacy Guidelines for Online Behavioral Advertising Data Use and Collection* (January 13, 2009), available at [http://www.iab.net/about the iab/recent_press_releases/press_release_archive/press_release/pr-011309](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-011309).

behavioral advertising and the choices that consumers have in connection with such advertising.²⁷

NAI member companies, especially ad networks, are well positioned to deliver consumer education across a great diversity of web sites. The reach of NAI member advertising networks creates a footprint for the broadest possible online audience. Moreover, given the NAI's focus on issues of consumer transparency and choice for online behavioral advertising, the NAI member companies are particularly well suited to promote consumer education specifically focused on the transparency and choice issues associated with browser-based behavioral advertising.

The NAI recently launched a new consumer education web page (http://networkadvertising.org/managing/learn_more.asp), which aggregates video, blog and explanatory content, together with information relating to general research and public policy discussion. Starting this month, the NAI is deploying educational banner links across participating NAI member companies' ad networks. Promotions may be of members' own education campaign materials, the NAI's, or any other entities' consumer-facing materials addressing online behavioral advertising and available consumer choices.

The NAI expects to take an interactive approach with consumers, factoring consumer input into its educational efforts on an ongoing basis. Moreover, the NAI also plans to coordinate its educational efforts with other initiatives by industry to promote common objectives of consumer awareness, particularly as those efforts may evolve to include initiatives such as enhanced advertising notice.

IV. Conclusion

The NAI thanks the Members of the Subcommittees for the opportunity to discuss the workings of its members' online behavioral advertising technologies, and the economic benefits they provide to ad-supported Web publishers and the consumers of these services. Public discussion of the privacy issues associated with online behavioral advertising remains a vital means for determining the appropriate focus of industry efforts to promote appropriate transparency and choice. The NAI and its members look forward to working constructively with the Subcommittees as they consider these important issues.

²⁷See, e.g., AOL's privacy education site, at <http://www.privacygourmet.com>. Google also maintains a privacy channel at YouTube, at <http://www.youtube.com/user/googleprivacy?blend=2&ob=1>.