



FUTURE OF PRIVACY FORUM

April 5, 2013

Marc Groman
Network Advertising Initiative
1634 Eye Street, NW, Suite 750
Washington, D.C. 20006

Re: Public Comments, March 2013 Draft Code of Conduct

Dear Marc:

The Future of Privacy Forum (FPF) is a think tank seeking to advance responsible data practices and is supported by leaders in business, academia, and consumer advocacy.¹ FPF thanks the Network Advertising Initiative (NAI) for providing this opportunity to comment upon the NAI's March 2013 Draft Code of Conduct for Public Comment (Code).²

The NAI has committed itself to the principles of transparency and choice in a rapidly developing online marketplace. Among other key issues, we believe that self-regulatory programs must evolve to reflect current business models, technologies and public policy. We also recognize that many NAI members face unique challenges since they lack a direct relationship with consumers. We commend the NAI for ensuring that their self-regulatory framework remains relevant and meaningful.

In this submission, we address (I) the inclusion of "retargeting"; (II) the inclusion of "sexual orientation" for sensitive data; (III) the coverage of "device fingerprinting" practices and (IV) the clarification of the proposed definition of "data appending."

(I) The Inclusion of "Retargeting"

The NAI makes clear in the Code that any requirements regarding Interest-Based Advertising now also include the practice of "retargeting." Retargeting is defined as "where an ad served on one website is selected based on a visit to a different website."³ While we recognize that there are differences in whether data sharing is involved that draw a logical policy line between retargeting and Interest-Based Advertising, we believe that consumers would consider the tailoring of an advertisement based on a visit to a non-affiliated site to be the very essence of Interest-Based Advertising. The NAI's amended approach to retargeting is consistent with the Federal Trade Commission's Final Privacy Report, which

¹ The views herein do not necessarily reflect those of the Advisory Board or supporters of the Future of Privacy Forum.

² See Network Advertising Initiative, March 2013 Draft Code of Conduct for Public Comment (Code), at 13, available at https://www.networkadvertising.org/Draft_NAI_Code_For_Public_Comment.pdf.

³ See Code, *supra* note 2, at 21.



FUTURE OF PRIVACY FORUM

states that retargeting falls within the scope of Interest-Based Advertising.⁴ We commend the NAI for expanding the definition of Interest-Based Advertising to include retargeting.

(II) The Inclusion of “Sexual Orientation” For Sensitive Data

The Code imposes obligations with respect to Sensitive Data, which now includes “sexual orientation” as a category.⁵ Companies would be prohibited from collecting or storing data about a user’s sexual behavior or orientation for Interest-Based Advertising without obtaining Opt-In Consent.⁶ The NAI’s inclusion of this category is consistent with the FTC’s 2009 OBA Report, which notes that there “appears to be a consensus that such data merits some form of heightened protection.”⁷ Many companies already have long treated sexual orientation as a sensitive category. As sexual orientation is regularly considered to be the very type of data that is sensitive, we commend the NAI’s approach and inclusion of this category in the Code.

(III) The Coverage of “Device Fingerprinting” Practices

The NAI makes clear that while it intends to be technology-neutral, “all technologies member companies use for online advertising activities should afford users an ‘appropriate’ degree of transparency and control.”⁸ Accordingly, Section II(C)(3) specifically bars the use of LSOs, Flash and Silverlight in accordance with NAI’s policy of prohibiting member companies from using emerging technologies for Interest-Based Advertising that do not, “at present, provide users with an appropriate level of insight or control.”⁹ We appreciate the clarification and expansion of this language. In addition, we suggest that such a policy restricts the use of device fingerprinting, as current implementations of this technology do not include a stable Opt-Out mechanism.¹⁰ As a result, the Code should specifically flag device fingerprinting as not providing the appropriate level of consumer transparency or control until such mechanisms are feasible.

(IV) The Clarification of The Proposed Definition of “Data Appending”

Though we believe that the current definition of Interest-Based Advertising can be read to include most types of appending practices, some methods of appending may not be covered. There is widespread

⁴ Federal Trade Commission, Protecting Consumer Privacy in an Era of Rapid Change, Recommendations for Businesses and Policymakers (March 2012) (FTC Final Privacy Report), at 41, *available at* <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

⁵ *Id.* at 6.

⁶ *Id.* at 21.

⁷ Federal Trade Commission, FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising, at 42 (February 2009) (“FTC 2009 OBA Report”), *available at* <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

⁸ See Code, *supra* note 2, at 25.

⁹ *Id.*

¹⁰ See HasOffers, Tracking Methods for Mobile Applications (2012), at 4 (“Fingerprinting technologies anonymously match a combination of attributes to a device in order to arrive at a high statistical probability that two events with a similar fingerprint are from the same device.”), *available at* <http://www.mobileapptracking.com/docs/MAT-Tracking-Methods-For-Mobile-Apps.pdf>.



FUTURE OF PRIVACY FORUM

uncertainty as to whether appended data is covered by Interest-Based Advertising rules, with some companies taking the position that it is covered while others believe it is excluded. Moreover, consumers would have a difficult time understanding the distinction of an Opt-Out Choice for ad targeting that is based on web surfing activity, but not based on other appended offline transaction data. As such, we suggest the NAI clarify that third party data appending, when used for Interest-Based Advertising purposes, is subject to the Code.

We thank the NAI for considering these comments.

Sincerely,

Jules Polonetsky

Heather Maxie Federman