Federal Trade Commission Proposes Principles Regarding Privacy in Online Behavioral Advertising

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As the author explains, those currently engaged in online behavioral marketing or planning to do so should pay close attention to the ever-changing landscape.

The Federal Trade Commission recently released proposed principles regarding Online Behavioral Advertising. These proposals followed a public workshop and forum held on November 1-2, 2007, during which the FTC sought to analyze the issues surrounding such practices and whether or not there existed a genuine issue for the FTC to address.

The FTC defines online behavioral advertising as “the tracking of a consumer’s activities online including searches the consumer has conducted, the web pages visited, and the content viewed in order to deliver advertising to the individual consumer’s interests.”

The Federal Trade Commission has kept a watchful eye on the interactive advertising industry since its inception. In that time, the FTC has overseen the implementation of the CAN-SPAM Act of 2003, enforcement actions against spyware companies, issues regarding marketing to

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children online, and numerous enforcement actions regarding a wide variety of deceptive practices online, including those related to the failure to adequately disclose or comply with an organization’s information collection and use practices.

One of the key promises of Internet marketing has always been the eventual ability of marketers to develop a one-to-one relationship with consumers based upon the vast amounts of detailed and accurate data available, and to use such data to deliver advertisements targeted directly to an individual consumer’s interests based upon their behavior online.

There is somewhat of a general consensus that the collection and use of personally identifiable information is a practice that requires special attention, but less attention has been focused on anonymous data collected online. As Internet services have grown more sophisticated and robust, the amount of data collected by online providers has exploded. The lines between personally identifiable data and aggregate/anonymous data are blurring. Many databases containing anonymous data regarding an individual’s online activities now contain so many data fields that the data can be used to identify specific individuals without the use of obvious fields such as name, address, and telephone number.

In 2006, AOL exposed anonymous data containing search queries of millions of AOL customers by posting such data online. Though technically anonymous, this data was used by some to identifying specific individuals based upon an analysis of their search terms. If individuals can be personally identified by their supposedly anonymous search queries, then it stands to reason that data collected for behavioral advertising purposes could similarly be used to identify individual consumers.

The FTC Proposed Principles are focused around four core issues.

1. FTC Issue — Transparency and consumer control — While Privacy Policies may disclose certain behavioral advertising practices in vague or general language, there is a recognition that consumers do not often read such policies. Therefore, additional steps should be taken above and beyond a mere Privacy Policy to clearly explain a service’s behavioral advertising practices. With this information in

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hand, consumers can make informed decisions about whether or not to use a particular service.

**FTC Proposed Principle:** “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.”

2. **FTC Issue — Reasonable security, and limited data retention, for consumer data** — The FTC has already made security breaches a major focus for the agency. With the vast amounts of behavioral data being recorded and retained by interactive companies, there is a growing fear that these companies will face similar security breaches and as a result expose this sensitive data. Most of the major search engines have taken the initiative and publicly stated that they will make search query data anonymous after a particular period of time.7

**FTC Proposed Principle:** “Any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data. Consistent with the 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 retain data only as long as is necessary to fulfill a legitimate business or law enforcement need. FTC staff commends recent efforts by some industry members to reduce the time period for which they are retaining data. However, FTC staff seeks comment on whether companies can and should reduce their retention periods further.”
3. **FTC Issue — Affirmative express consent for material changes to existing privacy promises** — Most privacy policies contain generic language which reserves the right for the service provider to change the privacy policy at any time by posting such changes to the website. The policies state that it is incumbent upon the user to check back frequently for changes. If the changes are material, such an approach runs contrary to the FTC’s view in the Proposed Principles. Material changes require “affirmative” consent, and not a mere notice posted online.

**FTC Proposed Principle:** “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 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.”

4. **FTC Issue — Affirmative express consent to (or prohibition against) using sensitive data for behavioral advertising** — Sensitive topics, such as medical information, often attract extra attention from regulators. The issue of behavioral advertising is no different in this respect, as proposed principle #4 directly addresses this point and requires the heightened standard of an affirmative opt-in for behavioral advertising based upon such data.

**FTC Proposed Principle:** “Companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising. FTC staff seeks specific input on (1) what classes of information should be considered sensitive, and (2) whether using sensitive data for behavioral targeting should not be permitted, rather than subject to consumer choice.”
While the FTC reviews comments to these Proposed Principles and considers formal rule making, individual states may jump into the mix and propose legislation of their own. “Do-not-track” lists have been mentioned in many state legislatures as a potential solution to concerns about aggressive online behavioral marketing practices.8

Companies currently engaged in online behavioral marketing or planning to do so should pay close attention to the ever-changing landscape to ensure that they do not have to rebuild their services from the ground up should regulators and lawmakers enact new laws and regulations.

NOTES

4 Children’s Online Privacy Protection Act, 13 U.S.C. § 1301 et seq.
6 Federal Trade Commission, Online Behavioral Advertising — Moving the Discussion Forward to Possible Self-Regulatory Principles.
8 DMNews, CT governor Rell mulls opt-out registry (January 14, 2008), see http://www.dmnews.com/CT-governor-Rell-mulls-opt-out-registry/article/104011/.