



NATIONAL ADVERTISING REVIEW COUNCIL

April 2, 2012

Via e-mail: privacyrfc2012@ntia.doc.gov

Aaron Burstein
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW., Room 4725
Washington, DC 20230

**Re: Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct
(Docket No. 120214135–2135–01)**

Dear Mr. Burstein:

The Online Interest-Based Advertising Accountability Program (Accountability Program) which provides enforcement of the Digital Advertising Alliance’s (DAA) Self-Regulatory Principles for Online Behavioral Advertising (OBA Principles), is pleased to comment on the National Telecommunications and Information Administration’s (NTIA) multistakeholder process to develop consumer data privacy codes of conduct. The Accountability Program is administered by the Council of Better Business Bureaus (CBBB)¹ under the policy direction of the National Advertising Review Council (NARC).² The Accountability Program’s comments are based on NARC/CBBB’s 40 years of experience in creating, administering and enforcing self-regulatory programs. Our comments focus primarily on creating voluntary self-regulatory programs that are effective and enforceable using best practices.

We appreciate the Administration’s recognition of the important role that self-regulation can play in responding to consumer concerns about personal privacy. Recognition and support by government is essential to the continuation and expansion of self-regulatory programs that provide clear consensus standards yet have the capacity to evolve to meet changes in technology and consumer expectations. Government can encourage development of robust self-regulation by providing a forum for discussion of programs, accomplishments and challenges, and using its

¹ The Council of Better Business Bureaus is the national umbrella of the 116 member Better Business Bureau system operating in the United States and Canada. The Council of Better Business Bureaus and BBB system are leaders in advancing marketplace trust through promotion of ethical business practices.

² NARC is a strategic alliance of the Council of Better Business Bureaus and the advertising industry to provide oversight of advertising practices.

“bully pulpit” to encourage continuing improvement in self-regulatory codes without stifling innovation. However, government should not place itself in the position of developing prescriptive standards for self-regulatory programs as these can become de facto regulation. Nor should government occupy the role of arbiter of disagreements among various stakeholders involved in the self-regulatory process. Rather, government should encourage the private sector to come together and develop appropriate standards of conduct. If carefully calibrated, the proposed multistakeholder process can serve as a catalyst for the development of credible self-regulatory programs to address consumers’ privacy concerns.

Successful Models of Industry Self-Regulatory Programs with Independent Accountability Mechanisms

Self-regulation has proven most successful where a number of key factors are present. Among the most important factors are creating clear standards that reflect industry consensus that effectively respond to consumer and governmental concerns and are independently enforced. In the forty-year strategic alliance between the CBBB and the advertising industry, a number of successful self-regulatory programs have been created that provide clear and effective industry self-regulatory standards. These programs have improved consumer protection regarding advertising practices while ensuring that the industry continues to thrive, innovate and contribute to economic growth. Below is a brief description of these programs which illustrate the variety of self-regulatory models and accountability mechanisms including industry consensus standards, “pledge programs,” and legislative “safe harbor” programs that have all proven effective. What these programs share in common is that they all provide independent, effective, and objective self-regulatory enforcement. Experience with these programs is that there is over 90 percent voluntary industry compliance with self-regulatory decisions. All self-regulatory decisions are publicly reported and instances of non-participation or non-compliance, are referred to the Federal Trade Commission which exercises its discretion to investigate cases under its Section 5 authority. They are enforceable and they are enforced.

- The National Advertising Division (NAD) of the CBBB was developed in 1971 in response to consumers’ concerns about truth and accuracy in advertising. NAD cases are developed through its own monitoring and complaints from consumers, businesses and local Better Business Bureaus. An important source of NAD cases are formal “challenges” by a company to the truthfulness and accuracy of the claims in a competitor’s advertisements.
- In 1974, the Children’s Advertising Review Unit (CARU) was chartered to assure that advertisers take special care in addressing advertising messages to children under 12. CARU guidelines set high standards for children’s advertisers. In the area of online data collection, principles developed under the CARU Guidelines process formed the base of the Children’s Online Privacy Protection Act (COPPA). CARU was also the first safe harbor program provider to be approved by the FTC under the statutory safe harbor provision. CARU now operates both as an approved safe harbor program under COPPA and as a self-regulatory program ensuring compliance by all members of online industry

with best practices for the collection of data from children under 13 that may go beyond the requirements of COPPA.

- In 2004, the Electronic Retailing Self-Regulation Program (ESRP) was created at the request of Electronic Retailing Association to meet the special needs of fast-paced direct-response industry. The direct response industry includes long form (infomercial) productions, short-form commercials, live home shopping channels, print advertising, Internet marketing and radio advertising. This self-regulatory forum inquires about the evidentiary support that a marketer possess for product claims made in direct response advertising. Cases are brought to ERSR's attention through competitive challenges and ERSR's own ongoing monitoring program.
- The Council of Better Business Bureaus' Children's Food and Beverage Advertising Initiative (CFBAI) was formed in 2006 to address public concern over advertising and childhood obesity. The Initiative's goal is to be part of a multi-faceted solution to the complex problem of childhood obesity by using advertising to help promote healthier dietary choices and lifestyles among children under 12. Under the Initiative's Core Principles, participants commit that 100% of their child-directed advertising will be for healthier products. This program has demonstrated how a voluntary industry pledge program can make significant and realistic improvements in the products advertised to children through the creation of voluntary standards.
- In 2007, NAD/Council for Responsible Nutrition launched an initiative to expand NAD's review of dietary-supplement advertising claims. The initiative was developed to increase consumer confidence in the truth and accuracy of advertising claims for dietary supplement products and encourage fair competition within the industry. This program illustrates how self-regulation can address misleading practices, resulting in greater consumer confidence and better competition using the NARC/CBBB model of independent compliance reviews.
- The Online Interest-based Advertising Accountability Program (Accountability Program) was created 2010 at the request of the DAA to provide independent enforcement of the OBA Principles. The mission of the Accountability Program is to build consumer trust online by ensuring that companies engaged in online behavioral advertising (OBA) provide transparency and give consumers control of how their data are used for advertising. The program works in cooperation with the Direct Marketing Association to ensure adherence to the OBA Principles.

The NARC/CBBB advertising self-regulation programs are characterized by independent, neutral accountability mechanisms. Neutral third-party administration and transparency in decision-making are essential to make self-regulation credible and effective. For instance, the Accountability Program³ monitors covered entities' compliance with the OBA Principles through

³ For further information on the Accountability Program, see <http://www.bbb.org/us/interest-based-advertising/>.

an independent accountability technology platform, staff research and investigation, as well as complaints. It follows established procedures to institute formal inquiries into cases of potential non-compliance.⁴ The formal inquiry and review process is confidential and provides the subject of the inquiry with the opportunity to present evidence of compliance. If the subject of the inquiry is found to be non-compliant, the Accountability Programs works with that company to expeditiously resolve the issues and effectuate compliance. To ensure transparency, the Accountability Program publishes its decisions.⁵ The Accountability Program, like the other NARC/CBBB self-regulatory programs, refers cases of non-participation or uncorrected non-compliance to the Federal Trade Commission for review under its Section 5 authority. To date, all subjects of inquiries have worked with the Accountability Program to come into compliance.

An Example of How Industry Codes of Conduct Develop and Grow

The Digital Advertising Alliance (DAA) is a good example of how industry, responding positively to FTC staff guidance on best practices for online behavioral advertising (OBA), created and continues to develop a strong self-regulatory program. The process by which the OBA Principles were developed was confidential but included the major trade associations and industry members representing all aspects of the OBA industry together with the Council of Better Business Bureaus. It resulted in the creation of Principles remarkably congruent with the White House Consumer Privacy Bill of Rights that have been operationalized in a voluntary code of conduct for the OBA industry. It has an accountability mechanism, in the words of Federal Trade Commission Chairman Jon Leibowitz, “with teeth.”⁶ The DAA has listened to advocates’ and regulators’ views of what further improvements are desirable and has responded by creating the Multi-Site Data Principles. The DAA is also working to adapt these Principles to the mobile environment and to work out a technical standard that will enable them to be implemented by a browser-level choice mechanism. The continuing expansion of the Principles demonstrates how self-regulation will respond responsibly to evolving consumer expectations.

Creating Successful Accountability Mechanisms through the Multistakeholder Process

Industry codes of conduct are only enforceable by an accountability mechanism if they represent consensus among the industry that is participating in the self-regulatory process. Moreover, the accountability mechanism must have clear standards to enforce and have the authority to resolve any ambiguity. These standards must be strong enough to demonstrate that they effectively address the area of concern. To encourage honest participation in the accountability mechanism by industry, an accountability program’s adjudicatory processes must be confidential. But the results of the decisional process must be transparent to the public and manifestly fair.

We believe that we can contribute to the multistakeholder process by helping to build consensus. As seasoned participants in the development of industry self-regulatory programs, we understand the need to create technically workable solutions that are acceptable to industry while at the same

⁴ See http://www.bbb.org/us/storage/113/documents/online-behavioral-advertising/OAB_Procedures.pdf

⁵ Accountability Program decisions are available at <http://www.bbb.org/us/interest-based-advertising/decisions/>.

⁶ Remarks of FTC Chairman Jon Leibowitz at White House Privacy Event (Feb. 23, 2012), available at <http://www.ftc.gov/speeches/leibowitz/120223whitehouse-privacy.pdf>.

time being responsive to consumer concerns and straightforward enough to be enforced. By advocating for such workable solutions that advance consumer interests and reflect technological feasibility, we can help to facilitate the process that will be necessary to reach the goal of enforceable data privacy codes of conduct.

We can also advise on the design and implementation of credible compliance mechanisms for the various industry codes of conduct. Our procedures offer a tested model for administering an accountability program. The self-regulatory codes that we have developed can remain voluntary and free standing or, as they have in the case of CARU, can serve to provide self-regulatory implementation of legislation containing a statutory safe harbor. Our experiences on the development and implementation of statutory safe harbor provisions that are both strong enough to ensure that the goals of the legislation are met and flexible enough to encourage innovation and incent industry to participate can be valuable if a legislative solution is deemed necessary.

Mobile Applications

If the multistakeholder process begins with looking at transparency in mobile applications, mobile is an area in which we have experience and interest.⁷ Encouragingly, it appears that there is growing consensus about general principles necessary to improve transparency in the mobile space. As footnote 15 of the NTIA Request for Comments points out, various segments of the mobile industry have already done a great deal of work in the creation of voluntary codes of conduct. However, to our knowledge none of these codes of conduct has yet included an independent accountability mechanism to make them enforceable, although the California Office of the Attorney General (see NTIA note 16) has called for the parties involved in the California AG settlement to develop a voluntary enforcement mechanism.

A Note on Successful Multistakeholder Processes

In terms of implementation strategies for the multistakeholder process, it is important to build flexibility as well as transparency into the process. One successful multistakeholder process was used at the Federal Communication Commission (FCC) for the development of a methodology to measure broadband speeds. The methodology had to produce a result that would meet consumer needs while being fair to the different segments of the broadband industry that was subject to the measurement process (and which used very different technologies). The FCC's process was successful because the FCC facilitated a variety of types of meeting and served as the forum in which formal discussions took place. Some FCC-hosted meetings involved a working group composed entirely of industry representatives; others involved industry, consumer advocates and academics, and a number were open to the public. The FCC took a position similar to NTIA's proposed role as forum convener, helping to narrow issues but not prescribing a specific outcome.

⁷ This commenter had the pleasure of working for a number of years in the FCC's Wireless Telecommunications Bureau and is now advising the DAA mobile working group.

Conclusion

The Accountability Program agrees with the fundamental premises set forth in NTIA's initiative—that consumers should be assured of enforceable baseline privacy protections and that these baseline protections can often be best provided through the development of voluntary self-regulatory programs. We thank the Administration and the FTC for their recognition that the partnership between the DAA and the CBBB is a successful example of how enforceable self-regulation can work. We stand ready to continue to work together as part of the multistakeholder process to implement baseline privacy protections across all industry sectors.

Respectfully submitted,



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