

2009 ANNUAL COMPLIANCE REPORT



December 30, 2009

EXECUTIVE SUMMARY

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.¹ In December 2008, the NAI revised the self-regulatory code of conduct governing the collection, use, and disclosure of data for online advertising services by its member companies ("NAI Code").² Among other things, the revised Code requires that member companies undergo an annual review of their compliance with the requirements of the NAI Code.

The NAI has now completed an evaluation of the NAI member companies subject to review.³ This report: (1) provides background on the NAI and its compliance mission; (2) explains the methodology used in the 2009 annual compliance review; and (3) sets forth the NAI's findings with regard to the compliance of the evaluated member companies.

Throughout the compliance process, the evaluated member companies provided extensive information and otherwise cooperated with NAI Staff, resulting in a thorough examination of their business practices.⁴ Members were first required to respond to a detailed

¹ The NAI and its members are committed to online advertising practices that address consumers' privacy expectations. Through a variety of business models, NAI members enable Web content and services providers to enhance the relevancy of the online display advertising provided to consumers. This increased relevancy of advertising, in turn, generates a variety of benefits, including increased revenue to support consumers' continued access to Web content and services without charge. In connection with online behavioral advertising, the NAI's self-regulatory code concurrently provides a comprehensive framework for consumer notice and choice.

² See NAI 2008 Principles: The Network Advertising Initiative's Self Regulatory Code of Conduct, *available at* http://networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf.

³ The 2009 compliance process applies to the 23 companies that were NAI members as of January 1, 2009. These 23 companies are referred to in this document as "evaluated members" or "evaluated member companies." As discussed in further detail below, members admitted after this date are independently evaluated as part of the membership application process. The NAI expects its 2010 Annual Compliance Review to encompass 35 member companies.

⁴ Section III's findings detail the areas in which NAI member companies' compliance remains subject to continuing review by NAI Staff.

questionnaire describing their practices and policies as they relate to NAI compliance, and to provide supporting documentation. A compliance team consisting of three NAI attorneys reviewed members' responses to the questionnaire, and independently evaluated the member companies' business practices as described on their Web sites, privacy policies, proprietary business materials, terms of service, contracts with advertising partners, and marketing materials. The NAI compliance staff also used independent technical methods to assess the responses provided. The NAI compliance staff then conducted a multi-stage interview process with high-level management and relevant engineering personnel.

Throughout the review process, the NAI compliance staff made compliance findings, educated members about NAI requirements, and informally shared best practices suggestions with NAI members. As a result, in addition to the formal evaluation from NAI Staff contained in this report, the compliance process has resulted in enhancements to member companies' business practices, disclosures, and opt out mechanisms for online behavioral advertising ("OBA").

NAI Staff's review produced valuable information about the compliance of its member companies, as well as areas in which the NAI and its members could do more to improve transparency and choice. The review demonstrated that the evaluated member companies met their compliance obligations with respect to the great majority of the requirements of the NAI Code. The NAI Code encompasses ten subject areas that include approximately twenty substantive requirements for the NAI and its member companies. NAI Staff found no compliance deficiencies with respect to eighteen of those twenty requirements.⁵ NAI Staff did, however, find a need for

⁵ In the order in which they appear, the following member requirements are generally provided for in the NAI Code, and as applied to data used for OBA: maintaining an NAI Web site; member education of consumers; member-provided notice of behavioral advertising practices; contractually requiring Web site partners to display notice and choice; prohibiting the creation of interest segments targeting children under 13 without parental consent; limiting the use of interest segments only for marketing purposes; not collecting personally identifiable information (PII) from third parties in the absence of a contractual relationship; limiting changes in privacy policies; prohibitions on the use of data following a change in privacy policy; contractual requirements for the sharing of PII; contractual requirements for the sharing of non-aggregate, non-PII; providing access to PII use; obtaining data from reliable sources; providing reasonable security for data; limiting retention of such data; abiding by applicable law; supporting maintenance of the NAI consumer complaint mechanism, and responding to consumer questions regarding compliance.

improvement with respect to some members' disclosure of their retention periods for data used for online behavioral advertising, and in members' efforts to enforce contractual requirements that their Web site partners implement notice and choice disclosures for OBA.

Consistent with the NAI Code's transparency requirement, the NAI continues to host a centralized consumer choice mechanism that allows consumers to opt out of online behavioral advertising by some or all of the NAI's member companies. To date in 2009, there have been nearly a million unique visitors to the NAI's main Web page, and nearly 300,000 unique visitors who went through the NAI's opt out process.⁶

Additionally, the NAI's Web site hosts a variety of educational materials that explain in a consumer-friendly manner and through a variety of different mediums what cookies are; how they are used for behavioral advertising; and the tools available to consumers to control the use of data for behavioral advertising. This summer, using ad impressions donated by its membership, the NAI launched a campaign of online ads linking to its educational site. To date this campaign has delivered approximately 185 million ad impressions.

In 2009, NAI members have developed new best practices for transparency in online behavioral advertising by developing consumer-facing tools that allow consumers to examine and change the predictive interest-related segments stored in connection with their browser cookies. NAI member companies Google, Yahoo, BlueKai, and Safecount have developed innovative and robust approaches that offer consumers a variety of different controls.⁷ Other NAI member companies have continued to develop educational tools, such as video and blog entries.⁸

With respect to notice, all the evaluated member companies include notices on their Web sites that describe their data collection, transfer, and use practices as required by the NAI Code. They also uniformly include provisions in their standard contracts requiring Web

⁶ See Section III(A)(1) findings, *infra*.

⁷ See <http://www.google.com/ads/preferences/view>; http://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/; <http://tags.bluekai.com/registry>; <http://www.safecount.net/yourdata.php>.

⁸ See Section III(A)(2) findings, *infra*.

site partners to display NAI-required notice wherever data is collected or used for their behavioral advertising services.

NAI Staff also found that the evaluated member companies have appropriate mechanisms in place permitting consumers to exercise the choice to opt out of behavioral advertising, and that they honor those choices. NAI Staff's testing of members' opt out tools throughout the year demonstrates that they function well.⁹ Significantly, the NAI and its member companies have worked to introduce improvements to the opt out process, including most notably the NAI's introduction of a beta version of a browser add on to protect consumer opt outs from accidental deletion.¹⁰

NAI Staff also found no compliance deficiencies for the evaluated members with respect to the portions of the NAI Code relating to the collection and use of personally-identifiable information ("PII") for behavioral advertising purposes. These requirements include the requirement for robust notice for prospective merger of PII and non-PII, opt in consent for retrospective merger of PII and non-PII, the collection of PII from third parties, changes to privacy policies with respect to PII, the transfer of PII (as well as non-aggregate non-PII to be merged with PII) to third parties, and providing consumers access to their PII. Likewise, NAI Staff found no compliance deficiencies with respect to provisions of the Code that restrict the use of sensitive data for OBA; that prohibit the creation of OBA segments for children under 13 without parental consent; and that preclude OBA segment use other than for marketing purposes.

NAI Staff further found that the evaluated member companies take appropriate measures to ensure the integrity of the non-PII they collect, store, and use for behavioral advertising. No compliance deficiencies were identified under the Code's requirements that member companies take appropriate measures to ensure that the data

⁹ Indeed, of the approximately 1,600 consumer communications received by the NAI, only 75 related to issues with members' opt out tools, all of which the NAI helped resolve. See *infra* at Section IV.

¹⁰ The Opt Out Protector is a Firefox browser add-on designed to protect opt out cookies from accidental deletion by helping the browser to "remember" previously set opt out preferences for NAI members that are stored in cookies, even if a user subsequently invokes the "remove all cookies" browser feature. See http://networkadvertising.org/managing/protector_license.asp.

they acquire for behavioral advertising come from reliable sources, and provide reasonable security for such data.

With regard to consumer inquiries, both the NAI and its member companies maintain mechanisms by which consumers can submit questions or complaints related to NAI member companies' compliance with the Code. NAI Staff regularly field questions and concerns from consumers, working with member companies where necessary, and resolving all questions related to NAI compliance.

In two areas of the NAI Code, a notable number of the evaluated member companies needed to make improvements in their compliance: (1) the requirement to include a data retention period in privacy notices, as required by section III.2(a)(vi) of the Code; and (2) the requirement to make reasonable efforts to enforce contractual requirements to provide OBA-related notice, or otherwise ensure that clear and conspicuous notice and choice are made available on all Web sites on which member companies engage in NAI-covered activities, as required by sections III.2(b), (c), and (d) of the Code.

Although the evaluated member companies do provide the required notice describing their collection, use, and disclosure of data for behavioral advertising purposes on their Web sites, with respect to one subset of the notice requirement – disclosing the approximate length of time for which such data will be retained – ten member companies did not disclose specific retention periods in their privacy policies. This requirement of retention specificity is above and beyond the NAI's separate code requirement that OBA-related data be kept only as long as necessary to fulfill a legitimate business need, or as required by law.¹¹ In response to the NAI Staff's findings, all of the ten members have either specified their retention periods or provided a plan to do so.¹²

With respect to the NAI Code requirement of reasonable efforts to ensure that OBA-related notice is present on Web publisher partner

¹¹ The NAI's retention requirement provides an additional level of specificity to the self-regulatory standard proposed by Federal Trade Commission ("FTC") Staff for limited data retention ("Companies should also retain data only as long as is necessary to fulfill a legitimate business or law enforcement need."). See FTC Staff Report: *Self-Regulatory Principles for Online Behavioral Advertising*, at p. 47 (Feb. 2009) (available at <http://www2.ftc.gov/os/2009/02/P085400behavadreport.pdf>).

¹² See discussion *infra* at Section III B(2)(A).

sites, NAI Staff found that the evaluated members largely lack robust programs for enforcing contractual notice requirements, or for otherwise ensuring that notice is present where data is collected or used for behavioral advertising. NAI Staff recognizes that the challenge for members in achieving comprehensive Web publisher implementation of OBA-related notice and choice is partly attributable to the absence of consistent, industry-wide principles for OBA disclosure. The recent adoption by leading advertising and industry associations of comprehensive disclosure principles for OBA will likely lead in 2010 to a substantial improvement in members' ability to ensure Web site partner notice adoption. Notwithstanding these expected improvements in 2010, NAI Staff believes that member companies must take additional steps to help implement Web site publication of notice and choice mechanisms. Based on the results of the 2009 review and the recommendation of NAI Staff, the NAI will be developing and implementing a comprehensive partner notice implementation plan that aims to further expand notice and choice for OBA across the large number of Web publisher sites that partner with NAI members. NAI Staff will review individual member plans, monitor their implementation, and measure their success, independent of the 2010 compliance process.

In addition to compliance assessments under the 2009 review, NAI Staff is also making additional best practices recommendations for members to augment transparency and choice with regard to behavioral advertising in 2010. These recommendations, detailed under the relevant substantive provisions of the NAI Code in the "Findings" section of this report, include: (1) increased efforts to educate consumers about behavioral advertising and the choices available to them with respect to such advertising; (2) improved prominence and accessibility of members' notices describing their data collection, transfer, and use practices; (3) improved efforts to respond promptly to consumer questions implicating members' compliance with the Code.

In 2010, NAI Staff also intends to pursue other initiatives to enhance transparency and choice, including best practices contract language for partner Web sites to display notice and choice; increased attention to consumer education; and improved methods for monitoring consumer questions and complaints relevant to online behavioral advertising issues.

The NAI Staff believes that member companies are, on the whole, highly committed to the NAI's self-regulatory framework.

2009 NAI Annual Compliance Report

Representatives of the evaluated members expressed commitment to, and a desire to learn from, the compliance process, and were anxious for further guidance from the NAI on how to best align their business practices with the NAI Code. With very few exceptions, the evaluated member companies promptly implemented suggested changes in practice. The NAI believes that the Annual Compliance process, the partner notice implementation plan adopted by the NAI, and the other initiatives that the NAI and its members are adopting for 2010 will further enhance consumer transparency and choice whenever NAI members engage in behavioral advertising.

2009 ANNUAL COMPLIANCE REPORT

I. Background

The NAI's self-regulatory model leverages multiple inputs relevant both to compliance and to the development of new best practices: these include technical and business-related information furnished by NAI members as marketplace participants; information relating to different business models and compliance mechanisms; and the observations of regulators, advocates, and consumers. These inputs help ensure a long-term and viable framework that also assures companies that make the affirmative choice to participate in self-regulation that their competitors will likewise have incentives to adhere to industry norms.

The NAI's self-regulatory model includes: (1) a binding set of rules to which all members must publicly attest their commitment; (2) a mechanism for accepting and responding to consumer complaints or credible claims relating to compliance; (3) periodic evaluation of compliance coupled with public transparency; and (4) mechanisms for accountability (including sanctions where applicable). The NAI's self-regulatory program evaluates members' compliance based on their consumer-facing policies and other representations, as well as their underlying technology infrastructures, business-to-business contracts, and internal practices and procedures.

In December 2008, the NAI released a revised set of principles to govern its member companies' collection, use, and disclosure of information for behavioral advertising.¹³ These principles, collectively referred to as the NAI's Self-Regulatory Code of Conduct ("2008 NAI Code" or "NAI Code"), regulate "Online Behavioral Advertising" (OBA), "Multi-Site Advertising," and "Ad Delivery & Reporting." OBA is defined in the NAI Code as "any process used whereby data are collected across multiple web domains owned or operated by different

¹³ In 1999, the NAI's founding companies worked with the FTC 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. The 2000 NAI Principles, commended by the FTC, were the first online advertising framework for self-regulation that explicitly addressed the online uses of non-personally identifiable data for advertising. See Federal Trade Commission, *Online Profiling: A Report to Congress (Part 2, Recommendations)*, at section III (July 2000), available at <http://www.ftc.gov/os/2000/07/onlineprofiling.htm>.

entities to categorize likely consumer interest segments for use in advertising online.” (Code § II.1.) “Multi-Site Advertising” means “‘Ad Delivery & Reporting’ across multiple web domains owned or operated by different entities.” (Code § II.2.) “Ad Delivery & Reporting” means “the logging of page views or the collection of other information about a browser for the purpose of delivering ads or providing advertising-related services,” and includes providing an advertisement based on a browser or time of day, statistical reporting, and tracking the number of ads served on a particular day to a particular Web site. (Code § II.3.)

As detailed below, the NAI Code imposes transparency, notice, and choice obligations on its members. The Code also imposes certain limitations on the use and transfer of information to be used for OBA or Multi-Site Advertising, requires members to provide reasonable access to PII retained for OBA purposes, to protect data used for behavioral advertising, and to obtain such data from reliable sources. Finally, the Code imposes data retention requirements on its members and requires them to adhere to applicable law.

Membership in the NAI requires public representations that a member company’s business practices are compliant with each aspect of the Code that applies to its business model. (Code § IV.1(b).) These attestations of compliance are subject to enforcement by the Federal Trade Commission under Section V of the FTC Act. The NAI’s use of this 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 to the United States.¹⁴

As an additional means of ensuring members’ compliance with these substantive requirements, the 2008 NAI Code requires members to undergo annual compliance reviews and to cooperate with NAI designees engaged in the compliance review. (Code § IV.1(c) – (d).) This review process is designed to proactively examine NAI member companies’ attestations of compliance by ensuring that their business practices and public representations are aligned with the requirements of the Code. The review process is also intended to educate and remind member companies of their obligations under the NAI Code and of the sanctions that can result from the failure to honor those

¹⁴ See, e.g., the U.S. Safe Harbor Framework’s Annual Reaffirmation Requirement, available at http://www.export.gov/safeharbor/eg_main_018243.asp.

obligations, including referral to the NAI Board of Directors, suspension or revocation of NAI membership, publication of revocation by press release, and referral of non-compliance to the FTC or other enforcement bodies.¹⁵ The Code specifies that the results of this review, as well as a summary of customer complaints and the resolution of those complaints, must be published annually.¹⁶ (Code § IV.1(e).) This document is the first annual report to be published under these procedures.¹⁷

Per the policies established by the NAI Board, NAI members become eligible for annual reviews in “the year following admission to the NAI as a new member.”¹⁸ For 2009, 23 companies have been members of the NAI for a year or more and therefore were eligible for the annual review.¹⁹ Members that joined the NAI in January 2009 or later have been subject to compliance review as part of the new member process, and must attest to compliance with the NAI Code, but were not assessed in the 2009 annual review process. Based on current levels of membership, the NAI expects that 35 member companies will be subject to the annual compliance review in 2010.

¹⁵ See NAI Compliance Program Attestation Review Process, at 3 (Feb. 17, 2009), *available at* http://networkadvertising.org/managing/NAI_COMPLIANCE_AND_ENFORCEMENT_PROGRAM_Attestation_Review_detail.pdf.

¹⁶ Prior to implementing a revised compliance regime in 2008, the NAI worked through the TRUSTe Consumer Watchdog mechanism to monitor and report on consumer complaints. As of 2009, consumer complaints are being directly handled by the NAI. See *infra* section IV for summary.

¹⁷ NAI Staff prepared this annual compliance report. The NAI’s Board was allowed the opportunity to review the report prior to approving its issuance, but not to alter the substance of the compliance findings.

¹⁸ See NAI Compliance Program Attestation Review Process, *infra* note 15, at section 2.

¹⁹ These 23 companies are as follows: [x + 1], 24/7 Real Media, Akamai (aCerno), AlmondNet, Audience Science, BlueKai, Collective Media, Dedicated Networks, Fetchback, Fox, Google, interCLICK, Media6Degrees, Microsoft (Atlas), Mindset Media, AOL Advertising (formerly Platform A, and including Tacoda and Advertising.com), Safecount, Specific Media, Traffic Marketplace, Tribal Fusion, Turn, Undertone Networks, and Yahoo (Blue Lithium).

II. Methodology

Under the procedures established by the NAI for compliance reviews, NAI Staff review the following materials to assess members' compliance with the NAI Code: (1) representations of business practices as set forth in the members' public and non-public materials, including the (a) public Web site, (b) privacy policy, (c) terms of service, (d) advertising contracts, and (e) marketing materials; (2) responses to an NAI Questionnaire regarding each provision of the NAI Code; (3) interviews with senior responsible executives who are authorized to bind the company, as well as with relevant engineering staff; and (4) responses to any alleged deficiencies in compliance raised by the press, other member companies, or the NAI's consumer complaint process (if any).²⁰

Under these published NAI procedures, NAI Staff are required to advise members on what NAI Principles apply and what modifications in business practices may be necessary to bring the company into full compliance with the NAI Code. Members must remedy any compliance deficiencies, or adopt a plan to do so, within 30 business days of identification of the deficiency. NAI Staff may extend this deadline, in its discretion, in the event of material technological constraints or unavoidable delays.

The NAI's compliance program for 2009 was based on a multi-stage written evaluation and interview process, as well as through a separate compliance training mechanism. NAI companies eligible for review (*i.e.* those admitted prior to 2009) were required to provide responses to a detailed questionnaire. The questionnaire asked members to describe their practices and policies relative to the principal NAI Code requirements, and to provide supporting documentation. The topics covered by the questionnaire included:

- Representative provisions of partner contracts requiring NAI-compliant notice and choice for OBA and Multi-Site Advertising;
- Methods of ensuring that partners engaging in the member's OBA and Multi-Site Advertising include NAI-required notice and choice;

²⁰ See NAI Compliance Program Attestation Review Process, *infra* note 15, at section 2.

2009 NAI Annual Compliance Report

- A technical description of the member's OBA opt out mechanism, including its location, functionality, and testing procedures, as well procedures for responding to a malfunction of the opt out, and any malfunctions in the opt out tool that have occurred;
- Contracts, processes, and controls for any sharing or acquisition of data used for OBA, Multi-Site Advertising, or Ad Delivery and Reporting;
- Any acquisition or use of de-identified data to support OBA or Multi-Site Advertising, including how such data is de-identified;
- How long data used for OBA, Multi-Site Advertising, or Ad Delivery and Reporting is retained and for what purposes it is retained;
- Whether there is any use of sensitive information for OBA or Multi-Site Advertising, and what policies and processes exist to govern any such use;
- Descriptions of the policies and practices designed to protect data used for OBA, Multi-Site Advertising, or Ad Delivery and Reporting;
- Representative samples of non-public marketing materials and training materials relating to OBA; and
- Descriptions of any complaints relating to NAI compliance and the resolution of such complaints.

The questionnaire also reminded members of the results of non-compliance, including referral to the NAI Board for sanctions.

The compliance evaluation and interview process was carried out by a team of three NAI attorneys with experience in privacy law, corporate compliance, and technology. In addition to reviewing members' responses to the questionnaire, the NAI compliance team independently reviewed member companies' business practices as described on their Web sites, privacy policies, terms of service, contracts with advertising partners, and marketing materials. In addition to publicly available materials, the compliance team reviewed business proprietary materials supplied by members. The compliance team also used independent technical methods to assess compliance, including testing the functionality of members' opt out tools, reviewing the Web sites of members' partners for notice and choice disclosures,

and investigating members' processes for handling consumer complaints.

NAI Staff then engaged in a multi-stage interview process. For these interviews, the compliance team was provided access to high-level management and relevant engineering staff. The compliance team used the interviews to conduct in-depth assessments of members' business practices, policies, and contract templates. The compliance team also engaged directly with technological representatives and discussed relevant data flows and opt out functionality.

In addition to assessing members' business practices and technology, the compliance team used these conversations to suggest improvements in business practices to enhance transparency and choice, even where members' practices were consistent with NAI requirements. For example, in some instances NAI Staff provided recommendations on how to make choice mechanisms easier to use. As described in further detail below, the compliance team also identified any instances in which members' business practices did not meet NAI Code requirements. In those instances, the compliance team advised the member about the need to remedy the practice at issue, and reached agreement on how the practice would be brought into compliance with the Code. As described in the Findings section of this report, in one area – member enforcement of the requirement that partner Web sites implement notice and choice disclosures for OBA – NAI Staff is taking additional programmatic steps to assist member companies' compliance efforts.

Finally, as part of this review, the NAI required member companies to attest to their ongoing compliance with the NAI Code and the veracity of the information provided in the review process. This certification supplements the member's public attestation that it complies with the provisions of the NAI Code.

III. NAI Compliance Findings

This section of the report sets forth the findings of NAI Staff with respect to the compliance of the evaluated member companies with each substantive provision of the NAI Code.²¹ The findings are presented in the order in which the requirements appear in the Code.²²

²¹ At the time of issuance of this annual report, one company, Specific Media, had not provided sufficient information to permit Staff to fully complete its evaluation

A. Transparency/Education

1. NAI Education

Standard

The NAI Code requires members to collectively maintain an NAI Web site to serve as a centralized portal offering explanations of online behavioral advertising and member companies' compliance with the NAI Principles, including information about and centralized access to consumer choice mechanisms. (Code § II.1(a).)

Findings

The NAI's Web site hosts educational materials, an explanation of the NAI Principles, an opt out page, and a mechanism for consumers to register complaints against member companies. There were approximately 645,000 unique visits to the NAI's consumer portal in 2008; in 2009, that number rose to over 1,000,000 unique visits.

Visits to NAI Consumer Portal

<u>Year</u>	<u>Total User Visits</u>	<u>Total Unique User Visits</u>
2007	NA	NA
2008	750,784	644,917
2009 YTD ²³	1,273,713	1,105,765

of Specific Media's compliance with the NAI Code, and therefore the results of its compliance review are not included in this report's conclusions. The information made available by Specific Media to date revealed possible compliance issues with certain provisions of the Code, and NAI Staff's evaluation is continuing. NAI Staff may supplement its 2009 Compliance findings as necessary.

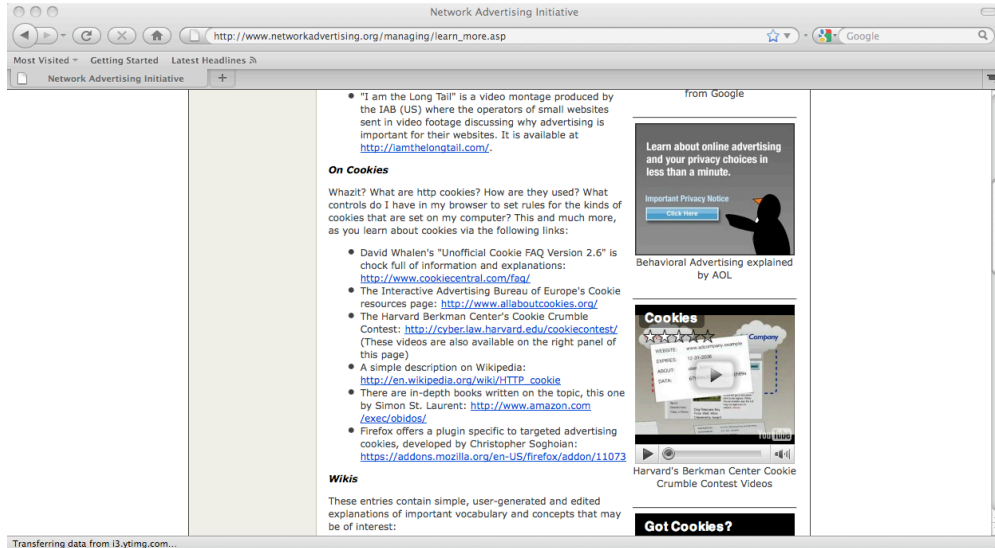
²² NAI compliance is a continuing obligation, and the annual compliance review's findings may be supplemented as appropriate.

²³ The NAI Web site visitor data in this report were current as of December 21, 2009.

a) NAI Consumer Education

In July 2009, the NAI launched a new consumer education web page (http://networkadvertising.org/managing/learn_more.asp) that aggregates video, blog, and explanatory content, together with information relating to general research and public policy discussion of online behavioral advertising.

NAI Consumer Education Web Page



Some of the videos hosted on the NAI site were produced by NAI members (including Google and AOL); others were produced by contributors to the FTC's 2007 Online Behavioral Advertising workshop. The videos explain, in plain English, what cookies are, how they work, how they can be used by advertisers to categorize consumers into interest groups, and how users can delete or block them. In addition, the NAI site contains many links to informational articles, blogs, and regulatory materials that also explain, in simple terms, the technology behind behavioral advertising and how consumers may exercise choice with respect to cookies.

NAI members have published banner ads linking to this educational page across their networks through their own educational efforts. Collectively, to date NAI members have contributed approximately 185 million ad impressions to help consumers obtain access to the educational materials on the NAI Web site. There have been approximately 60,000 unique page views of the educational Web site since it launched this summer.

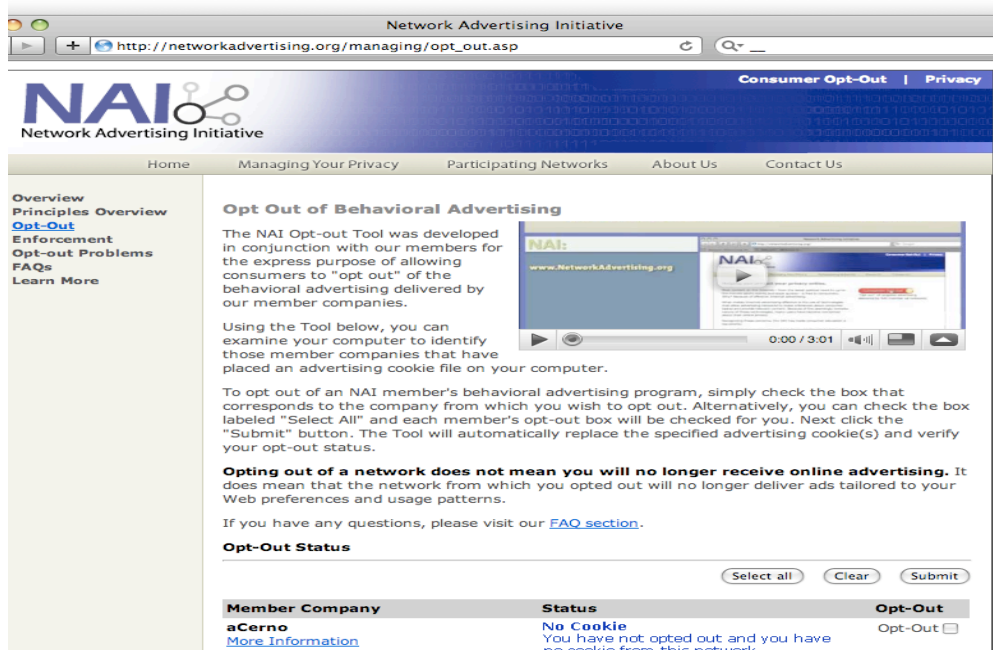
Visits to NAI Consumer Education Page

<u>Date</u>	<u>Total User Page Views</u>	<u>Unique User Page Views</u>
6/01/09 - 12/21/09	64,173	58,686

b) NAI Consumer Opt Out Tool

The opt out section of the NAI Web site²⁴ clearly explains how consumers may opt out of online behavioral advertising by one, some, or all NAI members; provides consumers information about which member companies have active OBA tracking cookies on their computers; and is designed to permit consumers to opt out of online behavioral advertising by all NAI member companies in only three clicks.

NAI Opt-Out Web Page



The NAI's opt out page works by accessing URLs hosted on member companies' servers. The URLs generally call scripts on the

24

http://networkadvertising.org/managing/opt_out.asp

2009 NAI Annual Compliance Report

members' servers, which check for or set opt out cookies on that member's domain. All NAI members are required to integrate with the NAI opt-out tool as a condition of their membership. The NAI Web site also contains an extensive FAQ section to aid consumers who have any difficulty in opting out, and, as detailed below, the Web site contains contact information for NAI Staff, who regularly assist consumers in the opt out process. In 2008, the NAI had approximately 145,000 unique visitors who entered opt out requests and received the NAI's opt out results page; by the end of 2009, that number is expected to reach nearly 300,000.²⁵

NAI Consumer Opt Out Usage

<u>Year</u>	NAI Opt-Out Tool – Page Views		Opt-Out Results Page Views	
	<u>Total</u>	<u>Unique</u>	<u>Total</u>	<u>Unique</u>
2007	1,097,996	798,006	140,661	84,022
2008 ²⁶	854,842	553,629	227,758	145,156
2009 YTD ²⁷	1,463,660	978,910	472,366	293,550

In general, the NAI tests the NAI opt out web page on a weekly basis, and as needed in response to consumer questions. The testing is done from a user's perspective, replicating the experience a user would have under various conditions. The testing always includes baseline conditions on current versions of several standard web browsers in the two major consumer desktop operating systems, Windows and Mac. NAI Staff also occasionally test other conditions, such as with web browsers set to block third party cookies, or with or without opt out cookies already present.

In November of this year, the NAI enhanced its opt out tool by releasing a beta version of the NAI Consumer Opt Out Protector.²⁸ The

²⁵ The consumer usage data for the NAI opt out tool does not include opt out requests processed by individual member companies. As described in section III(C)(1), member companies are required to individually maintain their own opt out tools, and consumers regularly use those tools as well.

²⁶ The drop in traffic between 2007 and 2008 likely reflects the NAI's adoption of new analytic tools.

²⁷ Numbers are current as of December 21, 2009.

Opt Out Protector, which was designed by NAI member BlueKai, is a Firefox browser add-on designed to help protect opt out cookies from accidental deletion. Once installed, the software helps the Firefox browser “remember” previously set opt out preferences for NAI members that are stored in cookies, even if a user subsequently invokes the “remove all cookies” browser feature.

c) NAI Consumer Inquiry and Complaint Mechanisms

In addition to the substantial educational materials and FAQs on the NAI Web site, the NAI also provides contact information for NAI Staff to assist consumers in the opt out process and to answer any other concerns they may have. As discussed in detail in section IV below, NAI Staff has fielded approximately 1,600 general consumer communications, resolving all of those that involved NAI or NAI member practices.

2. Member Education

Standard

The NAI Code requires members to individually and collectively educate consumers about behavioral advertising and the choices available to them with respect to behavioral advertising. (Code § II.1(b).)

Findings

Many NAI members have engaged in substantial and creative individual efforts to educate consumers about behavioral advertising in accordance with II.1(b) of the Code. Several NAI members have assisted the NAI’s educational efforts by contributing a sizeable number of ad impressions to the NAI educational campaign, or by contributing services to the NAI Web site. Other members support educational efforts by speaking and writing on OBA issues and by participating in workshops and conferences regarding such issues. Still others have made significant contributions to other OBA

educational campaigns, such as the recent initiative sponsored by the Interactive Advertising Bureau (IAB).²⁹

NAI members have also developed their own educational campaigns, including creative content. These innovative educational tools reach consumers in a clear and consumer-friendly manner. For example, Google offers a series of videos on the privacy section of its Web site that clearly explain cookies and behavioral advertising.³⁰ Safecount also hosts short informative videos explaining how it uses cookies.³¹ AOL hosts a series of easy-to-understand diagrams that explain behavioral advertising and the effect of opting out, and also hosts a virtual penguin that guides consumers with respect to their choices.³² Yahoo, BlueKai, Safecount, and Google also provide consumers an easy to understand explanation of how online activity is used for advertising purposes, and allow consumers to view the interest segments associated with their browsers.³³

Although these educational and transparency efforts are substantial, the NAI Staff believes that NAI membership, as a whole, could do even more, individually and collectively, to educate consumers about OBA. The transparency of NAI member companies' practices is an essential element of NAI compliance. NAI Staff accordingly encourages its members to augment their educational efforts in 2010.³⁴

²⁹ See "Privacy Matters" at <http://www.iab.net/privacymatters/>.

³⁰ <http://www.google.com/intl/en/privacy.html>.

³¹ http://www.safecount.net/ind_overview.php.

³² See <http://www.privacygourmet.com/blog/consumer-education-page.html>; <http://www.youtube.com/user/AOLCap>.

³³ See http://info.yahoo.com/privacy/us/yahoo/opt_out/targeting/; <http://tags.bluekai.com/registry>; <http://www.safecount.net/yourdata.php>; <http://www.google.com/ads/preferences/view>. eXelate, an NAI member not reviewed as part of this compliance report, also allows consumers to view and adjust the interest segments associated with their browsers. See <http://exelate.com/new/consumers-optoutpreferencemanager.html>.

³⁴ For example, members that have impressions could increase their contributions to the NAI educational campaign or to other industry OBA educational campaigns; those that do not have impressions could support industry efforts by supplying design services, articles, and other educational content. All member companies could participate in industry events regarding OBA education and share

B. Notice

1. Member-Provided Notice

Standard

Section III.2(a) of the NAI Code requires members directly engaging in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting to clearly and conspicuously post notice on their Web sites that describes their data collection, transfer, and use practices. The required notice must include clear descriptions of the following (as applicable): (1) the OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting activities undertaken by the member; (2) what types of data are collected by the member; (3) how such data will be used, including any transfer to a third party; (4) the types of PII and non-PII that may be merged; (5) an easy-to-use procedure for exercising opt in or opt out choice with respect to OBA data use (with the choice provided depending on the type of data); and (6) the approximate length of time that data used for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting will be retained by the member company.

Findings

There has been significant discussion about the optimal approach to informing users about the collection and use of their information for online behavioral advertising. Although Web site privacy policies have historically provided a scalable and consistent means of achieving notice across thousands of Web sites of varying size and complexity, the 2008 NAI Code expressly allows members the flexibility to pursue any disclosure approach so long as it is clear and conspicuous. The FTC has expressly encouraged such experimentation.³⁵

The NAI and its members have publicly expressed its support for the enhanced notice program adopted by leading advertising associations, and is currently working with its members and other industry groups to provide enhanced forms of notice such as notice in

best practices. NAI Staff, for its part, will continue to assist in coordinating and suggesting best practices for educational campaigns.

³⁵ FTC Staff Report: *Self-Regulatory Principles for Online Behavioral Advertising*, *infra* note 11, at pp. 36-37.

or around ads. NAI Staff believes that its subsequent annual compliance reviews will show a significant increase in alternative forms of notice. Indeed, NAI members Google and Fetchback have already built enhanced notice mechanisms that provide notice in or around their ads.³⁶ NAI Staff encourages members to continue these efforts to implement enhanced notice throughout their networks.

All evaluated members include notices on their Web sites that describe their data collection, transfer, and use practices. NAI Staff found that member notices are appropriately located and adequately describe the OBA, Multi-Site Advertising, and Ad Delivery and Reporting activities undertaken, the types of data collected and how the data is used and transferred, and descriptions of how to opt out of OBA data use in a sufficient level of detail to be understood by consumers.³⁷

At the time of the 2009 review, however, almost half of the NAI members reviewed – ten in total – lacked the information required in section III.2(a)(6) of the Code: disclosure of the approximate length of time that data used for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting will be retained by the member company.³⁸ This requirement of retention specificity is above and beyond the NAI's separate code requirement that OBA-related data be kept only as long as necessary to fulfill a legitimate business need, or as required by law. In response to the NAI Staff's findings, all of the affected members have either specified their retention periods or established a plan to do so. Six members updated their Web sites to include a retention period before this report was issued. Four members whose Web sites lack a stated retention period have represented that they are in the process of revising their data retention practices and will include a retention period for OBA data by the end of Q1 in 2010.

³⁶ See <http://googlepublicpolicy.blogspot.com/2009/10/coming-to-online-ad-near-you-more-ads.html>; http://www.fetchback.com/press_061509.html.

³⁷ Through the course of the compliance review, NAI Staff recommended to several member companies that they make improvements to their notices, even where their notices met the NAI Code's compliance standards. NAI Staff believes that revisions in the placement and/or wording of those notices could further improve their consumer friendliness.

³⁸ Some of the affected members have noted the challenge in establishing a single retention period for all OBA data because of sometimes differing legal and contractual requirements.

2. Web Site Partner Notice

Standard

In addition to providing notice and choice with respect to their own Web sites, NAI members must require Web sites with which they partner for OBA or Multi-Site Advertising to also post notice and provide consumers a means of exercising choice with regard to OBA. Specifically, section III.2(b) of the NAI Code requires members to require Web sites with which they contract for OBA or Multi-Site Advertising services to clearly and conspicuously post notice or ensure that notice is made available on the Web site where data are collected for OBA or Multi-Site Advertising purposes. Such notice must contain: (1) a statement of fact that OBA and/or Multi-Site Advertising is occurring; (2) a description of the types of data that are collected for OBA or Multi-Site Advertising purposes; (3) an explanation of how and for what purposes that data will be used or transferred to third parties; and (4) a conspicuous link to the OBA choice mechanism provided by the member, and/or the opt out page on the NAI's Web site.

In the event a member is notified or otherwise becomes aware that a contractee is in breach of these duties, the member is required to make reasonable efforts to enforce the contract. (NAI Code § III.2(c).) Even in the absence of a contractual relationship, members are required to make reasonable efforts to ensure that all companies engaging in their OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting furnish or require notices comparable to that described. (NAI Code § III.2(d).)

Findings

a) Contractual Provisions

Evaluated members submitted provisions from their contracts requiring their partners to display NAI-required notice and choice. Members verified that these provisions are included in members' standard operating contracts or other standard terms with partner sites, in some cases submitting relevant provisions of final executed contracts. Many members use sample language provided by the NAI, modified as necessary to reflect their business practices.³⁹ Based on

³⁹ Section II.2(b) of the Code contemplates that there may be means other than contractual provisions to "ensure that [] notice [is] made available on the Web site where data are collected for OBA and/or Multi-Site Advertising." As discussed with regard to member-provided notice, one way member companies may accomplish this

its review of these contractual provisions, NAI Staff believes that the evaluated members include appropriate provisions in their contracts, consistent with section III.2(b) of the NAI Code.

b) Enforcement of Contracts

Although the evaluated member companies have adequate contractual provisions to require notice on partner Web sites relating to their OBA services, NAI Staff believes that the notices required by these contractual provisions are not present on partner Web sites at a sufficient level of frequency.⁴⁰ In exploring the different reasons that partner Web sites do not display such OBA-related notice, NAI Staff found that one important cause is that evaluated members largely lack robust programs for enforcing contractual notice requirements, or for otherwise ensuring that notice is present where data is collected or used for their behavioral advertising.⁴¹ NAI Staff believes that the evaluated members could take additional steps to help ensure that the Web sites where they engage in OBA, Multi-Site Advertising, or Ad Delivery and Reporting provide consumers notice consistent with the NAI Code.

NAI Staff also recognizes that the challenge in achieving comprehensive Web publisher implementation of OBA-related notice and choice is also attributable in part to the absence of consistent, industry-wide principles for disclosure in connection with online behavioral advertising. The absence of such an industry consensus was a contributing factor to some publishers' lack of implementation of OBA-related disclosures. The recent adoption by leading advertising

is by including NAI-required notice in or around their ads. NAI Staff believes that industry progress to such enhanced notice will help ensure the NAI Code objective that notice and choice be available wherever OBA occurs.

⁴⁰ NAI Staff evaluated membership's efforts to enforce contractual notice requirements in several ways, including considering members' processes for enforcing contractual provisions; reviewing members' own findings with regard to whether the Web sites with which they partner have NAI-required notice and choice in place; and by using independent methods to evaluate the availability of notice and choice on Web sites on which NAI members collect or use data for OBA.

⁴¹ NAI Staff also found that NAI member companies reported increased difficulty in securing adoption of consumer OBA notice as the volume and scale of partner Web sites in their networks increase.

and industry associations of comprehensive disclosure principles for OBA will likely lead in 2010 to a substantial improvement in members' ability to secure enforcement of this NAI Code requirement.⁴² More importantly, NAI Staff believes that the adoption of industry-wide principles that promote enhanced notice – including through notice delivered in or around OBA advertisements – will also improve consumer access to notice and choice mechanisms wherever behavioral advertising occurs.

Notwithstanding these anticipated improvements in 2010, the NAI Code imposes an obligation that NAI members make reasonable efforts to ensure that their Web site publishing partners provide notice and choice wherever they engage in OBA. Based on the results of the 2009 review and the recommendation of NAI Staff, the NAI will be developing and implementing a partner notice implementation plan that aims to expand notice and choice for OBA across Web publisher sites that partner with NAI members. Among other things, NAI Staff will review members' individual plans for introducing and requiring OBA-related notice and choice at the initiation of a relationship with a Web site partner; members' on-going processes for evaluating whether notice is present on partner Web sites where they collect and and/or use data for behavioral advertising; and their policies and procedures for corrective measures for Web sites found not to be meeting these requirements.

NAI Staff will work with members in these efforts to enforce the partner notice requirement by providing training materials to assist in educating Web publisher partners; compiling and sharing model language; and sharing best practices for Web publisher cooperation. NAI Staff will review member plans and monitor their implementation. To further ensure that progress is timely, NAI Staff will reassess

⁴² The "Associations Principles" were released in July 2009 by leading advertising industry associations to govern the collection, use, and transfer of information for OBA. Section II.B of the Associations Principles requires that when data is collected from or used on a Web site for OBA purposes, the operator of the Web site include a clear, meaningful, and prominent link on the webpage where data is collected or used for such purposes that links to a disclosure that describes the OBA taking place, states the adherence to the Principles, and contains an opt out mechanism. This disclosure is not necessary when "enhanced notice" is provided by the third party placing the ad. Section II.A(2)(a) provides that this enhanced notice may be provided either in or around the ad, or on the web page where data is collected. See AAAA/ANA/BBB/DMA/IAB Principles, available at <http://www.the-dma.org/government/ven-principles%2007-01-09%20FINAL.pdf>

members' success in enforcing Web publisher notice requirements independent of the 2010 annual compliance review.

c) Reasonable Efforts to Provide Notice in the Absence of Contracts

Some NAI members engage in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting using business models that do not permit a direct contractual relationship with every entity participating in those activities with them. For example, some members place advertising on ad networks using standard insertion orders such as those adopted by the IAB, or by purchasing ad inventory through an ad network or ad exchange. In these cases, the member's relationship is with the ad network, not with the Web site where OBA data will ultimately be collected or used. Nevertheless, NAI members are required to make reasonable efforts to ensure that companies participating in their OBA, Multi-Site Advertising, or Ad Delivery and Reporting furnish notice comparable to that required where there is a direct contractual relationship with the Web site.

As noted in the discussion of enforcement of contractual provisions above, NAI Staff believes that OBA-related notice and choice disclosures are not present on partner Web sites at a sufficient level of frequency. As also previously discussed, the adoption of industry-wide principles is expected in 2010 to contribute to improvements in OBA-related disclosure. NAI Staff believes that notwithstanding these coming changes to the OBA ecosystem, NAI member companies can augment their efforts to ensure that notice and choice are present wherever they engage in OBA, even where they do not have a contractual relationship with the parties displaying their ads. NAI Staff recognizes the additional challenge that these indirect relationships pose to NAI member companies. Nevertheless, NAI Staff will work with members to develop plans that help ensure that notice is present wherever they collect or use data for OBA purposes, even in situations in which they do not have a direct contractual relationship with the Web publisher.

C. Choice

Standard

As set forth above, members are required to give consumers choice with respect to their use of data for OBA purposes. The type of choice members "must provide and honor" depends on the type of information used. (Code § III.3(a).) Specifically, and most

commonly, members must provide and honor an opt out mechanism for the use of non-PII for OBA purposes. (Code § III.3(a)(i).) This opt out mechanism must be available both on the member's Web site and on the NAI consumer Web site. (*Id.*)

If a member intends to merge non-PII with PII going forward (prospective merger), the member must provide robust notice as well as an opt out mechanism. (Code § III.3(a)(ii).) If a member merges PII with previously-collected non-PII for OBA purposes (retrospective merger), the member must require a consumer's opt in consent. (Code § III.3(a)(iii).) Members also must obtain opt in consent to use Sensitive Consumer Information. (Code § III.3(a)(iv).) "Sensitive Consumer Information" is defined to include Social Security Numbers and other government-issued identifiers, insurance plan numbers, financial account numbers, precise real-time geographic location derived through GPS-enabled services, and precise information about past, present, or potential future health or medical conditions or treatments. (Code § II.8.)

Findings

1. Opt Out for OBA

As described above, consumers can opt out of collection of their data for OBA purposes by any or all of the NAI member companies on the NAI Web site. In addition, every member must provide an easy-to-use procedure for opting out of use of data for OBA purposes on its own Web sites. NAI Staff determined that the evaluated member companies provide an appropriate and functioning opt out mechanism on their Web sites.⁴³ As part of the review process, NAI Staff also

⁴³ A NAI Member Company, Undertone, implemented a significant infrastructure change that caused it to lose the ability to read the consumer data connected with its previous cookie-serving domain. The data included opt-out preference data associated with the previous cookie domain. Thus, in addition to Undertone losing the ability to use previously-collected data for OBA, consumers who had previously opted out needed to renew their opt out for any future behavioral targeting by Undertone. Undertone has since publicly disclosed the event, implemented enhanced privacy controls, and continues to work with the NAI's Compliance Staff to implement procedures and training to avoid similar occurrences in the future.

shared, and members adopted, best practices recommendations for opt out placement and functionality.⁴⁴

In addition to ensuring that evaluated members provide an opt out mechanism, NAI Staff sought to ensure that members also honor consumers' opt out choices. As detailed in section III(A)(1)(b), above, NAI Staff regularly tests the opt out mechanisms provided by its member companies to ensure that they function as expected on the NAI opt out page. NAI Staff engaged in additional testing of all members undergoing review both on the NAI opt out web page and on the members' own sites. Specifically, NAI Staff checked members' opt out cookies to ensure: 1) that they were present after engaging the opt out; and 2) that they are set to a minimum five-year lifespan.⁴⁵ Furthermore, in any instances in which NAI Staff's testing indicated that a member was continuing to set cookies for other business purposes after a consumer has opted out of behavioral advertising, NAI Staff conducted a review with each member to verify that such cookies are used for non-OBA purposes and that consumers' opt out choices are honored.⁴⁶

Although NAI Staff encountered very few issues with opt out functionality in 2009,⁴⁷ NAI Staff recommends that members enhance the reliability of their opt out mechanisms through more systematic

⁴⁴ NAI Staff in some instances recommended changes in the placement and prominence of opt out links. Additionally, NAI Staff recommended that non-essential cookies be expired upon the setting of an opt out cookie.

⁴⁵ This summer the NAI established a policy that all NAI member companies must implement a minimum five-year lifespan for their opt-out cookies, as soon as reasonably feasible.

⁴⁶ NAI Staff's review of member cookie use under the NAI Code included the use of local shared objects, such as Flash cookies. All of the evaluated members confirmed that they do not use such technologies for OBA.

⁴⁷ In 2009 NAI Staff identified several minor functionality problems with the NAI opt out tool. First, when browsers are set to block third party cookies and an opt out attempt is made, the user should get a report that the attempt failed. While blocking third party cookies has the practical effect of disabling any OBA, in a handful of cases, members' scripts incorrectly reported that an opt out cookie had been placed. This issue is in the process of being remedied. Second, the NAI opt out page includes a feature that reports whether or not an "active cookie" is present in the user's browser. NAI Staff has worked with a number of members to ensure that the relevant scripts report the correct state. Finally, Staff has addressed member-specific issues, such as in the instance a member's opt out script was reporting a failed opt out even though the opt out cookie had actually been set.

testing. NAI Staff will continue to refine its specifications for opt out functionality, integration with the NAI opt out page, and other tools. The NAI recently issued a revised and more detailed functional specification for integration with the NAI opt out web page. In 2010, the NAI Staff plans to issue additional guidance to members on maintaining the functionality and security of opt out tools, including the prevention of inadvertent malfunctions resulting from Web site configuration changes.

2. Merger of PII and Non-PII

NAI Staff's review of member companies' practices revealed no compliance deficiencies with respect to the merger of PII with non-PII on a going-forward or retrospective basis. PII is defined in the NAI Code to include "name, address, telephone number, email address, financial account number, government-issued identifier, and any other data used for or intended to be used to identify, contact or precisely locate a person." None of the evaluated member companies have merged PII with non-PII for OBA purposes, or expressed plans to do so in the future. Sections III.3(a)(ii) and III.3(a)(ii) of the NAI Code require robust notice or opt in consent only in the event of such a merger.

3. Sensitive Information

For the evaluated members, NAI Staff found that financial account numbers, insurance plan numbers, social security numbers or other government-issued identifiers, or precise real-time geographic location information are not being collected or used for OBA purposes. The compliance process demonstrated that evaluated member companies have a uniformly high awareness of the sensitivity of this data, and have protections in place to ensure that it is not to be collected or used for OBA without the consumer consent mechanisms specified by the Code.

NAI Staff's review revealed no compliance deficiencies under the NAI Code with respect to its provisions relating to sensitive health information. The evaluated companies have policies in place for evaluating any potential collection or use of health-related information for OBA purposes or the creation of any health-related interest segments. These policies and procedures are designed to delineate

non-sensitive, as opposed to potentially sensitive, types of consumer information consistent with the NAI Code.⁴⁸

D. Use Limitations

1. Children

Standard

The NAI Code prohibits the use of non-PII or PII to create OBA segments specifically targeted at children under 13 without verifiable parental consent. (NAI Code § III.4(a).)

Findings

None of the evaluated members were found to create segments specifically targeting children under thirteen, and NAI Staff's review revealed no compliance deficiency with respect to this provision of the Code. The member companies have processes and procedures in place to ensure that segments specifically targeted at children under thirteen are not created or used.

2. Marketing Purposes

Standard

Under the NAI Code, members directly engaged in OBA are prohibited from using, or allowing the use of, OBA segments other than for marketing purposes. (NAI Code § III.4(b).)

Findings

None of the evaluated members were found to use, or allow the use of, OBA segments for any purposes other than marketing, and NAI Staff's review revealed no compliance deficiency with respect to this provision of the Code. The evaluated members report using OBA data only for purposes of determining likely consumer interests and serving ads to consumers. To the extent the evaluated members share non-aggregate non-PII, they do so for the purpose of allowing the third party receiving the data to deliver targeted ads to consumers.

⁴⁸ When the NAI released the 2008 Code, the NAI indicated that it would develop an implementation guideline governing Sensitive Consumer Information. (Code § II.8, n. 4.) The NAI is continuing its work to provide more detailed guidance relating to the application of the health-related provisions of the Code.

3. Collection of PII in Absence of Contract

Standard

The NAI Code forbids the collection of PII for OBA purposes in the absence of a contractual relationship with the company. (NAI Code § III.4(c).)

Findings

None of the evaluated members were found to collect PII for OBA purposes from third parties, and NAI Staff's review revealed no compliance deficiency with respect to this provision of the Code.

4. Changes of Privacy Policy With Regard to PII

Standard

The NAI Code provides that if a member changes its own privacy policy with regard to PII and merger with non-PII for OBA purposes, prior notice must be posted on the member's Web site, and any material change shall only apply to changes collected following the change in policy. (NAI Code § III.4(d).) Further, if data is collected under a privacy policy that states that data would never be merged with PII, such data may not be later merged with PII in the absence of an opt in consent from the consumer. (NAI Code § III.4(e).)

Findings

None of the evaluated members were found to have changed their privacy policies to allow the merger of PII with non-PII, and NAI Staff's review revealed no compliance deficiency with respect to this provision of the Code.

E. Transfer & Service Restrictions

1. Sharing of PII

Standard

NAI members must contractually require any third parties to which they provide PII for OBA or Multi-Site Advertising to adhere to applicable provisions of the NAI Code. (NAI Code § III.5(a).)

Findings

None of the evaluated members were found to share PII for OBA or Multi-Site Advertising purposes with third parties, and NAI Staff's review revealed no compliance deficiency with respect to this provision of the Code.

2. Sharing of Non-Aggregate Non-PII

Standard

When members provide non-aggregate non-PII to third parties to be merged with PII possessed by the third parties for OBA or Multi-Site Advertising services, they must contractually require the third parties to adhere to applicable provisions of the Code. (NAI Code § III.5(b).)

Findings

None of the evaluated members were found to be sharing non-aggregate non-PII to be merged with PII possessed by third parties. Those members that do share non-aggregate, non-PII include provisions in their contracts governing such sharing to ensure that non-aggregate non-PII is protected and not merged with PII. NAI Staff's review of those contractual provisions and members' internal policies with regard to any such sharing revealed no compliance deficiency with respect to the requirement that members take appropriate measures to protect the non-aggregate non-PII that they share with third parties.

F. Access

Standard

Members are required to provide consumers with reasonable access to PII, and other information associated with that PII, retained by the member for OBA or Multi-Site Advertising purposes. (NAI Code § III.6(a).)

Findings

None of the evaluated members were found to be using PII for OBA or Multi-Site Advertising purposes. Accordingly, the requirement of access to PII and associated non-PII data under section III.6(a) was not implicated.

G. Reliable Sources

Standard

Members are required to make reasonable efforts to ensure that they are obtaining data for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting from reliable sources. (NAI Code § III.7(a).)

Findings

Upon review of members' responses to the NAI questionnaire and supporting materials, NAI Staff found no compliance deficiency with respect to the requirement that members make reasonable efforts to ensure that the data they obtain for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting come from reliable sources. Most members report obtaining such data from NAI members that are bound by the NAI Code, or from companies that are applying to become NAI members and are bringing their practices into alignment with the NAI Code. Some members reported obtaining data to be used for OBA purposes from entities that are not NAI members. In those instances, the relevant members have a process in place to ensure that the companies from which they obtain data have appropriate protections to ensure reliability. For example, members that obtain OBA data from third parties conduct due diligence on those sources – including investigating from where the data was derived and whether it was obtained with appropriate disclosure – in order to help verify that it is complete and accurate.

H. Security

Standard

Members that collect, transfer, or store data used in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting are required to provide reasonable security for that data. (NAI Code § III.8(a).)

Findings

NAI Staff's review revealed no compliance deficiencies with respect to members' obligation to provide reasonable security for data used for OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting. NAI Staff reviewed member companies' descriptions of their security policies and protections, in order to establish that the member companies had conducted an appropriate evaluation of the

technological, administrative, and physical protections for data subject to the NAI Code.⁴⁹

I. Data Retention

Standard

Members engaged in OBA, Multi-Site Advertising, and/or Ad Delivery and Reporting are required to retain data collected only as long as necessary to fulfill a legitimate business need, or as required by law. (NAI Code § III.9(a).)

Findings

As separately discussed above, ten members lacked disclosures relating to the approximate length of retention of data for OBA, Multi-Site Advertising, and Ad Delivery and Reporting, and have remedied (or are in the process of remedying) those disclosures. NAI Staff's evaluation of the actual periods for which members report retaining data for these purposes found that member companies articulated legitimate business needs for their retention practices.

As part of the review process, NAI Staff reminded members of the need to keep pace with evolving best practices, including minimizing the data retained. For instance, NAI Staff suggested to several members that they limit the lifespan of their OBA cookies, or to limit retention periods for data logging only to the length of time practically necessary.

J. Applicable Law

Standard

Members are required to adhere to all applicable laws. Where the requirements of applicable law exceed or are in conflict with the Code, members must abide by applicable law. Where the requirements of the Code exceed those of applicable law, members must conform to the higher standards of the Code (insofar as compliance with the Code is not contrary to applicable law). (NAI Code § III.10.)

⁴⁹ The NAI's review process under the Code did not function as a formal audit of data security, although any such audits undertaken by member companies were considered as part of the review process.

Findings

NAI Staff's review showed no evidence of violations of the "applicable law" provision of the NAI Code.

K. Consumer Communications

Standard

NAI members are required to maintain a centralized mechanism linked to the NAI Web site to receive consumer questions or complaints relating to members' compliance with the Code. (NAI Code § IV.2(a).) NAI members also are required to respond to and make reasonable efforts to resolve questions implicating their compliance with the NAI Code within a reasonable period of time. (NAI Code § IV.2(b).)

Findings

The NAI Web site contains a form, phone numbers, postal addresses, and email addresses, all of which permit consumers to submit questions or complaints relating to members' compliance with the Code as required by NAI Code § IV.2(a). As detailed in section V, the NAI fields hundreds of consumer inquiries through these mechanisms.

NAI Staff tested members' compliance with section IV.2(b) of the NAI Code by reviewing members' sites for a mechanism that permits consumers to submit questions or concerns regarding NAI issues, and then independently testing member companies' responses to consumer questions regarding their opt out procedures. Most of the evaluated member companies responded promptly and with informative responses.

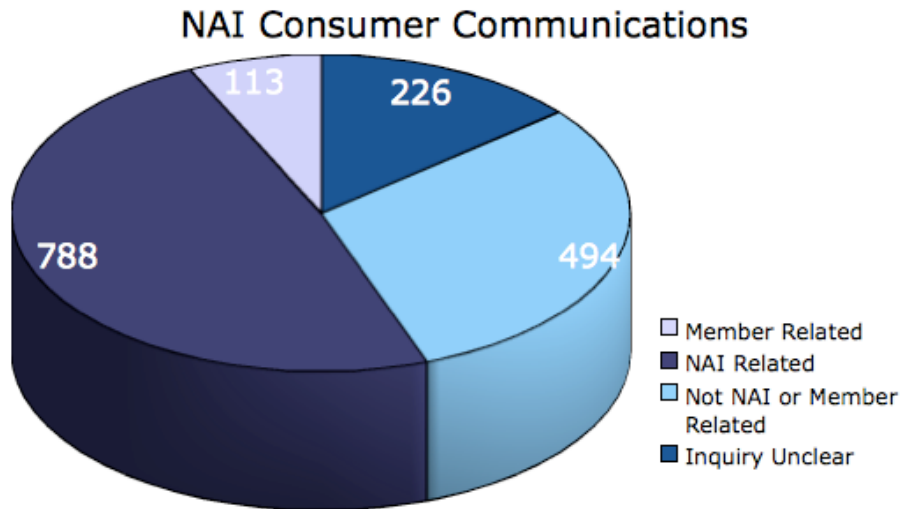
In some instances, however, NAI Staff found that members' responses to these inquiries were insufficiently responsive or untimely. NAI Staff reminded these members of the need to have a contact mechanism on their Web sites, and to respond to any questions or concerns related to NAI compliance in a timely manner. At the time of writing this report, NAI Staff believes that the affected members have made changes to their mechanisms for responding to consumer questions, or are otherwise aware of the issue and are making efforts to ensure that consumer questions are timely and accurately addressed. NAI Staff will continue to monitor members' responses to consumer questions and concerns in 2010, in order to help ensure that

consumer questions regarding NAI-related matters are timely addressed.

IV. Customer Communications

The NAI receives queries and complaints from consumers through multiple mechanisms: these include a form on the NAI web site, email, postal mail, and telephonic inquiry. NAI Staff makes every effort to respond in a reasonable and timely manner. Beginning in 2009, NAI Staff was required to “produce an annual summary of the nature and number of consumer complaints received, the nature and number of complaints that were escalated to membership and the nature and number of matters referred to the Board, specifying the name of companies, if any, that were sanctioned for failure to remedy compliance defects.”⁵⁰

In 2009, the NAI tracked consumer inquiries of all types, not just those that might qualify as complaints. These communications are classified into four categories: “Member Related,” “NAI Related,” “Not NAI or Member Related,” and “Inquiry Unclear.” The following summarizes the breakdown of consumer communications the NAI received in 2009:



⁵⁰ See NAI Compliance Program Consumer Complaint Process, http://networkadvertising.org/managing/NAI_COMPLIANCE_AND_ENFORCEMENT_PROGRAM_Consumer_Complaint_detail.pdf.

NAI Staff believes that it has resolved all consumer communications it received in 2009 that are related to NAI matters and are conducive to resolution.⁵¹

“Member Related” communications are those that require action on the part of an NAI member to resolve. When a “Member Related” issue is identified, it is escalated to the relevant member and NAI Staff track the member’s progress in resolving the issue. All of the “Member Related” communications identified in 2009 pertained to a limited number of functionality issues with certain members’ opt out tools.⁵² Each of the affected member companies promptly resolved the issues.

Communications classified as “NAI Related” are relevant to the NAI, but do not require action on the part of an NAI member. These communications account for just over half of all consumer inquiries. For the most part these communications relate to the NAI opt out tool, and are handled by Staff through direct communication with consumers. Of this particular subcategory, the majority of the questions arise from conflicts between consumers’ pre-existing software or computer settings, and the operation of the NAI’s opt out tool (for example, browsers preconfigured to reject all third party cookies, including opt out cookies from NAI members).⁵³

Consumer communications classified as “Not NAI or Member Related” are those that do not pertain to the NAI’s mission. For example, the NAI receives numerous messages from consumers seeking to unsubscribe from email marketing. The NAI also receives numerous messages from consumers with queries intended for operators of Web sites not affiliated with the NAI. This occurs because the NAI-required notice and link to the NAI site within a Web site’s privacy policy may be the only readily-discernible contact information

⁵¹ The consumer inquiry data are current as of December 21, 2009.

⁵² These complaints resolved to only six discrete functionality issues with particular members’ opt out tools.

⁵³ For the NAI Web site tool’s hundreds of thousands of visitors, an extensive FAQ provided attempts to address known issues (such as for the limited number of users with blocked third party cookie settings).

for that site. These communications account for approximately one third of all communications the NAI received in 2009.

“Inquiry Unclear” consumer communications are those where the purpose of the message is not discernible by NAI Staff. Messages that are clearly spam are deleted and not counted. For other messages in this category, NAI Staff respond requesting a specific query or complaint.

Based on experience in fielding OBA-related questions and complaints, the NAI will continue to work to adopt enhancements to the messaging and functionality of the NAI Web site. In 2010, NAI Staff also plans to improve its procedures for logging and tracking consumer complaints and to track the performance of its members throughout the year.

V. CONCLUSION

The NAI’s 2009 compliance review process provided comprehensive insight into the behavioral advertising practices, policies, and procedures of its member companies. Throughout the process, the evaluated companies cooperated with NAI Staff and provided extensive information and documentation concerning their marketing practices. The review found that the evaluated companies met their compliance obligations with respect to the great majority of the substantive requirements of the NAI Code. Additionally, NAI member companies understand and take seriously their obligations under the NAI Code.

In addition to the plan to enhance partner-provided notice discussed in this report, NAI Staff will continue to work with its members in the area of education, prominence and accessibility of NAI-required notice, and responses to consumer questions in 2010. NAI Staff also intends to continue its educational efforts, support members in their partner notice implementation efforts, and improve the NAI Web site. These efforts collectively will further enhance the transparency of behavioral advertising practices and of the choices available to consumers.