Guidance for NAI Members:
Health Audience Segments

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INTRODUCTION

The 2020 NAI Code of Conduct[1] (Code) requires member companies to obtain a user's Opt-In Consent[2] when using Sensitive Information[3] for Interest-Based Advertising (IBA),[4] Cross-App Advertising (CAA),[5] Viewed-Content Advertising (VCA),[6] Audience-Matched Advertising (AMA),[7] or Retargeting,[8] (together referred to as Tailored Advertising)[9] and Ad Delivery and Reporting (ADR).[10] In regard to health-related Tailored Advertising, Sensitive Information consists of two key types of data. First, Sensitive Information includes pharmaceutical prescriptions, medical records, or similar sources that provide actual knowledge of a user's condition or treatment, in which case the data is sensitive due to its source, regardless of the medical condition or treatment it relates to. Second, Sensitive Information can also refer to inferences that a user has, or is likely to have certain sensitive health or medical conditions or treatments, including cancer, mental health conditions, sexually-transmitted diseases, as well as health conditions predominantly affecting children and not treated with over-the-counter medication, in which case the condition can be sensitive even without actual knowledge that a user has, or is interested in that condition. In addition to the conditions enumerated above, the NAI also provides a multi-factor analysis that members should engage in to determine if any other health conditions may also fall into the Sensitive Information category.[11]

With respect to pharmaceutical and medical records, the Code requirement aims to mirror the principles of the Health Insurance Portability and Accountability Act (HIPAA)[12] in preserving the confidentiality and privacy of individuals' medical and pharmaceutical information. The Code's Opt-In Consent requirement for the use of inferences about certain sensitive health conditions provides peace of mind to users of websites and mobile applications related to such health conditions or treatments, with the understanding that responsible advertising technology companies will ask for permission before showing that user advertisements connected with that user's prior web browsing or app use. In other words, a user conducting research on a mental health condition, or any other sensitive condition, will not receive Tailored Advertising based on that activity unless the user has affirmatively consented to that advertising.

The NAI has long imposed and enforced these restrictions with the understanding that while Tailored Advertising helps to fund a robust and diverse Internet and provides users with relevant ads, a user's engagement with certain limited types of content at one time and in one environment may not always be appropriate for Tailored Advertising in a different environment or at a later time. For example, research about potential cancer treatments while at home on a personal device may not be appropriate for advertising at a later time when user is in an environment when that advertising may reveal to

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1 *See* Network Advertising Initiative, 2020 NAI Code of Conduct, https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf [hereinafter 2020 NAI Code of Conduct].

2 *Id.* at § I.H.

3 *Id.* at § I.O.

4 *Id.* at § I.G.

5 *Id.* at § I.C.

6 *Id.* at § I.R.

7 *Id.* at § I.B.

8 *Id.* at § I.M.

9 *Id.* at § I.Q.

10 *Id.* at § I.A.

11 *Id.* at app. 23.

12 The Health Insurance Portability and Accountability Act of 1996. P.L. No. 104-191, 110 Stat. 1938 (1996).

friends, family, or coworkers that the user may have been researching that topic or may in fact have such a condition. Additionally, the placement of web browsers or devices into audience segments labeled with sensitive conditions, to be used for ad targeting could also negatively affect a user's privacy, especially if such segments were to be misused or accessed without authorization.

Of course, many users are genuinely interested in products and treatments for their health or medical conditions and may also be interested in receiving Tailored Advertising for such products or treatments. Accordingly, the NAI provides those users with an opportunity to opt in to such advertising, described in a clear and conspicuous notice, through an affirmative action that manifests this intent.

Since its inception, the NAI has aimed to regulate the collection of data on websites, and later in mobile applications, for use in targeted digital advertising. The addition of Audience-Matched Advertising in the 2020 Code now also regulates the use of data collected in other environments, such as offline, if that data is used to target user-level digital advertising on websites, mobile applications, or on television screens. This expansion in the scope of the Code introduces some novel privacy challenges and considerations when it comes to health-related advertising.

NAI Code restrictions and guidance are not based on the content of the advertisements presented to users, and in fact, many of the technology companies involved in digital advertising may not have any visibility into the actual creative unit that is delivered. On the contrary, the NAI Code is focused on the determination that a user should see a given advertisement, what types of factors and data may govern that determination, and what choices the user has in preventing the collection or use of that data for digital advertising.

Many ad targeting methods for health or medical treatments or medications *do not* rely on the selection of ads based on an inferred interest in a health or medical condition, such as a specific inference based on a user's prior engagement with a given website or mobile application. Some advertisements may be targeted only based on general demographic factors such as age or gender. For example, a pharmaceutical company may advertise a treatment for a condition that only affects men. That condition, for example erectile disfunction, would be considered as sensitive under the Code, but the inference made in targeting such an advertisement would *not* be that the audience has the condition in question, or has expressed any interest in it, but rather, simply that the users are men. Similarly, a company may market a new treatment for Alzheimer's syndrome to an audience of users who are believed to be over sixty years old. The inference would not be that the users have the condition, or are interested in it, but rather that they are over 60 years old. This type of "modeled" or "demographic" targeting is most common when using offline data, now covered in the 2020 NAI Code, because it can be a reliable source of information such as age or gender compared to online activity. Ad targeting based on demographic factors such as age or gender is one way to allow users to receive ads that are relevant to them while at the same time preserving users' privacy.

The NAI recognizes that restricting companies from targeting ad campaigns based on general demographic data would present little discernible privacy benefit to consumers, while providing less relevant advertising, and leading to unnecessary costs for advertisers. Nonetheless, the NAI is also mindful of the fact that in some cases, if such demographic factors are combined and overlaid with additional information, such as an individual's web browsing, app use, shopping history, or Precise Location Information, it can become much more specific and precise. Such specificity and precision could equate to an inference that a user actually has, or is likely to have, a certain health or medical condition or treatment, under the guise of demographic targeting.

A lack of certainty around the potential sensitivity of a modeled audience segment can create considerable confusion for advertisers, NAI member companies, and consumers alike. The goal of this guidance document is to provide clarity as to what types of modeled audiences are considered non-sensitive by the NAI, regardless of the conditions they address, based on the size of the target audience, the type of targeting criteria involved, and the nomenclature used in segmenting audiences into such groups. While not all audience segments that fail to meet this criteria are automatically considered to be Sensitive Information, those audience segments that do meet the criteria in this guidance will be considered non-sensitive by the NAI.

Importantly, even for the use of non-sensitive audience segments detailed in this guidance, NAI members must comply with the transparency requirements in the NAI Code and provide full public disclosure of all "standard" or "off-the-shelf" audience segments used for health-related Tailored Advertising and a representative sample of "custom" audience segments used for the same purposes.[13]

Please note that this guidance is not intended as legal advice regarding compliance with laws or regulations. The NAI encourages its members to consult with counsel regarding compliance with laws and regulations in all geographic regions applicable to their business, and to review and update business models, privacy policies, terms of service, advertisements, or other representations accordingly.

ANALYSIS

When determining whether an audience used to target advertisements related to a health or medical condition or treatment involves the use of Sensitive Information, an NAI member should perform the following analysis consisting of the following steps:

Step 1: Audience Size

The initial step in a member's analysis is to determine whether the targeted audience is large enough to not implicate precise targeting or segmentation in the health or medical space. Any audience that is composed of at least ten percent of the overall targetable population would be considered to be adequately large so as to be non-sensitive by the NAI.[14]

Step 2: Type of Audience Attributes

Once the member has determined that the audience it is targeting is large enough, the member should consider the type of audience attributes used to create the target audience. An audience that is created based only on demographic attributes such as age, gender, education level, neighborhood affluence, or residence in a broad geographic region, would be considered non-sensitive by the NAI. Similarly, the use of offline marketing segments that are also modeled, and are not based on any user-level purchase, behavior, or activity, would also be considered non-sensitive by the NAI. However, the use of user-level non-demographic attributes such as purchase data, including over-the-counter medications, residence more precise than ZIP-level, or other user-level historical data would prevent the audience segment from being classified as non-sensitive under this analysis.

13 *See* 2020 NAI Code of Conduct § II.B.2.

14 The intent of this requirement is for the audience segment to be composed of a full ten percent of the population of the United States that can receive digital advertising from a given member company.

Step 3: Nomenclature

Having determined that an audience is large enough and does not utilize any non-demographic user-level data, the member must ensure that that segment is appropriately labeled in order for it to be considered de-facto non-sensitive by the NAI. This requirement is intended to protect consumers in the unlikely event that the audience data should be misused or misappropriated, while promoting transparency the marketplace by encouraging the labeling of such segments with their demographic compositions. For example, an audience segment consisting of all users believed to be women, comprising fifty percent of the population, but labeled as "breast cancer," would not be deemed non-sensitive by the NAI based on the nomenclature used to market the segment.

SUMMARY

This guidance assists members in clarifying whether the audience segments they are using for health-related Tailored Advertising or Ad Delivery and Reporting are eligible to be deemed non-sensitive by the NAI.

1. Members are *not* using Sensitive Information if they create an audience that:
    a. Is at least ten percent of the total targetable population;
    b. Is based only on demographic attributes including age, gender, education level, and residential setting; and
    c. Is labeled based on the demographic makeup of the audience.

2. Members using or creating audience segments that do not meet the above benchmarks must consult the definition of Sensitive Information in the NAI Code of Conduct as well as the additional information and multi-factor analysis provided in the commentary to the Code in order to determine whether they are using Sensitive Information, requiring a user's Opt-In Consent. This includes considering (a) the seriousness of the condition, (b) how narrowly the condition is defined, (c) the condition's prevalence, (d) whether the condition is something the average person would consider to be particularly private by nature, (e) whether the condition is treated by over-the-counter or prescription medications, and (f) whether the condition can be treated by modifications in lifestyle as opposed to medical intervention.

3. All NAI members engaged in health-related Tailored Advertising, whether they are using Sensitive Information or non-Sensitive Information, must comply with the transparency requirements of the Code and provide full public disclosure of all "standard" or "off-the-shelf" audience segments used for health-related Tailored Advertising *and* a representative sample of "custom" audience segments used for the same purposes.

APPENDIX A

How to Determine Whether a Health-Related Audience Segment is De-Facto Non-Sensitive