

# Morrison & Foerster Client Alert.

October 6, 2010

## Industry Associations Launch Behavioral Advertising Self Regulatory Program Involving Icon

**Goals Are Enhanced Consumer Control and Avoidance of Unnecessary Governmental Intervention**

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On Monday, October 4th, the nation's largest media and marketing associations<sup>1</sup> announced the launch of their much-anticipated Self-Regulatory Program for Online Behavioral Advertising. The program is intended to provide consumers with a better understanding of, and enhanced control over, the \$24 billion industry of delivering behaviorally-targeted advertisements online. The program's sponsors – the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, the Interactive Advertising Bureau, together with the Council of Better Business Bureaus<sup>2</sup> – and other industry members hope that these efforts will not only benefit consumers and further engender trust in online commerce, but also protect online advertising from the negative, unintended consequences of well-intentioned but short-sighted regulation or legislation.

### WHAT PROMPTED THE PROGRAM?

In February 2009, Federal Trade Commission (FTC) staff issued Self-Regulatory Principles for Online Behavioral Advertising. In addition to outlining recommended practices for companies engaged in online behavioral advertising, the FTC staff's report encouraged industry members to develop their own

<sup>1</sup> Together, IAB states that these associations represent more than 5,000 leading U.S. companies. See <http://www.iab.net/self-reg?o1408380=>.

<sup>2</sup> Online Behavioral Advertising is defined by the Principles as "the collection of data from a particular computer or device regarding Web viewing behaviors over time and across non-Affiliate Web sites for the purpose of using such data to predict user preferences or interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors. Online Behavioral Advertising does not include the activities of First Parties, Ad Delivery or Ad Reporting, or contextual advertising (i.e., advertising based on the content of the Web page being visited, a consumer's current visit to a Web page, or a search query)." See <http://www.iab.net/media/file/ven-principles-07-01-09.pdf> at pp. 10-11.

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processes for more robust consumer notice and control. In the year-and-a-half since it issued the principles, FTC officials have repeatedly warned the private sector that its failure to develop and launch such processes could result in FTC action, perhaps even including a recommendation for legislation.

Industry – represented by the organizations named above – quickly responded by releasing, in July 2009, its own Self-Regulatory Principles for Online Behavioral Advertising (Principles). These largely correspond to the FTC’s principles:

- (1) business and consumer education on the collection and use of information for online behavioral advertising;
- (2) transparency about data collection and use, principally through multiple, prominent notices to consumers;
- (3) consumer control over data collection and use, principally through opt-out mechanisms;
- (4) data security, including limited retention of data;
- (5) consumer consent for material changes to data practices;
- (6) limiting the collection and use of sensitive data; and
- (7) accountability and enforcement mechanisms.

Monday’s announcement represents the implementation of the Principles into practice.

### WHAT WILL THE PROGRAM DO?

Companies wishing to participate in the program should first carefully review the Principles and the implementation guidelines. The Program, as launched, has five major components:

**1. The Advertising Option Icon.** Companies may visit [www.AboutAds.info](http://www.AboutAds.info) to learn more about the program and how to begin using the icon, which must be placed *in or near online ads or on pages where data is collected and used for behavioral advertising*. The icon itself is below:



The icon will indicate that the advertisement is covered by the self-regulatory program and, when clicked, will link to an explanation of the data collection and use practices associated with the ad, as well as an opt-out mechanism.

Use of the icon represents a major shift in how consumers are notified about a company’s use of behavioral advertising. Historically, sites have included notice of their practices and consumers’ choices with respect to them solely within their privacy policies. With the icon, both notice and choice will be presented in a far more clear and conspicuous manner. That said, industry education will play a key role in making sure consumers understand the icon and, therefore, that the program accomplishes its intended purpose.

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Registering for the icon comes with an actual price – \$5,000 annually<sup>3</sup> – and a commitment, which may be enforceable under Section 5 of the FTC Act, to comply with a registration agreement, which is likely to include an agreement to comply with the Principles.

**2. Another Consumer Choice Mechanism.** Later this fall, when use of the icon has become common, consumers will be able to visit a single, industry-developed website to opt out of some or all participating companies' online behavioral ads. This additional choice mechanism will be convenient for consumers and is therefore likely to be viewed favorably by the FTC.

**3. A Site Dedicated to the Program.** Companies engaged in behavioral advertising can visit one site, [www.AboutAds.info](http://www.AboutAds.info), to learn more and/or join the program. Consumers can also visit the site to educate themselves about online behavioral advertising – a benefit that we expect will please both the FTC and legislators who have, in recent months, expressed dismay over consumers' apparent ignorance about how information about their online behavior is collected and used.

**4. Mechanisms for Accountability and Enforcement.** Beginning in 2011, the Council of Better Business Bureaus and the Direct Marketing Association will begin to monitor and enforce the compliance of those companies that choose to participate in the program *and the Council of Better Business Bureaus will also identify companies that are engaged in behavioral advertising and not following the program.* They will also manage the resolution of consumer complaints.

**5. An Educational Component.** Over the coming weeks and months, the participating trade associations will conduct educational campaigns targeted to both consumers and businesses. These will include webinars and other practical guidance for interested businesses on how to understand, implement and comply with the program's requirements.

## FAQ'S ABOUT THE NEW PROGRAM

### 1. Who should apply for use of the icon and program membership?

- Advertisers, advertising agencies, and publishers engaged in online behavioral advertising.

### 2. Is anyone *required* to use the icon and apply for program membership?

- Members of the Direct Marketing Association must participate in the program under DMA rules. Others engaged in online behavioral advertising may participate in the program. The American Association of Advertising Agencies and the Interactive Advertising Bureau may also require member participation, but have not finalized any such requirement yet.

### 3. What types of companies will likely apply for program membership first?

- We expect that, initially, advertising service providers – that is, those companies such as advertising networks, who deliver behavioral advertisements to consumers on behalf of advertisers, and advertising agencies, will be among the first to apply for program participation.
- Publishers that allow behavioral advertisements to appear on their pages may also apply early in the process. Ultimately, the Principles place compliance obligations on the publishers, but they may comply through service providers such as ad networks and agencies. One way to do so would be to make program participation mandatory in agency and similar vendor agreements (and to monitor compliance). Another way would be to place the icon on your

<sup>3</sup> There is no fee for web publishers with annual revenues from online behavioral advertising of less than \$2,000,000.

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own website and direct those who click to the appropriate portion of your website, provided that it complies with the program's requirements.

#### 4. I am an advertiser. What should I do?

- If you are an advertiser *and you engage companies to deliver online behavioral advertising for you*, you should consider requiring by contract that providers participate in the program (and then monitoring their compliance). Why? Because it is designed to deliver new levels of transparency and consumer choice, which the FTC has been calling for since the publication of its [Self-Regulatory Principles for Online Behavioral Advertising](#) in February 2009.
- If you are an advertiser and deliver behaviorally-targeted advertising *yourself*, you should apply directly for program membership for the same reasons, as well as to avoid being contacted and, ultimately, potentially called out, by the Council of Better Business Bureaus CBBB for failing to comply with industry standards.

#### 5. Is participation in the program a safe harbor from government action?

- No. But participating in the program and adhering to its requirements will place your company in good company for the time being, at least, and give your company something very positive (and innovative) to say about consumer transparency and choice.

#### 6. What are the downsides of participating in the program?

- Participation will require strict adherence to the program's licensing terms and proper use of the icon. Use of the icon could also be taken as an implied claim that your company meets all of the requirements of the Principles. Failure to do so could subject your company to FTC action, just as failure to live up to an express promise in your privacy policy could give rise to a cause of deception. Do not make a choice to participate lightly.

#### 7. What if I engage in online behavioral advertising and do not participate in the program?

- There is no cause of action strictly for failure to participate in the program; however, it does represent a new standard for transparency and control in online behavioral advertising, and brands tend to look for safe service providers. Over the medium term, failure to enroll in the program could create problems in the market for your company.

#### 8. Does the Program Apply to Mobile Ads?

- Not now, but the Principles may be expanded to apply to mobile ads at a future date.

This new program is innovative, and this is an exciting time for the online behavioral advertising industry. Hopes are high that the program takes off and that industry can thereby demonstrate to the government that it can regulate itself. Initial returns are positive, but the proof will be in the participation by the end of this year. If the FTC (or Congress, for that matter) believes that participation is inadequate, it could step in and take action.

For more information on this program and other issues related to privacy or online behavioral advertising, contact [Reed Freeman](#).

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