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FTC OKs Self-Regulation Program for Online Behavioral Advertising

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On August 15, the Federal Trade Commission's Bureau of Competition issued an advisory opinion letter stating that it has "no present intention to challenge" the Council of Better Business Bureaus' (CBBB) proposed accountability program, which was expected by most in the industry. The accountability program was formed to hold companies engaged in online behavioral advertising accountable for compliance with the Self-Regulatory Principles for Online Behavioral Advertising ("Principles"), which were released by the FTC in July 2009. In 2009, Reed Smith issued an *Alert* explaining the principles that is available here.

Likewise in 2010, the Principles were further supplemented through voluntary industry efforts of the Digital Advertising Alliance (an alliance of trade associations consisting of the American Association of Advertising Agencies, American Advertising Federation, Association of National Advertisers, Better Business Bureau, Direct Marketing Association, Interactive Advertising Bureau, and Network Advertising Initiative).

The Principles aim to provide consumers with more control and transparency about how their information is collected, used, and transferred for online behavioral advertising purposes. In addition, the Principles call for appropriate data security measures, the limited retention of data, consent for material changes in data policies, and the limited collection of information from children under 13, and some financial and health data. According to the CBBB, the Principles are designed to "address consumer concerns about the use of personal information and interest based advertising while preserving the innovative and robust advertising that supports the vast array of free online content and the ability to deliver relevant advertising to consumers."

The CBBB's accountability program focuses primarily on compliance with the provisions related to consumer control and transparency. According to the FTC's advisory opinion, the CBBB monitors companies "reasonably believed to be engaged" in online behavioral advertising through a vendor. When appropriate, the CBBB makes confidential inquiries to companies about possible non-compliance. If the company's response demonstrates non-compliance, the CBBB recommends steps to bring the company's practices into compliance. Under the program, the CBBB may publicly report incidents if they go uncorrected, and may refer such incidents to the FTC. A finding of uncorrected non-compliance may also result in the loss of the company's membership in the participating trade associations to the Digital Advertising Alliance. In Monday's statement, the FTC released that the DAA's anticipated sanctions "do not appear unreasonable."

The FTC's original concern with the program was that industry self-regulatory programs can often operate as agreements to exclude non-compliant companies from the market. The FTC said that "an agreement among competitors to deny advertising space to companies that do not comply with the Principles would be troubling." In addition, for companies participating in the program, certain fees are associated with both using the DAA's Advertising Option icon to indicate compliance with the Principles, and providing a consumer-choice mechanism linked to the DAA's website. Based on its analysis that the accountability program "impose[s] only relatively minor burdens on companies" and that it is "intended to enhance consumers' understanding and control," the FTC opined that the program has "little or no potential for competitive harm."

In the past, the FTC has warned companies about insufficient self-regulatory efforts. Indeed, in its December 2010 Report Protecting Consumer Privacy in an Era of Rapid Change, the Commission specifically noted that, "industry efforts to address privacy through self regulation have been too slow, and up to now have failed to provide adequate and meaningful protection." Also, it's important to note that the FTC's analysis was limited to competition law, and since its analysis did not address the appropriateness of the actual Principles themselves, its opinion should not be interpreted as a validation of the program itself. In fact, at the end of the letter, the FTC left open the possibility of a need for greater consumer protection measures. "[N]either the Principles nor the accountability program preclude companies' use of other systems, including browser-based 'do not track' systems, for providing consumers with transparency and control. Should it later appear, however, that collective adoption and enforcement of the Principles operates as an impediment to adoption of complementary or superior consumer protections, we might then reconsider this opinion." Still, though, the FTC's opinion on the accountability program signals a step in the direction of self-regulation.

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