



**Response to the 2008 NAI Principles:  
The Network Advertising Initiative's Self-Regulatory Code of  
Conduct for Online Behavioral Advertising**

**December 16, 2008**

The Center for Democracy & Technology (CDT) is pleased that the Network Advertising Initiative (NAI) has undertaken an update to its self-regulatory principles. In recent years we have urged the NAI to revisit its principles both to resolve issues present in the original version and to address emerging issues in the marketplace. Thus, the release of the 2008 NAI Principles: The Network Advertising Initiative's Self-Regulatory Code of Conduct,<sup>1</sup> is a welcome development. However, more work remains to be done within the NAI to address a number of areas critical to consumer trust. At the same time, Congress must move ahead in crafting a comprehensive privacy law that protects Internet users.

CDT believes the 2008 NAI Principles, while late in addressing new trends in the industry, demonstrate clear progress over the original code of conduct adopted in 2000. The transparency of the NAI's revision and compliance process, the approach to sensitive information, and the coverage of advertising practices beyond behavioral advertising all represent important steps forward. While robust self-regulation in the behavioral advertising space does not obviate the need for a baseline federal privacy law covering data collection and usage of all kinds, the NAI has made advances in several areas, yielding what we hope will be better protections for consumer privacy.

However, the 2008 NAI Principles still come up short in crucial respects including the opt-out choice requirement, the notice standard, the NAI member accountability model, the failure to address ISP behavioral advertising, the lack of a choice requirement for multi-site advertising, and the data retention principle. Some of these are outstanding issues that have existed within the NAI framework since its inception, while others are new concerns raised by the updates to the principles.

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<sup>1</sup> Network Advertising Initiative, *2008 NAI Principles: The Network Advertising Initiative's Self-Regulatory Code of Conduct* (Dec. 2008), [http://networkadvertising.org/networks/2008%20NAI%20Principles\\_final%20for%20Website.pdf](http://networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf) ("NAI Principles").

The NAI explains in its response to the public comments it received<sup>2</sup> that the process for updating the principles going forward will involve developing specific implementation guidelines for particular business models or data collection practices that the current principles do not adequately or clearly address. CDT urges the NAI to ensure that the process of developing implementation guidelines is expeditious – on the order of months rather than years – and that it address most if not all of the principles’ current shortcomings.

Below we briefly describe both the areas where the NAI has made progress and the areas that require further improvement.

### **Areas of progress:**

- **Transparency in principles revision process and in compliance documentation.** CDT was critical of the fact that the NAI member companies developed the original principles behind closed doors without any means for input or comment from the public. By first issuing the 2008 NAI Principles in draft form, allowing for a sufficient public comment period, incorporating revisions to the principles based on public comments received, and publishing a report detailing how each public comment was treated in the revision process, the NAI has made vast improvements to the transparency of its principles revision process. Also, as CDT suggested,<sup>3</sup> the NAI has chosen to make publicly available the documentation of both consumer complaints and enforcement actions taken against NAI members. This was the NAI’s original policy in 2000 and we are pleased that it remains unchanged in the final version of the 2008 NAI Principles. We look forward to being able to review these documents on a regular basis.
- **Coverage of advertising models beyond behavioral advertising.** CDT expressed concern about the fact that the draft principles were written to apply only to companies that use the data they collect to “categorize likely consumer interest segments,” because the privacy risks that arise from behavioral advertising are not limited to the situation where data is used to categorize consumers’ interests.<sup>4</sup> The NAI has since introduced another category of advertising practices, “multi-site advertising,” that covers a much broader set of data collection and use practices. We are pleased that the NAI has extended nearly all of its principles to cover both behavioral advertising and multi-site advertising, although we are concerned about the lack of a choice requirement for multi-site advertising (see below).

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<sup>2</sup> Network Advertising Initiative, *NAI Response to Public Comments Received on the 2008 NAI Principles Draft* (Dec. 2008), [http://networkadvertising.org/networks/NAI%20Response%20to%20Public%20Comments\\_Final%20for%20Website.pdf](http://networkadvertising.org/networks/NAI%20Response%20to%20Public%20Comments_Final%20for%20Website.pdf) (“NAI Response”).

<sup>3</sup> Center for Democracy & Technology, *Comments Regarding the NAI Principles 2008: The Network Advertising Initiative’s Self-Regulatory Code of Conduct for Online Behavioral Advertising* (June 2008), [http://www.cdt.org/privacy/20080612\\_NAI\\_comments.pdf](http://www.cdt.org/privacy/20080612_NAI_comments.pdf) (“CDT comments”) at 21.

<sup>4</sup> CDT comments at 13.

- **Potentially broad definition of “sensitive” information.** In CDT’s comments about the draft 2008 NAI Principles, we urged the NAI to grant the extra level of protection afforded to “sensitive” information to a far larger set of data types than what was proposed in the draft principles, where only a handful of medical conditions and data categories dealing with personal life were granted “sensitive” status.<sup>5</sup> The NAI has since incorporated many of the data types CDT had suggested into the definition of sensitive information, including precise geographic location information and a broader definition of health information.<sup>6</sup> However, the NAI notes that the definition of sensitive information will be further developed in an implementation guideline. If the NAI chooses to significantly narrow the sensitive information definition through this process – or if NAI member companies continue to use health, location, and other sensitive data categories for behavioral advertising while they wait for the implementation guideline to be completed – then the gains exhibited in the current NAI principles will be hollow. CDT hopes that the NAI will maintain a broad definition of sensitive information.

#### **Areas in need of improvement:**

- **Discredited opt-out choice mechanism.** The NAI’s decision to retain its original opt out definition allows NAI members to continue the discredited practice of relying solely on opt-out cookies as their consumer choice mechanism. The drawbacks of opt-out cookies are numerous, and as such we would have expected that over the last eight years the NAI would have evolved its standards to require a clear, easy-to-use and accessible opt-out method that honors consumer choices persistently. Instead we continue to wait for such a standard to emerge. Since the industry cannot agree on a better opt-out mechanism standard, we believe that it is incumbent on the government to help them do so, such as by instituting a Do Not Track list,<sup>7</sup> or by forcing them to move to a more informed consent standard.
- **Notice requirement below FTC standards.** In its proposed self-regulatory guidelines, the FTC requires that every Web site where data is collected for behavioral advertising provide a clear, concise, consumer-friendly, and prominent notice.<sup>8</sup> This is a higher standard than the “clear and concise” requirement employed by the NAI, and provides a better foundation for consumers to become more informed about behavioral advertising. The NAI explains that it is reluctant to meet the FTC standard for fear that more prominent and consumer-friendly notices may not work properly across a broad array of Web sites and Web browser software.<sup>9</sup> However, study after study has shown that the NAI’s preferred notice vehicle – Web

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<sup>5</sup> CDT comments at 6.

<sup>6</sup> NAI Principles at 6.

<sup>7</sup> See Pam Dixon et al, *Consumer Rights and Protections in the Behavioral Advertising Sector* (Oct. 2007), <http://www.cdt.org/privacy/20071031consumerprotectionsbehavioral.pdf>.

<sup>8</sup> Federal Trade Commission Staff, *Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles* (Dec. 2007), <http://www.ftc.gov/os/2007/12/P859900stmt.pdf> (“Staff Statement”) at 3.

<sup>9</sup> NAI Response at 14.

site privacy policies – are not working for consumers.<sup>10</sup> If the industry cannot standardize to meet basic user notice expectations, government should begin the process to develop a standardized mechanisms and formats to notify consumers.

- **Compliance not conducted by a third party.** In our comments to the NAI, we recommended that NAI member compliance reviews be conducted by an independent third party to lend credibility to the compliance process and ensure that all members are treated fairly.<sup>11</sup> Although the 2008 NAI Principles have been crafted so as to allow a third party to conduct compliance reviews, the NAI plans to conduct reviews in-house for the foreseeable future.<sup>12</sup> Given the difficulties that consumers would have in identifying violations of the principles since they have no direct relationship with the part of NAI companies that place advertisements, we continue to believe that employing a third party to conduct compliance reviews would create far more public trust in the accountability process than having the NAI itself act as auditor.
- **ISP behavioral advertising unaddressed.** A sizable section of our comments to the NAI was devoted to the issue of behavioral advertising that makes use of Internet traffic content from ISPs. This practice is not directly addressed in the 2008 NAI Principles. We hope to see the NAI pursue an implementation guideline that outlines the requirements for companies engaged in this practice.
- **Multi-site advertising without a choice requirement.** As noted above, we are pleased that the NAI has expanded the range of online advertising practices that its principles cover. Although the requirements for those engaged in the newly introduced category of “multi-site advertising” are outlined in nearly every principle, the NAI has established no choice requirements for multi-site advertising. This omission concerns us since choice is a fundamental component of privacy protection and is a basic element in the practices of most companies engaged in multi-site advertising today. We hope this gap will be closed as the NAI proceeds with its implementation guidelines.
- **Data retention not tied to the purpose for which data was collected.** The 2008 NAI Principles contain a new data retention principle that requires members to retain data “only as long as necessary to fulfill a legitimate business need, or as required by law.”<sup>13</sup> This is the same principle espoused by the FTC in its draft self-regulatory guidelines.<sup>14</sup> Just as we suggested to the FTC,<sup>15</sup> we believe the NAI can

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<sup>10</sup> See, e.g., Aleecia M. McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies* (Sept. 2008), <http://www.scribd.com/doc/7550344/Cost-of-Reading-Privacy-Policies>.

<sup>11</sup> CDT comments at 21.

<sup>12</sup> NAI Response at 45.

<sup>13</sup> NAI Principles at 10.

<sup>14</sup> Staff Statement at 4.

<sup>15</sup> Center for Democracy & Technology et al., *Comments of the Center for Democracy & Technology, Consumer Action, and Privacy Activism In Regards to the FTC Staff Statement, “Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles”* (Apr. 2008), [http://www.cdt.org/privacy/20080411bt\\_comments.pdf](http://www.cdt.org/privacy/20080411bt_comments.pdf) at 23.

better guard against unanticipated data uses if its data retention principle ties data retention to the purposes for which the data was collected in the first place, as opposed to any “legitimate business need.” The NAI claims in its response to public comments that tying data retention to purpose specification is not appropriate because “consumers should be allowed to consent to secondary uses of data as circumstances change.”<sup>16</sup> If this is the reasoning behind the language chosen for the data retention principle, then at the very least the NAI should codify informed user consent for secondary uses in the principles themselves.

- **Lack of a long-term plan for user controls.** Companies engaged in behavioral advertising must begin to use the power of the Internet to find new ways of engaging users in the decisions that are made about them so that users and companies can both make more informed choices. The NAI should be leading the discussion about allowing users to view their behavioral profiles to help them make opt-out decisions and about allowing users to edit their profiles so that they may more fully participate in the ad targeting process.

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<sup>16</sup> NAI Response at 42.