

# COMPLIANCE WARNING

## **SUBJECT: Responsibilities of First Parties for Notice of Third-Party Data Collection for Online Behavioral Advertising on Their Websites**

### **I. Introduction**

The Online Interest-Based Advertising Accountability Program (Accountability Program) is one of the two accountability agents charged by the Digital Advertising Alliance (DAA) with enforcing the Self-Regulatory Principles for Online Behavioral Advertising (OBA Principles).<sup>1</sup> In the course of its compliance monitoring activities, the Accountability Program has noted that a significant minority of website operators that are otherwise in compliance with the OBA Principles are omitting notice of data collection for OBA on their websites in cases in which the third parties are not able to provide real-time notice without first-party assistance.

The requirement at issue concerns one of the most important improvements for consumers created by the OBA Principles: the provision of “enhanced notice” under the Transparency Principle. The requirement of enhanced notice as set out in Section II of the OBA Principles shines a light on interest-based advertising whenever and wherever it is occurring online. Prior to this innovation, consumers had no “just-in-time” notice informing them that information regarding their browsing activities was being collected by third parties for their use in interest-based ads. Nor could consumers always discern when ads they received were based on their interests as inferred from their prior browsing activities.

The Transparency Principle’s enhanced notice requirement redresses these problems, demystifying interest-based advertising for the consumer. It requires that both third parties, such as ad networks, and first parties, such as website operators or publishers, ensure that the consumer has real-time notice and an easy-to-use way to exercise choice whenever third parties collect a consumer’s browsing activity for OBA and use the preferences inferred from this browsing activity to serve the consumer interest-based advertising.<sup>2</sup> Enhanced notice alerts the consumer with a recognizable signal, such as the DAA Advertising Option Icon (AdChoices Icon) or a phrase such as “AdChoices,” on any page where a website operator is allowing a third party to collect or use data on its website for interest-based ads or where the website operator itself is collecting data that it sells or otherwise transfers to an unaffiliated third party for OBA purposes.<sup>3</sup> This real-time knowledge dispels the so-called “creepy” feeling that the consumer is silently being followed around the Internet. The easy-to-use choice mechanism gives consumers

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<sup>1</sup> The Accountability Program works closely with its sister accountability agent, the Direct Marketing Association (DMA), which resolves consumer and business complaints through its Corporate Responsibility Team, in conjunction with the DMA Committee on Ethical Business Practice.

<sup>2</sup> This Compliance Warning focuses on the enhanced notice requirement when an interest-based ad is served on a website, not on in-ad notice.

<sup>3</sup> As explained in note 5 below, a first party’s collection of consumer data on its website for sale or transfer to an unaffiliated third party for use in OBA also requires notice and choice under the OBA Principles

ready recourse to an opt-out mechanism should they prefer to receive random, rather than interest-based, ads on ad-supported websites.

Moreover, the requirement that this enhanced notice link to that place in the first party's website where it discusses the third-party OBA practices occurring on its website and provides a choice mechanism, takes information formerly buried in the privacy policy or elsewhere on the website and makes it easily accessible to the consumer. The superiority of just-in-time notice and choice over other mechanisms is clear, but it can only be fully realized when all first and third parties carry out their responsibilities conscientiously so that consumers can understand interest-based advertising and can easily exercise granular choice about how, when and if to participate in it.

While there has been remarkably widespread deployment of the AdChoices Icon on interest-based ads, with trillions of impressions served monthly,<sup>4</sup> the Accountability Program has found that there has been some misperception about how enhanced notice should be provided for OBA collection on the websites that a consumer visits. Because several companies that the Accountability Program investigated, which were otherwise in compliance with all requirements of the OBA Principles, appeared genuinely confused by the requirements of the OBA Principles with respect to this first-party responsibility, the Accountability Program made the determination to provide technical guidance to all first parties covered by the enhanced notice requirement of the Transparency Principle prior to strictly enforcing this one aspect of the OBA Principles.

Accordingly, the Accountability Program herein issues a Compliance Warning in which it explains the responsibilities of first parties to provide website enhanced notice on every page where they permit third parties to collect information for interest-based advertising or when they themselves transfer such data to unrelated third parties. The Accountability Program also here provides an advance warning that it will begin enforcement against first parties that fail to provide the required notice under the OBA Principles beginning on January 1, 2014.

Any company that is unable to meet this deadline despite making all commercially reasonable efforts to do so may avoid potential enforcement action by contacting the Accountability Program in advance of the deadline and demonstrating why it cannot meet the deadline and providing a reasonable date certain to come into compliance.

## **II. Enhanced Notice Requirement**

Both the third party and the first party share responsibility for provision of enhanced notice. Because the third party which is collecting the data generally has no direct means to provide notice and choice on the website where its data collection is occurring, providing just-in-time notice of collection and an opt out requires cooperation between the third party engaged in the collection and the first party on whose website such collection is permitted.<sup>5</sup> Unfortunately,

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<sup>4</sup> These statistics were compiled by the DAA from data reports submitted by several major companies engaged in OBA. The actual numbers of Icons served may be higher.

<sup>5</sup> This Compliance Warning primarily discusses enhanced notice in the context of third-party collection for OBA on a particular website. However, the OBA Principles make clear that a first party's collection of data from its own website is considered OBA when it is used to deliver tailored "advertising on the Web sites of non-Affiliate entities." (OBA Principles Commentary at 29). Therefore, the sale, transfer or use of first-party data for OBA

sometimes first and third parties do not work together sufficiently to ensure that this requirement is fully met. The Accountability Program has, as a result, noted that even some of the most assiduously compliant companies that consistently provide the AdChoices Icon on all interest-based ads and maintain excellent privacy policies which include easy-to-use choice mechanisms with the requisite five-year opt-out cookie duration and a statement of their adherence to the OBA Principles, nonetheless, are inadvertently failing to meet the enhanced notice requirement regarding third-party OBA collection.

The obligations of first parties under the Transparency Principle are set forth under Section II.B. on pages 13-14 of the OBA Principles. This section focuses on the obligations to provide “*Web Site Notice of Third Party Online Behavioral Advertising*”<sup>6</sup> through a “clear, meaningful, and prominent link” provided by the website operator on each “Web page where **data is collected**” for OBA. (Emphasis provided). This link, known as the “enhanced notice link,” should take the consumer directly to the website operator’s disclosure of third-party OBA activity that either points to an industry-developed Web page such as the DAA’s Consumer Choice Page ([www.aboutads.info/choices](http://www.aboutads.info/choices)) or individually lists all the third parties engaged in OBA on its website and provides links to each of their respective choice mechanisms. Either way, a clear, prominent link to the website operator’s disclosure (usually placed in the footer of the website or along a sidebar) must be separate from the link that takes the consumer to the website operator’s privacy policy. It is this link that affords just-in-time enhanced notice and ensures that consumers are taken directly to a place where they can learn more about interest-based ads and decide whether they wish to participate. By these means, explanations of third-party data collection and use become readily available, rather than buried in an obscure corner of a lengthy privacy policy.

Website operators sometimes conflate the transparency obligations triggered by the **collection** of data for use in OBA by third parties and the transparency obligations triggered by the **delivery** (use) of interest-based ads by third parties.<sup>7</sup> They may believe that their enhanced notice obligations as first parties are satisfied by the in-ad notice provided for OBA delivered on their websites. This is true, as far as it goes. However, we have encountered pages on websites where third parties known to engage in OBA appear to be collecting data for OBA and where we did not see an ad present bearing in-ad notice, such as the AdChoices Icon. Unless an ad bearing in-ad notice is served on **every** Web page of a publisher’s site where third parties are collecting data for OBA and that notice directs a consumer to the choice mechanisms of all third parties collecting on that Web page or to an industry-developed choice mechanism, the Transparency Principle’s **enhanced notice** requirement for **collection** is not satisfied, and the website operator cannot rely on the third party’s in-ad enhanced notice as provided under Section II.A.2. of the OBA Principles (*Third Party Advertisement Notice*).

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purposes to unaffiliated third parties constitutes OBA and triggers the enhanced notice obligation typically required when a third party is engaged in OBA collection or use on a particular website.

<sup>6</sup> First Parties should also review the other requirements of Section II.B., e.g., “A Web site should also indicate adherence to these Principles in its notice.”

<sup>7</sup> The Implementation Guidance for First Parties provides a clear explanation of First Party responsibilities for enhanced notice on the second page of the Guidance, which is available at

<http://www.aboutads.info/resource/download/OBA%20Self-Reg%20Implementation%20Guide%20-%20First%20Party%20Responsibilities.pdf>

We also take a moment to provide a reminder to first parties that choose to individually list each third party collecting data for OBA on their website, rather than including a link to an industry-developed website in their disclosure of third-party OBA activity.<sup>8</sup> This approach requires that first parties provide an accurate, up-to-date and comprehensive list of all the third parties collecting data for OBA on their websites at any given time. In practice, this necessitates that a first party put in place sufficient technical and/or contractual safeguards to prevent unauthorized third parties from engaging in OBA data collection on its website.

### **III. Conclusion**

The Accountability Program expects all covered entities to review their current practices rigorously and ensure that they are meeting the requirements set out above, as well as all other requirements of the Principles. If a company has any questions or discovers that it may have a compliance issue, we urge that company to get in touch with the Accountability Program as soon as the issue is discovered, rather than potentially subject itself to an enforcement action. Our mission is to help the advertising industry comply with the Principles and thus demonstrate the efficacy of self-regulation. We believe that the DAA program, when vigorously enforced, will continue to help build trust between consumers who enjoy the free, content-rich Internet and the advertising industry that supports it.

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<sup>8</sup> The OBA Principles require only that the link be to an “industry-developed website;” however the Accountability Program recommends that companies include a link to the DAA Consumer Choice Page, [www.aboutads.info/choices](http://www.aboutads.info/choices), because it lists over 90 percent of all third parties engaged in OBA.