2013 NAI Code of Conduct

NAI
Network Advertising Initiative

INTRODUCTION

The Network Advertising Initiative ("NAI") is the leading self-regulatory body governing "third parties" in the online advertising ecosystem. The NAI is currently composed of more than 90 member companies and expanding. Since 2000, the NAI has imposed self-regulatory standards that establish and reward responsible business and data management practices with respect to the collection and use of data for Interest-Based Advertising and related practices. The NAI Code, first adopted in 2000, updated in 2008, and updated again with this revision in 2013, imposes notice, transparency, choice, and data security requirements on NAI member companies. Members are held to the promises they make to adhere to the NAI Code through a rigorous compliance and enforcement program that includes annual reviews, ongoing technical monitoring, mechanisms for accepting and investigating complaints of non-compliance, and sanction procedures. The NAI believes that, like a successful privacy program, effective self-regulatory programs must constantly evolve to take into account changes in business models, technologies, and public policy. The NAI strives to stay abreast of all such changes and ensure that the substantive obligations imposed on member companies reflect the current landscape. To that end, in 2012, the NAI convened a working group composed of dozens of member companies. That group, NAI staff, and the NAI Board of Directors evaluated the current advertising ecosystem, convening numerous conference calls to discuss such topics as: (1) changes in the ecosystem that the Code should address; (2) notice requirements; (3) choice requirements; and (4) prohibited uses of data collected for Interest-Based Advertising. From that work, the NAI developed a draft code of conduct, which it put out for public comment in March 2013. The NAI incorporated the comments it received into this final 2013 NAI Code of Conduct.

Purpose of this Revised Code

With this 2013 update to its Code of Conduct, the NAI seeks to accomplish several goals. First, the NAI wants to ensure that NAI member companies continue to implement, honor, and maintain strong standards with respect to the collection and use of data for online advertising. The NAI recognizes the unique role that NAI members play in the Internet ecosystem. While our members are responsible for driving much of the revenue that allows web publishers and other "first parties" to provide the content and services that users enjoy for free, they also present unique concerns for some precisely because they lack a direct relationship with users. Even though NAI member companies primarily collect and use only non-personally identifiable information, we believe that the NAI must impose rigorous education, notice, and choice requirements. And, as noted above, we believe we must continue to adapt those requirements to ensure that our self-regulatory framework remains relevant and meaningful.

Second, the "third party" online advertising ecosystem has expanded and become more complex since the NAI last updated its Code of Conduct in 2008. At its inception in 2000 and into 2008, the NAI was composed primarily of "ad networks" that collected data across a network of websites for the purpose of serving ads based upon users' presumed interests. Today, NAI membership is still composed entirely of "third parties" (or, in the case of some member companies, with the parts of the businesses that collect data as a "third party"), but the variety of business models is substantially more varied. NAI members today include not only ad networks, but also demand side platforms (DSPs), supply side platforms (SSPs), data management platforms (DMPs), data aggregators, ad exchanges, creative optimization firms, yield optimization firms, sharing utilities, and others. The NAI wants to ensure that it can welcome all companies in the ad technology space, and that its Code of Conduct is flexible enough to accommodate both existing and emerging business models and practices.

Finally, since the NAI last updated its Code of Conduct in late 2008, there have been significant changes in the regulatory and self-regulatory landscape surrounding online advertising. Shortly after the NAI released its 2008 Code of Conduct, the FTC in February 2009 released a Staff Report setting forth a set of Self-Regulatory Principles for Online Behavioral Advertising. Those principles are substantially similar to the NAI Code, and the NAI had informally adopted those principles through its compliance program. Nevertheless, the FTC's

OBA Principles – and the "enhanced notice" requirement in particular – have not until this time been formally codified by the NAI. In addition, also since the NAI last updated its Code of Conduct, the Digital Advertising Alliance (DAA) adopted, and has since begun enforcing, principles governing the collection and use of data for Online Behavioral Advertising (OBA). The DAA has also adopted the "AdChoices" standard industry icon, which is designed to inform users where ads are targeted to their interests. That icon, which is served trillions of times a month, is now an important component of self-regulation of online behavioral advertising practices.

Scope of the NAI Code

The NAI Code governs only NAI member companies. It does not govern all data collection by member companies, but is limited to their "Interest-Based Advertising" and "Ad Delivery and Reporting" activities as defined in this Code. The Code does *not* govern member companies' activities insofar as they are acting as first parties or solely on behalf of a single first party. For example, a company collecting and using data on a single domain or set of affiliated domains for the purpose of conducting analytics would not be covered by the Code so long as the data was not combined with data obtained on non-affiliated websites or sold for use on non-affiliate websites. To the extent a company collected data across non-affiliated websites, either for the purpose of engaging in Interest-Based Advertising or for Ad Delivery and Reporting across multiple websites, that activity would be governed by the NAI Code.

As of today, the NAI Code applies to members' Interest-Based Advertising and Ad Delivery and Reporting Activities that: (1) occur in the United States or (2) apply to U.S. users. We encourage NAI members to apply the high standards of the NAI Code to these activities globally (and many member companies do so), but only U.S.-based online advertising activities are subject to the NAI compliance program today. Member companies are, of course, expected to abide by the laws applicable to their businesses. The NAI Code generally goes above the requirements of applicable laws. However, to the extent there is a conflict between the NAI Code and a member's obligations under applicable law, the member should abide by the applicable law.

While NAI members currently use cookies, javascript, and pixels for the activities governed by the NAI, the Code is intended to be neutral with respect to the technologies used for Interest-Based Advertising. As Interest-Based Advertising models expand beyond traditional desktop web browsing to mobile devices and tablets where cookies are ineffective, companies may use other technologies to collect data and target ads. The NAI anticipates that such technologies, properly implemented, will also provide users an appropriate degree of transparency and control, and the principles contained herein are intended to apply regardless of the technology used.[1]

Relationship to the DAA's OBA and Multi-Site Data Principles

As noted above, the Digital Advertising Alliance has developed and enforces, through the Better Business Bureau (BBB) and the Direct Marketing Association (DMA), a set of Principles governing the collection and use of data for OBA, as well as a set of Principles governing the collection of data across unaffiliated websites more generally.[2] The DAA is composed of six trade associations representing website publishers, advertisers, offline data providers, *and* the "third parties" represented by the NAI. As a result, its Principles for OBA and for Multi-Site Data collection govern the entire Internet ecosystem and impose obligations not only on third parties, but also on website publishers.

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1 The NAI Code is not intended to govern member companies' collection and use of data on mobile applications. It is, however, intended to establish baseline standards from which mobile application-specific guidelines can be developed. The NAI is releasing in a separate document guidelines that specify the notice, choice, and other protections required of companies collecting and using data from mobile applications for Interest-Based Advertising and Ad Delivery and Reporting.

2 *See* Digital Advertising Alliance, Self-Regulatory Principles for Online Behavioral Advertising (DAA OBA Principles), *available at* http://www.aboutads.info/obaprinciples; *see also* Digital Advertising Alliance, Self-Regulatory Principles for Multi-Site Data (DAA Multi-Site Data Principles), *available at* http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf.

Because NAI member companies are bound both by the DAA's Principles and by the NAI Code, this Code largely harmonizes with the DAA's Principles as they apply to the OBA and Ad Delivery and Reporting by NAI member companies. Thus, for example, the Code imposes an "enhanced" notice requirement for ads informed by Interest-Based Advertising and also makes explicit the purposes for which member companies may not use, or allow the use of, data collected for advertising purposes (borrowing from the DAA's Multi-Site Data Principles). As always, unlike the DAA's OBA Principles, the NAI Code applies only to NAI members,[3] and only to the extent they are engaged in activities addressed by the NAI Code. As a result, obligations applicable to other companies in the advertising ecosystem contained in the DAA Principles are not included in the NAI Code. Similarly, obligations imposed on third-party advertising companies are in some cases phrased differently in this Code than in the DAA Principles.

In some instances, this Code (like the 2008 NAI Code) imposes obligations on member companies beyond those required by the current DAA OBA and Multi-Site Data Principles. Those obligations include: (1) heightened notice and consent requirements for the merger of PII with Non-PII collected and used for "Interest-Based Advertising" (as defined in the Code); (2) contractual notice requirements; (3) a requirement to provide transparency with respect to any health-related interest segments; (4) a requirement that the technologies used for Interest-Based Advertising provide users an appropriate degree of transparency and control; (5) data retention limits and disclosure obligations; (6) reliable sources requirements; (7) limitations on the transfer of data collected for online advertising activities; and (8) access requirements for PII and associated Non-PII used for Interest-Based Advertising. These additional obligations ensure both consumers and companies that do business with third parties that NAI member companies implement, honor, and maintain the highest standards for data collection for online advertising – increasing trust across the entire ecosystem. Thus, the NAI Code complements and enhances the DAA Principles.

Framework of the Code

The fundamental principle underpinning this Code is that differing notice and choice obligations should apply depending on the sensitivity and the proposed use of the data. This basic principle, which has long been recognized by the NAI, is supported by the FTC Final Privacy Report and the White House Privacy Report,[4] both of which explicitly acknowledge that privacy protections should not be applied in a "one-size fits all" approach but should be flexible, scalable, and take into account the context in which the data is collected and used.

To that end, this Code identifies three categories of data of varying levels of "identifiability" and imposes different obligations on NAI members based on the sensitivity of the data. These three categories are: (1) Personally Identifiable Information (PII); (2) Non-PII; and (3) De-Identified Data. PII refers to data that is used or intended to be used to identify a particular *individual*; Non-PII refers to data that is not linked or reasonably linkable to an individual, but is linked or reasonably linkable to a particular *computer or device*; and De-Identified Data refers to data that is not linkable to either an individual or a device. In addition, this Code imposes obligations with respect to "Sensitive Data" and "Precise Geolocation Data." Sensitive Data is defined to include specific types of PII that are sensitive in nature, as well as Non-PII related to precise health information and sexual orientation. Precise Geolocation Data is a defined term under the Code.

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3 The NAI Code does promote some best practices for non-NAI member companies. For example, the NAI requires member companies to work with reliable sources and requires member companies to require their website partners to provide notice and choice on their sites. The NAI does not, however, impose any obligations on non-NAI member companies.

4 Federal Trade Commission, Protecting Consumer Privacy in an Era of Rapid Change, Recommendations for Businesses and Policymakers (March 2012) (FTC Final Privacy Report), *available at* http://www.ftc.gov/os/2012/03/120326privacyreport.pdf; White House, Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy (February 2012) (White House Privacy Report), *available at* http://www.whitehouse.gov/sites/default/files/privacy-final.pdf.

2013 NAI CODE OF CONDUCT

I. Definitions

A. INTEREST-BASED ADVERTISING

Interest-Based Advertising means the collection of data across web domains owned or operated by different entities for the purpose of delivering advertising based on preferences or interests known or inferred from the data collected.

B. AD DELIVERY AND REPORTING

Ad Delivery and Reporting is separate and distinct from Interest-Based Advertising and means the logging of page views or the collection of other information about a computer or device for the purpose of delivering ads or providing advertising-related services, including but not limited to: providing a specific advertisement based on a particular type of browser or time of day; statistical reporting in connection with the activity on a website; analytics and analysis; optimization of location of ad placement; ad performance; reach and frequency metrics (*e.g.*, frequency capping); security and fraud prevention; billing; and logging the number and type of ads served on a particular day to a particular website.

C. PERSONALLY IDENTIFIABLE INFORMATION (PII)

Personally Identifiable Information (PII) is any information used or intended to be used to identify a particular individual, including name, address, telephone number, email address, financial account number, and government-issued identifier.

D. NON-PII

Non-PII is data that is not PII as defined in the NAI Code, but that is linked or reasonably linkable to a particular computer or device. Non-PII includes, but is not limited to, unique identifiers associated with users' computers or devices and IP addresses, where such identifiers or IP addresses are not linked to PII. Non-PII does not include De-Identified Data.

E. DE-IDENTIFIED DATA

De-Identified Data is data that is not linked or reasonably linkable to an individual or to a particular computer or device.

F. PRECISE GEOLOCATION DATA

Precise Geolocation Data is information that describes the precise real-time geographic location of an individual derived through any technology that is capable of determining with reasonable specificity the actual physical location of a person or device, such as GPS level latitude-longitude coordinates or Wi-Fi triangulation.

G. SENSITIVE DATA

Sensitive Data includes:

- Social Security Numbers or other government-issued identifiers;
- Insurance plan numbers;
- Financial account numbers;
- Precise information about past, present, or potential future health or medical conditions or treatments, including genetic, genomic, and family medical history; and
- Sexual orientation.

H. OPT-IN CONSENT

Opt-In Consent means that a user takes some affirmative action that manifests the intent to opt in.

I. OPT-OUT MECHANISM

Opt-Out Mechanism is an easy-to-use mechanism by which users may exercise choice to disallow Interest-Based Advertising with respect to a particular browser or device.

II. Member Requirements

A. EDUCATION

1. Members shall collectively maintain an NAI website to serve as a centralized portal offering education about Interest-Based Advertising, the requirements of the NAI Code, and information about and centralized access to user choice mechanisms.

2. Members shall use reasonable efforts, both individually and collectively, to educate users about Interest-Based Advertising, and the choices available to them with respect to Interest-Based Advertising.

B. TRANSPARENCY AND NOTICE

1. Each member company shall provide clear, meaningful, and prominent notice on its website that describes its data collection, transfer, and use practices for Interest-Based Advertising and/or Ad Delivery and Reporting. Such notice shall include descriptions of the following, as applicable:

    a. The Interest-Based Advertising and/or Ad Delivery and Reporting activities undertaken by the member company;

    b. The types of data collected, including any PII collected or used for Interest-Based Advertising or Ad Delivery and Reporting purposes;

    c. How such data will be used, including transfer, if any, to a third party;

    d. A general description of the technologies used by the company for Interest-Based Advertising and Ad Delivery and Reporting;

    e. That the company is a member of the NAI and adheres to the NAI Code;

    f. The approximate length of time that data used for Interest-Based Advertising or Ad Delivery and Reporting will be retained by the member company; and

    g. An Opt-Out Mechanism.

2. Members that use standard interest segments for Interest-Based Advertising that are based on health-related information or interests shall disclose such segments on their websites.

3. Members shall require the websites where they collect data for Interest-Based Advertising to clearly and conspicuously post notice that contains:

   a. A statement of the fact that data may be collected for Interest-Based Advertising;

   b. A description of types of data that are collected for Interest-Based Advertising purposes;

   c. An explanation of how, and for what purpose, the data collected will be used or transferred to third parties; and

   d. A conspicuous link to an Opt-Out Mechanism.

4. As part of members' overall efforts to promote transparency in the marketplace, members should make reasonable efforts to enforce contractual notice requirements and to otherwise ensure that all websites where they collect data for Interest-Based Advertising purposes furnish notices comparable to those described above.

5. Members shall provide, or support the provision of, notice of Interest-Based Advertising data collection and use practices and the choices available to users in or around advertisements that are informed by Interest-Based Advertising.

C. USER CONTROL

1. The level of choice that members must provide is commensurate with the sensitivity and intended use of the data. Specifically:

   a. Use of Non-PII for Interest-Based Advertising shall require an Opt-Out Mechanism, which shall be available both on the NAI website and on the member's website.

   b. Use of PII to be merged with Non-PII on a going-forward basis for Interest-Based Advertising purposes (prospective merger) shall require provision of an Opt-Out Mechanism accompanied by robust notice of such choice.

   c. Use of PII to be merged with previously collected Non-PII for Interest-Based Advertising purposes (retrospective merger) shall require a user's Opt-In Consent.

   d. Use of Precise Geolocation Data for Interest-Based Advertising shall require a user's Opt-In Consent.

   e. Use of Sensitive Data for Interest-Based Advertising shall require a user's Opt-In Consent.

2. When a user has opted out of Interest-Based Advertising, member companies must honor the user's choice as to the particular browser or device. Companies may continue to collect data for other purposes, including Ad Delivery and Reporting.

3. The technologies that members use for Interest-Based Advertising purposes must provide users with an appropriate degree of transparency and control.

D. USE LIMITATIONS

1. Member companies shall not create Interest-Based Advertising segments specifically targeting children under 13 without obtaining verifiable parental consent.

2. Members shall not use, or allow use of, data collected for Interest-Based Advertising or Ad Delivery and Reporting for any of the following purposes:

   a. Employment Eligibility;

   b. Credit Eligibility;

   c. Health Care Eligibility; or

   d. Insurance Eligibility and Underwriting and Pricing.

3. Members who make a material change to their Interest-Based Advertising data collection and use policies and practices shall obtain Opt-In Consent before applying such change to data collected prior to the change. In the absence of Opt-In Consent, data collected prior to the material change in policy shall continue to be governed by the policy in effect at the time the information was collected.

E. TRANSFER RESTRICTIONS

1. Members shall contractually require that any unaffiliated parties to which they provide PII for Interest-Based Advertising or Ad Delivery and Reporting services adhere to applicable provisions of this Code.

2. Members shall contractually require that all parties to whom they provide Non-PII collected across web domains owned or operated by different entities not attempt to merge such Non-PII with PII held by the receiving party or to re-identify the individual without obtaining the individual's Opt-In Consent. This requirement does not apply where the Non-PII is proprietary data of the receiving party.

F. DATA ACCESS, QUALITY, SECURITY, AND RETENTION

1. Members shall provide users with reasonable access to PII, and other information that is associated with PII, retained by the member for Interest-Based Advertising purposes.

2. Members shall conduct appropriate due diligence to ensure that they obtain data used for Interest-Based Advertising from reliable sources that provide users with appropriate levels of notice and choice.

3. Members that collect, transfer, or store data for use in Interest-Based Advertising and/or Ad Delivery and Reporting shall provide reasonable security for that data.

4. Members engaged in Interest-Based Advertising and/or Ad Delivery and Reporting shall retain Non-PII and PII collected for these activities only as long as necessary to fulfill a legitimate business need, or as required by law.

III. Accountability

A. MEMBER OBLIGATIONS

1. The NAI Code is self-regulatory in nature and is binding on all members of the NAI.

2. To help ensure compliance with the NAI Code, each member company should designate at least one individual with responsibility for managing the company's compliance with the NAI Code and providing training to relevant staff within the company.

3. Membership in the NAI requires public representations that a member company's business practices are compliant with each aspect of the NAI Code that applies to its business model, as supplemented by applicable implementation guidelines that shall be adopted by the NAI Board from time to time. Such representations involve explicit acknowledgement of NAI membership and compliance with the Code in each member's publicly available privacy policy, and inclusion in a group listing of participating companies on a designated page of the NAI website.

B. NAI OVERSIGHT

1. Members are required to annually undergo reviews of their compliance with the NAI Code by NAI compliance staff or other NAI designee. Members shall fully cooperate with NAI compliance staff or NAI designee, including in the course of annual compliance reviews and any investigation of a potential violation of the NAI Code.

2. The NAI's policies and procedures for annual compliance reviews and compliance investigations may be updated from time to time, and these policies and procedures shall be made available on the NAI website. These policies and procedures shall not only describe the process undertaken for a compliance review, but shall also articulate the penalties that could be imposed for a finding of non-compliance, including referral of the matter to the U.S. Federal Trade Commission.

3. The NAI shall annually post on its website a report summarizing the compliance of its members with the NAI Code and NAI policies, including any enforcement actions taken and a summary of complaints received.

C. USER COMPLAINTS

1. The NAI website shall include a centralized mechanism to receive user questions or complaints relating to members' compliance with this Code.

2. Each member shall provide a mechanism by which users can submit questions or concerns about the company's collection and use of data for Interest-Based Advertising, and shall make reasonable efforts to timely respond to and resolve questions and concerns that implicate the company's compliance with the NAI Code and NAI policies.

COMMENTARY ON 2013 NAI CODE OF CONDUCT

The purpose of the commentary is not to add substantive obligations on member companies or to alter the principles set forth in the Code itself, but to explain the intent behind certain provisions of the Code. The commentary is also intended to provide examples of ways member companies can meet the substantive obligations of the Code.

I. Definitions

INTEREST-BASED ADVERTISING

Interest-Based Advertising is defined as the collection of data across web domains owned or operated by different entities for the purpose of delivering advertising based on preferences or interests known or inferred from the data collected. Consistent with the DAA's OBA Principles and the FTC's definition of Online Behavioral Advertising, the definition of Interest-Based Advertising does *not* include "contextual advertising," in which the ad selected depends upon the content of the page on which it is served, or "first party" marketing, in which ads are customized or products are suggested based on the content of the page or users' activity on the page (including the content they view or the searches they perform).[5] To the extent NAI member companies are engaged in such activities, those activities are outside of the scope of the NAI Code.

Online Behavioral Advertising/Interest-Based Advertising has always been understood to include the collection of data about a computer or device's web viewing (or "click stream") behavior over time to place browsers or devices into interest segments such as "car enthusiast" or "interested in travel." In this Code, Interest-Based Advertising also includes the practice known as "retargeting," where the ad served on one website is selected based on a visit to a different website. For example, if a user visits SampleTravel.com, and then visits SampleNewspaper.com and is served an ad for SampleTravel based on the previous visit to SampleTravel.com, that activity falls within the definition of Interest-Based Advertising even though the ad was selected based on a single website visit and the user may not have been included in an interest segment such as "interested in travel."

PII, NON-PII, AND DE-IDENTIFIED DATA

The NAI Code divides data into three categories of "identifiability": PII, Non-PII, and De-Identified Data. Retrospective merger of PII with Non-PII for Interest-Based Advertising requires Opt-In Consent; use of Non-PII alone for Interest-Based Advertising requires notice and Opt-Out Consent; and use of De-Identified Data does not impose specific notice, consent, or data retention requirements. In addition, as discussed below, the Code imposes obligations with respect to "Sensitive Data" and "Precise Geolocation Data," both of which require Opt-In Consent when used for Interest-Based Advertising.

Under this framework, data is considered PII if it is used or intended to be used to identify an *individual*, Non-PII if it is linked or reasonably linkable to a specific *computer or device*, and De-Identified Data if it is not linked or reasonably linkable to either an individual or to a specific computer or device. This framework mirrors the "reasonable linkability" analysis set forth in the FTC Final Privacy Report, which rejected a "bright line" test and instead adopted a scaled approach to evaluating risks and determining the obligations that attach to data.[6] This scaled approach recognizes that different categories of data present different levels of risk. Although regulators have raised questions about the utility of maintaining the traditional distinctions between

5 *See* FTC Final Privacy Report, *supra* note 4, at 41; DAA OBA Principles, *supra* note 2, at 10-11 (defining OBA to exclude first party activity, ad delivery and ad reporting, and contextual advertising).

6 *See* FTC Final Privacy Report, *supra* note 4, at 19-20 (acknowledging commenters' concerns that requiring the same level of protection for all data might undermine companies' incentives to avoid collecting data that is easily identified).

PII and Non-PII,[7] we believe it is appropriate for the NAI Code to continue to encourage efforts to prevent members from linking the Non-PII they collect for Interest-Based Advertising and Ad Delivery and Reporting purposes with particular individuals. To encourage these data minimization efforts, the NAI Code continues to distinguish between PII and Non-PII and to impose different notice and choice requirements for each, with the level of protection required increasing with the "identifiablitity" and sensitivity of the data.

PII

PII includes any information used or intended to be used to identify a particular individual, including name, address, telephone number, email address, financial account number, and government-issued identifier. In addition to the examples of PII enumerated in the definition, PII could include new technologies not currently in use for Interest-Based Advertising. For example, "faceprints" would be considered PII to the extent a company employed facial recognition technology for the purpose of identifying individuals, even if such faceprints were not linked to name, address, telephone number, email address, or other traditional identifiers.

Non-PII

Non-PII is defined as "data that is not PII as defined in the NAI Code, but that is linked or reasonably linkable to a particular computer or device. Non-PII includes, but is not limited to, unique identifiers associated with users' computers or devices and IP addresses, where such identifiers or IP addresses are not linked to PII. Non-PII does not include De-Identified Data." In order for data to be treated as Non-PII under the NAI Code, the company would need to: (1) take measures to ensure that the data cannot reasonably be linked to a particular individual, such as using only randomly generated numeric identifiers rather than names or other personal information; (2) publicly commit to maintain the data as Non-PII, and (3) take reasonable steps, such as contractual measures, to prevent any companies with whom it shares the Non-PII from attempting to merge the data with PII or otherwise using the data to identify a particular individual (unless the Non-PII is proprietary to the receiving party).

De-Identified Data

The NAI Code defines De-Identified Data as "data that is not linked, or reasonably linkable to an individual or to a particular computer or device." In order to be considered "De-Identified Data" under the NAI Code, the company must take steps similar to those enumerated above with respect to Non-PII: (1) take reasonable steps to ensure that the data cannot reasonably be re-associated or connected or associated with an individual or with a particular computer or device, such as by removing the cookie identifier or IP address, or truncating the IP address; (2) publicly commit to maintain and use the data in a de-identified fashion and not attempt to re-associate the data with an individual or with a particular computer or device; (3) obtain satisfactory assurance that any non-affiliate that receives the De-Identified Data will not attempt to reconstruct the data in a way such that an individual or computer or device may be re-identified and will use or disclose the De-Identified Data only for uses specified by the NAI member company. This process mirrors the definition of "De-Identification Process" in the DAA's Multi-Site Principles.[8]

SENSITIVE DATA

Health

It is difficult to draw bright lines between "sensitive" and "non-sensitive" data in the health space. Whether a particular piece of data is sensitive may lie in the eye of the beholder and depend upon a number of subjective considerations. In recognition of that subjectivity, and following commentary provided in response to our draft 2008 Code, the NAI has not developed an exhaustive list of conditions or treatments

7 *See id.* at 18-19.

8 *See* DAA Multi-Site Data Principles, supra note 2, at 8.

that it considers to be "precise."[9] Rather, the NAI requires companies to consider a number of factors in determining whether a particular condition or treatment is "precise" and therefore requires the company to obtain Opt-In Consent if it wishes to serve ads based on presumed interest in the topic,[10] including: the seriousness of the condition, its prevalence, whether it is something that an average person would consider to be particularly private in nature, whether it is treated by over-the-counter or prescription medications, and whether it can be treated by modifications in lifestyle as opposed to medical intervention. Under this analysis, all types of cancer, mental health-related conditions, and sexually transmitted diseases are "precise" and require Opt-In Consent. Other conditions, such as acne, high blood pressure, heartburn, cold and flu, and cholesterol management, the NAI considers to be generic and not topics that require Opt-In Consent. Similarly, interest in diet and exercise as well as vitamins and supplements typically do not relate to "precise information about past, present, or potential future health or medical conditions or treatments, including genetic, genomic, and family medical history" for which Opt-In Consent is required.

Section II(B)(2) of the NAI Code requires member companies to publicly disclose any standard interest segments they use for Interest-Based Advertising that are related to health conditions or treatments. Together, these two sections require members to obtain Opt-In Consent to serve ads on non-affiliate websites that are based on presumed interest in precise or sensitive health conditions or treatments (whether through "standard" interest segments, custom segments, or retargeting), and to disclose (and provide an Opt-Out Mechanism for) any "standard" interest segments that are based on non-precise, non-sensitive, health-related interests.

Sexual Orientation

By adding sexual orientation to the list of categories considered "sensitive," the NAI intends to prohibit companies from collecting or storing information about a user's status or perceived status as gay, lesbian, bisexual, or transgendered for Interest-Based Advertising without obtaining Opt-In Consent. The NAI does *not* intend to prohibit retargeting based on visits to dating websites, wedding registries, services for couples (such as travel), or similar content. The NAI does, however, intend to prohibit the creation of interest segments such as "gay male" or "interested in LGBT issues," as well as the retargeting of visitors to sites that reflect the user's sexual orientation, such as dating or travel sites targeted to LGBT visitors. While advertising on such websites and to the LGBT community is incredibly valuable, this policy recognizes that LGBT status may be considered sensitive in some contexts, and thus that Opt-In Consent should be obtained before using such data for Interest-Based Advertising.

PRECISE GEOLOCATION DATA

The definition of "Precise Geolocation Data" is intended to recognize that a range of technologies now and in the future may be able to provide "with reasonable specificity" the actual physical location of a device. At the same time, the definition is intended to *exclude* more general geographic location data, such as IP address-derived location, postal code, zip code, city, and neighborhood. While the NAI has removed "Precise Geolocation Data" from the definition of "Sensitive Data" for purposes of this Code update, the NAI believes that a user's precise location is often sensitive, particularly when such data can be used to build detailed profiles of user movements over time.

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9 The 2008 NAI Code was always intended to require Opt-In Consent to target users on the basis of any presumed interest in, as well as actual knowledge of, "precise" health conditions or treatments, not merely actual knowledge that the user suffers from such condition. Nevertheless, there has been considerable confusion among member companies and others on this point. *See, e.g.* http://blog.privacychoice.org/2011/12/14/yet-another-better-definition-of-sensitive-boundaries-for-ad-targeting/ (stating that the NAI's standard applies only to the actual health status of the user). With this commentary, the NAI intends to make clear that targeting users on the basis of any presumed interest in, not merely actual knowledge of, precise or sensitive health-related topics requires Opt-In Consent.

10 These requirements apply only to the extent member companies are collecting data to associate users with presumed interests. They do not apply to members' services that do not require tagging users' browsers or devices, such as categorizing websites associated with particular conditions or treatments so that advertisers can serve contextual advertising on those sites.

II. Member Requirements

MEMBER-PROVIDED NOTICE (§ II(B)(1))

Section II(B)(1) of the NAI Code requires companies to provide clear, meaningful, and prominent notice concerning their data collection practices. To meet the "prominent" requirement, companies should provide conspicuous links to their consumer-facing disclosures, such as obvious links to privacy policies, "consumer information" links, and independent links to Opt-Out Mechanisms. Links to privacy policies and other consumer-facing materials (such as an opt-out page) should be in a location that is easy for users to locate, in an appropriate size font, and in a color that does not blend in with the background of the page. To meet the "clear and meaningful" requirement, the notice should describe the company's data collection and use practices in an understandable manner and accurately reflect the company's data collection and use practices. In describing the types of data they collect, members that obtain data from third parties for purposes of supplementing user profiles should disclose the data they collect and how they use it for Interest-Based Advertising.

Finally, members should describe their data collection and use practices in as clear and concise a manner as possible. Members are also required to disclose the technologies they use for Interest-Based Advertising and Ad Delivery and Reporting. Member companies are *not* required to disclose the technologies they use with a level of specificity that would reveal their proprietary business models.

HEALTH TRANSPARENCY (§ II(B)(2))

Under section II(C)(1)(e) of the Code, member companies continue to be required to obtain Opt-In Consent for the collection and use for Interest-Based Advertising of "Sensitive Data," which is defined to include "precise information about past, present, or potential future health or medical conditions or treatments, including genetic, genomic, and family medical history." As a result, if an NAI member company were to seek to serve ads to users on the basis of knowledge of a user's health condition or treatments or presumed interest in sensitive health conditions such as cancer, mental health-related conditions, or sexually transmitted diseases, the company would need to clearly explain that intent and obtain Opt-In Consent for such use. The transparency requirement, by contrast, is intended to capture those interest segments for which Opt-In Consent is not required under the Code, but nevertheless may factor into an individual's decision about whether to opt out of Interest-Based Advertising by a particular member company. Thus, for example, member companies may seek to target users on the basis of such general health categories as headaches, allergies, or diet and fitness that would not require Opt-In Consent, but would require disclosure under the transparency policy. The disclosure may be in, or linked from, the member's privacy policy, in other consumer-facing materials, such as a preference manager, or in another location on the member's website that is reasonably easy for users to find.

In addition to disclosing their standard interest segments that are related to health conditions or treatments, members are expected to have internal policies governing any use of health-related targeting. Many NAI members do not have "standard" interest segments, but rather engage solely in retargeting, keyword retargeting, or the creation of "custom" segments. Other members do have standard interest segments, but also allow their clients to create custom or retargeted segments. In all such cases, members must ensure, consistent with Section II(C)(1)(e), that they obtain Opt-In Consent for any targeting (including retargeting or custom segments) that is based on "precise" health conditions or treatments.

WEBSITE NOTICE (§ II(B)(3)-(5))

Contractual Notice Requirements (§ II(B)(3)-(4))

Where an NAI member company has a direct contractual relationship with a website where it collects data for Interest-Based Advertising, it must contractually require the website to post notice of Interest-Based Advertising data collection and link to an Opt-Out Mechanism.[11] Such notice should be provided in a privacy policy or separate footer link, such as "About our Ads." Members should use reasonable efforts to enforce contractual notice provisions, as well as to ensure that notice is provided even in the absence of a contractual requirement to provide such notice. Members should seek to ensure that notice is provided where they collect data by, for example, regularly checking a reasonably sized sample of the websites where they collect data for Interest-Based Advertising to ensure that they provide appropriate notice and following up with those that do not.[12]

Enhanced Notice Requirement (§ II(B)(5))

The Code requires members to "provide, or support the provision of" notice in or around the ads they serve. The NAI expects that companies who lack the ability to include the standard industry icon or other form of enhanced notice on ads will nevertheless support the provision of such notice by configuring their systems to support that capability. In addition, if a publisher or advertiser asks an NAI member to conduct a campaign informed by Interest-Based Advertising without enhanced notice, the NAI member should decline to conduct the campaign and should report such advertisers and publishers to the BBB or DMA compliance program.[13] The NAI will work with DAA and DAA member organizations to educate advertisers and publishers on the requirements of the DAA program, including the requirement that all Interest-Based ads include enhanced notice.

CHOICE (§ II(C))

Provision of Choice Mechanisms (§ II(C)(1))

The NAI Code requires members to provide an Opt-Out Mechanism for the collection and use of Non-PII for Interest-Based Advertising purposes, and to obtain Opt-In Consent for the use of Sensitive Data, Precise Geolocation Data, and the retrospective merger of PII and Non-PII for Interest-Based Advertising purposes. For the prospective merger of PII and Non-PII for Interest-Based Advertising purposes, the Code requires the provision of an Opt-Out Mechanism coupled with "robust" notice. To be considered "robust" under this provision, such notice must be provided immediately above or below the mechanism used to authorize the submission of any PII. The notice should also clearly and conspicuously describe the scope of any Non-PII to be merged with PII and how the merged data would be used for Interest-Based Advertising purposes.

Honoring Opt-Out Choices (§ II(C)(2))

Following an opt out, companies must cease collecting and using data for Interest-Based Advertising purposes, but may continue to collect data for other purposes, including Ad Delivery and Reporting. It is widely acknowledged that certain commonly accepted "internal operations" practices should not require user choice and thus that collection of data for such purposes following an opt out is permissible. Such purposes

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11 The requirement to contractually require a website publisher to post notice applies only where the NAI member itself is collecting data. Some member companies do not themselves collect data, but facilitate others' collection of data for Interest-Based Advertising purposes, such as by providing software or other technology that allows others to collect such data. The NAI encourages, but does not require, members to ensure that proper notice is provided where their technology is used to collect data for Interest-Based Advertising purposes.

12 The contractual notice provisions are intended to ensure that users are provided notice at the point of data collection, even where there is no ad served. Some member companies may collect data for Interest-Based Advertising purposes only where they serve ads. Member companies that provide in-ad notice pursuant to section II.B(5) and only collect data for Interest-Based Advertising where they serve ads will ensure that notice is provided wherever they collect data for Interest-Based Advertising, and need not contractually require their website partners to provide notice or enforce contractual notice requirements.

13 Similarly, because enhanced notice will now be a requirement of the NAI Code, the NAI will have authority to enforce the enhanced notice requirements against NAI member companies under its compliance and enforcement program.

include frequency capping and similar advertising inventory metrics.[14] They also include calculating usage statistics and verifying ad delivery.[15] The NAI Code accordingly allows member companies to continue to collect data for such purposes following a user's choice to opt out.

While companies may continue to collect and use data for purposes other than Interest-Based Advertising following an opt out, their Opt-Out Mechanisms must be consistent with the representations they make to users and to NAI staff. The NAI works with each member company during the pre-certification and annual review processes to ensure that its opt out, at minimum, stops the collection of data across unaffiliated domains for purposes of delivering advertising based on inferred or known preferences or interests. Some companies' opt-out tools cover activity that does not squarely fall within the definition of "Interest-Based Advertising" as defined in this Code. The NAI expects that companies' opt outs will be consistent with the representations made to NAI staff and in their privacy policies and will hold companies accountable for their representations through the NAI's sanctions procedures.

Technologies Used for Interest-Based Advertising (§ II(C)(3))

The NAI Code is intended to be technology-neutral, imposing the same obligations on member companies regardless of the technologies they use for Interest-Based Advertising. At the same time, the NAI believes that all technologies member companies use for online advertising activities should afford users an appropriate degree of transparency and control. While member companies currently primarily use cookies and pixel tags for Interest-Based Advertising, the NAI believes that technologies other than standard HTTP cookies can provide an "appropriate" level of transparency and control when implemented consistent with NAI standards. The NAI is working to develop policies with respect to the use of non-cookie technologies, particularly those that facilitate cross-device tracking and those that allow tracking on mobile devices.

USE LIMITATIONS (§ II(D))

Children (§ II(D)(1))

The NAI Code forbids member companies from creating interest segments specifically targeted to children under 13 without obtaining verifiable parental consent. NAI member companies, of course, must also comply with the FTC's COPPA rules as such rules may be updated from time to time.

Prohibited Uses (§ II(D)(2))

The NAI's prohibition on the use of data collected for Interest-Based Advertising and Ad Delivery and Reporting for eligibility decisions is consistent with the White House's "Respect for Context" principle – that consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which the data was provided.[16] Users are made aware, through in-ad notice and privacy policies of website publishers, that data is collected for the purpose of providing more relevant ads. The use of such data for purposes other than marketing, including any insurance, health, credit, or employment eligibility decisions, would be inconsistent with that context.

Material Changes (§ II(D)(3))

A "material" change for purposes of this provision generally will relate to the collection or use of PII for Interest-Based Advertising purposes or the merger of Non-PII with PII when a company previously represented that it does not collect PII for Interest-Based Advertising purposes or merge PII with Non-PII. Changes are

14 *See* FTC Final Privacy Report, *supra* note 4, at 39.

15 *See id.* at 12 (stating that data collection for such purposes may not require companies to provide "extensive options for control").

16 *See* White House Privacy Report, *supra* note 4, at 18 (encouraging companies engaged in online advertising to refrain from collecting, using, or disclosing data that may be used to make decisions regarding employment, credit, and insurance eligibility or similar matters that may have significant adverse consequences to consumers and noting that such uses are at odds with generating revenue and providing consumers with ads that they are more likely to find relevant).

not material for purposes of this provision if they result in less collection or use of data, or when a company changes its disclosures to provide greater transparency about its existing practices. We encourage member companies to innovate and provide increased transparency around their data collection and use practices, and this section is not intended to cover efforts to provide increased transparency for existing practices.

TRANSFER RESTRICTIONS (§ II(E))

The restrictions on the transfer and use of data collected across non-affiliate websites for Interest-Based Advertising or Ad Delivery and Reporting purposes are extensions of the requirements set forth above for data to be treated as Non-PII rather than PII under the NAI Code. In addition to contractually forbidding the third party from merging the Non-PII collected across non-affiliated websites with PII without obtaining the user's Opt-In Consent or from otherwise attempting to identify the individual using Non-PII, members should impose technical measures to help prevent the receiving party from engaging in such activities. For example, member companies that pass encrypted data to third parties should not provide the encryption key. These restrictions do not apply when the NAI member is acting as a service provider for a single party and the data transferred is proprietary to that party.

ACCESS (§ II(F)(1))

NAI member companies collect and use data for marketing purposes. Indeed, members are forbidden from using, or allowing to be used, the data they collect for any eligibility decisions. In light of the limited purposes to which member companies are permitted to use the data they collect, the NAI Code requires member companies to provide reasonable access to any PII and associated Non-PII collected and used for Interest-Based Advertising purposes, but does *not* require companies to provide access to Non-PII that is not associated with PII. Though not required by the NAI Code, some NAI member companies provide users access to Non-PII-based interest segments associated with their browsers. The NAI believes that these "preference managers" are an excellent means of providing users increased levels of transparency and control. Accordingly, the NAI continues to encourage such access to Non-PII as a best practice.

RELIABLE SOURCES (§ II(F)(2))

Generally, the NAI encourages member companies to obtain data from companies that are part of the NAI or another self-regulatory program. Additional steps that companies should take to ensure that their data sources provide appropriate protection for data include: (1) reviewing the company's privacy policy; (2) understanding the technologies the company uses to collect data and whether the company provides an effective opt out that, if possible, is included on an industry-wide opt-out page; (3) ensuring that the data source secures an appropriate level of consent; and (4) reviewing the company's marketing materials to understand how the company collects data from users and what types of data it collects. Such measures are particularly important when member companies obtain data from companies that are not NAI members or otherwise subject to oversight of their privacy practices.

DATA RETENTION (§ II(F)(4))

The NAI Code requires member companies to keep data that is "reasonably linkable to a device," and thus considered Non-PII under the Code (or any PII used for Interest-Based Advertising or Ad Delivery and Reporting purposes) only so long as necessary to serve their business needs. In accordance with section II(B)(1)(f), member companies are required to publicly disclose the period for which they retain such data for those purposes. At the end of that publicly stated retention period, members are required to either delete such data, or to render it De-Identified Data by taking steps to ensure that it cannot reasonably be linked to a particular person, computer, or device. Such measures may include removing unique user identifiers, removing IP addresses, and/or truncating the IP addresses.

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