

Arnold & Porter LLP
Comparison of FTC, NAI, and IAB
Behavioral Advertising (BA) Guidelines

	FTC Principles	NAI	IAB
Scope	Not detailed, but assumes any business model or technology. BA can be practiced by anyone, but some parties and practices exempted.	Assumes traditional advertising network model. BA can only be practiced by third parties, and BA requires using segments (matches of data to likely consumer interests).	Addresses alternative models including search engines, ISP's, and application developers. BA can be practiced by anyone, but most restrictions on third parties (ad networks) and service providers (ISP and application developers).
Data	Any data that can reasonably be associated with a particular person or device.	Distinguishes between PII and non-PII, with different notice, choice, and protections for each. Data also doesn't have to be linked to a device, only person.	Distinguishes between PII and non-PII, but fewer differences than NAI in treatment. PII: specific mention of collection in notices; service providers must try to anonymize data when sharing; restrictions on merging. Non-PII: Can include IP addresses if not linked to first and last name of specific person.
First Parties	<i>First-parties</i> exempt, unless they sell or share data with third parties for BA or participate in BA networks. Families of websites under common ownership or control are first parties if the relationships are consistent with consumer expectations.	<i>First parties</i> completely exempt, without restrictions on sharing data or participating in networks, unless they actually collect data across third party sites. Families determined by bright-line test of ownership or control (no reference to consumer expectations).	<i>First parties</i> mostly exempt, but still have some notice requirements where BA practiced on their sites. No restrictions on transferring data to third parties for BA, unless the first party itself practices BA on third party sites. Families determined by bright-line test of ownership or control (no reference to consumer expectations).
Exempt Practices	Contextual advertising - delivering ads based on data from a single session, and data not retained.	Ad Delivery & Reporting - collecting data for metrics on ad placements; and continuing to place targeted ads using basic data but not interest segments.	Contextual advertising, Ad Delivery, and Ad Reporting. AD: No precise limit on AD before it becomes BA, except for use of information over time, collected from non-affiliate sites. Data linked to a particular device is a factor.
Notice	Clear, concise and prominent on data collection, use, or transfer. Can appear in general privacy policies.	Two types of notice (Notice and Robust Notice), and both require "clear and conspicuous" disclosures. Both though can be satisfied by disclosure in general privacy policies. Also requires "reasonable access" for consumers to their own PII data.	Third parties and service providers: "clear, meaningful, and prominent" notices on their own websites (in general privacy policies, but linked to from page that collects or uses data). Enhanced notice is "in or around" actual ads placed (icon or link), and encouraged, but not required. First parties must provide notice of collection, use, and transfer policies in general privacy policy.

Choice	Opt-in for heightened privacy concerns; otherwise opt-out sufficient.	Opt-in for merging PII with already collected non-PII, and use of sensitive information. Opt-out for use of non-PII, and merging PII with newly-collected non-PII. Use of non-PII can continue for ADR even after users opt-out of BA.	Third parties provide opt-out of collection, use, or transfer. Service providers require opt-in consent before collection or use, and users can later withdraw consent. Prior consent required before collection or use of sensitive data, or for material changes to privacy policies.
Heightened Concerns	Material, retroactive changes to privacy policies. Use of sensitive data, broadly defined. Requires affirmative express consent.	Merging previously-collected non-PII with PII is material, but other changes may not be. Medical data only sensitive if condition is sensitive. Extends COPPA protections for non-PII data. Requires express consent, through some affirmative action.	Same approach as NAI (merging previously-collected non-PII with PII is material, but other changes may not be). Changes that collect less data automatically not material. Child data protections based on COPPA (PII or merged non-PII), but limited where entities have actual knowledge of age, or to sites directed to children under 13. Sensitive includes financial account numbers, SSAN's, prescriptions or medical records, but not wider data about medical conditions or sexual orientation. Standard only "consent" before collection or use - not "affirmative express consent."
Security & Retention	Reasonable security protections for all covered data. Retention for legitimate business needs or law enforcement.	Generally the same as Principles.	Different standard: "appropriate physical, electronic, and administrative safeguards". Retention the same as Principles.
Secondary Uses & Transfers	Outside BA: No restrictions on use of data for other purposes. Inside BA: If first parties transfer data to third parties, they're no longer exempt from the principles.	Inside BA: Protections for PII data have to be included in contracts to perform BA or ADR across sites. Outside BA: No restrictions on data, but created BA segments must be used for <i>marketing purposes</i> .	Inside BA: Transfer of data by third parties or service providers triggers notice and choice provisions. Outside BA: No restrictions. Other: Service providers must anonymize data before sharing.
Compliance	None directly, but other enforcement actions in data security protections and misleading or incomplete privacy disclosures likely to continue.	Develops basic scheme, but focus is on internal compliance between members and NAI (some difficulty reported for consumers to submit complaints and follow status).	Accountability program will include monitoring, transparency & reporting, and compliance programs, but no specific programs expected before 2010. Programs will most likely be implemented by member groups (BBB, DMA, etc.), and strong intimation for eventual referral of violations to government agencies.