

INQUIRY

The Online Interest-Based Advertising Accountability Program (Accountability Program) opened an inquiry into the OBA practices of 23andMe upon observing what appeared to be retargeted 23andMe ads without enhanced notice as required by the OBA Principles. In multiple tests, the Accountability Program visited the 23andMe website (www.23andMe.com), browsed the site for a time, and then proceeded to visit non-affiliated websites within the same browsing session. Without fail, soon after leaving the 23andMe website, the Accountability Program was served ads for the 23andMe service. However, none of the 23andMe ads observed by the Accountability Program featured the enhanced notice link, typically provided through the Digital Advertising Alliance's (DAA) Advertising Option Icon (AdChoices Icon), that is required under the OBA Principles on all ads based on previous website visits.²

The Accountability Program also found that the 23andMe website did not provide enhanced notice on any of the Web pages where we observed what appears likely to have been third-party data collection for OBA purposes.³ Nor did 23andMe provide a statement of adherence to the OBA Principles. However, 23andMe did provide an extensive discussion of its use of cookies in its privacy policy and the URL of an industry-developed website where consumers could exercise choice.

COMPANY'S POSITION

In response to the Accountability Program's inquiry, 23andMe explained that it had contracted with a third-party advertising agency, 3Q Digital (formerly PPC Associates), to manage all aspects of the OBA campaign in question. Upon learning of the non-compliant ads, the company stated that it immediately instructed 3Q Digital to enable the AdChoices Icon for this campaign. The company also promptly launched a review of all its current OBA campaigns to verify that the appropriate notice and choice is included on all its interest-based ads.

The company explained that it is 23andMe policy to obtain confirmation from any advertising partner with which it works that it is compliant with applicable statutory and regulatory requirements. 23andMe stated that it understood from 3Q Digital that it was conducting all interest-based campaigns on behalf of 23andMe in accordance with industry best practices.

23andMe was forthright in admitting that it was not familiar with the specific requirements of the DAA Self-Regulatory Principles. With regard to the enhanced notice link absent from the 23andMe Web pages from which third-party data collection for OBA purposes was occurring, the company explained that it had been unaware of this requirement of the OBA Principles, but it quickly took steps to implement the link upon learning of the omission from the Accountability

inferred from such Web viewing behaviors." (OBA Principles at 9-10, Definition G.).

² See OBA Transparency Principle II.A.2(a) ("Third Party Advertising Notice" requires a "clear, meaningful and prominent link" in or around the interest-based ad, which takes the consumer to an explanation of OBA and an easy-to-use mechanism to exercise choice.).

³ See OBA Transparency Principle II.B. ("Web Site Notice of Third Party Online Behavioral Advertising" requires a "clear, meaningful and prominent link" on every Web page where third-party collection for OBA occurs, that takes the consumer to a disclosure about this collection and an opportunity to opt out of OBA.).

Program. Going forward, the company has committed to explicitly requiring that its advertising partners are compliant with the DAA Self-Regulatory Principles and to meeting its own obligations as a first party.

DECISION

The enhanced notice requirement of the Transparency Principle was created to tackle one of the principal complaints about OBA collection and use: its inconspicuous nature. The industry's response was not only to more frequently and clearly disclose these practices, but also to integrate notice and choice, through the AdChoices Icon, directly into the advertising consumers see. In this way, consumers can be more cognizant of the interest-based advertising they encounter on a daily basis and make more informed and granular decisions about whether they want participate in this type of advertising.

The first type of enhanced notice at issue in this case is the real-time notice that an ad is based on interests inferred from a prior website visit. Specifically, when an ad for 23andMe is directed to a consumer because that consumer's browser has previously visited the 23andMe website, the ad must carry real-time notice, usually provided through the AdChoices Icon, which when clicked, takes the consumer to a location where the consumer can learn about OBA and make an informed choice about participating in interest-based advertising.

The second type of enhanced notice at issue is the "clear, meaningful and prominent" notice that signals to the consumer that data for OBA is being collected by a third party. 23andMe permits third parties to engage in data collection for OBA purposes on the 23andMe website. Therefore, consumers should be provided with an enhanced notice link that takes the consumer to a location where this third-party OBA activity is discussed and an opportunity to exercise choice is presented.

The Accountability Program wants to be clear that this decision does NOT involve 23andMe's handling of genetic data. 23andMe understands that the personal nature of the service it provides makes privacy of particular importance to its customers. In fact, the company has put in place a rigorous set of protocols that protect the privacy of a consumer's genetic data throughout the collection, analysis, and storage processes.

Moreover, the Accountability Program understands that the company made good-faith efforts to engage advertising companies that share its commitment to consumer privacy and compliance with industry codes of conduct. As such, 23andMe believed it had performed its due diligence and was confident its advertising campaigns would be conducted in compliance with applicable regulations and industry standards. However, we note that 23andMe, as an advertiser concerned about privacy, would have benefited by being more actively engaged in learning about developments in advertising industry privacy best practices such as the DAA Principles.

We are pleased that 23andMe has pledged to adopt the DAA Self-Regulatory Principles going forward and to explicitly require its advertising partners to do the same. We also commend

23andMe for its conscientious attention to the Accountability Program’s inquiry and its commitment to its users’ privacy.

With regard to the enhanced notice link absent from 23andMe website where third-party data collection for OBA is occurring, the Accountability Program has recognized that this requirement has sometimes been misunderstood or overlooked by website operators. Indeed, the Accountability Program released a “Compliance Warning” to remind first parties of their responsibility to comply with this transparency obligation under the OBA Principles.⁴ We reiterate that all websites allowing third parties to collect data for interest-based ads must provide enhanced notice and choice as explained in the Compliance Warning and must be in compliance by January 1, 2014 in order to avoid a possible enforcement action.

CONCLUSION

While it can be difficult to determine what any individual may consider sensitive, companies that are engaged in a business where some consumers may have heightened concerns about privacy should be especially proactive in seeking knowledge about and adopting industry best practices and programs in their advertising. Companies should also provide consumers with tangible and clear notice about their practices—particularly about how the data are handled and protected—and a choice about how their data are used. The data at issue in the instant case relate only to the consumer’s visit to the 23andMe website and bear no relationship to the data collected by 23andMe as part of its genetic testing services. Nonetheless, displaying a commitment to consumer data privacy for all levels of data, including data regarding Web browsing activity for OBA, will elevate consumer trust in the company’s overall data protection practices.

The online privacy debates of today are driven by a growing recognition that consumers expect to have more control over uses of their online data. Companies that do not respond quickly to this changing paradigm may well see diminished trust in their brand. The OBA and Multi-Site Data (MSD) Principles (collectively, the Principles) should serve as a roadmap for companies navigating today’s online data privacy landscape. As the lines between the traditional notions of personally identifiable information (PII) and non-PII continue to blur, companies must strive to apply the tenets of notice and choice to all the consumer data with which a company comes into contact.

COMPANY’S STATEMENT

23andMe shares the Accountability Program’s commitment to transparency and consumer control, and it is our intent at all times to provide both elements to consumers. 23andMe appreciates the opportunity to work with the Accountability Program to further strengthen 23andMe’s efforts to promote transparency and to align our advertising initiatives with the highest standards of industry best practices.

⁴ This Compliance Warning can be accessed <http://www.bbb.org/us/Storage/113/Documents/First-Party-Compliance-Warning-20131008.pdf> or <http://www.asrcreviews.org/wp-content/uploads/2013/10/Accountability-Program-First-Party-Enhanced-Notice-Compliance-Warning-CW-01-2013.pdf>.

DISPOSITION OF DECISION

The Accountability Program's recommendations have been implemented.

A handwritten signature in black ink, appearing to read "Genie Barton". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Genie Barton
Vice President and Director
Online Interest-Based Advertising Accountability Program