

COMPANY STATUS

Wayfair Inc. (Wayfair) is an e-commerce business headquartered in Boston, Massachusetts. The company offers product discovery and online retailing services through its five brands: Wayfair, Joss & Main, AllModern, DwellStudio and Birch Lane.

INQUIRY

As part of its routine monitoring and enforcement efforts, the Accountability Program opens investigations based on consumer complaints regarding alleged noncompliance with the DAA Principles. This specific case arises from a consumer complaint claiming that Wayfair's website was not in compliance with the requirements of the Transparency Principle of the OBA Principles.

In response to the consumer complaint, the Accountability Program visited the website www.wayfair.com to review Wayfair's compliance with the Principles. During its visit, the Accountability Program observed data collection by third-party companies known to engage in IBA.

When the Accountability Program examined Wayfair's website, we located links in the footer labeled "Privacy Policy" and "Terms of Use." When we clicked on the Privacy Policy link, it directed us to the top of a section of a page entitled "General Information" containing the company's privacy policy. In reviewing this policy, we located a description of the third-party data collection occurring on its website.³ We also found links to the DAA's opt-out page (www.aboutads.info/choices) and the Network Advertising Initiative (NAI) opt-out page (<http://networkadvertising.org/choices>).

However, the privacy policy footer link did not comply with the enhanced notice link requirements because, under the Transparency Principle, Wayfair must provide a link, distinct from the privacy policy link, on each page where third-party data collection for IBA occurs. An enhanced notice link must, unlike the Wayfair website's privacy policy link, take users directly to its IBA disclosure. When we examined the Terms of Use link to determine if it met the enhanced notice requirements, that link directed us to a section of the General Information page that only described the terms of use for the company site and did not contain an IBA disclosure.

Based on the above review, the Accountability Program sent an inquiry letter to Wayfair explaining the compliance issues it had found on its website.

content/uploads/2013/10/Accountability-Program-First-Party-Enhanced-Notice-Compliance-Warning-CW-01-2013.pdf.

³ Wayfair, *General Information*, http://www.wayfair.com/customerservice/general_info.php#privacy (last visited Sep. 19, 2016). ("Third-party advertising management partners may help us display tailored content to our customers' interests and serve interest-based advertising on our behalf. Wayfair and our advertising management partners may use cookies, web beacons and other tools to collect General Information about your activities on the Service, to deliver advertising on the Service or elsewhere on the Internet based upon your interests that may be more relevant to you and to measure effectiveness of our marketing efforts and the Service.")

COMPANY'S POSITION

Upon receiving the Accountability Program's inquiry letter, Wayfair immediately committed to coming into compliance with the DAA Principles. Wayfair worked with the Accountability Program and developed a plan to modify its website to fulfill the requirements of the OBA Principles. Specifically, Wayfair added an enhanced notice link labelled "Interest-Based Ads" to its website footer, separate from its privacy policy link and featured on each page of its website where third-party companies collect information for IBA. This link takes users to an IBA disclosure page entitled "Interest-Based Ads Policy" that addresses third-party IBA on the website⁴ and includes a link to www.aboutads.info/choices and a statement of adherence to the DAA Principles.⁵ The company also added this enhanced notice link to the website footers for all its properties, including Joss & Main (<https://www.jossandmain.com/>), DwellStudio (<https://dwellstudio.com>), Birch Lane (<https://www.birchlane.com/>), and AllModern (<https://www.allmodern.com/>).

DECISION

Because Wayfair authorizes third parties to collect data on its website for IBA, the company has duties as a first party under the OBA Principles. This case continues our line of cases⁶ addressing first parties' responsibilities under the OBA Principles to provide enhanced notice when third parties⁷ collect data on their websites or mobile applications.

First party duties are set out in section II.B. of the OBA Principles. According to this section, when first parties allow third parties to collect visitors' browsing data for use in IBA on their websites, or when they transfer such data to third parties for tailoring ads on non-affiliate websites, they must provide consumers with appropriate notice and an opportunity to exercise choice about whether to participate in IBA.⁸ A first party must include a disclosure somewhere on its website that describes the IBA activity occurring there.⁹ This disclosure must contain either a link to an industry-developed consumer choice page (e.g., <http://aboutads.info/choices>) or a list of every third party conducting IBA activity on the first-party website.¹⁰ Additionally, a first party must state its adherence to the DAA Principles on its website.¹¹

⁴ Wayfair, *Interest-Based Ads Policy*, https://www.wayfair.com/customerservice/interest_based_ads.php (last visited Dec. 5, 2016).

⁵ *Id.*

⁶ *See, e.g., In re: Answers Corporation* (38-2014, Oct. 28, 2014), *In re: Best Buy Co.* (39-2014, Oct. 28, 2014), *In re: Yelp* (40-2014, Oct. 28, 2014), *In re: TWiT, LLC* (46-2015, May 14, 2015), and *In re: The Hollywood Reporter, Inc.* (58-2015, Jan. 14, 2016).

⁷ *OBA Principles* Definition J at 11. ("An entity is a Third Party to the extent that it engages in Online Behavioral Advertising on a non-Affiliate's Web site.")

⁸ *OBA Principles* § II.B. at 13-14.

⁹ *Id.*

¹⁰ *Id.* We note that when first parties choose to list third parties individually, the Commentary to the Consumer Control Principle instructs companies that "choice should be available from the Third Party(s) disclosure linked from the page where the Third Party is individually listed." *OBA Principles* Commentary at 35.

¹¹ *OBA Principles* § II.B. at 13-14.

Most significantly, the OBA Principles require first parties to provide consumers with real-time “enhanced notice” when third parties are collecting or using their data for IBA on a first party’s website. This real-time indicator must be in the form of a “clear, meaningful, and prominent” link that directs consumers to the first party’s IBA disclosure, described above,¹² and not just to the top of a privacy policy.¹³ In addition, this link must be distinct from the company’s privacy policy link and appear on every page where data collection or use for IBA occurs on the first party’s website.

In practice, this first party enhanced notice link can be provided by either the first or the third party. However, both parties are independently responsible for ensuring that enhanced notice is provided. To achieve compliance, companies should work with one another to make sure that this requirement is met. Where third parties are unable to place enhanced notice, the first party must take whatever steps are necessary either to provide the notice itself or to empower third parties to do so. Further, first parties are cautioned that

[u]nless an ad bearing in-ad notice is served on **every** Web page of a publisher’s site where third parties are collecting data for [... IBA] 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*) (Emphasis in original).¹⁴

Enhanced notice provides consumers with two benefits. One, the enhanced notice informs users that third parties are engaged in data collection for IBA on a website. Two, enhanced notice serves as a conduit to relevant information consumers need at the time of data collection and use for IBA by linking to a disclosure that describes the IBA activities occurring on a website and providing a method by which consumers can exercise choice. By drawing attention to this otherwise invisible background activity in real time, explaining it in plain language, and providing one or more choice mechanisms, enhanced notice educates consumers about IBA and empowers them to make choices about the use of their data.

Following consultation with the Accountability Program, Wayfair added a separate and distinct enhanced notice link on the footer of each page of its website where third parties collect data for IBA. The link directs users to an IBA disclosure page that includes a link to www.aboutads.info/choices and a statement of adherence to the DAA Principles.

¹² *Id.*

¹³ *OBA Principles Commentary* at 32 (“The Principles also state that the Web sites at which Third Parties are collecting data for Online Behavioral Advertising purposes should include a new clear, meaningful, and prominent link on their Web sites when Third Parties do not provide the notice described in II.A.(2)(a). This would link from the Web page where data is collected to specific language in a disclosure. If the disclosure language is in the privacy notice, the link should go directly to the relevant section of the privacy policy where the disclosure is located and not just generally to the privacy policy.”).

¹⁴ *First Party Enhanced Notice Compliance Warning* at 3.

CONCLUSION

The Accountability Program has now released more than two-dozen cases addressing the duties of first parties under the DAA Principles. When we first broached the topic in our 2013 compliance warning, we noted widespread misunderstanding regarding section II.B. of the OBA Principles, and we provided both time and instructions for companies to reach compliance before facing Accountability Program inquiries. As this case indicates, a number of first parties still do not understand that the OBA Principles go beyond third parties and extend to them. While we would like all companies in the ecosystem to understand their responsibility without the necessity of bringing further cases, we are pleased by two things: one, like Wayfair, almost all companies who have received our inquiries have been positive and decisive in working with us to reach full compliance with the Principles.¹⁵ Two, we have noticed an uptick in compliance among first parties, both as a result of our compliance actions and through the independent actions taken by companies who understand that demonstrating concern about their customers' digital privacy builds trust, loyalty, and greater engagement. Popular consumer-facing websites are key allies in our work to bring to bring notice and choice about IBA to all consumers. We will continue—through both enforcement and education—to assist them in doing so.

The Accountability Program appreciates consumers' assistance in identifying companies with potential compliance issues under the DAA Principles. Consumer complaints are an integral part of our compliance monitoring activities. The Accountability Program, will, as part of the exercise of its discretion to determine what inquiries to pursue, determine whether to open an investigation to resolve germane issues raised in a complaint, as well as any other compliance issues we discover during the course of such an inquiry.

The Accountability Program also appreciates Wayfair's prompt action to resolve its compliance issues under the DAA Principles. We applaud Wayfair for performing a comprehensive review of all its websites to ensure that each site has an enhanced notice link where third parties are collecting data for IBA.

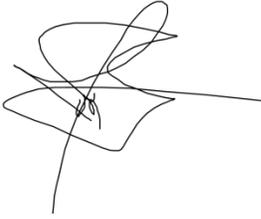
COMPANY'S STATEMENT

Wayfair strongly supports the OBA principles and is committed to providing transparency and choice to our customers. We appreciate the Accountability Program for bringing this matter to our attention.

DISPOSITION OF DECISION

Practices voluntarily corrected.

¹⁵ See Accountability Program, *SunTrust Bank Referred to the CFPB for Refusal to Participate in Self-Regulation*, <http://www.asrcreviews.org/suntrust-bank-referred-to-the-cfpb-for-refusal-to-participate-in-self-regulation/> (last visited Dec. 6, 2016) (announcing the Accountability Program's referral of SunTrust Banks, Inc. to the Consumer Financial Protection Bureau, its sole referral as of this writing).



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