

**ADVERTISING SELF-REGULATORY COUNCIL/COUNCIL OF BETTER
BUSINESS BUREAUS**

ONLINE INTEREST-BASED ADVERTISING ACCOUNTABILITY PROGRAM

FORMAL REVIEW

Case Number: 91-2019

COMPANY:)
Fontem US, Inc. d/b/a blu eCigs.)
)
)
CHALLENGER:)
Online Interest-Based)
Advertising Accountability Program)
)
)

DECISION

DATE: January 28, 2019

SYNOPSIS

The Digital Advertising Alliance’s (DAA) Self-Regulatory Principles (DAA Principles)¹ cover entities engaged in interest-based advertising (IBA) across websites or mobile applications (apps). Any operator of a website (a first party)² that allows unaffiliated entities (third parties)³ to

¹ The DAA Principles include a suite of four documents related to interest-based advertising which may be read in full at <http://www.aboutads.info/principles>. The relevant documents are titled: Self-Regulatory Principles for Online Behavioral Advertising (OBA Principles), Self-Regulatory Principles for Multi-Site Data (MSD Principles), Application of Self-Regulatory Principles to the Mobile Environment (Mobile Guidance), and Application of the Self-Regulatory Principles of Transparency and Control to Data Used Across Devices (Cross-Device Guidance). The DAA also maintains a set of self-regulatory principles dedicated to political advertising, the Application of the Self-Regulatory Principles of Transparency & Accountability to Political Advertising, which are unrelated to this decision.

² The DAA Principles assign responsibilities to an entity based on its role in a particular situation. Thus, an entity can be a first party, third party, or service provider depending on the function it is performing. Website operators are first parties. *OBA Principles* Definition F at 10 (“A First Party is the entity that is the owner of the Web site or has Control over the Web site with which the consumer interacts and its Affiliates.”). *See also* Online Interest-Based Advertising Accountability Program, *First Party Enhanced Notice Compliance Warning* CW-01-2013, <http://www.asrcreviews.org/wp-content/uploads/2013/10/Accountability-Program-First-Party-Enhanced-Notice-Compliance-Warning-CW-01-2013.pdf>.

collect visitors' web browsing data for IBA must provide visitors with notice and enhanced notice as prescribed in the OBA Principles. Additionally, covered companies must comply with section V. of the OBA Principles, also known as the material changes provision, if they apply any material change to their IBA data use policies or practices.

COMPANY STATUS

Fontem US, Inc. d/b/a blu eCigs (Fontem) is the U.S. branch of an electronic cigarette company, Fontem Ventures, headquartered in Amsterdam, Netherlands. One of Fontem's electronic cigarette brands marketed in the United States is blu.⁴

INQUIRY

This case arises from a consumer complaint that the website for Fontem's blu electronic cigarette brand (<https://www.blu.com/en/US/>) allowed third parties to collect users' data for use in interest-based advertising without providing notice and choice to these users as required under the OBA Principles.⁵ Specifically, the consumer described being unable to find information on blu's website on how to opt out of ads related to the consumer's prior web-browsing behavior.

In response to the complaint, the Accountability Program reviewed the blu website, where we observed data collection by third-party companies known to engage in IBA. We then reviewed blu's website for compliance with all applicable provisions of the OBA Principles.

The Accountability Program first looked for an enhanced notice link on the blu website. When the Accountability Program first loaded blu's homepage, the site displayed an age-gate mechanism that contained a link directing users to the top of a PDF version of blu's privacy policy. On further examination of the blu website, we also found multiple privacy policy links in the page's footer. When clicked, these links directed us to the top of the webpage containing the company's privacy policy. We were unable to find a link, separate from these privacy policy links, directing us to a disclosure of the third-party IBA activity occurring on the blu website.

We then reviewed the blu privacy policy for the presence of a compliant IBA disclosure. Though the privacy policy included a section on "Cookies," it did not mention IBA, stating only that "Some of our business partners (e.g., advertisers) use cookies on our site. We have no access to or control over these cookies." We could find no other disclosure of third-party IBA activity occurring on the blu website, and we could not locate a statement of adherence to the DAA Principles.

³ In the desktop context, third parties are entities that collect data for IBA from non-affiliate websites. *See* 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.").

⁴ Fontem, *Blu*, <https://www.blu.com/en/US/> (last visited Nov. 13, 2018). The Accountability Program notes that the scope of this decision covers the website for the blu brand of Fontem and does not touch on any other offerings the company may provide. The Accountability Program may in its discretion open an inquiry into any website where it finds a germane compliance issue under the DAA Principles.

⁵ The Self-Regulatory Principles for Online Behavioral Advertising (OBA Principles) are the first set of industry-wide principles adopted by the DAA. For more information, please see <http://www.aboutads.info/obaprinciples>.

During our review, the Accountability Program also observed a section describing Fontem’s policy with regard to future changes to its privacy statement. The policy did not specify whether Fontem would apply future material changes retroactively to data previously collected under earlier versions of its privacy policy. This ambiguity raised a possible compliance issue under the Material Changes provision of the OBA Principles.

Following our review, the Accountability Program sent an inquiry letter to Fontem detailing these issues and explaining the requirements of the DAA Principles.

ISSUES RAISED

I. Enhanced notice of website data collection for IBA

First-party duties under the OBA Principles are set out in section II.B. According to this section, if first parties allow third parties to collect visitors’ browsing data for use in IBA on their websites, or if they transfer such data to third parties for tailoring ads on non-affiliate websites, they must provide consumers with appropriate transparency and an opportunity to exercise control over IBA.⁶ A first party must include a disclosure somewhere on its website that describes the IBA activity occurring there.⁷ This disclosure must contain either a link to an industry-developed consumer choice page (such as <http://aboutads.info/choices>) or a list of every third party conducting IBA activity on the first-party website.⁸ Additionally, a first party must state its adherence to the DAA Principles on its website.⁹

Most significantly, the OBA Principles require first parties to provide consumers with real-time “enhanced notice” when third parties are collecting or using 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, not just to the top of a privacy policy.¹⁰ In addition, this link must be distinct from the company’s privacy policy link and must appear on every page where data collection or use for IBA occurs on the first party’s website.¹¹ The link may be provided directly by the first party or by one of the third parties active on its website.¹²

⁶ *OBA Principles* § II.B. at 13–14.

⁷ *Id.*

⁸ *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.

⁹ *OBA Principles* § II.B. at 13–14. *See, e.g., In re: Best Buy Co., Inc. (39-2014)*, Oct. 28, 2014, at 4. All prior cases cited herein can be found at <http://www.ascreviews.org/accountability-program-decisions/>.

¹⁰ *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.”).

¹¹ *Id.* at 31.

¹² *First Party Enhanced Notice Compliance Warning* at 3.

Enhanced notice provides consumers with two benefits. One, it informs consumers of the fact that third parties are engaged in IBA on a website. Two, by linking directly to a disclosure that describes the IBA activities occurring on that website and providing a method by which consumers can exercise choice, enhanced notice serves as a bridge to relevant information consumers need at precisely the time they need it. 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 helps consumers understand IBA and make choices about the use of their data for IBA.

II. Material changes provision

Under section V. of the OBA Principles, covered entities should acquire users' consent before making material changes to their IBA data use policies or practices.¹³ Specifically, a company must obtain opt-in consent if (1) it makes a material change to its IBA practices resulting in more expansive uses of data than previously disclosed to the user, *and* (2) the company applies this material change retroactively to data previously collected from the user under an earlier version of its privacy policy.¹⁴ Consent is defined in the OBA Principles as “an individual’s action in response to a clear, meaningful, and prominent notice.”¹⁵

COMPANY RESPONSE AND ANALYSIS

I. Enhanced notice of website data collection for IBA

Fontem responded to the Accountability Program inquiry by conducting a thorough review of its compliance with the DAA Principles. The company worked with the Accountability Program to revise its privacy disclosures, embracing the requirements of the DAA Principles. To reach full compliance, Fontem added an enhanced notice link labeled “Internet Based Advertising,” separate from its “Privacy Policy” link, on each page of its website through which third parties collect information for IBA. This link takes users directly to a dedicated section of the privacy policy which describes third-party IBA activity occurring on the blu website and provides a link to the Network Advertising Initiative’s opt-out page.¹⁶ The company also revised its privacy disclosures to include a statement of adherence to the DAA Principles and a link to the DAA’s WebChoices page. These actions resolved the compliance issues under section II.B. of the OBA Principles.

II. Material changes provision

To resolve the Accountability Program’s concerns under the material changes provision, Fontem confirmed that its policy is not to apply material changes to its IBA practices retroactively to previously collected data. Fontem also proactively added a notification on the landing page of the blu website explaining the recent updates to its privacy disclosures, providing links to the

¹³ *OBA Principles* Section V. at 16 (“Entities should obtain Consent before applying any material change to their Online Behavioral Advertising data collection and use policies and practices prior to such material change.”).

¹⁴ *OBA Principles* Commentary at 38–39.

¹⁵ *OBA Principles* Definition D at 10.

¹⁶ Fontem, *Privacy Policy*, <https://www.blu.com/en/US/faqs/our-policies/Privacy-Policy.html#IBA> (last visited Nov. 14, 2018).

disclosures, and requiring users to affirmatively acknowledge these new terms before proceeding to the website. The Accountability Program found that these steps resolved its concerns under the material changes provision of the OBA Principles.

CONCLUSION

IBA provides consumers with ads tailored to their interests as they traverse the web with their desktop computers, laptops, tablets, and smartphones. Recognizing that consumer preferences differ with respect to IBA, the DAA Principles require that users must be able to locate notice and choice mechanisms in relevant and prominent locations. The Principles rely on familiar touchpoints to provide a pathway to this crucial information in the form of enhanced notice, such as a distinct link on a website footer or the DAA's AdChoices Icon .

Today's case continues our enforcement of the first-party provisions of the OBA Principles, underscoring that website publishers must provide enhanced notice of third-party tracking when advertising entities are unable to provide it themselves. As we have stated in prior cases, all companies in the online advertising ecosystem share the responsibility to provide consumers with this type of notice.

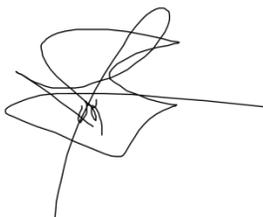
As a result of today's case, Fontem modified its website to provide consumers with an enhanced notice link that leads them directly to information about IBA and an opt-out tool. The Accountability Program urges other website publishers to model their privacy practices after Fontem, and we applaud the company for its efforts to achieve compliance with the DAA Principles and its commitment to consumer privacy.

COMPANY'S STATEMENT

Fontem US, Inc. thanks the BBB Accountability Program for its continued efforts to promote and enforce the DAA Principles. We are committed to consumer privacy and truly appreciate the opportunity to meaningfully engage with the BBB to improve our online practices.

DISPOSITION OF DECISION

Practices voluntarily corrected.



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Online Interest-Based Advertising Accountability Program