

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

ONLINE INTEREST-BASED ADVERTISING ACCOUNTABILITY PROGRAM

FORMAL REVIEW
Case Number: 94-2019

COMPANY:)
Mizzen and Main LLC)
)
)
)
)
)
CHALLENGER:)
Online Interest-Based)
Advertising Accountability Program)
)
)

DECISION

DATE: April 2, 2019

SYNOPSIS

Companies engaged in interest-based advertising (IBA) must comply with the Digital Advertising Alliance’s (DAA) Self-Regulatory Principles (DAA Principles).¹ Any operator of a website (a first party)² that allows unaffiliated entities (third parties)³ to collect visitors’ web browsing data for IBA must comply with the enhanced notice requirement of the DAA Principles. Specifically, under section II.B. of the OBA Principles, first parties must post a clear, meaningful, and prominent link to a disclosure on any web page through which IBA data is

¹ The DAA’s interest-based advertising principles are embodied in four documents: the Self-Regulatory Principles for Online Behavioral Advertising (OBA Principles), the Self-Regulatory Principles for Multi-Site Data (MSD Principles), the Application of Self-Regulatory Principles to the Mobile Environment (Mobile Guidance) and the Application of the Self-Regulatory Principles of Transparency and Control to Data Used Across Devices (Cross-Device Guidance). These documents may be found online at <http://www.aboutads.info/principles>.

² See *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>.

³ 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.”).

collected. This disclosure should explain the IBA activity occurring on the first party's site, provide consumers with a means to opt out of IBA, and state the website's adherence to the DAA 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

Mizzen and Main LLC (Mizzen) is a clothing company headquartered in Dallas, TX.⁴

INQUIRY

This case arises from the Accountability Program's regular monitoring activities. During our review of websites for compliance with the DAA Principles, we observed that Mizzen's website (<https://www.mizzenandmain.com/>) allowed third parties to collect users' data for use in IBA without providing enhanced notice to these users as required under the OBA Principles. This prompted a full examination of Mizzen's compliance with all applicable requirements of the DAA Principles.

The Accountability Program first looked for an enhanced notice link on the Mizzen website. At the time of our review, we located a link in the company's website footer entitled "Policy/Terms." When clicked, this link directed us to the top of the webpage containing the company's terms and conditions document.⁵ We then looked for a link, separate from this "Policy/Terms" link, that would direct us to a disclosure of the third-party IBA activity occurring on the Mizzen website. However, we could find no such link.

The Accountability Program then located a privacy policy document for the Mizzen website. We manually searched the Mizzen privacy policy and terms and conditions pages for the presence of a compliant IBA disclosure. We did not find any language on these pages or any other page that would satisfy the notice requirement under the DAA Principles.⁶ Further, we could not locate either a link to an industry-developed opt-out page or list of third parties with corresponding opt-out links. Finally, Mizzen's disclosures did not include a statement of the company's adherence to the DAA Principles.

During our review, the Accountability Program also located language in Mizzen's disclosures stating the following:

We reserve the right to modify this privacy policy at any time, so please review it frequently. Changes and clarifications will take effect immediately upon their posting on the website. If we make material changes to this policy, we will notify you here that it has been updated, so that you are aware of what information we

⁴ See generally Mizzen, *Mizzen and Main*, <https://www.mizzenandmain.com/> (last visited Dec. 5, 2018).

⁵ [<http://web.archive.org/web/20180919204252/https://www.mizzenandmain.com/pages/terms-of-service>]

⁶ Mizzen, *Mizzen and Main*, Privacy Policy, <https://www.mizzenandmain.com/pages/privacy-policy> [<http://web.archive.org/web/20160910012039/http://www.mizzenandmain.com/pages/privacy-policy>]

collect, how we use it, and under what circumstances, if any, we use and/or disclose it.

This language did not specify whether Mizzen 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 Mizzen detailing these issues in order to bring the company into compliance with 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.⁷ A first party must include a disclosure somewhere on its website that describes the IBA activity occurring there.⁸ 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.⁹ Additionally, a first party must state its adherence to the DAA Principles on its website.¹⁰

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.¹¹ 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. The link may be provided directly by the first party or by one of the third parties active on its website.¹²

⁷ *OBA Principles* § II.B. at 13–14.

⁸ *Id.*

⁹ *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.

¹⁰ *OBA Principles* § II.B. at 13–14. *See, e.g., In re: Best Buy Co., Inc. (39-2014)*, Oct. 28, 2014, at 4, <http://www.ascreviews.org/wp-content/uploads/2014/10/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-39.20141.pdf>.

¹¹ *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.").

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

Enhanced notice provides consumers with two benefits. One, the enhanced notice 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 empowers them to 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. Consent is defined in the OBA Principles as "an individual's action in response to a clear, meaningful, and prominent notice."¹⁴

COMPANY RESPONSE AND ANALYSIS

I. Enhanced notice of website data collection for IBA

Mizzen responded to our inquiry by conducting a thorough review of its compliance with the DAA Principles. As the culmination of this process, Mizzen revised its website to meet the standards set by the DAA Principles. To start, the company added an enhanced notice link labeled "IBA Policy," separate from its "Privacy Policy" link, on each page of its website where third parties collect information for IBA. This link takes users directly to a new section in Mizzen's revised privacy policy that discloses third-party tracking activity occurring on the Mizzen site and includes a link to the DAA's WebChoices page.¹⁵ Mizzen also updated its privacy policy to include a statement of adherence to the DAA Principles.

II. Material changes provision

To resolve the compliance issue under the material changes provision, Mizzen confirmed that its business practice is not to apply material changes to its IBA activity retroactively to previously-collected data. These actions resolved Mizzen's compliance issues under section V. of the OBA Principles.

CONCLUSION

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* Definition D at 10.

¹⁵ Mizzen, *Privacy Policy*, https://www.mizzenandmain.com/pages/privacy-policy#cookie_policy (last visited Dec. 5, 2018).

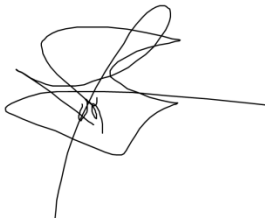
Today's case continues the Accountability Program's mission to ensure that enhanced notice is provided to users across the web. We have spent considerable effort on this front, starting in 2013 with our original compliance warning on the subject. It is vital that all covered entities—from ad tech providers to online retailers—provide this level of notice to consumers rather than relying strictly on obscure legalese. The Accountability Program urges new direct-to-consumer companies, which are a burgeoning sector of the modern networked economy, to follow the example set by Mizzen. We appreciate Mizzen's hard work in reaching compliance and its commitment to digital advertising privacy standards.

COMPANY'S STATEMENT

Mizzen+Main is committed to doing the right thing for its customers, including incorporating improvements to our online practices.

DISPOSITION OF DECISION

Practices voluntarily corrected.

A handwritten signature in black ink, appearing to read "Jon M. Brescia". The signature is stylized with loops and a long horizontal stroke extending to the right.

Jon M. Brescia
Director, Adjudications and Technology
Online Interest-Based Advertising Accountability Program