

CLIENT ALERT

FTC Reaches First Online Behavioral Advertising Settlement, Opt Out to Last Five Years

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The FTC announced yesterday that it has settled with Chitika, Inc. over the company's online behavioral advertising techniques. Chitika serves as an intermediary between advertisers and third party companies on whose websites the advertisements appear. To place its clients advertisements, Chitika uses a relatively common online behavioral advertising practice of placing cookies on users computers and tracking the users' behavior to serve targeted advertising. According to the complaint, from February 2008 to May 2010, the company told consumers that if they wanted to opt out of being tracked for the purposes described here, the needed only to select a button on the Chitika website that read "opt out." Although the user would then see a message that read "you are opted out," in fact – the FTC complaint alleged – the opt out only lasted for ten days, after which time new cookies were placed on users computers and the users were tracked again and again served with targeted ads. The FTC alleged that this practice was deceptive in violation of the FTC Act. In the settlement, Chitika agreed to delete all "identifiable user information" collected during the time that the opt out did not function, and to provide consumers with an opt out ability in each targeted ad that allows users to opt out for at least five years. Chitika has also agreed to notify consumers who previously tried to opt out that the opt out was ineffective, and that they need to opt out again.

Of note, the settlement also included information about how to give notice of online behavioral advertising activities both on the website and within a behaviorally-served ad. In particular, Chitika agreed to put a statement on its home page that reads "we collect information about your activities on certain websites to send you targeted advertisements. To opt out of Chitika's targeted ads, click [here](#)." When the user selects "here," the user would be directed to an opt out page where additional disclosures would be made. These additional disclosures include that by opting out, Chitika would not use that information to serve targeted ads, the status of the user's opt out (i.e., if the user is currently opted out or in), that opt out is specific to the user's browser, and that the opt out will need to be repeated if the user switches to another browser. In addition, Chitika agreed to place a link within any advertisement that reads "Opt Out?" and that contains an interstitial (text that appears when a user's cursor hovers over the link) that reads "Opt out of Chitika's targeted ads." The "opt out?" link in the ad would take people to the mechanism described above.

TIP: This decision is the first from the FTC after its issuance of notice and choice principles for those who participate in online behavioral advertising. This decision underscores the FTC's believe that lack of notice and consent in the OBA context is a deceptive practice. As such, if your company uses vendors to help serve targeted ads, or your website serves targeted ads, now is the time to make sure that you are taking the steps

necessary to effectuate notice and choice, and to explore if you have not done so already the self regulatory program offered through aboutads.info.

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