

**Before the
Federal Trade Commission**

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In the Matter of)
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Protecting Consumer Privacy)
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In an Era of Rapid Change)
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COMMENTS OF eBay Inc.

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eBay Inc (“eBay”) hereby submits these comments to the Federal Trade Commission (“Commission”) in response to the questions posed in the Commission’s report *Protecting Consumer Privacy in an Era of Rapid Change*. eBay appreciates the opportunity to provide our thoughts and feedback on issues as important as promoting greater levels of privacy protections for consumer information and data.

Founded in 1995 in San Jose, Calif., eBay (NASDAQ:EBAY) connects millions of buyers and sellers globally on a daily basis through eBay, the world's largest online marketplace, and PayPal, which enables individuals and businesses to securely, easily and quickly send and receive online payments. We also reach millions through specialized marketplaces such as StubHub, the world's largest ticket marketplace, and eBay classifieds sites, which together have a presence in more than 1,000 cities around the world.

eBay takes the quality of the privacy protections we provide to our users very seriously. The success of our community is based on trust, which is strengthened by our ability to provide our users with a level of transparency and control concerning the collection and use of information about them and their activities. Because of our strong privacy protections, Privacy International rated eBay one of the best companies for privacy on the Internet¹ and eBay is the most trusted company in 2009 for privacy as rated by U.S consumers².

eBay Inc. has also consistently been on the forefront of advocating for omnibus federal consumer privacy legislation in the form of Meg Whitman, eBay’s former CEO and Scott Shipman, eBay’s CPO, testifying at the House Energy and Commerce Committee hearings held in 2006. Additionally, seeing the need to rally industry support for federal privacy legislation, eBay co-founded the Consumer Privacy Legislation Forum (now the Business Forum for Consumer Privacy).

After hearing the FTC raise behavioural targeting as an area of exploration in 2007, eBay also built an ad opt-out link connected to behavioural targeting preferences and launched the program, called AdChoice, in time for the FTC’s eBehavioral Advertising workshop in the fall of 2007. We continued to participate in various FTC privacy events, most recently the Privacy Roundtable hosted at the University of California’s Berkeley Campus in March of 2010.

eBay strongly believes that innovation in the Internet economy depends on consumer trust and that maintaining consumer privacy is essential to the continued growth of the Internet. eBay supports initiatives that seek to provide a rational and constructive framework to protect consumers while recognizing legitimate uses of personal information. Therefore, we applaud the Commission’s efforts to conduct a comprehensive review of the effectiveness of the current U.S. privacy policy framework.

¹ Privacy International Consultation Report, 2007. Available at: <http://www.privacyinternational.org/issues/internet/interimrankings.pdf>

² Survey conducted by Ponemon Institute and TRUSTe in September 2009. See www.truste.com, Press room, Archives, September 16, 2009 : [2009 Most Trusted Companies In Privacy Announced](#)

Although eBay believes that a number of the questions posed in the report are important to the overall discussion of developing a strong and effective U.S. privacy policy framework, we have focused our comments to the questions which are most relevant to our business model and our users.

Scope

Are there practical considerations that supports excluding certain types of companies or businesses from the framework—for example, businesses that collect, maintain, or use limited amount of non-sensitive consumer data?

eBay supports excluding certain types of companies or businesses from the framework. It is unreasonable to expect that the local lawn care businesses or Boy Scout troop would have the resources or expertise to develop an information security plan and draft and disclose a privacy statement. Without carefully tailoring the scope of the framework, there is a risk of stifling innovation and imposing unnecessary burdens on start-ups, community support groups, entrepreneurs, and small business that are struggling to get off the ground. It would be our recommendation to exempt entities that only collect, use, store, or disclose non-sensitive information from fewer than 5,000 individuals in any twelve month period.

It is important to note that the concept of excluding certain types of companies or businesses from compliance is not a novel idea and others have shared eBay's small business concerns. In fact, the legislation introduced in the 111th Congress by Congressman Rush, HR 5777, and the draft legislation released by Congressman Boucher and Congressman Stearns both included similarly worded exemptions.

Is it feasible for the framework to apply to data that can be “reasonably linked to a specific consumer, computer, or other device”?

eBay believes that lawmakers need to be cautious when developing rules or regulations that apply to data that can be “reasonable linked” to either a specific consumer, computer or other device.

In regard to data “reasonably linked” to a specific consumer, it is important for lawmakers to understand that many businesses use anonymized data in certain circumstances when it is inappropriate to use personal information. The focus has always been on removing personally identifiable information and/or ensuring that the pool was large enough so that non-personally identifiable information elements could not be combined to identify a consumer. It will be incredibly important that this “reasonably linked” concept is accompanied by a clear, operational definition, thereby ensuring that there is a crisp understanding of what “reasonably linked to a consumer” means and how it can be interpreted on an operational or actionable level. It is also important to create a framework

that distinguishes between reasonably linking data to an individual and reasonably linking data back to a bunch of characteristics or what is truly an audience segment.

eBay does question whether it is feasible to apply the “reasonably linked” standard to either a computer or device as well. Oftentimes, computers or devices have more than one user and would therefore be difficult to actually identify a consumer by the device or computer being used. In addition, creating a “reasonably linked” standard for computers or devices would, by definition mean there was no such thing as an anonymous cookie. If there can no longer be anonymous cookies, then this heightens the need to ensure that lawmakers, when discussing Do Not Track proposals, recognize that tracking for risk management, anti-fraud and other safety concerns is a critical business process and cannot be lumped into the behavioral advertising debate. Furthermore, it is important to keep in mind that creating a reasonably linked standard could place an undue burden on companies if they are forced to reconfigure their infrastructure to meet any new requirements.

Companies should promote consumer privacy throughout their organizations and at every stage of the development of their product and services

Are there substantive protections, in addition to those set forth in Section V(B)(1) of the report that companies should provide?

eBay strongly endorses the four protections that the Commission proposes within the report. In fact, each of these principles, security, collection limitation, data retention, and data quality and integrity, are outlined in great detail in a white paper released by the Business Forum for Consumer Privacy (“BFCP”) in 2009, which describes the fundamental principles of the use and obligations model that eBay has long endorsed.

However, there is one fundamental protection contained in the BFCP white paper that eBay would recommend the Commission consider for their privacy framework: data use minimization. Although closely tied to the collection limitation protection, which requires entities to only collect data for which it has a use or purpose, data use minimization goes a step further and requires entities to determine what data should be used to perform different business functions and then only use that data to fulfill that particular function. According to the white paper, data minimization will encourage an entity to act

“more thoughtfully and strategically” in order to reduce the risk of exposure or breach of an individual’s data.³

Is there a way to prescribe a reasonable retention period?

eBay understands that any effective privacy framework must include a reasonable retention period, however, it is essential that the Commission recognize that a one size fits all approach will be extremely detrimental to not only the business community, but to consumers as well.

eBay’s recommendation is that the Commission adopt a set of prescriptive criteria that would assist companies as they develop retention periods that would be effective and reasonable based on their business model and their relationship with their users.

What is reasonable will be relative to the context of the business, the data involved, and the particulars of the business relationship. Different business processes require maintaining longer “memory” of the transaction than other business models. There are a number of different reasons why companies retain specific information related to their users which are tied to legitimate business purposes and needs. Not only is it necessary to keep data in order to respond to regulatory and law enforcement requirements, but it is also necessary to protect against fraud and malevolent activities so that companies can maintain a safe business environment.

Maintain comprehensive data management procedures

How can the full range of stakeholders be given an incentive to develop and deploy privacy-enhancing technologies?

In order to facilitate greater development and deployment of privacy-enhancing technologies, eBay would recommend that the Commission engage in two initiatives. The first would focus on education and awareness. Education and awareness is always the first hurdle that must be overcome when trying to address any issue. The FTC should engage in an education and awareness program so that companies can become better informed of the benefits and efficiencies of consciously designing privacy into products and services and the greater level of trust and confidence it will engender. Many companies may

³ “A Use and Obligations Approach to Protecting Privacy: A Discussion Document”, The Business Forum for Consumer Privacy: December 7, 2010. To access the full document please follow this link: http://www.huntonfiles.com/files/webupload/CIPL_Use_and_Obligations_White_Paper.pdf

also be unaware of the technologies and solutions that are available to make privacy by design easier and more affordable to achieve.

The second measure would be to help create market dynamics that would lead to continued innovation and efficiencies by creating a Safe Harbor program that would offer businesses and covered entities protections if they were to adopt privacy by design measures. If constructed in the right way, a Safe Harbor has the potential to create an environment that encourages innovation and technological development, which in turn encourages a marketplace for companies to develop and deliver better and more affordable solutions and technologies that help others achieve Safe Harbor status. This in turn would help propel the proliferation, adoption, and resources for such solutions.

What roles should different industry participants – e.g., browser vendors, website operators, and advertising companies – play in addressing privacy concerns with more effective technologies for consumer control?

eBay strongly believes that everyone, including consumers, has an important role to play in ensuring consumer privacy and control. Each browser vendor and website operator should adopt technology that gives consumers greater control over how their information is used. In addition, all industry participants should strive to educate consumers on how to utilize these technologies and what steps they can take in order to have a more positive and secure online experience.

However, eBay believes that consumer protection is not the sole responsibility of the business community and therefore it is essential that each consumer shares in that responsibility and takes reasonable steps to ensure their privacy preferences are properly communicated and that bad actors are made to heel.

Commonly Accepted Practices

Is the list of proposed “commonly accepted practices” set forth in Section V(C)(1) of the report too broad or too narrow? Are there practices that should be considered “commonly accepted” in some business contexts but not in others?

eBay believes that the list of “commonly accepted practices” proposed by the FTC is a good overview of current commonly accepted business practices for many businesses. However, as we all know, business practices and technology evolves over time and therefore the Commission, in collaboration with industry leaders, might need to reassess and redefine “commonly accepted practices” in the future, especially within the context of what constitutes sensitive personal and sensitive financial information and how that information is collected and used. Perhaps, in the future, the FTC can give further guidance so that companies can, with a certain degree of assurance, continue to evaluate for their

business model what is “commonly accepted” and what it is not, rather than rely upon the FTC for a sanctioned list. This is especially important since in addition to the fact that “commonly accepted practices” will evolve, they will also vary based on the nature of the service or business under discussion.

Should marketing to consumers by commonly-branded affiliates be considered first-party marketing?

At eBay, we have made it a practice to not share information for marketing communications purposes, even among our wholly-owned subsidiaries, except with consent. For example, if StubHub, which is a wholly-owned subsidiary of eBay, has a special deal on tickets that they would like to market to individuals that only have a direct relationship with eBay Marketplace, eBay Marketplace would send the promotional email to the individual directly and would therefore not share any of the individual’s personal information with StubHub. By adopting this practice, we can ensure that we are not breaching consumer trust or expectation by sharing their information with an entity with which they do not have a direct relationship or may not expect is owned by eBay, Inc.

How should the proposed framework handle the practice of data “enhancement”, whereby a company obtains data about its customers from other sources, both online and offline, to enrich its databases? Should companies provide choice about this practice?

There are legitimate business reasons for why a company may need to enhance their databases from other sources, separate from reasons associated with marketing. For example, eBay oftentimes practices data enhancement for security reasons and for fraud detection and prevention. However, data enhancement practices even in the case of first party marketing should be considered an acceptable practice, if handled in a responsible manner. If the data is licensed appropriately and is acquired legally then it should be treated no differently from other data.

Practices that Require Meaningful Choice

What is the most appropriate way to obtain consent for practices that do not fall within the “commonly accepted” category? Should the method of consent be different for different contexts?



eBay strongly believes that each consumer should be offered meaningful choices that would help communicate their use preferences to the entity collecting the data. Consumers should have the right to set their preferences, especially for uses that fall outside of the “commonly accepted” category, and expect that covered entities respect these preferences. In order to ensure that consumers are aware of their choices and familiar with the entities’ collection and use policies,

entities' privacy notices should be clear, readily available, and in plain English. And in order for users to manage their preferences, preference management mechanisms should be simple, intuitive, and both easy to find and easy to use.

However, meaningful choice does not necessarily mean a one-size fits all approach for all particular uses of data and, in fact, eBay would recommend that the Commission offer guidelines that are based on a sliding scale and on the potential for consumer harm. For example, the collection of non-sensitive information intended to be shared with affiliates for marketing communications may require a less affirmative mechanism, while the collection of sensitive information shared with third parties should most likely require a more affirmative mechanism, because the potential for harm is greater.

Would a uniform icon or graphic for presenting options be feasible and effective in this and other contexts?

eBay has consistently been an Internet industry leader in advocating for stronger privacy protections and greater consumer control. After seeing the need for a mechanism that offered consumers more meaningful choices over the way their data was used for advertising purposes, eBay developed and implemented a program called AdChoice that allows eBay users to choose whether to receive customized advertising on eBay and on the websites of our advertising partners. If an eBay user would prefer not to see these customized ads, they can use AdChoice at any time to communicate to eBay their preference. Because we want to ensure that our website and services remain free for consumers, eBay users will still see ads—they just won't be tailored to their interests.

The AdChoice program works as follows: advertisements on and off eBay that are part of the AdChoice program will have an AdChoice link and  icon. When eBay users click on the link or  icon, they see a pop-up window that gives them the ability to specify their advertising preferences, opt-out of receiving tailored ads all together and read our privacy policy.

Since the launching of our AdChoice technology in 2007, eBay has received positive feedback from consumers, lawmakers, and fellow industry leaders.

In fact, the initiative has been so successful that in October of 2010, a group of major marketing and media companies launched a similar program, which endorses the use of the "Advertising Option Icon", which is to be displayed within or near online advertisements or on Web pages operated by members of the participating entities. eBay believes that programs like AdChoice or the Advertising Option Icon can not only give consumers greater choice and control over the use of their information for tailored advertising, but it would foster an environment that would allow companies to innovate and create new technological solutions that could surpass current models.

Special Choice for Online Behavioral Advertising: Do Not Track

eBay supports the Commission's efforts to encourage greater consumer choice and control and believes that the development and universal implementation of baseline choice mechanisms would be a step in the right direction to address the concerns that have been expressed regarding behavioral tracking and advertising. It would be our recommendation that the Commission encourage or potentially even require covered entities to offer some type of choice mechanisms to consumers.

However, each entity should have the ability to offer a mechanism that best fits their business model or the needs of their users. Choice mechanisms could include anything from customized web-based solutions, a centralized opt-out website for participating members, third party add-ons, or a solution integrated within a browser.

eBay would caution the Commission from adopting a singular technological approach to this issue. Restrictive technological mandates or overly prescriptive requirements will only hinder the continued growth of the ecommerce industry which could ultimately lead to a limitation on the services and products that entities can offer to consumers. In addition, the Commission needs to be cautious to not adopt any framework or choice mechanism requirement that would be inflexible. The adoption of baseline requirements or guidelines would allow covered entities to innovate and have the freedom to develop technology that would go above and beyond any baseline requirements and add greater consumer controls and granularity.

We have already seen a number of companies, trade associations, and other industry groups voluntarily adopt choice mechanisms over the past few years and eBay strongly believes that with the proper amount of education, support, and even baseline requirements more companies will develop and implement effective choice mechanisms, therefore creating a solution without the need for sweeping Do Not Track regulation or legislation.

Improved Privacy Notices

What is the feasibility of standardizing the format and terminology for describing data practices across industries, particularly given ongoing changes in technology?

eBay strongly supports the Commission's efforts to ensure privacy notices are written and provided in a way that is easy for a consumer to access and digest. eBay believes that all privacy notices should be written in plain spoken English, transparent and comprehensive

However, eBay would caution the Commission from mandating a more standardized format or language, which was the approach taken in the Gramm-Leach-Bliley Act ("GLBA"). Some companies that are covered by the GLBA have found the standardized notice requirements to be extremely cumbersome and limiting. eBay would recommend that the Commission adopt guidelines that would assist companies as they develop their privacy notices while still providing flexibility and the ability to tailor the notice when appropriate.

Reasonable Access to Consumer Data

Should access to data differ for consumer facing and non-consumer facing entities? Should companies inform consumers of the identity of those with whom the company has shared data about the consumers, as well as the sources of the data?

eBay believes that all individuals should have reasonable access to the information that is collected about them. However, we believe that consumers should gain access through the entity that collected the information and not the service providers or third parties that might process the information on behalf of the entity. Oftentimes, service providers do not have the authority to provide the access to the information, so all requests should go through the entity that has the direct relationship with the consumer.

In addition, eBay would caution the Commission on mandating covered entities to supply the identities of the third parties or service providers with whom they share collected data. The European Commission has adopted a similar requirement and it has been both confusing and burdensome for companies to manage.

Conclusion

eBay thanks the Commission for its commitment to encouraging consumer privacy and for the opportunity to provide comments on the policy concerns outlined in the Commission's staff report. eBay is dedicated to assisting the Commission in moving the dial forward in regard to promoting innovation while restoring consumer trust in online commerce. eBay looks forward to working with the Commission in the months and years ahead on these important issues.