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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: A Preliminary Federal Trade Commission Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers - File No. P095416

Dear Sir or Madam:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Federal Trade Commission's (FTC) preliminary staff report (Report) entitled *Protecting Consumer Privacy in an Era of Rapid Change*.² With this report, the FTC has made an important contribution to the privacy policy debate. The Report sets out a proposed framework for how businesses should protect consumers' privacy that would improve transparency, simplify the ability of consumers to exercise choices about how their information is collected and used, and ensure that businesses take privacy-protective measures as they develop and implement systems.

The banking industry has a long history of protecting the privacy and security of customer information. The FTC acknowledges this history; for example the Report highlights the efforts of the banking industry to develop privacy notices that are clearer, shorter, and more standardized to enable better comprehension and comparison of privacy practices.³

In the past, the FTC has subscribed to a "notice-and-choice" as well as a "harm-based" approach to privacy, both of which the Commission now views as not being sufficiently responsive to today's rapid technological changes. The FTC has acknowledged that, particularly as to the financial services industry, significant progress has been made on improving privacy notices under the "notice-and-choice" model. At the same time, the Commission believes the "harm-based" model focuses too narrowly on physical and economic injury or unwarranted intrusion.⁴

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than \$165 million in assets. Learn more at www.aba.com.

² FTC, Preliminary Staff Report: *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, report released Dec. 1, 2010, available at <http://www.ftc.gov/os/2010/12/101201privacreport.pdf>.

³ *Id.* 71.

⁴ Report at 20 and 32-33.

As an alternative, the FTC has proposed a new privacy framework that encompasses the following:

1. **Privacy by Design.** Companies should adopt a “privacy by design” approach by building privacy protections into their everyday business practices. This would include promoting privacy at every stage of development of products and services (e.g., data security, reasonable collection limits, sound retention policies, data accuracy, and data management procedures).
2. **Simplified Choice.** Companies should provide choices to consumers about their data practices in a simpler, more streamlined way than has been used in the past. Consumer choice would not be necessary for a limited set of “commonly accepted” data practices, but for data practices that are not “commonly accepted,” consumers should be able to make informed and meaningful choices.
3. **Transparency.** A number of measures that companies should take to make their data practices more transparent to consumers are included in the report (e.g., clearer and shorter privacy notices, reasonable access, and affirmative consent to data uses that differ from the purposes for the data collections).
4. **Education.** The paper proposes that stakeholders undertake a broad effort to educate consumers about commercial data practices and the choices available to them, particularly since increasing consumer understanding of the commercial collection and use of their information is important to facilitating competition on privacy across companies.

In developing a new privacy framework, the ABA recommends that the FTC focus on:

1. Businesses currently not subject to industry-specific federal privacy laws or regulations;
2. Broad policy goals as opposed to prescriptive technological mandates; and
3. Data use restrictions and consumer data access privileges that are proportional to the potential consumer harm.

FTC Should Focus on Unregulated Businesses

In recognition of the unique role that financial institutions have in protecting personally identifiable customer information, Congress has enacted a number of privacy laws specific to the financial services industry, including the Gramm-Leach Bliley Act (GLBA) and Fair Credit Reporting Act (FCRA). While the existing privacy framework has been described as “a gap-filler” for companies that are not subject to GLBA or FCRA, as proposed in the Report it would apply broadly to *all* commercial entities that can be reasonably linked to a specific consumer, computer, or other device, online or offline.

ABA recommends that FTC explicitly focus its recommendations on commercial entities not covered by existing privacy and security laws or regulations. Including in the scope of the Report and its privacy framework banks and other financial institutions that must already adhere to elaborate, existing privacy laws and regulations will create confusion to the extent the Report’s framework is inconsistent with the current governing regulatory requirements. More important, inconsistencies or conflicting mandates could do a disservice to consumers.

Privacy Framework Should Focus on Broad Policy Goals

ABA recommends that, as it develops its privacy framework further, the FTC avoid narrow prohibitions and specific technological recommendations. For instance, the Report endorses the concept of “Do Not Track,” suggesting it would provide a more comprehensive method of providing consumer choice. The

report is very specific in this regard, identifying the placing of a persistent cookie on a consumer's browser as the "most practical method" of providing uniform choice for online behavioral advertising.⁵

While providing greater consumer choice regarding privacy preferences is a worthy goal, proscribing specific technologies and focusing on instilling a narrow "Do Not Track" system ignores the important role of continuing technological innovation and the valuable role that innovation can play. The federal bank regulatory agencies, in crafting information security guidance, have long recognized the need for such guidance to be "technologically neutral." For example, in drafting online banking authentication guidance, the banking agencies were very careful not to endorse a particular technology.⁶

Data Use Restrictions and Customer Access to Data Should be Proportional to Potential Harm

In the Report, the FTC discusses the diminishing distinction between personally identifiable and (supposedly) anonymous or de-identified information.⁷ Regardless of this blending, the potential harm to consumers from use of their data varies significantly, depending on the nature of that data. The ABA recommends that FTC develop a privacy framework that prioritizes data based upon that data's sensitivity, varying the level of security, privacy, and consumer access to their data accordingly.

While the Report emphasizes that to make meaningful choices consumers need more information about how their data will be used, as well as enhanced access to that data, it does not assess the value of the additional information to the consumers who would benefit from it. Nor does it assess the costs to businesses of providing enhanced choice and access. The ABA recommends that a more rigorous analysis of the costs and benefits of this approach be conducted.

The AB A looks forward to continuing to work with the FTC and others to ensure consumers enjoy a secure online environment where their privacy preferences are honored.

Sincerely,

Wm. Douglas Johnson
Vice President,
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⁵ Report at 66.

⁶ Financial Institution Examination Council, *Authentication in an Internet Banking Environment*. Released June 17, 2005. Available at: http://www.ffiec.gov/pdf/authentication_guidance.pdf

⁷ Report at 35.