



**BEFORE THE
FEDERAL TRADE COMMISSION**

**IN THE MATTER OF IN SHORT WORKSHOP; FTC PROJECT NO
P114506**

COMMENTS SUBMITTED BY EBAY INC.

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eBay Inc. ("eBay") respectfully submits these comments in response to the Federal Trade Commission's ("FTC") request for public comments following the May 30, 2012 workshop ("In Short Workshop") on potential modifications to the *Dot Com Disclosures: Information About Online Advertising* guidance document ("Dot Com Disclosures").

I. Opening Statement

About eBay

eBay is a global commerce platform and payments leader. It enables commerce through three reportable segments: Marketplaces, Payments and GSI. These segments provide online platforms, services and tools to help individuals and small, medium and large merchants around the globe establish online and mobile commerce and payments. In particular, eBay's Marketplaces brings buyers and sellers together through fully automated and easy-to-use online websites and mobile applications that are generally available throughout the world at any time, including through localized eBay.com sites in many countries. eBay had approximately 100.4 million active users at the end of 2011, compared to approximately 94.5 million at the end of 2010. eBay defines an active user as any user who bid on, bought or listed an item on any of eBay Marketplaces trading platforms (excluding users of Half.com, StubHub, and eBay's Korean subsidiaries) during the preceding 12-month period. eBay's Marketplaces segment includes the core ecommerce platform eBay.com, the vertical shopping sites such as StubHub, Fashion, Motors and Half.com, the classifieds websites such as Marktplaats.nl and mobile.de, and advertising services. Additionally, Marketplaces has acquired technologies to help enable new commerce opportunities, including RedLaser to facilitate mobile commerce, Milo to enable search for goods at local retailers and Hunch to improve search and merchandising based on customers' needs and tastes. These acquisitions are intended to deliver new services to merchants and consumers by utilizing innovative technology and improved experiences across multiple channels of commerce.

Dot Com Disclosures

eBay has been following developments to the Dot Com Disclosures closely, as any changes will have a significant impact both on eBay and the millions of consumers and businesses who use eBay's numerous platforms. eBay is a member of the Promotion Marketing Association ("PMA") and supported PMA's initial Dot Com Disclosures commentsⁱ. Also, senior members of eBay's legal team, including its Senior Marketing Counsel, attended the In Short Workshop in Washington D.C. on May 30, 2012.

eBay agrees with the FTC that the Dot Com Disclosures need to be updated to address the rapid changes in the online ecosystem. In making those updates, eBay asserts that:

- a prescriptive approach to avoiding deception in online advertising would likely be outdated quickly, and therefore, flexibility should be the guiding principle throughout the updated Dot Com Disclosures;
- the FTC should abandon requiring material terms of an offer to be in close proximity to the triggering claim and instead embrace the use of contextually relevant disclosures and universal symbols or labels to advise consumers that there is important information to know about an offer; and
- the FTC should recognize the applicability of Section 230 of the Communications Decency Act to online platforms and online service providers, such as eBay and similarly situated businesses.

II. Flexibility

The 2000 Dot Com Disclosures were issued to address a single new medium of communication, the World Wide Web. Today, new mediums, platforms and applications are launching on a continual basis, each rich with their own features and tools, but also limitations and challenges. Taking mobile platforms as an example, we have seen the ability to connect more closely and relevantly with consumers, but through an interface that is considerably smaller than computers. Twitter is another example. It has enabled parties to communicate quickly and succinctly, but with a 140 character or less standard that creates interesting challenges. To account for the rapidly changing landscape, the FTC should expressly allow for flexibility in achieving clear and conspicuous disclosure of material terms of an offer.

The flexible approach is necessary to address the various ways people now consume information and transact with brands. What may be extremely effective in one medium may not be sufficient in another. For example, there was significant discussion at the In Short Workshop about requiring a checkbox (or click wrap) for consumers to agree to certain terms of a subscription based offer. However, that approach, which is common and more easily executable on a web page, may not effectively provide consumers with the information they need in another medium, including ones that will become commonplace tomorrow.

eBay joins many other businesses in a concern that a prescriptive approach to the Dot Com Disclosures will become outdated quickly. And so while the many examples in the current Dot Com Disclosures were helpful beginning in 2000, and industry is expecting more helpful examples in the updated Dot Com Disclosures, the FTC should ensure that the examples are not presented as the one or exhaustive way of achieving compliance. We believe there is widespread support for flexibility in how businesses provide consumers with relevant disclosures, as evidenced by comments from both the marketer and consumer advocate panelists at the In Short Workshop.

III. Universal Symbols/Labels & Contextual Relevance

A central principle in the current Dot Com Disclosures is the requirement that “disclosures that are an integral part of a claim or inseparable from it...should be placed on the same page and immediately next to the claim...without referring the consumer somewhere else to obtain the disclosure.” eBay recommends that the FTC revisit and revise this principle in favor of universal symbols or labels that tell consumers there is important and relevant information to learn. The industry already does this with banner advertising and consumers are accustomed to the practice – they know that they must click through to find out further information. Consumers are already aided by symbols, but are also generally much more technologically savvy and sophisticated than when the original Dot Com Disclosures were released. Adopting universal symbols or labels in marketing claims context is likely the best way to balance flexibility (see Section II, above) with the need to provide consumers with a relevant way to get all of the material information associated with a claim. eBay recognizes that consumer education will be an important element to adopting universal symbols or labels and all members of the industry will have to take on the responsibility to educate consumers on any newly adopted symbols or labels.

The FTC should also support the use of contextually relevant disclosures – allowing marketers to effectively communicate to consumers what they need to know, when they need to know it. Supporting the use of contextually relevant disclosures gives advertisers flexibility to provide consumers relevant information while also taking into account the nature of the disclosures and the platform and technology being used. Contextually relevant disclosures also are likely to be more easily understandable for consumers and, therefore, more effective in most circumstances. For example, in the privacy context,

speakers at the In Short Workshop supported the way in which Apple's App Store requires an application to disclose and require consent to the use of a person's location data, which occurs the first time the application will access the data. The location data disclosure is not presented at the time the app is advertised, but rather at the time of access (which is when the consumer must decide yes or no). The contextually relevant approach also helps to eliminate the need for repetition of disclosures. Repetition, depending on the medium, can be impractical and even tiresome for the consumer.

IV. Communications Decency Act

Section 230 of the Communications Decency Act ("CDA") generally creates immunity for certain platform providers from liability associated with third party generated content on the platform. Such platform providers are not the speakers or creators of the offers on their platforms. The CDA was specifically passed to help ensure that a platform provider would not be treated as the speaker of third party content. In fact, case law applying the CDA broadly supports: (1) that a web site provider has CDA immunity unless it is involved in creating the subject contentⁱⁱ; and (2) a web site provider's profit motive is irrelevant to the CDA immunity analysisⁱⁱⁱ.

eBay supports the fundamental concept of compliance. To that end, the updated Dot Com Disclosures should focus on how to achieve compliance, which will likely impact all players in the advertising ecosystem. However, legal responsibility for ensuring compliance cannot and should not be put on the platforms that host third party content and listings. The CDA supports that approach and the FTC should specifically recognize the broad applicability of the CDA to online marketplaces and platforms.

V. Conclusion

eBay supports an updated Dot Com Disclosures that provides meaningful guidance to the online advertising ecosystem and preserves the much needed flexibility for businesses to continue to develop new technologies and tools, while remaining compliant. We hope that the foregoing is helpful to the FTC in its efforts to revisit and update the Dot Com Disclosures in a way that benefits both businesses and consumers. Furthermore, we would welcome the opportunity to review and comment further on any specific changes the FTC proposes to the Dot Com Disclosures before finalizing the matter.

Respectfully submitted,

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NOTES:

ⁱ While eBay is aware that PMA is preparing and submitting a written comment on behalf of its members, eBay is concurrently submitting its own comment as well to address matters that are particularly important to eBay.

ⁱⁱ See, e.g., *Fair Housing Council*, 521 F.3d at 1169 & n. 24, 1171, 1174 n. 37, 1175; *Barrett v. Rosenthal*, 40 Cal.4th 33, 47, 51 Cal.Rptr.3d 55, 146 P.3d 510 (2006); *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 822, 835, 121 Cal.Rptr.2d 703 (2002); *Mazur v. eBay*, No. C 07-03967 MHP, 2008 WL 618988, at *9 (N.D.Cal. Mar. 4, 2008).

ⁱⁱⁱ *Goddard v. Google*, 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008); see also *Hill v. StubHub, Inc.*, 2012 WL 696223 (N.C. Ct. App. Mar. 6, 2012).