



THE VOICE OF FOOD RETAIL

Feeding Families  Enriching Lives

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Federal Trade Commission, Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Comments of the Food Marketing Institute – Spring Privacy Series: Mobile Device Tracking, Project No. P145401

The Food Marketing Institute (“FMI”) appreciates the opportunity to comment on this important matter. FMI believes that mobile application have the potential to positively transform consumers’ retail experiences and spur significant innovations to improve the shopping experience.

FMI proudly advocates on behalf of the food retail industry. FMI’s U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost \$770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org.

FMI urges the Commission to recognize the benefit retailer mobile technology can confer to the retail customers of our members.

Discussion

There are numerous reasons that FMI members utilize mobile tracking technologies as discussed in this report, such as to:

- Improve customer service
- Calculate total sales opportunities and conversions
- Compare store performance locally, regionally, nationally
- Compare store performance to the total available market
- Determine marketing campaign effectiveness
- Improve labor scheduling efficiency

Despite the enormous customer and societal benefits that widespread implementation of these technologies promises, the onset of mobile device tracking technologies in retail is far from a certainty. Although the FTC has already held a workshop regarding mobile device tracking, a survey of FMI members found that, far from ubiquitous, the use of these technologies is sporadic at best. Several responding members indicated that they had not yet begun to utilize these technologies. Others had not decided whether to use these technologies. For those who had, many of the members suggested they were likely several years away from even initial implementation. The full-scale implementation of these services, for those members, is certain to be even more remote in time from the date of this submission. As a result, those members who will begin to use these services in the future are likely to have technologies – with corresponding safeguards – far more advanced than those discussed during the Workshop or than are commercially available today.

Regulation guiding, limiting or mandating certain requirements is premature given this nascent state of actual in-store implementation of mobile device tracking. The FTC, and any other regulatory or legislative body, should wait to determine whether the implementation of the myriad of potential mobile device tracking technologies foreseeable today would raise concerns requiring their control before taking regulatory action. This is especially true given the extraordinary pace of technological change in the mobile technology industry. Any guidance – even the establishment of FTC-blessed “best practices” risks appearing to produce a “tech mandate” that will be written around technologies that likely will be utterly outdated even before the guidance is finalized. The risk is even greater for the drafting of regulations or laws given the typically slow pace at which thoughtful regulations or laws are drafted, considered, ratified and implemented.

Privacy Impact Limited: Technologies Collect Geolocation But Not Tied to Identity

In the main there are four key technologies currently available to make possible mobile device tracking and their privacy impact is limited at worst. These are: Bluetooth, Global Positioning System (“GPS”), Global System for Mobile Communication (“GSM”) and WiFi. In theory, both a Near Field Communication-enabled (“NFC”) chip and Radio-Frequency Identification (“RFID”) tracking system also could be used to determine relative proximity of a device. Although these six technologies could determine with varying levels of precision a device’s location at any moment or over time, none of these technologies make it possible – absent the marrying of some other as-of-yet-unknown technology capturing definitive, personally identifying information, or intentional broadcast by a consumer carrying the device of their identity and location – to identify who exactly the consumer is that is visiting a store using any of these technologies. In short, stores can determine that a device visited a store but cannot determine whether a specific customer visited a store. As a result, while FMI believes that the device-specific geolocation could be sensitive information if it were tied to a particular person, FMI believes that the current state-of-the-art technologies that could be used by our members do not capture personally identifiable information. Moreover, because these mobile retail tracking

technologies do not identify individuals the privacy concerns attached to these technologies' use by FMI members is relatively low.

Consumer Behavior Creates Other De Facto Privacy Protections

This technology limitation is critical; it allows businesses to capture the data they need to improve customers' experiences and make stores more efficient and profitable without actually tracking a specific customer. Other privacy limitations result from typical device usage realities including:

- (i) Customers' tendency to share a single device among multiple family members;
- (ii) Customers' frequency of purchasing new devices to upgrade to newer models or replace broken devices;
- (iii) The still-limited market penetration of smart phones (it was only in 2013 that "smart phones" were owned by more than half of the mobile phone users in the United States); and,
- (iv) That consumers do not always carry their devices with them each time they visit a store, particularly where the device is a tablet or laptop.

Each of these realities diminishes the device-specific and cumulative benefits of these technologies but function as de facto privacy protections for customers concerned about the data that could be captured from these devices. Cumulatively, these four issues create erroneous, confused, inconsistent or time-limited data. For example, if a mother gives her phone to her teenage daughter for the afternoon and she visits the same store her mother frequents, although that device may travel to the same store it is highly unlikely that the varying shopping habits of the two will produce consistent mobile device tracking information. This clouds or confuses data tied to that device. When a customer upgrades their device, all the device-specific information formally gathered becomes stale almost immediately and cannot be tied – even if tracking begins for that customer's new device – to all the legacy information captured and tied to the prior device. Once data is stale it can only inform an FMI member what historically occurred with a device that is no longer associated with shopping in their businesses. Its relevance diminishes with each passing day. If a shopper leaves his tablet or phone in his car or at home the data derived from any retail tracking of that device will be incomplete due to episodic data gathering.

Technologies Employed Primarily Utilize Aggregate Data Not PII

The device-identifying-but-not-individual-customer-identifying limitations of these technologies yield additional privacy protections because they primarily result in data analysis of aggregate data sets rather than of data from an individual device. In the main, because identity of a customer is not known absent the corresponding capture and marrying of additional actually-identifying personally identifiable information, businesses employing mobile device tracking technologies tend to analyze any device info obtained in the aggregate. Because of the price

point of goods and services bought from our industry by specific customers, tracking specific individuals, except for in rare circumstances not present in the food marketing industry, is not practicable. Contrast this with the use of device tracking for high priced or luxury goods such as cars, appliances or jewelry. As a result, FMI member companies will look at mobile device tracking data for averages and trends far more often than when analyzing the data from a single device. This also functions as a de facto privacy impact limitation.

In summation, FMI members are essentially not obtaining personally identifiable information in those still rare circumstances when they are using mobile device tracking technologies. The current state-of-the-art of the technologies available, inability to identify the device-carrying shopper, price point of the goods and services obtained from FMI members, and prevailing consumer trends for usage of mobile devices all contribute to an at worst de minimis and speculative privacy impact. Despite – and perhaps because of – the likely march of technological advancement, it would be challenging if not impossible to craft meaningful regulations regarding these technologies. The well-documented, accelerating pace of mobile innovation and change would likely render any FTC-authored guidance in this field obsolete in the period between drafting of the paper and its issuance.

Mobile Retail Tracking Yields Extraordinary Consumer Benefits

FMI members' businesses thrive when their customers have great shopping experiences. Happy first time customers can become occasional or even regular customers loyal to our stores and our brands. FMI members, therefore, constantly seek innovations and improvements that provide our consumers with benefits. These make our stores more attractive to customers. Mobile retail tracking technologies offer great promise for our members for new methods to do exactly this for our customers.

Mobile retail tracking can aid customers in numerous, important ways. The collection of technologies either currently employed or that may soon be available for implementation offer a means for stores and companies to identify with greater precision the exact mix of products and services to offer in retail locations. They also provide a chance to distinguish with precision between and amongst the competing brands for products and services that the customers of a particular store or chain prefer. It is conceivable that mobile retail tracking will facilitate the introduction of new offerings for consumers thereby increasing their choices and increasing the likelihood that the products or service they buy will best fit each consumer's needs and desires.

Correctly anticipating and fulfilling customers' exact product and service demands can provide meaningful benefits to consumers. We believe that mobile retail tracking technologies may be a useful tool to help us achieve this. When we employ tools to give us more precise data at the store level or chain of stores level we are better positioned to help consumers spend their money on exactly what they desire rather than on what we might guess they desire. This is true whether we are providing – due to our use of mobile device tracking technologies – the ideal

brand, size, variety or quality, and price level of products and services customers visiting a particular store desire. For example, if mobile retail tracking technologies can tell us that a particular store primarily serves single adults then we can avoid placing products in that store that are sold in “family sizes” or bulk packaging. Absent some knowledge of our customers, FMI members’ efforts may be left to essentially blind trial and error, which decreases that store’s profitability. We have all had the experience of walking into a store as a consumer and realizing that the store’s offerings were not appropriate for us. That is a bad, inefficient consumer experience and mobile device tracking technologies may help our members avoid that unfortunate outcome.

Mobile Device Tracking Helps Businesses Effectively Locate Additional Stores

A second important consumer benefit made possible through the use of aggregated mobile retail tracking information is the proper siting of our stores. These technologies can increase FMI members’ knowledge of what other shopping or errands consumers typically are doing before or after they visit our stores. As a result, when chains are expanding to open additional stores we may be able to better understand and respond to what our customers’ expectations are and help their errands become more efficient shopping experiences. If we do this correctly, our stores will be proximate to those customers who are most likely wanting their service and product offerings.

Mobile Device Tracking Aids Businesses in Optimizing Store Layouts

A third important consumer benefit made possible through the use of aggregated mobile retail tracking information is improved layout of our stores. Just as siting stores near to consumers or in locales that make their visits time efficient gives consumers back valuable time in their lives, consumers benefit directly when the stores they visit are logically arranged to help them find the goods and services they want within a store quickly and easily. Consumers who visit our stores seeking to find olive oil, for example, should not have to hunt within a store to find that oil. Should the olive oil be sold in a special “Italian or Mediterranean Foods” section of the store or should it be next to canola, vegetable or peanut oil? Mobile retail tracking may assist FMI members in answering that question in a manner that utilizes customers’ information derived from their devices to map out a store most appropriately. When that happens, consumers can come into our stores, move directly to the goods they want most, and finish their shopping expeditiously.

Mobile Device Tracking Reduces Unnecessary Real Estate Costs

Perhaps more importantly, one of the highest value uses of mobile device tracking is that it can assist businesses in reducing real estate expenses. Rental of physical space represents a huge portion of the costs that FMI members incur. Mobile device tracking technologies can aid FMI members in renting the ideal size space for their stores. Eliminating rental of extraneous space or avoiding rental of a space that is too cramped or too small to hold a proper array of products are both hugely beneficial outcomes that can be achieved through mobile device tracking.

Labor Can Be Properly Allocated by Studying Mobile Device Tracking Data

FMI members want their customers to have efficient, pleasant shopping experiences. At the same time, FMI members want to efficiently staff their stores. Having either too many or too few employees at a location at any given time produces unacceptable and previously unavoidable costs. Either type of labor efficiency now can be addressed by utilizing mobile device tracking to determine peak or trough shopping times for specific departments or sections of a store. Simply focusing on purchase data will not alone help FMI members “right size” their labor force but the addition of mobile device tracking data may make this feasible. This is not a unidirectional benefit; customers also benefit when a store has enough employees to answer questions, provide personalized service and expedite consumers’ shopping.

Mobile Retail Tracking Spurs Substantial Efficiency Gains for Retailers

FMI members operate in a business environment where their margins are tight; the difference between whether a store or chain of stores is profitable is often a surprisingly small increase or decrease in costs. For this reason, FMI members are constantly seeking innovations that may create additional efficiency gains. Because large portions of FMI members’ products are perishable the ability to get exactly the correct food item, in exactly the correct amount, to a customer at exactly the correct time is paramount to our success as an industry. Mobile device tracking offers the possibility of efficiently gauging the suitability of products for specific stores. Similarly, having a sense of when certain products will be rapidly sold out will further allow our businesses to be properly stocked so as to not lose sales when customers want a specific food item. In the future, we anticipate that understanding what products are bought by people with specific devices will allow us to offer inducements and discounts to increase our sales and perfect our pricing.

Preserve Flexibility for New Technologies

FMI urges the FTC and other regulatory bodies to consider the extremely limited privacy impacts and manifest customer and business benefit when evaluating mobile device tracking technologies. Rather than foreclosing these technologies, the FTC should help businesses embrace them to advance individual and societal benefit. Doing so will necessarily require the FTC to be open to the introduction of new mobile device technologies. The FTC should also be mindful of the ever-accelerating advance of new technologies that would effectively render any guidance or regulation nearly or totally obsolete within the time period that guidance was drafted, reviewed and published by the FTC. Moreover, FTC guidance may not anticipate new technological revolutions and both their new benefits and new considerations they may raise. The advancement of privacy protections in other data fields and subsequently applied to new mobile device tracking is further likely to diminish even the hypothetical privacy impact for consumers of the use of these technologies. Given the extraordinary benefits these technologies may provide to our businesses and our customers we urge caution and restraint

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and fair assessment of the benefits derived from these technologies at the same time their hypothetical burdens are considered.

We appreciate your consideration of these comments. Please do not hesitate to contact me at elieberman@fmi.org or (202) 810-4044 if you have any questions.

Sincerely,

Erik R. Lieberman
Vice President and Chief Regulatory Counsel