

**Federal Trade Commission**

**Title:** Federal Trade Commission  
(Bureau of Consumer Protection)

Staff Report

**Subject Category:** A Preliminary FTC  
Staff Report on "Protecting Consumer Privacy  
in an Era of Rapid Change: A Proposed  
Framework for Businesses and Policymakers"

**Comments Due:** February 18, 2011



**COMMENTS OF CLICK SALES INC.**

**To**

**THE FEDERAL TRADE COMMISSION**

**In Response to Questions for Comment on Proposed Framework**

On December 2, 2010, the Federal Trade Commission (the "Commission") published a Preliminary FTC Staff Report entitled "A Proposed Framework for Business and Policymakers" (the "Report"). In conjunction with its publication of the Report, the Commission requested public response to a series of questions ("Questions for Comments") related to the privacy framework proposed in the Report by the Commission (the "Proposed Framework").<sup>1</sup>

This comment is submitted on behalf of Click Sales Inc., d/b/a ClickBank, a subsidiary of Keynetics Inc. Keynetics also owns Kount, Inc. which has submitted a separate comment. As described below, ClickBank's comments express specific concerns regarding adverse commercial and compliance consequences of the Proposed Framework.

**I. Introduction**

**A. ClickBank**

Founded in 1998, ClickBank is a leading seller of downloadable digital products sold over the Internet. ClickBank has created a substantial and valuable electronic marketplace, through which tens of thousands vendors and affiliates offer, and hundreds of thousands of

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<sup>1</sup> Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework For Businesses and Policymakers; Preliminary Staff Report, December 2010*, , available at <http://www.ftc.gov/opa/2010/12/privacyreport.shtm>.

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consumers purchase, a wide range of electronic products. Over \$350 million in sales occurred on this marketplace in calendar year 2010.

**B. FTC Request for Comments**

On December 2, 2010, the Commission published its Report and Proposed Framework. Central to the Proposed Framework is a proposal that would allow consumers to use a browser-based mechanism to prevent tracking of online activities and transactions ("Do Not Track").

**C. Apparent Conflict with Legitimate Uses for Tracking**

The Report acknowledged that there should be some exceptions to Do Not Track for "commonly accepted practices," including product fulfillment, fraud prevention, legal compliance and public purpose. (Report at 53-54). The thrust of the proposal, even with exceptions, creates a conflict between Do Not Track and tracking that is required to offer, monitor, and maintain an electronic marketplace, such as that created by ClickBank. As discussed below, our view is that Do Not Track should be re-visited altogether or modified to articulate unambiguous exceptions to allow companies, such as ClickBank, an ability to track purchases for internal accounting, fraud prevention and compliance purposes.

**II. ClickBank's Business and Limited Use of Tracking**

**A. ClickBank's Electronic Marketplace**

ClickBank is a leading seller of "digital" products. ClickBank provides a platform for companies and individuals to sell products including "how to" guides, software, membership sites and electronic books. These parties, referred to as "vendors," use ClickBank to process customer purchases. As the provider of the marketplace, ClickBank handles credit card, PayPal

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and European Union direct debit transactions. ClickBank also provides important customer support, as well as anti-fraud protections and other compliance measures.

In addition to providing the marketplace itself, ClickBank offers a key commercial resource for vendors and other parties through its network of marketing specialists referred to as "affiliates." These affiliates design individual marketing plans to promote products sold by vendors. In return for the sales generated by these efforts, affiliates receive commissions on each sale. Vendors determine commission rates paid to affiliates.

**B. Essential Tracking**

ClickBank adds significant value to this process by offering – within its marketplace – technology that connects creators of digital products with appropriate affiliates. The ClickBank uses patented technology involving "hoplinks" to record sale histories through limited and targeted use of bit text stored on web browser, commonly referred to as a "cookie." ClickBank's tracking is for accounting purposes that are essential to support online affiliate marketing. ClickBank does not use tracking data to conduct "behavioral advertising" nor does ClickBank sell the data to third parties.

**C. Substantial Revenue for Vendors and Affiliates**

The electronic marketplace created by ClickBank is commercially significant. During a time when brick and mortar jobs have declined, thousands of individuals have achieved financial success working with ClickBank's digital platform and affiliate network. In 2010, ClickBank

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processed 10 million transactions, had over \$350 million in sales and processed commission or sales proceeds to nearly 20,000 different individuals.

The commercial importance of ClickBank is such that it has become a noteworthy contributor to U.S. dominance in Internet commerce. The electronic marketplace allows consumers access to a wide range of products they want, while providing income earning opportunities for Americans of diverse backgrounds.

**D. Conflict Between Do Not Track and Electronic Marketplace**

As discussed in more detail below, unless the Commission's Proposed Framework allows for tracking, as done by ClickBank (to credit and process sales, prevent fraud and ensure legal compliance), the proposal could inadvertently impair a growing aspect of the U.S. economy. Absent a means of determining where a sale originates to ensure proper crediting of a referred transaction, Do Not Track would compromise the commercial core of this electronic marketplace.

In addition to permitting appropriate accounting and functioning of its electronic marketplace, tracking also enables ClickBank to confirm the legitimacy of orders and other transactions on its system. As noted in separate comments by its sister company, Kount Inc., multiple federal legal requirements, ranging from controls on prohibited parties to money laundering, effectively require that ClickBank have in place a means of determining the legitimacy of transactions in "real time." There are also state and commercial requirements that compel ClickBank (and presumably other e-commerce companies) to have in place tracking

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features to guard against fraud and other illegal conduct. Do Not Track could impair or prevent altogether these important compliance efforts.

**III. Online Affiliate Marketing**

**A. "Online Affiliate Marketing" is an Accepted and Established Business Distinct from "Affiliate Marketing"**

"Affiliate Marketing," as the term is defined and used in connection with the Commission's enforcement of 16 C.F.R. § 680 (the "Affiliate Marketing Rule"),<sup>2</sup> is not the same as "Online Affiliate Marketing," the latter being central to the functioning of ClickBank's electronic marketplace.

"Affiliate Marketing" – referred to by the Commission's Affiliate Marketing Rule – concerns the practice of passing information taken from a consumer's credit report between affiliated entities for marketing purposes, **without the consumer's consent**. ClickBank does not engage in "Affiliate Marketing."

"Online Affiliate Marketing" refers to the established, consumer-driven business model where an interactive service provider (a "Network") provides an online marketplace for vendors to sell goods or services to consumers. This marketplace involves third parties (affiliates) who promote products in exchange for a portion of sales proceeds.

**B. Online Affiliate Marketing is Not the Same As Behavioral Advertising**

As discussed in the Report, behavioral advertisers use cookies to track consumer browsing activities. Advertisers then use that information to build a profile of those customers.

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<sup>2</sup> 15 U.S.C. 1681s-3

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These profiles are either sold to third parties with whom consumers have no relationship, or used by the behavioral advertiser to serve advertising to the consumer on behalf of third parties. In this way, behavioral advertising is similar to Affiliate Marketing regulated by the Affiliate Marketing Rule. Affiliate Marketing, like behavioral advertising, involves the disclosure of a consumer's personal information to unrelated third parties for the purpose of targeting the consumer with unwanted advertising.

In contrast, Online Affiliate Marketing involves consumer browser information collected for the limited purpose of completing a transaction that was **initiated by the consumer**. When a consumer purchases a product as a result of an affiliate's activity, ClickBank uses tracking information to ensure that affiliates are credited for sales and that the transaction is otherwise compliant. The tracking mechanism is added at the time the affiliate first attracts a purchaser to a product. ClickBank only references the gathered data for a limited period of time and does not sell them to third parties.

**IV. Do Not Track Should Exempt Online Affiliate Networks**

**A. The Use of Information By Online Affiliate Networks is a Type of Product Fulfillment**

In Section C.1 of its Report, the Commission recognized there are certain "commonly accepted practices" that merit exemption from any anti-tracking rule. One specific exception

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would be for the purpose of "product fulfillment."<sup>3</sup> This distinction is appropriate and should be included in any final rule or regulation. To this end, the Commission should define "product fulfillment" in sufficiently clear terms to encompass the entirety of an online transaction and not just final delivery of a product.

Generally when a consumer purchases a product via a Network, the Network or the seller will deliver the product to the consumer, either physically or electronically (through a download or providing access to a password protected website). The product fulfillment process is not complete, however, until the Network has also delivered payment of sales proceeds to both the affiliate and the vendor. Completion of this portion of the transaction is only possible if the Network has the ability to identify and properly credit all parties to the transaction.

ClickBank's use of its proprietary hoplinks and its limited use of tracking data allows for accurate, instantaneous and cost effective distribution of digital products. Consumers benefit from lower prices that result from increased convenience and decreased costs.

**B. Limited Tracking for Fraud Prevention Benefits Consumers**

Online transactions involving credit cards involve inherent risk. Because the consumer is placing an order from a location remote from the retailer, there are increased opportunities for identity theft and other forms of fraud. These transactions, defined as "card not present" (or "CNP") sales, are presumptively assigned a category of high risk by merchant banks. Merchant

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<sup>3</sup> Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework For Businesses and Policymakers; Preliminary Staff Report, December 2010*, Section V.C.1, (page 54): "Based on roundtable discussions and comments, staff has identified a limited set of 'commonly accepted practices' for which companies should not be required to seek consent once the consumer elects to use the product or service in question. They are...Product and service fulfillment..."

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banks charge retailers higher fees for CNP sales. Ultimately, the lower the fraud or risk of fraud in a CNP transaction, the more efficient a marketplace functions. A marketplace with lower fraud-related costs allows CNP consumers to receive products with lower transaction costs.

Internet retailers, therefore, are motivated to identify and minimize fraud. They do so through traditional methods, such as requiring a billing address or card security code. However, those methods are limited and are, themselves, vulnerable to fraudulent manipulation. In response, multiple networks employ digital fingerprinting to identify fraud and reject suspicious transactions.<sup>4</sup> These more robust methodologies rely on tracking data.

This means that without an appropriate exemption, Do Not Track would cause these Networks, such as the marketplace offered by ClickBank, to encounter more fraud. Transaction costs would increase and consumers would pay more for the same products. As envisioned, Do Not Track would increase the risk of fraud and inevitably raise transaction costs.

**C. Do Not Track Would Shift Electronic Marketplaces Overseas**

ClickBank owns patents for its specific applications, *i.e.*, "hoplinks" to track consumer responses from initial advertising to converted sales. Nonetheless, there are a number of other companies who use similar methods that rely on tracking data to account and credit specific transactions. Unless it contained a clear exception allowing tracking for such accounting, Do Not Track could prevent ClickBank and other Networks from using the most efficient means to process transactions. A likely consequence would be that affiliate networks might move off

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<sup>4</sup> Digital fingerprinting is described in the submission from ClickBank's sister company Kount Inc., and is also referenced in more detail below.

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shore to find electronic marketplaces that are allowed to employ tracking to process transactions cost effectively. The parties benefiting from such a move would be non-U.S. affiliates or competing non-U.S. electronic marketplaces.

Offshore competition is a reality in this industry. ClickBank has many vendors with large sales volumes who are located outside of the United States. Some have started affiliate networks of their own. These foreign businesses would enjoy a significant advantage if they could use tracking in a cost effective manner – while ClickBank and other marketplace providers could not. Offshore competing marketplaces could achieve fraud prevention, credit sales, and transaction fulfillment without the regulatory costs of Do Not Track. In a time when the U.S. President and Congress are calling for efficiency and cost-cutting in regulations, Do Not Track appears to contravene that policy shift in favor of non-U.S. companies.

**V. Online Tracking is Essential for Legal Compliance and Fraud Prevention**

The Commission has received a comment submitted on behalf of Kount Inc. (“Kount”), which, like ClickBank, is a subsidiary of Keynetics. In its comment, Kount describes its methodology for device fingerprinting that uses a variety of indicators (but not personal information) to assist e-commerce providers in determining if a device used for an online transaction might involve parties or countries targeted by U.S. trade sanctions or if data from the device otherwise signal fraudulent activity. Kount explains how a “Do Not Track” rule that does not provide for exceptions for legal compliance and fraud prevention would compromise the ability of companies to comply with multiple existing obligations under U.S. law.

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ClickBank is just such a company. ClickBank's marketplace relies on third-party tools – such as Kount's device fingerprinting – to comply with numerous federal laws that prohibit transactions with individuals who are subject to trade sanctions ("Restricted Parties"). Device fingerprinting also identifies transactions involving countries that are known hotspots for Internet fraud,<sup>5</sup> as well as other patterns of conduct that might signal fraudulent activities. As Kount explained, device fingerprinting monitors up to 200 different points of non-personally identifiable data that relate to online transactions. Essential data points include browser configuration elements, the location of the device and Internet service provider being used by the buyer and any past fraudulent activity involving the same the credit card, buyer, or device.

As underscored in Kount's submission, device fingerprinting is an essential anti-fraud tool because it provides real-time data about fraud across multiple merchants and across the globe. As a result, device fingerprinting can identify velocity data (also known as "fraud runs") as they happen so that Internet merchants can react swiftly to prevent losses from criminal enterprises. Networks of ClickBank's size process a massive amount of transactions in brief spaces of time. For example, Clickbank processes more than 35,000 digital transactions every day, involving purchasers from more than 200 countries. Tracking tools such as device fingerprinting enable ClickBank and other electronic marketplaces to safely and compliantly

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<sup>5</sup> 12 international locations account for the majority of online fraud: Ukraine, Indonesia, Yugoslavia, Lithuania, Egypt, Romania, Bulgaria, Turkey, Russia, Pakistan, Malaysia, and Israel, according to a ClearCommerce, Inc., White Paper: Fraud Prevention Guide, *available at* [http://www.atg.com/repositories/ContentCatalogRepository\\_en/products/clearcommerce\\_fraud\\_protection.pdf](http://www.atg.com/repositories/ContentCatalogRepository_en/products/clearcommerce_fraud_protection.pdf)

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complete millions of transactions in a matter of seconds without requiring personally-identifiable information.

It would be unworkable to require ClickBank or other Networks to obtain the consent of identify thieves, Restricted Parties or parties attempting to circumvent U.S. trade sanctions before tracking. Doing so would prevent Networks from complying with federal trade sanctions, money laundering laws, or other protections discussed in the Kount submission.

**VI. Conclusion**

Providing a demonstrably valuable electronic marketplace for consumers, vendors and affiliates, ClickBank engages in limited and necessary use of tracking data to account for legitimate transactions – and prevent illegitimate ones. Networks similar to ClickBank's – where sales are promoted by online affiliate marketing – also need to use tracking data as the most efficient means to monitor, approve and fulfill transactions. Fraud prevention, compliance with federal, state and other requirements designed to protect consumers and further U.S. interests all depend on tracking data.

ClickBank has created a successful marketplace – where none existed before – because of its commitment to consumer protection and legal compliance. Tracking is a key compliance tool. Do Not Track would work against that compliance. Even with exceptions, Do Not Track presents regulatory costs. Marketplace efficiency would diminish and consumers would encounter higher prices for the same products.

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ClickBank, therefore, requests that the Commission consider the proposal in light of this and other information provided by industry. It appears that either the scope of Do Not Track should be reconsidered, or an appropriate exception should be broad and unambiguous. Should the Commission like additional information as to the commercial and compliance impact of Do Not Track, ClickBank would be pleased to assist.

Respectfully submitted,

Brad Wiskirchen  
Chief Executive Officer  
Click Sales, Inc.