

**In the Matter of the Request for  
Comments on the Preliminary Federal  
Trade Commission Staff Report:  
“Protecting Consumer Privacy in an Era of  
Rapid Change: A Proposed Framework for  
Businesses and Policymakers”**

**File No. P095416**

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**Federal Trade Commission  
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Staff Report: “Protecting Consumer Privacy in an Era of Rapid Change: A Proposed  
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**Comments of LifeLock, Inc.**

LifeLock, Inc. (“LifeLock”) appreciates the opportunity to respond to the Commission’s Staff Report on “Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers” (“Staff Report”).

We commend the Federal Trade Commission (“FTC”) on its efforts to update the current privacy framework to meet the privacy challenges of the twenty-first century while supporting beneficial uses of information and technological innovation.

We strongly support the Staff Report’s observations regarding the need for improved transparency for consumers regarding online data collection and sharing. Indeed, both “Do Not Track” and “Why Did I See This Ad” self-regulation and Internet cookie control mechanisms are in place today, but have seen relatively little adoption or utilization to date. We believe this is due to a lack of understanding by consumers of the types of information captured and the fact that the information is held in profiles by third parties with whom the customer has no relationship. To address this lack of understanding, consumers need to be provided with clearer indications when their information is being captured and provided for profiles held by data brokers or made publicly available.

In particular, we respond to the Staff Report’s request for comments on the standardization of privacy notices. Our comments focus on what we understand to be the central challenge that the enhanced framework is to address – improving transparency and enhancing consumer choice in an era when consumer data flows far more widely than consumers presently understand.

In brief, we propose a two-phased approach that promotes transparency and establishes baseline privacy principles. First, we promote a simple, standardized, transparent rating system that uses colors/numbers to indicate the risk level associated with data collection and use

practices. Such a system can be implemented quickly to provide notice to consumers. Second, we urge standardized privacy notice elements developed with industry input. These notice elements would be standardized bullet points that explain data collection and use practices in a clear and effective manner.

## **I. About LifeLock**

LifeLock provides a wide range of services to consumers with respect to privacy protection, including identity theft protection and data breach response services. Headquartered in Arizona, LifeLock's 300 agents help our members keep their identities safe 24 hours a day. The company has a strong focus on educating consumers and working with law enforcement and elected officials to better understand the increasing threats of identity theft. LifeLock was recently ranked 8th on Inc. magazine's 29th Annual Inc. 500 List, a ranking of the nation's fastest-growing private companies.<sup>1</sup> In addition, LifeLock was recognized as #1 in the Security category.<sup>2</sup> LifeLock does not transfer consumer data but has thought extensively about transparency issues raised in this proceeding.

## **II. The Historical Landscape: The Commission's Focus on Transparency**

To date, the FTC's efforts have balanced the privacy interests of consumers with the need to encourage industry innovations. The lynchpin of that approach has been and must continue to be transparency. As stated by Chairman Leibowitz, "...the FTC wants to help ensure that the growing, changing, thriving information marketplace is built on a framework that promotes privacy, transparency, business innovation and consumer choice."<sup>3</sup> LifeLock's proposed privacy notice framework is designed to realize that concept. It is an approach that is fully consistent with the FTC's many efforts over the past decade and in recent years to drive transparency and consumer control.

### *A. Commission Rules Aimed at Promoting Clarity in Consumer Disclosures*

The FTC has brought a long series of enforcement actions against companies that dissembled in their privacy policies regarding the actual practices with regard to personal information<sup>4</sup>, culminating in its Sears, Roebuck & Company consent decree of 2009.

<sup>1</sup> See <http://www.inc.com/inc5000/list>.

<sup>2</sup> See <http://www.inc.com/inc5000/list/industry/security>.

<sup>3</sup> Press Release, Federal Trade Commission, FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers (Dec. 1, 2010).

<sup>4</sup> See e.g., *FTC v. Toysmart.com, LLC*, No. 00-11341-RGS, 2000 WL 34016434 (D. Mass. July 21, 2000); *In re Liberty Fin. Cos.*, 128 F.T.C. 240 (1999); *FTC v. ReverseAuction.com Inc.*, No. 00-0032 (D.D.C. Jan. 6, 2000); *FTC v. Sandra Rennert*, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000); *In re Premier Capital Lending, Inc.*, No. C-4241, 2008 WL 5266769 (F.T.C. Dec. 10, 2008); *In re Life Is Good, Inc.*, No. C-4218, 2008 WL 1839971 (F.T.C. Apr. 16, 2008); *In re Petco Animal Supplies, Inc.*, 139 F.T.C. 102 (2005); *MTS, Inc.*, 137 F.T.C. 444 (2004); *In re Microsoft Corp.*, 134 F.T.C. 709 (2002); *In re TJX Cos.*, No. C-4227, 2008 WL 3150421 (F.T.C. July 29, 2008); *In re Guidance Software, Inc.*, No. C-4187, 2007 WL 1183340 (F.T.C. Mar. 30, 2007); *In re Petco Animal Supplies, Inc.*, 139 F.T.C. 102 (2005); *In re Guess?, Inc.*, 136 F.T.C. 507 (2003); *FTC v. Navone*, No. 2:08-CV-001842 (D. Nev. Dec. 30, 2008); *United States v. Am. United Mortg. Co.*, No. 1:07-CV-07064 (N.D. Ill. Dec. 18, 2007); *In re CVS Caremark Corp.*, No. C-4259, 2009 WL 1892185 (F.T.C. June 18, 2009); *United States v. Rental Research*

The approach we recommend is consistent with the FTC's July 2009 settlement involving Sears, Roebuck & Company, which made clear that it is deceptive to bury notice of intrusive data collection practices in the midst of a long end-user license agreement ("EULA"), even if the consumer opts-in and earns money in exchange for accepting the contract.<sup>5</sup>

The consent order in that case bound Sears "[c]learly and prominently, and prior to the display of, and on a separate screen from, any final 'end user license agreement,' 'privacy policy,' 'terms of use' page, or similar document, [to] disclose all types of data that would be the subject of any tracking application, how such data may be used, and whether the data may be used by a third party."<sup>6</sup>

At an FTC Privacy Roundtable on December 7, 2009, Chairman Leibowitz said the following about the *Sears* Consent Order:

The thrust of our case was that, while the extent of tracking was described in the EULA, that disclosure wasn't sufficiently clear or prominent given the extent of the information tracked, which included online bank statements, drug prescription records, video rental records, library borrowing histories, and the sender, recipient, subject, and size for web-based e-mails. So, consumers didn't consent with an adequate understanding of the deal they were making.<sup>7</sup>

The framework outlined below would achieve the FTC's goal of providing clear and prominent notice of information collection, use, and disclosure practices.

#### B. *Online Behavioral Advertising*

Similarly, the February, 2009 Staff Report on online behavioral advertising<sup>8</sup> embraced as part of the principle of transparency and consumer control, a clear, prominent, consumer-friendly disclosure that data are being collected to provide tailored advertising and that consumers can choose whether to have their information collected for that purpose.<sup>9</sup>

One example it discussed of a method for websites to notify consumers of the websites' online behavioral advertising practices is very similar to our proposal. This is the "Why did I get this ad?" disclosure located in close proximity to an advertisement that links to the pertinent section of a privacy policy that explains how data is collected for purposes of delivering targeted

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*Serv.*, No. 09 CV 524 (D. Minn. Mar. 5, 2009); *United States v. ChoicePoint, Inc.*, No. 1:06-CV-0198 (N.D. Ga. Feb. 15, 2006).

<sup>5</sup> *In the Matter of Sears Holdings Management Corp.*, Complaint, Docket no. C-4264 (Aug. 31, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> FTC Privacy Roundtable, Dec. 7, 2009, Introductory Remarks of Chairman Jon Leibowitz, *available at* <http://www.ftc.gov/speeches/leibowitz/091207privacyremarks.pdf>.

<sup>8</sup> FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising – Behavioral Advertising Tracking, Targeting, & Technology (Feb. 12, 2009) *available at* <http://www.ftc.gov/opa/2009/02/behavad.shtm>.

<sup>9</sup> *Id.*

advertising, rather than a discussion (even a clear one) that is buried within an entity's privacy policy.<sup>10</sup>

We submit that our proposal would achieve transparency in a much broader range of situations and would be every bit as clear and easy-to-read. In addition, our approach would provide consumers with information regarding the collection and use of data when that information is actually collected (as opposed to the example above, where the consumer is being notified after the fact that information was collected and is currently being used). The example above is also still confusing to consumers who do click on the advertising icon. Our approach avoids this confusion by using a simple, easy to understand color/number system with standardized bullet points that clearly and effectively inform consumers about data practices.

#### C. *Commissioner Brill's Remarks at CWAG*

The approach is also consistent with Commissioner Brill's remarks in her personal capacity at the 2010 Conference of the Western Attorneys General regarding "privacy 3.0,"<sup>11</sup> which stressed the importance of:

- notice when new data collection practices or uses may result;
- simple, universal symbols that signal issues to consumers; and
- notice of unexpected/surprising uses.

#### D. *Concerns Expressed in the Staff Report*

The Staff Report repeatedly expresses an overriding concern that notice and choice is ineffective because it is too complicated, not transparent to consumers, and does not enable meaningful choice.<sup>12</sup> We agree. Our proposal would provide consumers with clear, actionable information that they could act upon to exercise their privacy choices.

#### E. *Early FTC Reports*

In important respects, standardized, easy-to-understand privacy notices have been at the core of FTC efforts on privacy for more than a decade. Transparency has been a core feature of the FTC statements regarding privacy in the Internet age. In the 1990s, in tandem with the Clinton Administration's e-commerce initiatives, the FTC engaged in broad business education efforts to encourage the posting of online privacy policies. Both of its reports to Congress on the state of online privacy protection stressed the importance of easy to understand privacy notices.

In its first report to Congress on Internet privacy in 1998, "*Privacy Online: A Report to Congress*," the Commission wrote that:

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<sup>10</sup> *Id.* at 35-36.

<sup>11</sup> Commissioner Julie Brill, Federal Trade Commission, Conference of the Western Attorneys General (July 18-21, 2010).

<sup>12</sup> Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (Dec. 1, 2010), at iii-iv; 19-20; 25-28, 40, 52-53, 57-63, and 69-79.

To be effective, [notice] should be . . . unavoidable and understandable so that it gives consumers meaningful and effective notice of what will happen to the personal information they are asked to divulge.<sup>13</sup>

In its 2000 follow-up report to Congress, “*Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress*,” the FTC wrote that:

Improving the clarity and comprehensibility of such policies . . . is essential to overcoming consumer concerns about the misuse of their personal information . . . [o]f utmost importance, privacy policies and other information practice disclosures should be clear and conspicuous, and written in language that is simple and easy to understand.<sup>14</sup>

### **III. The Proposal: Rating System and Standardization of Privacy Notices**

The Staff Report requested comments on the best approach to promote transparency so that consumers can make informed choices in an information economy. As the Staff Report accurately points out, the current framework has led to long, complex, and incomprehensible privacy policies that consumers cannot understand.<sup>15</sup>

In response, LifeLock advocates a two-phased approach that promotes transparency, is easy for consumers to understand, and thus allows consumers to make informed decisions. First, we suggest a simple, standardized, transparent rating system for consumer privacy notices that can be implemented quickly, followed in a second phase by standardized privacy notice elements developed with industry input. We believe this approach would address expeditiously and effectively the transparency and consumer empowerment interests that animate the Staff Report, without chilling innovation or beneficial uses of consumer information. We also believe that it may advance many of the goals of the Staff Report’s “Do Not Track” proposal, while giving time for technology and self-regulation to evolve before attempting to implement a specific technology solution in that area.

#### *A. Phase One: Color/Number Coded Icon/Seal System*

A central concern of the Staff Report<sup>16</sup> and, we believe, a central privacy concern of the information age, is the degree to which consumer data is transferred and compiled into vast individual profiles in ways that most consumers do not understand and cannot control. For this reason, we believe that consumer privacy notices should clearly and in a standardized manner indicate the extent to which consumer information may be disclosed for profiling when a consumer provides data to a business, non-profit, or governmental entity.

<sup>13</sup> Privacy Online: A Report to Congress (June 1998) at 8.

<sup>14</sup> Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress (May 2000) at 27.

<sup>15</sup> Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (Dec. 1, 2010) at iii, 19-20, 26-28, 44, 60, 70-72.

<sup>16</sup> *Id.* at i-ii, iv, 7, 9, 11, 13, 14, 20, 21-22, 23-24, 26-27, 30-33, 35, 37, 39, 46, 49-51, 54-55, 58, 61, 63, 69.

We propose a standardized, color-coded and numbered privacy seal or icon system that would make immediately apparent to consumers whether their data may be transferred to a database of information used to compile individual profiles. For greatest effectiveness, the privacy seal or icon should be prominently presented on the home page of the website and near the request for information and would map to the key features of the privacy framework as follows:

1. A clear and conspicuous green seal or icon prominently featuring the number “1” would indicate that a commercial, non-profit, or governmental entity does not disclose consumer data or does so only for what the FTC’s Staff Report calls “commonly accepted” practices;
2. A clear and conspicuous yellow seal or icon prominently featuring the number “2” would indicate that a commercial, non-profit, or governmental entity discloses information in ways that require consumer choice but that do not lead to proliferation of consumer data, or that disclose information in a format that cannot reasonably be re-identified; and
3. A clear and conspicuous red seal or icon prominently featuring the number “3” would indicate that a commercial, non-profit, or governmental entity sells, exchanges, or publicly discloses consumer information or discloses that information to any other entity, such as a data broker, that in turn offers it for sale, exchange, or public disclosure, and would contain a very brief statement in the icon about the disclosure.

It is particularly important that this third, higher risk category be reserved for practices that proliferate consumer information in ways that can readily identify individuals. Such practices are qualitatively different from the practices described in the first and second, lower risk categories as such practices build large consumer profiles and are rarely transparent to consumers under conventional privacy notices.

In addition, because the practices described in the third category are higher risk and have raised more concern regarding consumer transparency and choice, an opt-out option should be offered in connection with these activities. Conversely, the practices described in the first and second categories are much lower risk and are already transparent to consumers. Thus, the practices described in the first and second categories should not, at this time, need an opt-out option. That said, we suggest that this system be adopted before such opt-out/opt-in options are decided. One of the significant benefits of this system is that it is very flexible and can be adapted quickly to evolving self-regulatory standards or rules and can incorporate additional options at later dates.

Each icon would contain a link to a concise and specific explanation of the significance of the color/number code. This system should apply equally to non-profits and governmental entities, where they disclose consumer data.

This notice system would have the major advantages of: (a) being immediately visible to consumers; (b) being easy for both consumers and commercial, non-profit, or governmental entities of all sizes to understand and apply, thereby promoting competition in privacy practices; (c) being deployable on paper, mobile, and web media without the need to build and agree on technical standards or interfaces; (d) providing transparency regarding data collectors' relationships with non-consumer facing entities that compile consumer profiles; (e) avoiding preempting site-by-site consumer choice, as well as imposition of a technology mandate; and (f) fitting well with existing seal programs, while covering both behavioral advertising and other data sharing models. It bears considerable similarities to the MPAA's movie rating system, whose success in educating the public points to the likely success of this model.

#### B. *Phase Two: Standardized Privacy Bullet Points*

The second phase of this transparency solution would develop standardized, easy to understand points that would appear when the user clicked on the icon or seal, or on the next page of a written notice. We recommend standardized bullets describing consumer data practices, rather than longer, standardized privacy notices because the standardization of privacy notices is far too complex and difficult to achieve in a short period of time. Rather, we recommend creating a directory of data collections, uses, and disclosures that correspond to standardized bullet points. This approach is much easier than standardizing privacy notices, and the bullets can be modeled after the FTC's proposed standardized descriptions.

Under this approach, when users click on the icon or seal, they would go to a "Privacy Notice" page. However, instead of seeing a common, overly legalistic privacy notice, they would see a list of standardized bullets – easier to understand, more transparent, easier to standardize – that would eliminate legalese and use plain English so as effectively and efficiently to provide consumers with information regarding data collection, use, and disclosure.

We emphasize that this rating/seal system would fulfill in a very flexible and scalable way the critical function of consumer transparency in achieving consumer control. This rating/seal system would provide a foundation that both industry and the FTC could build upon as self-regulatory systems evolved because it could accommodate a range of features. For example, the rating/seal system could evolve to include additional features, such as additional opt-out and opt-in options – i.e., by adding categories relating to different opt-out or opt-in options, or some version of a "do not track" mechanism. However, this basic system as proposed would address consumer transparency and set the foundation for basic consumer control through informed decision-making, while at the same time facilitating greater consumer control later as consumer choice technologies are perfected.

#### C. *Implementation and Enforcement*

The proposal described above would be self-executing – each company/advertiser making a designation decision would make that decision based on criteria, though not regulations, enunciated by the FTC with industry input. That designation would then be considered a material statement to consumers that would be actionable under Section 5 by the



FTC as an unfair or deceptive business practice if the applicable entity failed to live up to the designation. Self-regulatory organizations would refer non-compliance to the FTC for investigations and/or enforcement, just as the Better Business Bureau's NAD has long referred deceptive advertising cases to the FTC for enforcement.

#### **IV. First-Party Marketing**

In addition to the transparency approach described above, we support limited restrictions with respect to first-party marketing activities. Consumers understand and expect that their information may be used for first-party marketing purposes. Such uses are not intrusive on consumer privacy expectations. Flexibility and limited restriction on first-party marketing should also extend to direct affiliate sharing, assuming affiliates are also not further sharing the information with third parties.

We thank you for considering our views, and are eager to continue to work with you in a constructive fashion to help achieve the FTC's goals of balancing consumer transparency and choice with beneficial uses of information and continued technological innovation.

Sincerely,

Clarissa Cerda  
Senior Vice President, General Counsel & Secretary