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VIA FACSIMILE

September 9, 2002

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

To Whom It May Concern:

On behalf of the Computer & Communications Industry Association (CCIA), I submit the enclosed comments concerning the proposed consent order between the Federal Trade Commission and Microsoft Corporation regarding privacy and security problems with Microsoft's Passport service.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jason Mahler', is written over a horizontal line.

Jason Mahler
Vice President and General Counsel

Enclosure





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Federal Trade Commission
Office of the Secretary
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RE: File No. 012 3240, In the Matter of Microsoft Corporation

The Computer & Communications Industry Association (CCIA) respectfully submits these comments concerning the proposed consent order between the Federal Trade Commission ("the Commission") and Microsoft Corporation ("Microsoft") regarding privacy and security problems with Microsoft's Passport service.

CCIA is an association of computer, communications, Internet and technology companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and online services, resellers, systems integrators, and third-party vendors. Our member companies employ nearly one million people and generate annual revenues exceeding \$300 billion.

For nearly 30 years, CCIA has supported competition policies that ensure competition and a level playing field in the computer and communications industries. CCIA was founded on the belief that competition and vibrant markets are critical factors in the success of our economy and in our ability to lead the world in innovation and technology. We are the leading industry advocate in promoting open, barrier-free competition in the offering of computer and communications products and services worldwide, and our motto is "open markets, open systems, open networks, and full, fair and open competition." CCIA testified during congressional consideration of the Tunney Act and played active roles in the antitrust cases against AT&T and IBM. CCIA has been closely following and intimately involved in the Microsoft antitrust cases in the U.S. and Europe for the past eight years.

We are pleased that Microsoft has owned up to many of the shortcomings in the security of its products. We are also encouraged that Microsoft has pledged to take steps to address the vulnerability of consumer data collected by the company, to provide improved disclosure of its data collection policies, and to curtail its use of such data. However, we are disturbed that the proposed consent order does nothing to address the root causes of the problems identified by the Commission and will allow Microsoft to continue to abuse its illegal monopoly to the detriment of consumers and their privacy. As such, we are deeply dismayed that the proposed consent order – although well

intentioned and superficially addressing the issues at hand – contains no effective enforcement provisions to ensure Microsoft's compliance nor to remedy their past misconduct. For nearly a decade, Microsoft has ignored the terms of negotiated settlements and adverse judicial rulings and followed a course of conduct that disregards the dictates of the law or legal authorities, and seeks only to protect and extend its illegal monopoly. Because the proposed consent order provides for only an essentially meaningless fine for future violations – and does nothing to address past misrepresentations and statutory violations – Microsoft has again avoided all responsibility for its unlawful behavior and ensured that the foundation for its continuing misconduct remains firmly in place.

Passport is merely one of the more recent outgrowths of Microsoft's dominance in desktop computing, and is integral in Microsoft's strategy to perpetuate its monopoly power on the Internet. Microsoft has ensured that Passport will become the dominant authentication and sign-on service by requiring or inducing users of other dominant Microsoft applications and services to obtain Passport accounts. For instance, users of Microsoft's Hotmail web-mail service, MSN Messenger, MSN Explorer, and MSN.com are also registered with Passport whether they know or not, and whether they desire such a service or not. Passport, Hotmail, and MSN login names and passwords can be used interchangeably.

Therefore, because of its broad dominance in personal computing and the Internet, Microsoft has been able to force most users of their products and services to become users of Passport.¹ Microsoft also employs its monopoly power to deceive users of Windows XP (their most recent desktop operating system) to obtain a Passport account. Upon booting up Windows XP and connecting to the Internet, Windows will prompt the user to set up a Passport account by implying that a Passport account is necessary to use Internet services with Windows XP. The Windows prompt is as follows:

Add your .NET Passport to Windows XP!

You've just connected to the Internet. You need a Passport to use Windows XP Internet communications features (such as instant messaging, voice chat, and video), and to access .NET-enabled services on the Internet.

[Click here to set up your Passport now](#)

It is easy to understand how most users will interpret this admonition as an indication that Passport is essential to their fully utilizing and accessing Internet communications and services. This process obviously raises extremely troubling antitrust issues, but it also presents a very serious issue with regard to the privacy disclosure of Passport services. The quoted prompt is extremely deceptive and misleading as to the need for a Passport account for Windows users, and creates a false inducement for Windows users to enroll in Passport, and thus relinquish sensitive information to Microsoft.

¹ A survey of Passport users showed that 61% of them obtained Passport accounts because they were required to do so to use other Microsoft products and services. A. Litan, Research Note M 14-4839, Gartner Group, October 12, 2001.

While the Windows prompt is clearly deceptive regarding the need for a Passport account, it is not entirely false. Microsoft has actually required all users of such Microsoft applications and services as MSN Explorer, MSN Messenger, and Windows Media.com to obtain a Passport account, further leveraging its dominant position in personal computing into the authentication market, so that Microsoft now maintains that Passport can claim over 200 million accounts. Even this staggering number is probably only a fraction of the market share that Microsoft will claim as Windows XP proliferates and becomes the dominant PC platform.

Just as Microsoft has monopolized the key PC software markets, Microsoft envisions Passport as the near ubiquitous platform for authentication and authorization on the Internet. Certainly, this will harm consumers in a variety of ways – competition will be eliminated, consumers will be forced to pay higher prices for Passport-related services, and innovation in this area will be severely curtailed. But perhaps the greatest threat to security will inhere from the very existence of such a monopoly. The centralization of the sensitive information collected by Passport – potentially a ubiquitous intermediary in e-commerce services – within the control of a single entity or a within a single security structure is extremely hazardous from a security or privacy perspective. Penetration of the security of the Passport infrastructure would open up a “Fort Knox” of consumer data. And the ability and temptation for a company in control of such all-encompassing information about consumers to use that information for their own purposes is extremely great. Given Microsoft’s past record on privacy and security, this threat is even more disconcerting.

Microsoft has also demonstrated that they are not trustworthy with regard to their willingness to accept and abide the authority of the Commission and other government regulatory bodies. Even within the context of this investigation, Microsoft was found to have misrepresented its information collection practices and security. During a conference call announcing the proposed consent order, Commission Chairman Muris stated:

We believe that Microsoft made a number of misrepresentations, dealing with, one, the overall security of the Passport system and personal information stored on it; two, the security of online purchases made with Passport Wallet; three, the kinds of personal information Microsoft collects of users of the Passport service; and four, how much control parents have over the information collected by Web sites participating in the Kids Passport program.²

We are deeply troubled by the misrepresentations that Microsoft has been found to have made to the Commission, but for Microsoft such distortions are routine. Microsoft’s protracted history of scrutiny by the Commission, the U.S. Department of Justice, 19 U.S. States, the European Commission, and other regulatory agencies is replete with false or misleading testimony – often under oath – and efforts to deceive legal authorities and the

² See Joe Wilcox, *Microsoft-FTC settle over Passport*, ZDNet News, August 8, 2002, <http://zdnet.com.com/2100-1105-948922.html>.

judiciary. In his order finding against the company, Judge Thomas Penfield Jackson wrote that

Microsoft has proved untrustworthy in the past. In earlier proceedings in which a preliminary injunction was entered, Microsoft's purported compliance with that injunction while it was on appeal was illusory and its explanation disingenuous.³

Finally, the proposed consent order also would impose an \$11,000 per day fine on Microsoft if the company is found to have violated the terms of the agreement. For a company that generates approximately \$1 billion per month in profit and holds around \$40 billion in cash, such an amount (about .03% of profits) is not even a blip on the balance sheet, much less a deterrent to committing further violations.

So while the Commission has extracted some useful promises and commitments from Microsoft, we believe the proposed consent order is flawed for two principal reasons:

(1) The proposed consent order does nothing to address the root cause of the problems created by Passport, which by its size and scope of the Passport services is a threat to the security and privacy of online consumers. Because Passport has inherited its dominant position by the longstanding and intertwining monopolies that Microsoft hold on desktop computing, the problems created by Passport cannot be solved by looking at Passport alone.

(2) The commitments made by Microsoft to remedy its conduct are ultimately dependent on Microsoft's willingness to stand by them. Microsoft has shown time and again that it is fundamentally incapable of living up to obligations that have been imposed on it by government authorities.

Therefore, we urge the Commission to withdraw from the proposed consent order, to continue its investigation into the lawfulness of Microsoft's anticompetitive use of Passport and related technologies, and take steps to address the fundamental causes of Microsoft's ongoing unlawful behavior, which harms consumers, thwarts competition, and impedes innovation.

³ U.S. v. Microsoft, Memorandum and Order, U.S. District Court, District of Columbia, June 7, 2000.

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Priority: URGENT

FYI

Reply Requested

Please call with comments

As requested/discussed

COMMENTS/NOTES:
