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E-COMMERCE AND PRIVACY

FEDERAL TRADE COMMISSION
OFICE OF POLICY PLANNING
PUBLIC WORKSHOP ON BARRIERS TO E-COMMERCE

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On behalf of the members of the National Business Coalition on E-Commerce and Privacy, I want to thank you for permitting me the opportunity to submit, for the consideration of the Commission, our views on existing barriers to e-commerce. We hope that they will prove helpful to the Commission as it prepares its Report and proceeds to consider its appropriate next steps in the evolution of its policy choices in this very important area. We believe that what policy decisions the Commission makes, and its unique role in the emerging debate over privacy and the Internet, are critical to the continued balanced and efficient use of the Internet. We believe your decisions in this area are not only important only for e-commerce generally, but also for the U.S. economy as a whole.

The National Business Coalition on E-Commerce and Privacy, of which I am the Executive Director, is comprised of 15 nationally recognized companies dedicated to the pursuit of a balanced and uniform national policy pertaining to electronic commerce and privacy. We are engaged in virtually every sector of the economy and in every geographic location in the country, with over 40 million customers. We deliberately

created this diverse coalition because e-commerce and privacy policy is not just restricted to the financial services industry or the health care community alone, but affects every sector of our economy.

We believe that we are the only coalition whose membership includes both financial and non-financial companies. Our wide range of member companies compete in manufacturing, such as General Motors and John Deere Corporation; retail (Home Depot); hospitality (Six Continents Hotels); media (General Electric), as well as insurance and financial services, with companies such as CIGNA and Charles Schwab and Co. Inc.. These and our other members are all top competitors in the e-commerce marketplace, and they use the Internet as an essential component of their ability to deliver goods and services to their customers.

Our members have spent decades developing respected brand names and cultivating mutual trust with their customers, and I can assure this Commission that we are strongly committed to ensuring the efficient use of the Internet and, in so doing, the privacy of our customers, both on-line and off-line.

I. Electronic Signatures and the Clinton Administration's OMB Guidance.

We are distressed that guidance released from the Office of Management and Budget (OMB) has had the effect of discouraging the use of electronic signatures within the federal government. On September 25, 2000, OMB Director Jacob J. Lew issued a

memorandum to the heads of federal departments and agencies that was intended to inform their implementation of the E-SIGN Act, passed by the Congress in June 2000 for the historic purpose of authorizing the legal use of electronic signatures in electronic commerce. While the OMB guidance recognized that E-SIGN was intended to "eliminate barriers to electronic commerce", the content of the OMB guidance unfortunately had just the opposite effect.

The OMB guidance has had the practical effect of chilling the widespread use of electronic signatures within the government and has discouraged their broad use and application within the private sector as well. We believe that the purpose and Congressional intent behind the passage of E-SIGN was and remains clear: to create a "consistent, predictable, national framework of rules governing the use of electronic signatures and records," as stated by Senator Abraham (R-MI), the bill's chief sponsor. We do not believe that this goal has been met by the OMB Memorandum of September 25, 2000 or by the OMB guidance that accompanied it. Regrettably, this memorandum has yet to be replaced by Internet-friendly guidance, and we hope the Commission will use its authority to encourage the Bush Administration to revisit this issue, both in regulation and legislative proposals, that would enable the E-SIGN Act to better realize its intended purpose.

II. Privacy

As we testified before Chairman Cliff Stearns' House Commerce Subcommittee on Commerce, Trade and Consumer Protection, we believe that H.R. 4678 moves the privacy debate in a positive and useful direction, and recognizes the potentially debilitating effect of extraordinary barriers to the continued expansion of e-commerce that are being considered in the Congress and in many states and localities.

By requiring the prominent posting of, and by requiring adherence to, a company's privacy policies, it is our view that HR 4678, more than any other piece of legislation currently before the Congress, assures that consumers have the information that they need in order to make informed choices about the use of personal information that pertains to them. A well-informed consumer is the heart of the matter because in a free market economy, knowledge empowers the customer. And we believe that the simple and straightforward step of letting consumers know how information is going to be used is the single most important and useful thing that we can do in the area of privacy.

In this regard, there are three specific areas that our Coalition deems especially important: 1) the creation of uniform national privacy standards; 2) the equal treatment of off-line and on-line information; and 3) private rights of action. We believe that HR 4678 deals with each of these vital issues in a balanced and sensible way.

By creating uniformity of state and local privacy laws, we believe HR 4678 demonstrates an appropriate appreciation of the nature of e-commerce and the modern economy. An economy in which orders for new products and services can be made at the touch of a

button. An economy that allows a customer in Oregon to purchase a product in Florida in a matter of mere seconds. An economy that is, in a very real way, an economy without borders.

The patchwork of state and local laws that is emerging in some states will pose an enormous burden to, and fragmentation of, our economy. This will create, in turn, a significant disincentive for companies to participate in the e-commerce marketplace, especially smaller companies, since they would be forced to navigate a sea of often conflicting state and local privacy laws. As Governor Gilmore noted in response to a question posed at the October 10th workshop, a corporate general counsel simply cannot comply with the potential of diverse and inconsistent laws now being considered and, in some cases, adopted in the states and localities.

This year alone, over 548 privacy bills were introduced in the state legislatures. That's 548 different approaches to what 50 different state jurisdictions ought to do about the single issue of privacy.

And numerous local jurisdictions are now also jumping in and beginning to tackle the question of privacy. For example, in the State of California, San Mateo County and Daly City have both just passed their own privacy laws, with San Francisco, Berkeley, Marin County, Contra Costa County, and Alameda County all expected to do so in the coming weeks. And that's within just the San Francisco Bay Area. Surely there will be more after that. Remember, there are almost 100,000 local government jurisdictions in the

United States. I'm not sure I want to even contemplate how a company could comply with 50 states multiplied by 100,000 localities multiplied by a minimum of 548 different privacy policies.

Obviously, this is a recipe for a disjointed and inefficient marketplace. We, therefore, wish to strongly impress upon the Commission our hope that it will encourage the prompt passage of strong Federal preemption of both state and local laws. If the Internet is not deserving of such preemption, what is? We believe that only by effectively providing a uniform privacy standard across the nation, will the Congress be able to avoid the problems that would accompany a multitude of legal requirements, with all of the ultimately unworkable administrative requirements that would imply.

I would also add that this evolving compliance nightmare was the product of language, adopted in the House-Senate conference on GLB via unanimous consent, which in effect created a federal privacy floor but not a ceiling. But if privacy is to mean anything, it is as a guarantee of certainty so that consumers may know the "rules of the road" wherever they go in cyberspace. Far from being a protection of privacy, the "floor and not a ceiling" argument will inevitably result in confusing and conflicting standards that will benefit some consumers and punish others almost at random because of the mere accident of geographical location. In the world of floors and ceilings, where you live may become more important to your privacy than who you are. And there are real costs to such an approach. As the general counsel of CheckFree, a member of our Coalition, noted at your October 10th workshop, it literally cost her company several hundred thousands of

dollars to adjust to the changed use of Social Security numbers by the laws of only one state: California. Imagine this cost replicated 50 or more times by the various states, or 100,000 times for localities. These are the demonstrable costs of haphazard compliance decisions, and they are potentially devastating both to e-commerce as well as to the public.

Secondly, the Coalition was greatly pleased to see that HR 4678 treats information gathered on-line and off-line in the same way. Every one of our member companies operates both on-line and off-line, as does, I assume, almost every major American company, as well as a number of smaller ones. While we appreciate that those who seek to make a distinction between on-line and off-line information may believe that they are assisting certain portions of the business community, the truth is that doing so, in fact, would be enormously burdensome and presents some very real difficulties.

As a general rule, all information collected by companies either on-line or off-line is stored in the same system. Often no distinction is made based on where the information is collected. To create such a distinction in law would be to invite enormous record keeping and financial burdens for private industry, to no practical real world benefit for the consumer.

Furthermore, to create such a distinction becomes an exercise in the most profound hair splitting. Is information collected in person and then stored online considered online or offline? What if the information is collected over the telephone, or through a computer?

Or transmitted from a telephone to a computer? These are the kinds of Solomonic judgments that will keep the courts busy for years if a distinction is made between on-line and off-line information.

By treating similar information gathered on-line and off-line in the same way, we believe that HR 4678 sensibly balances the needs of industry with the privacy of the consumer, and assures the protection of both with a minimum of ambiguity.

Thirdly, we are especially pleased that HR 4678 does not permit private rights of action at a time when everyone agrees that our society is already far too litigious. The Coalition is well aware that this matter of private rights of action will be highly controversial and is an outgrowth of broader legal reform issues facing policymakers. But the likely result of yet another private right of action would be to dissuade companies from relying on e-commerce, or more likely, it would cause them to hedge their bets against frivolous lawsuits by adding costly procedures and protections. Such procedures and protections would not measurably aid consumers, but their costs, like other compliance expenses, will inevitably be passed on to consumers in the form of higher prices and reduced service.

In the context of privacy, there is concrete evidence to show that existing law has more than sufficed to protect consumer interests. The Commission has recognized that existing enforcement authority already deals with most violations of privacy law. Opening the door to private rights of action will simply create an environment conducive to even more

unnecessary lawsuits in an already clogged and expensive legal system. It is also important to stress that the states still have existing private rights of action and the litigation authority already vested in them through the mini-FTC Acts. Any new private rights of action created by Congress would be in addition to, not instead of, remedies by state Attorneys General and private parties already in effect in the states.

Mr. Chairman and Members of the Commission, we thank you for the opportunity to submit our views for your consideration, and we regret that we did not have the opportunity to participate in the workshops held last week. If, however, the Commission decides to offer additional workshops on this subject, we would welcome the opportunity to participate.