

**Before the
Department of Commerce
National Telecommunications and Information Administration**

In the Matter of

Information Privacy and Innovation

In the Internet Economy

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COMMENTS OF eBay Inc.

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eBay Inc (“eBay”) hereby submits these comments to the Department of Commerce (“Department”) in response to the questions posed in the Department’s green paper *Commercial Data Privacy & Innovation in the Internet Economy: A Dynamic Policy Framework*. eBay appreciates the opportunity to provide our thoughts and feedback on issues as important as promoting greater levels of privacy protections for consumer information and data.

Founded in 1995 in San Jose, Calif., eBay (NASDAQ:EBAY) connects millions of buyers and sellers globally on a daily basis through eBay, the world’s largest online marketplace, and PayPal, which enables individuals and businesses to securely, easily and quickly send and receive online payments. We also reach millions through specialized marketplaces such as StubHub, the world’s largest ticket marketplace, and eBay classifieds sites, which together have a presence in more than 1,000 cities around the world.

eBay takes the quality of the privacy protections we provide to our users very seriously. The success of our community is based on trust, which is strengthened by our ability to provide our users with a level of transparency and control concerning the collection and use of information about them and their activities. Because of our strong privacy protections, Privacy International rated eBay one of the best companies for privacy on the Internet¹ and eBay is the most trusted company in 2009 for privacy as rated by U.S consumers².

eBay Inc. has also consistently been on the forefront of advocating for omnibus federal consumer privacy legislation in the form of Meg Whitman, eBay’s former CEO and Scott Shipman, eBay’s CPO, testifying at the House Energy and Commerce Committee hearings held in 2006. Additionally, seeing the need to rally industry support for federal privacy legislation, eBay co-founded the Consumer Privacy Legislation Forum (now the Business Forum for Consumer Privacy). After hearing the FTC raise behavioural targeting as an area of exploration in 2007, eBay also built an ad opt-out link connected to behavioural targeting preferences and launched the program, called AdChoice, in time for the FTC’s eHavioral Advertising workshop in the fall of 2007. We continued to participate in various FTC privacy events, most recently the Privacy Roundtable hosted at the University of California’s Berkeley Campus in March of 2010.

eBay strongly believes that innovation in the Internet economy depends on consumer trust and that maintaining consumer privacy is essential to the continued growth of the Internet. eBay supports initiatives that seek to provide a rational and constructive framework to protect consumers while recognizing legitimate uses of personal information. Therefore, we applaud the Department’s efforts to conduct a comprehensive review of the effectiveness of the current U.S. privacy policy framework.

1 Privacy International Consultation Report, 2007. Available at: <http://www.privacyinternational.org/issues/internet/interimrankings.pdf>

2 Survey conducted by Ponemon Institute and TRUSTe in September 2009. See www.truste.com, Press room, Archives, September 16, 2009 : [2009 Most Trusted Companies In Privacy Announced](#)

Although eBay believes that a number of the questions posed in the report are important to the overall discussion of developing a strong and effective U.S. privacy policy framework, we have focused our comments to the questions which are most relevant to our business model and our users.

1.a. Should baseline commercial data privacy principles, such as comprehensive FIPPs, be enacted by statute or through other formal means to address how current privacy law is enforced?

eBay has consistently been an Internet industry leader in advocating stronger privacy protections and has been dedicated to educating policymakers and others within the industry on the importance of enacting federal baseline commercial data privacy legislation. eBay believes that baseline commercial data privacy legislation will provide greater protection for consumer data and therefore ultimately engender a greater level of confidence and trust in the ecommerce platform while not compromising the velocity of innovation.

We believe it will also benefit businesses, both large and small, by creating a national standard. Under the current patchwork of state laws and regulations, businesses, especially those that are engaged in interstate commerce, oftentimes have difficulty navigating the various consumer commercial data privacy laws and dealing with the various state enforcement agencies.

1.b. How should baseline privacy principles be enforced? Should they be enforced by non-governmental entities in addition to being the basis for FTC enforcement actions?

Enacting federal baseline commercial data privacy principles which gives the FTC enforcement authority would give businesses the legal certainty they need and give consumers greater confidence in industry practices. However, the FTC may want to consider partnering with trusted NGO certification providers to assist in implementing the FTC's enforcement standards within the context of safe harbor provisions. The NGO certification providers would be responsible for providing the oversight needed to ensure that businesses participating in any FTC endorsed safe harbor would be fully compliant with the agreed upon standards. By inviting NGO certification authorities to participate in this manner, it would help to ensure that each industry would find marketplace options for certifying its practices in compliance with the FTC framework and thus qualifying for safe harbor status.

In addition, state attorney generals, although a governmental entity, could also play an important enforcement role. eBay recommends that policymakers adopt an approach similar to the enforcement provisions in CAN-SPAM, P.L. 108-187, which allows state attorney generals to step in and enforce privacy principles when the FTC passes on taking any action.

1.d. Should baseline commercial data privacy legislation include a private right of action?

eBay strongly cautions against the inclusion of a private right of action provision in any baseline commercial data privacy legislation or framework, whether or not there would be protection offered to businesses that participate in an FTC endorsed safe harbor program. Any private right of action provision would not only create unnecessary litigation costs and uncertainty for businesses, but it would not have any corresponding benefit to consumer privacy.

Furthermore, any private right of action would place a disproportionate amount of cost on small businesses. For instance, most safe harbor programs charge a membership fee, which for smaller businesses would be a financial burden. If policymakers were to move forward and create a safe harbor program that only shielded participants from private right of action, larger businesses would be protected while small businesses would be extremely vulnerable to nuisance suits.

Policymakers should encourage policies that would promote greater transparency, legal certainty, and protection for consumers and industry and not adopt a framework that would encourage nuisance suits. It is important to note that even the strict privacy regime of the European Union does not recognize private right of action as a remedy for encouraging compliance. eBay instead recommends the following approach: any private party who has a grievance against a company that participates in an FTC endorsed safe harbor and believes the company has violated the safe harbor principles should direct that grievance to the FTC. The FTC, in turn, can evaluate if the company is in violation of any agreement. If a violation has occurred, the FTC can then take the appropriate action.

2.a. What is the best way of promoting transparency so as to promote informed choices?

The first step a company can take to promote transparency and encourage informed choice is to develop a privacy notice that is easily discoverable, comprehensive, and written in plain spoken English. Consumers cannot make informed choices regarding their privacy unless they are fully educated and aware of how an entity collects, manages, stores, and uses their data. Many notices today are extremely lengthy, written in confusing legal language, and are sometimes even impossible to find. eBay believes that the best way to promote transparency is to encourage the industry, either through participation in a safe harbor program or through legislation, to subscribe to a set of best practices or basic principles that would provide guidance to businesses as they develop their privacy notices. Although businesses should have the ability to tailor their privacy notices in a way that best fits their business model, there are simple measures a company could take to make their notices more transparent, more understandable, easily digestible, and more complete. For example, employing the use

of layered notices, standardizing on the minimum topics that need to be covered, or agreeing to use uniform terminology for certain practices – all would help ensure better policies and statements were posted.

2.b. What incentives could be provided to encourage the development and adoption of practical mechanisms to protect consumer privacy, such as PIAs, to bring about clearer descriptions of an organization's data collection, use, and disclosure practices?

eBay believes that safe harbors are the most effective incentive for adoption of practical mechanisms. Safe harbors create an environment that fosters innovation and technological development through the flexibility of robust self-regulatory principles, which could include the adoption of PIAs, transparent collection and use practices, clearer and more easily located notices, and most important accountability. And since the FTC would have the authority to bring action against any entity not in compliance with the safe harbor principles, entities would have greater incentive to adhere to the agreed upon principles and guidelines.

2.e. Should there be a requirement to publish PIAs in a standardized and/or machine readable format?

For a number of reasons, eBay strongly believes that under no uncertain terms should businesses consider or be required to publish machine readable PIAs, unless credible evidence is found that it is critical to the overall privacy debate. First, it is important to understand that there are many forms and depths of PIAs. Therefore, before this question can be answered in the candid manner it warrants, there needs to be a greater understanding of the kind of PIA under consideration or even if a standard PIA could be created. An additional point of concern is that publishing PIAs may increase risk -- for a PIA to be meaningful, it would necessitate providing information that could be used to exploit vulnerabilities in a system, and thus, open up a company to the risk of malevolent activity.

2.s. What incentives could be provided to encourage companies to adopt technologies that would facilitate audits of information use against the company's stated purposes and use limitations?

While eBay believes that the cost savings and safe harbor status alone would be incentive enough for businesses to adopt this type of technology, the more that can be done to make such tools easy to implement and consume less bandwidth, the easier it would be to make the business case for them. However, there may be businesses that are unaware of the cost benefits and therefore, it may be necessary to provide education on how adoption would save money while still providing a greater level of protection for consumer privacy.

4.b. How can the Commerce Department best encourage the discussion and development of technologies such as “Do Not Track”?

eBay supports policymakers’ efforts to encourage greater consumer choice and control and believes that the development and universal implementation of baseline choice mechanisms would be a step in the right direction to address the concerns that have been expressed regarding behavioral tracking and advertising. However, each entity should have the ability to offer a mechanism that best fits their business model or the needs of their users. Choice mechanisms could include anything from customized web-based solutions, a centralized opt-out website for participating members, third party add-ons, or a solution integrated within a browser. For example, in 2007 eBay developed and implemented its own choice mechanism, called AdChoice, which allows eBay users to click on an icon present on any targeted advertisement and choose whether to receive customized advertising on eBay and on the websites of our advertising partners.

eBay strongly cautions policymakers from adopting a singular technological approach to this issue. Restrictive technological mandates or overly prescriptive requirements will only hinder the continued growth of the ecommerce industry which could ultimately lead to a limitation on the services, solutions and products that entities can offer to consumers. In addition, there are commonly accepted business practices that employ tracking that could get swept up into the Do Not Track technology, leaving some businesses very vulnerable. For instance, there is a certain level of tracking that needs to occur in order for a company to protect itself against fraud or other illegal activities. These legitimate business practices have almost entirely been left out of the Do Not Track debate, which is of great concern to those that rely on these practices to maintain a safe environment.

It is eBay’s belief that the adoption of baseline requirements or guidelines would allow covered entities to innovate and have the freedom to develop technology that would go above and beyond and add greater consumer controls and granularity. In such a rapidly evolving environment, businesses must have the ability to evolve or we could potentially see what was once a thriving, dynamic industry become static and eventually irrelevant.

Although the FTC has the enforcement authority, the Department has a very important role to play in the development and implementation of any commercial privacy framework, whether it be Do Not Track or a more comprehensive baseline approach. The Department has years of experience in fostering innovation and, because of their strong relationships with various industries; the Department has the ability to bring stakeholders from all corners of the U.S. market together.

It would be our recommendation that the Department use both of these abilities to assist the FTC in the development and implantation of any commercial privacy framework. The Department, in conjunction with the FTC, could establish workshops, programs, or

forums that would bring stakeholders from across the industry together in an effort to encourage an open discussion and find a workable solution.

5.a. Do FIPPs require further regulatory elaboration to enforce, or are they sufficient on their own?

In 2006, eBay cofounded the Business Forum for Consumer Privacy, which has been committed to bringing the FIPPs into the 21st Century. After years of research, the BFCP published a paper in 2009 advocating for the adoption of a U.S. privacy framework that was based on the use and obligations privacy model.³ As stated in our comments to the Department in June of 2010, eBay strongly believes in the use and obligations framework and feels that a more modern way to characterize FIPPs is to realign the FIPPs so that focus is on the uses of information and the proportional obligations that arise from those uses.⁴

Although, eBay believes that the FIPPs (and there are several variations) serve as excellent principles, it would be extremely difficult to translate FIPPs into regulatory requirements or law without further elaboration or definition. FIPPs can help guide and direct policymakers as they develop commercial privacy frameworks, but it would be eBay's recommendation to have FIPPs remain as principles and not attempt to lock the principles into law.

5.c. Should FIPPs be considered an independent basis for FTC enforcement, or should FTC privacy investigations still be conducted under Federal Trade Commission Act Section 5 "unfair and deceptive" jurisdiction, buttressed by the explicit articulation of the FIPPs?

Due to the fact that FIPPs are principles, with several meaningful variations, and have not been codified into law, it is our belief that FIPPs cannot be considered an independent basis for FTC enforcement. FIPPs were designed to inform and shape what we think is fair and acceptable practices. They have been the foundation blocks from which policymakers have built our nation's data protection laws, therefore it is imperative that FIPPs and FTC policy and enforcement action are in alignment, but the former should not replace the latter. Instead, the former should continue to inform the latter.

³ "A Use and Obligations Approach to Protecting Privacy: A Discussion Document", The Business Forum for Consumer Privacy: December 7, 2010. To access the full document please follow this link: http://www.huntonfiles.com/files/webupload/CIPL_Use_and_Obligations_White_Paper.pdf

⁴ eBay's submitted comments to Department of Commerce Notice of Inquiry Docket No. 100402174-0175-01. To access document please follow the following link: <http://www.ntia.doc.gov/comments/100402174-0175-01/attachments/eBay%20Inc%20Comments.pdf>

6. The U.S. Government should continue to work toward increased cooperation among privacy enforcement authorities around the world and develop a framework for mutual recognition of other countries' commercial data privacy frameworks.

eBay agrees that the U.S. Government, and in particular the Department, should continue its commitment to global engagement and cooperation on commercial data privacy frameworks. Today, more than ever before, businesses are part of a highly interconnected global community, one which often extends over different sovereign entities with multiple, diverse, and sometimes contradictory requirements. Therefore it is critical that global privacy frameworks are in place that enable and not hinder businesses, large or small, as they operate internationally. eBay would encourage the Department to continue to be a strong voice on behalf of American businesses worldwide and work to provide harmonization of the various privacy standards that currently exist. We have already argued that it is inefficient and burdensome for businesses to keep track and comply with fifty state privacy laws. However, for businesses that operate on a global level, there are over 200 additional country laws that also have to be taken into consideration. That is why the Department's participation in the EU and APEC privacy frameworks are so critical to the success of American businesses.

On a similar note, eBay would urge the Department to continue to build relationships with large emerging technology nations that are not currently participating in the existing international privacy frameworks. This work is also critical to building bridges and trust that would facilitate the easy transfer of data and information.

9.a. Should a preemption provision of national FIPPs-based commercial data privacy be narrowly tailored to apply to specific practices or subject matters, leaving States free to regulate new concerns that arise from emerging technologies? Or should national policy, in the case of legislation, contain a broad preemption provision?

It has been our experience that the current patchwork of state commercial data privacy laws and regulations has been an impediment for many businesses, especially smaller businesses and entrepreneurs that participate in interstate commerce. eBay believes that the development and implementation of a comprehensive federal privacy framework would go a long way to providing consistency so that consumers can trust businesses in the digital era and businesses can be confident of the privacy standards.

In order to achieve this goal, eBay recommends enacting federal legislation that would contain a balanced preemption provision that would harmonize national laws, but still give states some freedom to legislate in this area.

10. The Administration should review the Electronic Communications Privacy Act (ECPA), with a view to addressing privacy protection in cloud computing and location-based services. A goal of this effort should be to ensure that, as technology and market conditions change, ECPA continues to appropriately protect individuals' expectations of privacy and effectively punish unlawful access to and disclosure of consumer data.

eBay strongly supports the review of ECPA that is currently underway in both the Administration and Congress. Updating ECPA to reflect current practices and technological development is essential to providing adequate levels of protection for not only consumers but to the businesses that receive government requests for consumer data and information. Indeed, the debate regarding ECPA reform is a critical piece of the overall debate regarding data protection and privacy and it is our belief that without digital due process, one should question how we could even adopt a national privacy framework. Although eBay understands and respects the needs of the federal government for access to certain data and information, there needs to be a clear process in place that ensures predictability to industry and consumers alike.

Conclusion

eBay thanks the Department for its commitment to encouraging consumer privacy and for the opportunity to provide comments on the policy concerns outlined in the Department's green paper. eBay is dedicated to assisting the Department as it continues to move forward in promoting innovation while restoring consumer trust in online commerce. eBay looks forward to working with the Department in the months and years ahead on these important issues.