



June 28, 1999

Secretary, Federal Trade Commission
Room H-159
600 Pennsylvania Ave, N.W.
Washington, DC 20580

**Re: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace—
Comment P994312**

Dear Mr. Secretary,

ESRB Privacy Online, a division of the Entertainment Software Rating Board, is pleased to submit this Public Comment in response to the Federal Trade Commission's Request for Comments announced in the Federal Register on December 16, 1998 (63 Fed. Reg. 69289). ESRB Privacy Online shares the opinion of the FTC that the full benefits of electronic commerce cannot be realized until consumers develop confidence in global electronic networks. ESRB Privacy Online is committed to the development of that confidence.

ESRB Privacy Online is an independent, industry-led online privacy seal provider that assists companies in protecting personally identifiable consumer information exchanged via the Internet. Our program offers a comprehensive privacy certification service that assists Web site publishers in implementing effective, self-regulatory, privacy regimes. The program includes the provision of consumer oriented alternative dispute resolution services and other consumer recourse mechanisms, independent compliance monitoring and verification processes, and enforcement mechanisms that assure adherence to recognized principles of fair information practices. Although ESRB Privacy Online's efforts with regard to consumer protection focus on consumer privacy online, we are confident that our program can serve as an example of how industry-led self-regulatory programs can provide effective protection for consumers in all areas of the global electronic marketplace.

As the newest division of the leading self-regulatory entity, the Entertainment Software Rating Board, ESRB Privacy Online seeks to ensure online privacy protection for consumers, and to provide companies doing business online with an effective means to address growing concerns over the collection and dissemination of personal, confidential information. Using the experience, knowledge, and success of both the rating board and our established sister entity, ESRB *Interactive* — another prominent self-regulatory body within the online industry — ESRB Privacy Online provides the most comprehensive privacy protection program available on the World Wide Web today.

We are grateful to have the opportunity to reflect on the following issue, listed as item 24 in the above referenced Federal Register:

“To what extent do/will industry-led self-regulatory programs provide effective protection for consumers in the global electronic marketplace?”

The global electronic marketplace is in its nascent stage. As such, the e-marketplace requires experienced and capable hands to assist it in achieving its fullest potential. A critical element of achieving this potential is to ensure that participating consumers are protected to the maximum extent possible. ESRB Privacy Online asserts that effective self-regulation is the best way to achieve this goal. This belief is grounded in the fact that the online industry is highly motivated to adapt quickly to marketplace changes and employ meaningful measures that will protect consumer rights. The people and companies that deal with the industry's constant change and unique requirements are those in the best position to guide and refine its development. As all successful and responsible business people realize, consumer protection is an essential element of this development. An online business that cannot assure consumers that their privacy will be guarded is a business that will fail.

For this reason, ESRB Privacy Online believes, in agreement with what the Federal Trade Commission has thus far maintained, that it would be best for government to contain the regulatory impulse and facilitate self-regulation as the proper approach to protecting consumers in the e-marketplace. Government regulation could well obstruct the existing market incentives that have already begun to inspire merchant dedication to consumer protection. Furthermore, governmental regulations are jurisdictionally self-limited. In a global electronic market place, various differing jurisdictions and incompatible regulations will surely generate wasteful conflicts—conflicts between nations, between the federal and state governments, even between the states themselves. The result of these conflicts will certainly be the accompanying protracted litigation of choice-of-law statutes, provisions, and agreements.

Instead of impeding market incentives, government's role should be to encourage and facilitate industry-led self-regulation. To be effective, the online industry requires speed and flexibility to self-regulate the dynamic e-marketplace. By combining adaptability with stability, self-regulatory programs led by industry and nurtured by government provide the most effective protection for consumers in the global electronic marketplace. Such industry-led self-regulatory programs develop consumer confidence in e-commerce in a variety of ways.

Privacy Seals

Self-regulatory, industry-led privacy seal programs strive to protect the personally identifiable data that consumers may provide when they visit a website. Entities like ESRB Privacy Online, independently evaluate a website's privacy policies to ensure that: (i) such policies comply with recognized principles for fair information practices; and, (ii) consumer data is not being mishandled. Such entities act as a proxy for the consumer, demanding the same privacy guarantees that a consumer would but with greater review and enforcement power than the individual consumer would be able to exercise. As a proxy consumer, seal providers have a vested interest in the *transaction* with the merchant, but owe allegiance to the consumer. The veracity and reliability of the third party's seal is the sole market influence on the seal provider; if they do not provide effective protection for consumers, they become obsolete. It is this threat of obsolescence that prevents third-party seal providers from becoming facades that merchants might use to avoid governmental intervention. As a result, the consumer confidence that is required for a seal provider to operate is the most efficient and effective form of consumer protection in the global electronic marketplace.

Remedies

Not only do self-regulatory seal programs encourage confidence in the global electronic marketplace in their role as guides to reputable businesses, they also provide a mechanism for accountability and recourse. Seal providers like ESRB Privacy Online have a number of remedies available to them that the average consumer does not. Seal providers are in a position to impose penalties on non-conforming merchants. They are also able to exert market pressures on merchants by publicizing the names of non-conforming merchants; a stigma difficult for the average consumer to apply. Seal providers can make use of extensive alternative dispute resolution agreements with the merchants in order to ensure accountability. They can refer non-conforming merchants to applicable law enforcement and administrative bodies, such as the FTC, but with much more intensity than the individual consumer. Finally, seal providers can pursue breach of contract claims against merchants who fail to implement and maintain the requisite level of consumer protection.

Education

Industry-led self-regulatory programs also serve to educate the online community. Throughout the process of certification, both consumers and merchants learn the value of privacy protection. Consumers who learn and have confidence that they can control the use of their own personal information will be less likely to avoid e-commerce for that reason. By removing the most prevalent deterrent to e-commerce — consumer fears regarding privacy online — independent seal providers stimulate the electronic economy and provide effective protection for consumers. As merchants learn that consumers demand privacy protection, those who want to remain competitive in a burgeoning industry will regard privacy protection as a mere “cost of doing business” online. By providing cost-effective privacy certification services, third-party seal providers like ESRB Privacy Online help reduce the costs of doing business online and encourage greater self-regulation by industry.

Such self-regulation, led by industry with the support of government, makes superior use of market forces and the flexibility of industry to deal with the rapidly evolving nature of the Internet. By assuring consumer control of personal privacy, providing a variety of efficient remedies, and encouraging confidence in the global electronic marketplace through education, independent privacy seal providers such as ESRB Privacy Online will be able to provide the most effective protection for consumers in the global electronic marketplace. We hope that our deliberations will be of some assistance to the Federal Trade Commission and will further intelligent discourse about the necessity of self-regulation in the global electronic marketplace.

Respectfully submitted,

Marc E. Szafran
General Counsel,
ESRB Privacy Online