

**Before the
Department of Commerce**

National Telecommunications)
and Information Administration)
Docket No. 120214135-2135-01)
Multi-stakeholder Process to)
Develop Consumer Data Privacy)
Codes of Conduct)
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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”) on substantive consumer data privacy issues that warrant enforceable codes of conduct and procedures to foster the development of these codes. A multi-stakeholder approach is important and eBay appreciates the opportunity to provide our thoughts and feedback on issues as important as creating a safe and secure online experience for consumers and businesses alike.

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. Currently, we have over 100 million users worldwide and last year alone over \$60 billion in goods were traded on our site. We are also an engine for small business growth and development, with hundreds of thousands of small businesses in the United States using our platform to reach a global consumer base.

Due to the fact that eBay Inc. touches so many lives and so many aspects of the Internet marketplace, we take 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 was the most trusted company in 2009 for privacy as rated by U.S consumers².

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 encourage Congress to pass a baseline federal privacy framework while developing a multi-stakeholder process that would eventually lead to an enforceable voluntary code of conduct.

eBay's position on federal privacy legislation

Over the past several years eBay Inc. has consistently been on the forefront of advocating for omnibus federal consumer privacy legislation that not only ensures consumer trust and confidence in the ecommerce marketplace, but also encourages innovation and growth on the Internet. The current patchwork of state privacy laws has left consumers without adequate privacy protections and has left businesses, especially small businesses, vulnerable to legal uncertainty as they struggle to navigate the myriad of state and local privacy regulations. Trust, by consumers and businesses alike, is crucial to the continued success of the ecommerce marketplace. And without strong federal privacy protections, it is hard to build a strong and lasting foundation of trust.

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](#)

eBay has long believed that carefully crafted comprehensive federal privacy legislation would help to build a strong foundation of trust and potentially bridge the divide between consumer and industry concerns – and the policy recommendations included in the Consumer Privacy Bill of Rights has the potential to be that bridge. By codifying the Fair Information Practice Principles (FIPPs) and creating a strong safe harbor program enforced by the FTC, we believe the Consumer Privacy Bill of Rights strikes the right balance of protecting consumers' right to privacy, while also ensuring that the Internet ecosystem continues to be an incubator of successful businesses and entrepreneurs.

In addition, recognizing that it would take time for Congress to pass the Consumer Privacy Bill of Rights, we support the Department's decision to not be idle, but instead move the privacy debate forward by creating a multi-stakeholder process that would help build consensus on various privacy issues. Developing a strong privacy code of conduct that can stand the test of time and technological innovation is not just a responsibility of our nation's policymakers, but a responsibility that is shared by companies, privacy advocates, and other thought leaders.

We look forward to working with the Department, the White House, and U.S. Congress to ensure that comprehensive federal privacy legislation is enacted and the Internet remains an outlet for consumer engagement and an economic driver for our nation's economy.

Enforceable Codes of Conduct

With Internet and Mobile technology and services evolving at an extremely rapid rate and society becoming more wired every day, the notion of consumer privacy is no longer a narrow concept. Today, consumer privacy impacts different policy issues, technologies, and Americans of all ages. eBay believes that codes of conduct should be broad in scope and application, maintain the goals of technological neutrality, and support baseline principles based on the FIPPs.

A code of conduct is integral in understanding a company's handling of information and represents a commitment to protecting personal information. eBay is a strong advocate of a privacy code of conduct and is one of a handful of companies that has worked to implement "Binding Corporate Rules" outlining behaviors we take with regard to private data. Our Binding Corporate Rules have been accepted within the European Union member states where we conduct business. In fact, eBay was the first eCommerce company to receive approval of our Binding Corporate Rules from European Data Protection Authorities.

Consumer Data Privacy Issues to Address in a multi-stakeholder process

A multi-stakeholder process will help to build consensus on the important issues that affect privacy and online commerce. Many consumer data privacy topics should be addressed through this type of process to ensure that all parties understand the complexities of the issues. Some of the issues that should be discussed during the multi-stakeholder process include the following:

Mobile Applications and Geo-location Services

Mobile applications and technology continue to grow in popularity and importance, not only to society, but to commerce as well. Due to the technology's flexible and transient nature, mobile provides unique challenges when dealing with privacy concerns. However, these are challenges that can be easily overcome with innovation, transparency and a commitment to recognizing consumers' expectations. Policymakers need to be cautious to not impose overly prescriptive regulations.

eBay Inc. has experience in the mobile arena and can testify to the benefits and challenges of mobile technology. Through the launch of several new and exciting mobile applications, eBay Inc. has become a strong leader in mobile commerce. In 2011, eBay generated approximately \$6 billion in global mobile sales, an overall 150% increase from previous years. eBay mobile has experienced great popularity across the globe, with consumers from over 190 countries worldwide downloading more than 70 million applications. Consumers bought everything from cars, clothing, shoes, electronics, and toys from our mobile applications. It is a technology that offers companies a new platform to highlight their goods and services and offers consumers the flexibility and choice they want.

Although we recognize that some companies have experienced privacy challenges when offering new mobile technologies, we at eBay believe it is possible to balance consumer desires with the sensitivity of geo-location data. Consumers should have the ability to ensure that companies will use information in the appropriate context for which it is provided without going against their expectations. It is important, however, to not stifle innovation in this process, but rather have companies clearly respect the context of the grant of personal data.

Therefore eBay has made a commitment to build privacy policies that would separate out geo-location data from personal data so it can be used for services and product location and not for other purposes that our outside of consumer expectation. However, it is important for policymakers to note that geo-location data is also critical to balancing our need to secure our platform. Geo-location and device ID are key pieces of information that we use to help fight fraud. eCommerce, unlike social or search, relies on safety, security and authenticated transactions and therefore we must collect and retain information to ensure transactions happen appropriately. In order to balance the needs of consumers, while protecting our site from fraud, eBay focuses on securing data by separating data by use case—so it can be used properly and meet the expectations of our consumers. It is essential that policymakers be cautious to not disturb this balance.

Online Services Directed Towards Teens & Children

As Internet-enabled technologies and services continue to grow in social importance and become facets of everyday life, the percentage of teenagers and even young children that use these technologies will only increase. However, as the use of Internet enabled technologies by teens and children continues to increase, so does the challenge of protecting young people from certain risks online.

Over the years, many companies have included age limitations in their user agreements to ensure that children are not viewing age inappropriate material. However, as children and young adults become more and more technologically savvy and interested in various sites and services, it has become increasingly more difficult for companies to verify the age of their users.

In light of this difficulty of verification and the rapid evolution we are witnessing in the online world, parents have found it harder and harder to introduce their children to the Internet in a controlled and safe environment.

eBay is attempting to develop innovative ways to address these challenges with appropriate lessons and content for children. We have worked with families and industry thought leaders to develop a product where children can work with a parent through our PayPal business unit to have accounts for children that are controlled; allowing children freedom to interact online without the concern that they will overstep appropriate behavior. Although the specific details of the solution take advantage of the use of offline age verification of parents through financial instruments and technical means of parental control in the program's set up, the lessons that this innovative solution provides will ensure a healthy Internet experience for children. Any multi-stakeholder approach should have this same type of innovation and collaboration, and take care to enable future programs to develop worthwhile solutions in the online world.

Do Not Track Mechanisms

eBay supports the Consumer Privacy Bill of Rights concepts of Individual Control and Transparency. 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 policymakers should instead focus on the adoption of baseline requirements or guidelines that 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.

Balancing Privacy & Security Needs

As we alluded to above, there is oftentimes a need to balance the needs of privacy and security when working within a policy framework. There have been those that have expressed the belief that privacy and security are oftentimes diametrically opposed and that policymakers must sacrifice one for the other.

However, we disagree with that philosophy and instead subscribe to the philosophy espoused by David Clark in his paper *Tussle in Cyberspace: Defining Tomorrow's Internet*.³ Clark recognized that there would be times when “tussles” arise between stakeholders that are part of the Internet milieu and there may be tensions, but that does not always mean that their interests are adverse.

Too often, the debate is framed in such a way as to imply that privacy is the only goal. In information security circles, it is generally believed that privacy cannot be achieved if a system is insecure. If we design systems to attempt to maximize the privacy of participants, but handcuff the system designers such that they cannot protect participants from criminal actors, then we have not in fact helped the cause of privacy at all.

We encourage the Department to include security in the privacy discussions in order to not pull the debate too far in one direction. To achieve true success, security considerations need to be weighed during the multi-stakeholder process.

Data Security and Breach Notification

eBay has dedicated teams that are focused on privacy, anti-fraud and information security. We have made it a corporate policy worldwide to notify customers of any suspicious activity with their accounts and to also notify customers if we believe there has been unauthorized access of their personally identifiable information.

Because of our dedication to privacy and security, eBay has long advocated for a federal comprehensive privacy framework that includes a balanced national data security and breach notification mandate. We believe that the current myriad of 47 different state laws confuse consumers and jeopardizes consumer trust. We also believe that current state laws make it hard for small and medium size businesses, like the ones we represent, to compete in a digital economy, because the compliance hurdles are too varied and costly.

eBay believes that federal law is needed to simplify the current piecemeal of state security and breach laws and restore consumer trust in the online ecosystem. Therefore, we believe data security and breach notification should be a part of the debate at the multi-stakeholder meetings. eBay, Inc believes that any balanced federal data security and breach notification framework should include the following provisions:

- The flexibility to send notices to consumers via email, if that is the traditional method a company uses to communicate with its customers. Paper notice mandates would be extremely burdensome and costly. And in our experience, E-SIGN has also been a very onerous system to comply with.

³ *Tussle in Cyberspace: Defining Tomorrow's Internet* available at : <http://groups.csail.mit.edu/ana/Publications/PubPDFs/Tussle2002.pdf>

- A strong preemption provision—the current patchwork of state laws is part of the problem. We need a strong and balanced federal standard.
- No private right of action—creating a system that leaves companies vulnerable to nuisance suits is not a way to promote innovation and job growth.

Implementing the Multi-stakeholder Process

The Department of Commerce and the White House have a unique opportunity to “move the dial” on creating a federal privacy framework. However, this unique opportunity brings with it a unique set of challenges; dealing with a large group of stakeholders with different viewpoints and potentially conflicting agendas can create difficult challenges in building consensus, especially in dealing with a broad and complex issue like privacy. While challenges are inevitable, we strongly support the Department and the White House’s efforts, believe that it is an endeavor worth undertaking and suggest that adoption of the following principles is an important ingredient to success.

General Principles for Multi-stakeholder Meeting

As a company that has participated in other multi-stakeholder processes, we would like to offer our support and provide some basic recommendations based on our previous experiences. Over the years, we have found there to be 5 general principles that successful multi-stakeholder organizations have adopted. They include:

- **Inclusiveness** – There should be no barrier to participate in the multi-stakeholder process. Parties that have expressed an interest in the process, that have indicated a willingness to build consensus, and that have been leaders in privacy issues should be considered part of the multi-stakeholder process. However, this means that the meetings need to be accessible to all interested parties. Therefore, it will be critical to hold meetings in different locations and time zones, provide enough time and notification for involvement and make provisions for multiple forms of participation (e.g. in-person, via discussion lists, teleconferences, etc.).

For instance, successful distributed organizations require decisions be made, or at least ratified, via email discussion lists rather than at in-person meetings. While the physical meetings are incredibly important to advance the work, it can introduce onerous travel requirements if they are the only means by which decisions are made. Furthermore, an effort should be made to make available to participants any meeting notes and materials (e.g. presentations) as soon after the meeting as.

- **Openness** – One aspect of "privacy-related" work that may differ from a majority of technical multi-stakeholder discussions is the need to empower input by those who may be disenfranchised or otherwise in danger of reprisal. We have found that some important contributors can be marginalized unless they are offered a mechanism to provide commentary without fear of reprisal (or mis-characterization). To this end, we have found it useful to (on occasion) embrace a Chatham House Rule for specific meetings. In this way the salient points of the discussion can be reported without attributing specific comments to individuals or organizations. When announced at the start of the meeting, this can have a positive effect on the openness of the conversation.

- **Geography / Time Zone Considerations** – Privacy is an especially sensitive issue on the global stage such that it often doubles the number of meetings and teleconferences in an effort to cover all those interested in participating.
- **Culture vs. Rules** – The spontaneous culture that emerges within a self-organizing meritocracy is often more resilient and flexible than that which can be defined by a carefully-crafted set of rules. While there is no prescription for how to develop and nurture an effective culture, seeding it with founders already widely-respected in their fields offers a significant head start.

Structurally, we have found that flatter organizations are preferable to hierarchical ones and smaller groups tend to be more successful than larger ones. In addition, we find it helpful to have group Chairmen that are independent and serve to move work along, **not** to advocate for or direct others to a desired position. To this end, we have also found that encouraging two Co-Chairs (and sometimes three, though that is less common) to be an effective mechanism for covering multiple points of view. While it is difficult to formalize a general selection process, it is imperative that the Chairs not be "appointed from above", but rather selected and supported from within the group itself.

There should also be a deliberative body of experts that establishes strategy and overall direction. However, plans, decisions and the like should avoid prescription, except in exigent circumstances like clearing a long-standing significant hurdle. This body must itself work by consensus and demonstrate that to the plenary on a regular basis. The Department might want to consider soliciting nominations for the above group and make the final selection. However, we would urge the Department to be cautious if/when creating these groups. Strategy groups should be representative of the breadth of participants but mandating participation from all stakeholder groups may not be advisable. For example, defining representative groups can be contentious and locating qualified experts with consensus-based experience can be problematic.

- **Rough Consensus (not Unanimity)** – Wherever possible, it is important to encourage decisions by rough consensus rather than relying on the outcomes of a vote. Voting can divide or otherwise entrench positions, often erroneously reducing complex situations to binary outcomes (supported / not), while consensus can allow for a variety of supportable outcomes. It should be noted, however, that privacy-related discussions may have polarized positions that are difficult to reconcile. Using tools such as the Chatham House Rule may facilitate bridging divides, though some discussions may only be effectively represented by multiple supported outcomes.

Furthermore, it is important that the Department and other stakeholders not have an expectation that all stakeholders will agree. We have been involved in multi-stakeholder processes in the past where one entity was entrenched and wouldn't concede their position. Rather than fighting the inevitable, this reality should be expected and appropriate provisions should be made to avoid fracturing the process and damaging future prospects of consensus.

Conclusion

eBay thanks the Department and the White House for their commitment to encouraging consumer privacy and for the opportunity to provide comments on the implementation of the multi-stakeholder process and the issues that should be addressed during this process. 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 and participating in the multi-stakeholder process.