



November 7, 2018

The Honorable David J. Redl
Assistant Secretary
U.S. Department of Commerce
National Telecommunications and Information Administration
1401 Constitution Ave NW
Washington, DC 20230

**Re: Docket No. 180821780–8780–01, Developing the Administration’s
Approach to Consumer Privacy**

Dear Assistant Secretary Redl:

Shutterfly, Inc. and its wholly-owned subsidiary, Lifetouch Inc., welcome the Department of Commerce’s efforts to create a national data privacy framework that balances the goals of privacy, prosperity and innovation. Shutterfly is the leading retailer and manufacturing platform for personalized products, and Lifetouch is the national leader in school photography, built on the enduring tradition of “Picture Day”; together, we are in a unique position to provide input relating to the collection, storage and use of personal information in the form of photographs and image-based products. Schools, individuals and families trust us to safeguard their photographs. Given our wealth of experience and the central role that trust plays in our relationship with our customers, we hope our comments below help inform what can be a powerful and important American framework for online privacy.

Corporate Background

Shutterfly Inc. acquired Lifetouch in April 2018, joining together two companies that work to help customers share life’s joy through photographs. Together we have more than 100 years of experience in the photographic industry. Lifetouch photographs more than 25 million children across 50,000 schools annually, and Shutterfly serves more than 10

million unique customers each year with more than 40 billion photos hosted on the Shutterfly photo platform. Though prior to the acquisition the two companies were built independently, our missions are closely aligned, and the combination of the companies provides us with an even more holistic view of what our customers – schools and consumers alike – should and can expect from interacting with us in the schoolhouse, at the camera, and within our online platforms.

With this as context, we offer the following in response to the NTIA's Request for Comment on the development of an approach to consumer privacy:

I. **The Importance of Recognizing Intentionality and Reasonable Expectations**

We think it is important to recognize the concepts of intent and reasonable expectations in determining the nature and scope of rules and regulations applicable to personal information. Shutterfly customers engage with us online for a particular purpose; typically, a customer uploads their photographs to our platform to access innovative online tools that enable them to organize, share, store and create content and products such as photo books, custom stationery, invitations, home décor and other image-based personalized gifts. Likewise, schools nationwide trust Lifetouch to capture photographs of their student population for use in yearbooks, student IDs, school safety programs, and other administrative and community-building purposes as well as offering the photos for sale to the students' families. Our customers know that when they do business with Shutterfly and Lifetouch, their photographs are not being sold or harvested for data that is shared with a third party, but rather, that we use the photographs precisely for the purposes they intended and would reasonably expect.

We urge that a policy framework recognize that consumers intentionally provide their digital and other personally identifiable information to certain online companies and platforms to enable those businesses to provide a product or service in return. So long as the data provided by a consumer is not being used for purposes unrelated to the service the business was engaged to provide, and is being used in a manner reasonably expected by the consumer, these intentional engagements do not present concerns of misuse and should not be swept up in overbroad or imprecise regulations. As such, intentional transfers of information by consumers that occur for the explicit purpose of securing, for their own personal, noncommercial use, a good or service that is based on, or incorporates, that information should be protected as distinct in policy approaches that are otherwise designed for online platforms whose data collection and usage practices do not meet this litmus test of 'intentionality'. As the Request for Comments appropriately

notes, prosperity and innovation cannot thrive in an environment lacking a foundation of trust.

II. Risk-based Flexibility and Balancing of Interests

We applaud NTIA's interest in a policy framework that focuses on the outcomes of organizational practices rather than prescribing specific means to achieve such outcomes, and we believe this flexible approach is essential to avoiding unintended consequences that often result from overly prescriptive, one-size-fits-all mandates.

The role of photography in privacy policy presents a case in point for the need for a flexible, context-driven approach. Under a number of legislative proposals and policies we have seen, photographs and personalized products themselves might be deemed to qualify as "personal information" and therefore be subject to a number of restrictions. While certain privacy principles such as transparency and accountability should have universal application, an overly prescriptive regulatory approach to other concepts, such as the role of consent and usage restrictions, present a high risk of unintended consequences as applied to the business of photography. In particular, a rigid "notice and choice" approach falls flat when applied to photography in any context where the photo subject is unknown, has not engaged with the party charged with obtaining consent and is at no practical risk of harm. For example, a law requiring the background subjects in a photograph taken at a sporting event to consent to the person who took the photograph printing that photograph to display in their home or making a mug with that photo on it to remember and commemorate their experience would be unnecessarily restrictive, impractical to comply with and inconsistent with developed legal principles around photography.

In the context of photography in particular, traditional legal principles have historically taken an appropriately nuanced approach to privacy issues related to photography, recognizing the need to balance the interest of an individual subject of a photo with that of the photographer and with the status of photographic content as creative expression¹. Context is critical: viewed through the lens of privacy concerns, and as existing law recognizes, the marketing and sale to our customer of a portrait we captured of her or a photobook from her collection are worlds apart from nonconsensual use of a person's likeness in a photo to advertise merchandise. Accordingly, while privacy legislation often rightly seeks to prevent harms that may ensue from "commercialization" of personally identifiable information, this focus is misplaced when applied to photographs to the extent

¹ See, for example, Samuel Warren and Louis Brandeis' foundational examination of the right of privacy in the context of photography in *The Right to Privacy* (4 Harvard L. R. 193 (Dec. 15, 1890)).

it impedes the traditional business of photography and the creation of personalized products. These tested principles are sound and should not be eroded by overbroad laws that do take into account the nuances of photographs falling with the definition of “personal information.”

For us, an effort to provide, at a federal level, a framework to assist in establishing and operationalizing risk-based privacy protections in ways that are flexible and context-appropriate would ensure that companies which are doing what customers expect from them are not inadvertently tripped up by broad regulations that may undermine the valued nature of their business.

III. Fragmentation

We strongly support efforts to address the increasingly fragmented policy and legal marketplace for digital and consumer privacy. Since we conduct business nationwide, we have come across dozens of distinct, and often conflicting state statutes that share the goal of protecting consumer privacy but have varying degrees of practical effectiveness. We believe that the creation of a single, thoughtful federal standard can ensure the effective protection of consumers while also supporting the efforts of good actor businesses to thrive in the free market unimpeded by an unnecessarily cumbersome and thus often ineffectual legal infrastructure.

The marketplace has changed drastically over the last ten years and companies like ours who in many ways are rooted in community and relationships have changed. What has not changed is our dedication to respecting the rights of our customers and the trust they place in us to protect their photographs so that we can produce products that are deeply important to them.

As photography industry leaders and innovators, we extend ourselves as a resource to you throughout this process. From the classroom to the cloud to the family bookshelf, Shutterfly and Lifetouch are committed to our customers. Thank you for your time and consideration; I hope you will view the Shutterfly and Lifetouch team as a well of information on protecting our consumers’ data, and on strategies for the future that serve this critical goal.

Sincerely,



Jason Sebring
General Counsel