

The NetChoice Coalition

Promoting Convenience, Choice, and Commerce on The Net

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June 4, 2010

Rep. Rick Boucher

Chairman, Subcommittee on Communications, Technology and the Internet

House Energy & Commerce Committee

2187 Rayburn House Office Building

Washington, DC 20515

Rep. Cliff Stearns

Ranking Member, Subcommittee on Communications, Technology and the Internet

House Energy & Commerce Committee

2370 Rayburn House Office Building

Washington, DC 20515

Subject: Comments on Staff Discussion Draft of Privacy Legislation

Dear Chairman Boucher and Ranking Member Stearns:

Please accept these comments from NetChoice, a coalition of trade associations and e-commerce companies, plus over 13,000 small businesses that rely on e-commerce. NetChoice works to promote the integrity and availability of the global Internet, and is significantly engaged in privacy issues in the states, in Washington, and in international internet governance fora.

The comments submitted by NetChoice do not necessarily reflect the views of each one of our individual member companies. In part because of the dynamism and fluidity of online commerce, there is not complete consensus among our online companies on all the issues we address.

First, we want to thank you for taking a transparent and inclusive approach to develop this legislative proposal. Your draft has indeed stimulated broad discussion of business models and regulatory frameworks.

Fortunately, open and thoughtful consideration of this matter can continue without undue pressures to find a quick fix for privacy. Because while there have been state legislative proposals on privacy, there is not now a patchwork of state laws creating unworkable compliance challenges for interstate e-commerce. In other words, we can take our time and get this right.

Turning to the specific approaches in the discussion draft, we do not believe that privacy regulation should use the same approach for both personally-identifying (PII) and non-identifying information. PII and non-PII should have different rules for notice and consent, as in most legislative proposals we've seen.

Below we describe four cases that demonstrate how the approach of this draft legislation would fail to accommodate reasonable business situations where individuals are aware and in control of how their personal information is used.

1. The *Operational Purpose* exemption in this draft legislation is too narrow, in that it does not permit use of covered information for marketing or advertising to existing customers.

Case 1: A consumer buys a new washer and dryer and writes her email address on a product registration card. That's an Operational Purpose, so no consent is required to collect the info.

But if the retailer later wants to send an email offering an extended service contract, he has to first obtain consent to send the email, since that's a use of covered information for marketing purposes.

Additional consent should not be required when a business uses covered information to do follow-up marketing to customers with whom it has already established a business relationship. Customers expect their vendors and suppliers to offer upgrades, options, service contracts, etc. Congress has recognized this consumer expectation in past legislation, which is why it built important exceptions in the CAN-SPAM Act for “relationship messages” to contact customers in an existing business relationship.

But the *Operational Purpose* exemption is denied if the business uses any covered information for advertising or marketing -- to its own customers. This would force businesses to first request consent from their customer before contacting them with information about additional services or products. A low response rate to these permission requests will mean that fewer customers will learn about products and services they value, and businesses will have to spend more to market to existing customers.

2. Ad networks may not be able to take advantage of the *Exception For Individual Managed Preference Profiles* included in this legislation.

Case 2: An ad network places its cookie on my computer when I read a sports page online. A local sports retailer wants the ad network to place its ads with local users like me, who access sports websites.

But the ad network would have to first obtain my affirmative consent before disclosing my preference profile to advertisers in its network.

Ad networks are the only way that many small businesses can place online ads in front of large audiences of potential customers. Businesses with smaller ad budgets are not able to place their own ads with prominent online publishers, so they increasingly turn to ad networks for economies of scale and better targeting tools.

But ad networks may not be able to take advantage of the *Exception For Individual Managed Preference Profiles* included in this legislation. Ad networks will have to obtain affirmative consent to share covered information among unaffiliated advertisers, even if this covered information is not personally-identifying. It's already challenging to obtain affirmative consent, but this would become even more difficult once opt-in requests acquire the stigma of being associated with sensitive information such as medical, sexual, and financial data.

3. The *Covered Entity* definition in this legislation attempts to protect small businesses, but fails to protect businesses that collect any financial information.

Case 3: A home-based craft business serves less than a hundred customers per year, many of whom pay via their Paypal account.

The Paypal account is non-identifying, but it's treated as sensitive financial information collected by the seller, which means the seller can't qualify for the small seller exemption.

Small businesses will be hard pressed to get affirmative consent and are not likely to get first-time website visitors to enroll in their ad preference manager program. That's presumably why the draft legislation exempts those who collect from fewer than 5,000 users per year.

But small businesses can't fit into the covered entity small business exception if they collect any sensitive information at all – including financial information needed to process payments. Moreover, the collection of shipping addresses could deny a small business its exemption status if regulators regard address as a precise geolocation, which is another *Sensitive Information* item.

4. The discussion draft includes unintended consequences that extend beyond the online world and into traditionally protected speech. As currently proposed, the rules would even require express affirmative consent for collecting information about otherwise public events.

Case 4: Consider a situation where a reporter covers a Christian rally and is seeking interviews with a few enthusiasts. Per the discussion draft, a reporter could not even ask someone for their name without first providing a written privacy notice. Moreover, the reporter could not disclose anyone's name in a published story without first obtaining their express affirmative consent.

We believe this is an unintended consequence of the discussion draft, since it would compromise our first amendment right to free expression.

This wouldn't be the first time that proposed privacy legislation clashed with free speech principles. Last year, NetChoice worked with a legislative committee in Maine as it reconsidered a new law regulating collection of personal information from minors. The Maine law generated unintended consequences, including the Case 4 described above. When Maine legislators realized the unintended effects, they voted to repeal the law.

NetChoice would be happy to provide further input on the discussion draft, and we look forward to the opportunity to review future proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve DelBianco", with a long horizontal flourish extending to the right.

Steve DelBianco
Executive Director, NetChoice

NetChoice is a coalition of trade associations and e-Commerce businesses who share the goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org