

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

Comments of

eBay Inc.

on the

FACT Act Affiliate Marketing Rule, Matter No. R411006

Notice of Proposed Rulemaking

August 16, 2004

I. Introduction and Summary

eBay thanks the Federal Trade Commission (“Commission”) for this opportunity to submit comments in response to its Proposed Rulemaking on the regulations to be enacted under Section 214(b) of the Fair and Accurate Transactions Act of 2003 (“FACT Act” or “the Act”), 16 C.F.R. Part 680; 69 Fed. Reg. 3324. eBay submits these comments to ask that, consistent with the FACT Act’s text, legislative history, and consumer expectations, the Commission clarify that the term “pre-existing business relationship” includes a contractual relationship between a consumer and a business, where the consumer has requested the provision of a good or service, or affirmatively registered to receive a service, whether or not a fee is assessed.

II. About eBay and PayPal

eBay is the world’s leading online marketplace for the sale of goods and services by a diverse community of individuals and businesses. Today, the eBay community includes 114

million registered members from over 200 countries around the world. On an average day, there are millions of items listed on eBay in thousands of categories.

eBay offers a wide variety of features and services that enable members to buy and sell with each other on the site quickly and conveniently. Buyers have the option to purchase items in auction-style format or items can be purchased at a fixed price. Sellers may offer anything from a single personal item from their garage to substantial inventory from their online business.

eBay is not a traditional “auctioneer,” and is not involved in the final transaction between buyers and sellers. The eBay website acts as a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere. To engage in transactions through our online marketplace, our customers complete a registration form, and affirmatively agree to our User Agreement, thus creating a binding contract for the use of our services. Sellers pay a listing fee and a small percentage of the ultimate sale price to eBay. By contrast, joining and bidding on items at eBay is free, so buyers do not pay us a fee, although they can use our services, review their transactions and participate in discussions on the eBay website, and consider themselves eBay customers.

Our marketplace services also include online payments services offered by our affiliate PayPal. PayPal enables any individual or business with an e-mail address to securely send and receive payments online. PayPal’s service builds on the existing financial infrastructure of bank accounts and credit cards and utilizes the world’s most advanced proprietary fraud prevention systems to create a safe, global, real-time payment solution. Founded in 1999, PayPal has more than 50 million accounts and is available to users in 45 countries around the world. PayPal acts as a facilitator to help consumers accept payments from and make payments to third parties.

PayPal serves a wide variety of merchants by allowing them to accept payments, from buyers and sellers on eBay, online businesses and even traditional offline businesses. Our PayPal customers enter into contracts for the provision of online payment services by accepting PayPal's User Agreement during registration. Like eBay, PayPal offers many services to our customers free of charge (*e.g.*, opening an account, sending payments, and receiving funds into a personal account).

III. Discussion

Section 214 of the FACT Act adds a new consumer notice and opt-out requirement for solicitations from a person based on information that has been shared from an affiliate of that person. This section contains an exception relieving businesses from providing their own customers with notice and opt out where there is a "pre-existing business relationship." Section 214 defines three categories of relationships that qualify as a "pre-existing business relationship"¹, and specifically authorizes and invites regulators, including the Federal Trade Commission, to add by regulation to this list "any other pre-existing customer relationship" that they deem appropriate.

eBay asks that the Commission use its authority to define undefined terms used in the "pre-existing business relationship" provision, such as "active account," or otherwise clarify that

¹ The term "pre-existing business relationship" is defined as "a relationship between a person and a consumer, based on (A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this part; (B) the purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by this part is made or sent to the consumer; (C) an inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by this part is made or sent to the consumer; or (D) any other pre-existing customer relationship defined in the regulations implementing this section." 15 U.S.C. § 1681s-3(d).

“pre-existing business relationship” includes circumstances where there is a contractual agreement in place for the provision of goods or services, or the consumer has affirmatively registered for a good or service, regardless of whether any fee is assessed for such good, service, or registration. As we explain below, this is consistent with the Act’s text, with congressional intent, and with consumer expectations in the online world.

As noted above, PayPal requires its users to enter into a binding agreement for use of its payment-processing services. In providing online payment services, PayPal may collect and use information that falls within the FTC’s proposed definition of “eligibility information.” PayPal may share this information with eBay for several important purposes, including fraud prevention and detection, authentication, and marketing. When transferring the information to eBay for marketing solicitations, PayPal would trigger the notice and opt-out requirements of section 214. Similarly, eBay may collect and share information with its affiliated PayPal company. Some of that information may pertain to consumers who have not yet become customers of eBay. We offer full notice and opt-out for non-customer information sharing. Other information that eBay may transfer to PayPal may qualify as “eligibility information.” As the courts have acknowledged, the test for determining if information bears on one or more of the enumerated factors in the FCRA section 603(d)(1) definition of “consumer report” is not very demanding because “almost any information about consumers arguably bears on their personal characteristics or mode of living.” *Trans Union Corp. v. FTC*, 245 F.3d 809, 813 (D.C. Cir. 2001). When transferring this information to PayPal, if that information is used for marketing solicitations, eBay would trigger the notice and opt-out requirements of section 214.

Nevertheless, PayPal's and eBay's relationships with their customers should qualify as "pre-existing business relationships."

First, the plain language of the statute strongly suggests the fact that an account or service is free is irrelevant to whether a pre-existing business relationship exists. Congress chose the term "pre-existing *business* relationship" instead of the narrower term "customer relationship". The "business relationship" term has been defined in the Telemarketing Sales Rule and elsewhere as encompassing inquiries from consumers even where no transaction has occurred. *See* 15 C.F.R. § 301.2(n)(2).

Furthermore, relationships such as the PayPal and eBay arrangements fit the second pre-existing business relationship exception spelled out in the statute – where the consumer has purchased, rented or leased a person's goods or services, or entered into a financial transaction, including by holding "an active account" or "having another continuing relationship". § 1681s-3(d)(1)(B). This exception is sufficiently broad to cover use of services combined with holding an active account or having an ongoing user relationship relating to transactions, even if the services are free.

eBay asks that the Commission either clarify in the final rule that this exception applies where no fee is charged, or exercise its authority under § 1681s-3(d)(1)(D) to recognize an additional exception covering relationships where no fee is charged. Such clarification in the final rule is necessary to fulfill congressional intent, and to avoid an artificial distinction at odds with the realities of the online world.

There are two sources of relevant legislative history bearing on this issue. First, a floor statement of Senator Robert Bennett (R-UT) specifically "urge[s]" regulators to include such

arrangements in the definition of “pre-existing business relationship.” Senator Bennett was Chairman of the subcommittee of the Senate Banking Committee with jurisdiction over consumer privacy issues, and a member of the conference committee that developed the final version of the FACT Act. In his floor statement, Senator Bennett stated that contractual relationships in which consumers do not pay fees should qualify as “pre-existing business relationships”:

“As a Conferee, I believe the Conference Report intends that the term ‘pre-existing business relationship’ includes a contractual relationship between a consumer and a person, where the consumer has requested the provision of a good or service, or affirmatively registered to receive a service, whether or not a fee is assessed.”

“Certain business models, such as those in the online world, do not follow the traditional fee for services model that characterizes the brick and mortar world. Financial consideration may not exchange up front with a customer, or at all for that matter. Accordingly, I urge the regulators to factor in new and innovative business models when issuing the regulations implementing section 214 of the Fair and Accurate Credit Transactions Act of 2003, particularly with regard to the definition of “pre-existing business relationship.” 149 CONG. REC. S15966 (daily ed. Nov. 25, 2003) (statement of Senator Bennett).

This statement makes clear that Congress envisioned that the Commission would interpret the pre-existing business relationship provision to include circumstances where there is a customer contract and a clear customer relationship, regardless of whether the consumer is assessed a fee—as is the case with the eBay business model and other online business models. It would be entirely consistent with the Commission’s past practice in interpreting affiliate sharing provisions to rely upon the floor statements of members of the congressional committee of jurisdiction as relevant legislative history. *See, e.g.*, 65 Fed. Reg. 33646, 33663 (relying upon

conferees' statements as a basis for determining the proper scope of the final rule on Privacy of Consumer Financial Information) (May 24, 2000).

As the Commission acknowledged in the NPRM, the second source of relevant legislative history bearing on this issue is the Congressional intent that consumer expectations help shape the scope of the "pre-existing business relationship" exception. *See* 69 Fed. Reg. at 33327-28 (citing H.R. Rep. No. 102-317, at 14-15 (1991)). eBay has a very loyal customer base of buyers and sellers, and eBay buyers who register for the eBay service consider that they have a business relationship with eBay. In fact, eBay offers its registered users – buyers and sellers alike – not only a broad array of services (such as escrow services and fraud protection), but also the ability to participate in the eBay community. For example, eBay members benefit from a detailed user feedback system to obtain information about whom they are considering doing business with, and can sign up for newsletters, learn about doing business on eBay through eBay University, or participate in one of the many workshops we offer (*e.g.*, how to buy a vehicle on eBay). Moreover, eBay members can participate in chat and discussions of various topics, as well as connect with people who share common interests through eBay Groups.

It would be utterly contrary to the expectations of eBay consumers for the final rule to classify eBay sellers *alone* as having a pre-existing business relationship with eBay because they pay fees to eBay, whereas buyers do not.

As Senator Bennett observed, online companies similarly situated to eBay may not follow the traditional brick-and-mortar model of assessing all consumers a fee as consideration for services. In fact, in the online marketplace, the currency that effectively serves as consideration is participation in the marketplace and a percentage of the sale price paid by the seller to the

marketplace. Therefore, whether the “pre-existing business relationship” exception applies should depend upon whether there is a binding agreement and a product or service provided to the consumer, not on whether the buyer pays a fee. Such an interpretation would give effect to consumer expectations in the online world, and avoid a formalistic interpretation that would artificially exclude business arrangements that significantly benefit consumers.

For these reasons, eBay respectfully requests that the Commission clarify that the scope of the pre-existing business relationship exception includes those instances where there is a contractual relationship between a consumer and a person, or where the consumer has affirmatively registered to receive a good or service from that person, whether or not a fee is assessed.

Respectfully submitted,

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