

Comments of Grocery Manufacturers of America
concerning the
Federal Trade Commission Public Workshop
on
Radio Frequency Identification: Applications and
Implications for Consumers

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Radio Frequency Identification: Applications and Implications for Consumers

The Grocery Manufacturers of America (GMA) was pleased to participate in the panel discussion regarding “Implications of RFID Use for Consumers” at the Commission’s Public Workshop, “Radio Frequency Identification: Applications and Implications for Consumers” on June 21, 2004. We appreciate the opportunity to provide these comments for the record of the Workshop. Radio Frequency Identification (RFID) technology offers significant benefits for consumers and we believe consumers can enjoy those benefits with confidence that current law will guard their privacy as technology emerges.

GMA is the world’s largest association of food, beverage, and consumer product companies. With U.S. sales of more than \$500 billion, GMA members employ more than 2.5 million workers in all 50 states. The organization applies legal, scientific, and political expertise from its member companies to vital food, nutrition, and public policy issues affecting the industry. Led by a Board of 42 Chief Executive Officers, GMA speaks for food and consumer product manufacturers at the state, federal and international levels on legislative and regulatory issues.

Electronic Product Code Technology

By way of background, for more than four years, the Auto-ID Center at Massachusetts Institute of Technology (MIT) has been developing applications for RFID technology that promise to deliver significant benefits to the economy and consumers. One such application, the electronic product code, or EPC, stands out as one example of how public, private, and academic interests can unite to support research and development, and help move technology forward to benefit society. The Auto-ID Center, now known as the Auto-ID Labs, is supported by many of the world’s leading companies and organizations including many in the food, beverage and consumer products industry. EPCglobal, a joint venture between EAN International and the Uniform Code Council, was chartered last September to develop open, global standards for use of the EPC Network and currently has a subscriber base of more than 200 companies representing a cross section of major global industries. EPCglobal is responsible for the orderly adoption and implementation of the EPC system worldwide.

Very generally, the EPC offers the next generation of product identification. Building on the success of the Universal Product Code (UPC), known commonly as the “bar code,” the EPC provides the same basic information about a manufacturer and product currently carried on the UPC; plus it uses an extra set of digits to individually identify each case, pallet or package. For example, by reading the tag on one of its EPC shipped products, a

business can look up on a data base the date on which the item was shipped, the manufacturing facility from which it was shipped, and the retailer it was shipped to.

Connected to a network, EPC technology will allow companies for the first time to manage their global supply chain in real time, at any time – offering never before available benefits. Some of those benefits include:

- Streamlining inventory control on a global scale;
- Deterring theft and counterfeiting;
- Keeping shelves stocked with products desired by consumers;
- Speeding the placement of new products; and
- Easing removal of expired products.

It is also important to note that EPC technology can offer solutions to government, such as:

- Improved customs handling and border controls;
- Enhanced Department of Defense (DoD) logistics management; and
- Better security for moving luggage through airport terminals.

Radio Frequency Identification Technology

Within the food, beverage, and consumer products industry, EPC/RFID is a part of a broad range of e-commerce activities designed to make the supply chain more effective and efficient. From a manufacturing perspective, some of the benefits of EPC/RFID include the elimination of manual counting and recounting of products in distribution. Warehouses, trucks, backrooms, and shelves will contain readers that will automatically and continually track products and maintain perpetual and accurate inventory data. Out-of-stocks – a problem that costs the consumer and the manufacturer - could be virtually eliminated through preset triggers that would automatically call for replenishment. This would also allow for theft to be measured and controlled in real time, and will increase the ability to identify counterfeit products. Additionally, product recalls could be conducted in a much more efficient and effective manner through continuous monitoring of products throughout the supply chain.

Though much of the research is focused on business and supply chain applications of the technology, the EPC ultimately promises consumer benefits as well. Consumers may see improved checkout procedures and customer service. Other benefits could include better availability of products and swifter and more effective food and product safety recalls.

Status of EPC/RFID Implementation

Pilot studies on the use of EPC/RFID in warehouses, backrooms, trucks and manufacturing plants are currently underway. While it is clear that broad implementation of EPC/RFID on individual items tracked to the store level is still years away, the market is on the verge of accelerating its adoption of the technology on a broader scale for supply chain applications. Vendors of RFID technology are embracing the economics of lower cost production in higher volume uses that could bring down individual tag costs

(currently a significant barrier). Several manufacturers have been leading initiatives to test the use of EPC/RFID to reduce theft in the supply chain, especially for high value goods, and look forward to realizing benefits from the day-to-day use of the technology.

As with any new technology, many hurdles stand between current capabilities and ultimate implementation. These include:

- Difficulty in reading radio frequencies through metals and liquids.
- Upgrading chip quality and consistency to improve read rates.
- Avoiding interference with other radio frequency technologies, such as those used in warehouses, manufacturing plants, stores, etc.
- Developing software to help sort vast amounts of data into meaningful information.
- Improving the ability to read all cases on a pallet.
- Making RFID affordable for many consumer product manufacturers.

These issues must first be addressed in a reliable and cost-efficient manner before we are likely to see widespread adoption of EPC/RFID throughout the retail and manufacturing industry.

Privacy

While EPC/RFID can and will afford major benefits, the technology also raises public policy issues that must be addressed in a proactive and responsible way. Chief among those issues are concerns about consumer privacy, which some legislators and advocacy groups are already trying to address by proposing legislation that specifically regulates RFID. GMA believes RFID-specific legislation is unnecessary because the existing legal framework, industry self-regulation, and market forces provide consumers ample protection against potential abuses of the technology.

Under Section 5 of the Federal Trade Commission Act, the FTC has authority to regulate unfair or deceptive practices in and affecting commerce. In recent years, the Commission has used this authority to develop a substantial body of law regulating the manner in which businesses collect and use consumers' personal information, particularly online. In addition, the Commission enforces specific privacy laws such as the Children's Online Privacy Protection Act, the Fair Credit Reporting Act, and the Gramm-Leach-Bliley Act. This body of law is readily applicable to consumer privacy concerns about potentially unfair or deceptive uses of RFID technology.

The protections of Section 5 of the FTC Act and other statutes enforced by the Commission are not technology-specific. Section 5 was not amended with the advent of radio or television, nor during the emergence of concerns about online consumer privacy. While there have been some laws enacted to deal with certain aspects of emerging technologies, FTC consumer protection enforcement, including enforcement of general consumer privacy protections, stems primarily from existing prohibitions against deception and unfairness. Specifically, the FTC has brought several consumer privacy

cases on the theory that a company's failure to abide by its stated privacy policies constitutes a deceptive practice under the Act. *See, e.g., Liberty Financial Companies, Inc.*, FTC Dkt. No. C-3891 (Aug. 12, 1999) (consent agreement); *GeoCities*, FTC Dkt. No. C-3891 (Aug. 12, 1999) (consent agreement); *Guess, Inc.*, FTC Dkt. No. C-4091 (Jul. 30, 2003) (consent agreement).

In conjunction with its enforcement activities, the FTC has long encouraged companies to make privacy policies available to consumers. Many of the retailers at the forefront of implementing EPC/RFID, whether supermarkets, department stores, or super centers, already publish and abide by privacy policies that provide consumers a measure of protection against misuse of their personal information. Retailers know that consumers, as well as the FTC, hold them to the promises made in their privacy policies. They recognize that it will be necessary to update these policies to notify consumers that EPC/RFID technology is in use in their stores, how they collect and use information from EPC tags, and any choices consumers have.

State law enforcers and the plaintiffs' bar have also been active in the consumer privacy arena. Their cases, while arising from consumer protection principles similar to those found in Section 5, have often focused on allegations of violations of unstated policies, for example, the failure to disclose how consumer personal information is collected or that it has been shared with another company. *See, e.g., In the Matter of DoubleClick, Inc.*, at http://www.oag.state.ny.us/press/2002/aug/aug26a_02_attach.pdf (settlement agreement between DoubleClick, Inc. and ten states) (last visited Jul. 9, 2004); *In re DoubleClick Inc. Privacy Litig.*, 2002 U.S. Dist. LEXIS 27099 (D.N.Y., 2002); *In re Toys R Us, Inc.*, 2000 U.S. Dist. LEXIS 18658 (J.P.M.L., 2000).

These precedents demonstrate that basic consumer protection principles such as deception and failure to disclose were able to evolve to protect privacy in the online context. With the framework already in place, these principles are readily applicable in the context of RFID. There is no reason to believe, even in the absence of a law that specifically mentions "radio frequency identification," that the Commission, state law enforcers, and the plaintiffs' bar will stand by in the face of abuses of RFID technology. Like the internet, RFID is simply another method by which consumers and businesses can share information. Any privacy concerns it raises are virtually identical to those raised by information collection on the internet, and the same solution should apply: Market forces and government encourage businesses to provide privacy policies, and the promises contained in those policies are enforced.

Self-regulation has an important role in encouraging responsible use of EPC/RFID. In January 2004, the GMA Board of Directors formally adopted privacy guidelines established by EPCglobal. They are available at www.epcglobalinc.org. The guidelines will continue to evolve as technological applications and consumer opinions develop, but they already address important aspects of a sound privacy policy -- consumer notice, choice, and education, as well as records use, retention and security. Specifically, the guidelines focus on the need for consumer notification and choice when RFID tags are present in or on products available for purchase. In addition, they affirm companies'

commitment to use, maintain, and protect records generated through EPC/RFID in compliance with all applicable laws, including privacy laws.

Of course, even in the absence of legal and self-regulatory incentives, retailers and manufacturers have ample incentives to deal fairly with their customers. Retailers and manufacturers of brands rely on repeat business. Repeat business depends on consumer confidence in the seller. Thus, when a shopper goes into a supermarket for a favorite brand of food, the whole supply chain recognizes that the shopper's trust in the businesses that brought that brand to the market is critical to his or her decision to return again and again. In addition, manufacturers have invested hundreds of millions of dollars to create consumer confidence, trust and loyalty to their brands. It is therefore in the industry's interest to act responsibly when implementing this new technology.

Some commentators have called for new laws to address RFID. Enacting laws and promulgating regulations now would likely do more harm than good. New laws specifically regulating RFID could stifle development of the technology before its benefits are fully recognized. Since the currently-known benefits of the technology arise in interstate commerce, a patchwork of state regulation of RFID would be particularly problematic. The appropriate approach is to monitor the situation to assess whether there are privacy concerns that legitimately arise as this technology develops and then ask whether they are concerns that cannot be addressed through industry self-regulation and the application of the unfairness and deception principles of the FTC Act.

GMA and its member companies look forward to participating in continuing discussions about the use of EPC/RFID in the consumer packaged goods industry. As the industry adopts this technology, we are committed to doing so in a way that protects consumer privacy and offers consumer benefits. We appreciate the work the Commission is doing to understand the complexities of the issue and look forward to working jointly to address any concerns.