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Note: The following paper on aspects of "choice" is prepared for the Internet Caucus Advisory Committee's 2001 Privacy Briefing Book on the "Policy of Choice." It contains excerpts from the Online Privacy Alliance's "Privacy Guidelines Commentary" that can be read in its entirety, along with the OPA's "Guidelines for Online Privacy Policies" at <http://www.privacyalliance.org/resources/> .

Privacy Guidelines Commentary

November 19, 1998

ONLINE PRIVACY ALLIANCE

Commentary to the Mission Statement and Guidelines

INTRODUCTION

1. This commentary is intended to serve as an introduction to the Alliance's Mission Statement and Guidelines as well and to serve as an interpretive tool, which will assist Alliance Members and others to establish and refine on-line privacy programs internally and in working with third parties to develop enforcement programs. This document attempts to reflect the thoughts of the drafters of the Guidelines, their areas of disagreement, and the compromises they have reached in their final product. ...

GUIDELINE 3. CHOICE/CONSENT.

“Individuals must be given the opportunity to exercise choice regarding how individually identifiable information collected from them on-line may be used when such use is unrelated to the purpose for which the information was collected. At a minimum, individuals should be given the opportunity to opt out of such use. Additionally, in the vast majority of circumstances, where there is third-party distribution of individually identifiable information, collected on-line from the individual, unrelated to the purpose for which it was collected, the individual should be given the opportunity to opt out.

“Consent for such use or third-party distribution may also be obtained through technological tools or opt-in.”

26. This Guideline covers use of the collected information for a purpose unrelated to that for which it was gathered, either by the entity that originally gathered it, or by a third-party to whom it is distributed. Under Guideline 2, the intended use must be disclosed. The information may not be used by the gathering entity without extending to the individual “[a]t a minimum the opportunity to opt out of such [unrelated] use.” Although the Guideline uses “should” language for opt out of third-party distribution, the vast majority of Members believe opt out is mandatory for all cases of unrelated use. The permissive “should” language was intended to cover two situations: first where the third-party disclosure is pursuant to law, statute, regulation, or disclosed contract; and second, those business models where the service is provided in exchange for the provision of personal information, and the ability to use that information. Rather than attempt to cover the universe of “exceptions” in the

Guidelines, the Members believe the standard should be interpreted as mandatory, with limited exceptions.

27. Whether a purpose is “unrelated” should be approached from a common-sense perspective. It should at a minimum be measured against the uses disclosed and the reasonable expectations of the individual. It is not acceptable to disclose that one will use the information for “any related business purpose now known or hereafter discovered by us” or the like. Some degree of specificity is required.

28. Opt-out is mandatory, “in the vast majority of cases,” where a third-party to whom the information is distributed will use it for an *unrelated* purpose. It should be noted that this provision implies two things. First, a Member who outsources various of its functions in order to fulfill the “purpose for which the information is gathered” need not provide opt out. The provision of the information to the third-party is probably necessary for fulfillment of the Member’s contracted obligation to the individual. Other “uses” of the information may be required for reasonable business purposes for successful completion of the company’s undertaking to the consumer, such as using it to verify his or her creditworthiness or his or her address for the shipment of a product. Opt-out should not be necessary in this circumstance. Second, the opt out will normally apply to both the disclosure to the third-party and the unrelated use, unless this third-party is also performing a function of the information gatherer’s disclosed use and use can be limited. A third-party’s merely storing data, or combining it with other data, thus would appear to be an unrelated use.

29. It is expected that an opt out must be given where unrelated use by a third-party is anticipated.

30. The last sentence of this Guideline reminds the reader that providing opt out for unrelated use is a minimum, for it suggests that “opt out” could also take the form of “consent” or “opt-in.” The drafters wished to underscore that the exercise of choice in the on-line environment can be accomplished in numerous ways, and they encourage the use of new technological tools to empower consumers to exercise choice.