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Comments of eBay, Inc. on New Zealand's Discussion Paper, "Legislating Against Spam"

eBay, Inc. ("eBay") welcomes the opportunity to submit comments on the Ministry of Economic Development's recently released discussion paper, *Legislating Against Spam* ("Discussion Paper"). As one of the world's most popular Internet destinations, eBay is deeply engaged in efforts to combat unsolicited email or "spam." We have also followed closely the legislative steps that other countries, particularly Australia and the United States, have taken to address this serious concern. As New Zealand looks toward possible legislative solutions to the issue of spam, eBay looks forward to working with the Government throughout this important policy development process.

eBay is the premier online marketplace, where more than 100 million Internet users from around the world meet to buy and sell just about anything. Recognizing the special problems that trading online presents, eBay has implemented numerous policies to facilitate its goal of providing a safe, fair, and legal trading environment, and to make its user experience as easy, safe, and rewarding as possible. These policies address a number of areas, including spam, and anticipate a number of the concerns raised by the Discussion Paper.

As an overview, eBay does not rent or sell any personal information about its users to any third party, nor does it authorize users to make use of eBay features to send spam. See Privacy Policy, Use of Email Tools, at <http://pages.ebay.com/help/community/png-priv.html>. These policies help to ensure that users' personal information is not subject to data mining for the purposes of spam. In addition, eBay aggressively pursues parties, whether or not eBay users, that violate our users' expectations of privacy and our policies by surreptitiously harvesting e-mail addresses from our site. We are constantly improving our anti-harvesting policies, and the technological measures employed to implement them and to detect and pursue violations.

Though the Discussion Paper addresses a wide range of issues surrounding spam, we focus on three that are of key importance to eBay: 1) the parameters for granting and obtaining consent to receive unsolicited email; 2) the prohibition against supplying, acquiring, and using address-harvesting software; and 3) enforcement.

I. Consent

In order to become a member of eBay, and gain access to our online marketplace, users are required to read and consent to eBay's comprehensive User Agreement and Privacy Policy. To ensure that eBay gets its users' informed consent, we have developed a series of charts and matrices to explain our privacy policies as clearly as possible. *See* Appendix to the Privacy Policy, at <http://pages.ebay.com/help/policies/privacy-appendix.html>. eBay collects and uses personal information about its members to resolve disputes, troubleshoot problems, help ensure safe trading on its site, and to enforce the User Agreement, but, as noted above, it does not sell or rent this information to third parties, without consent of the user. *See* User Agreement, Privacy, at <http://pages.ebay.com/help/policies/user-agreement.html>.

By agreeing to the Privacy Policy, a pre-condition for membership in eBay, users consent to receiving communications from eBay, including administrative notices, product offerings, and general communications relevant to the eBay website. Many users find this information helpful and informative, as it often directs them to products or services they would not otherwise know about. However, if users do not wish to receive these messages, they can easily change their user preferences to avoid receiving them.

The Discussion Paper asks whether proposed legislation should adopt an "opt-in" or "opt-out" approach to the issue of consent. eBay believes that an opt-out approach is adequate. This is the model employed by U.S.'s CAN-SPAM Act, *see* 15 U.S.C. § 7704(a)(3), (4), and it is similar to the model that eBay has used for many years. An opt-in approach, where individuals would be required to explicitly request receipt of email, may in fact be harmful to the interests of eBay users. In a broad, thriving online community such as eBay, we often need to communicate important information to our users, and believe that the default status should be for users to receive this information. The "opt-out" approach embodied in the eBay User Agreement and Privacy Policy maximizes efficiency for our users, while preserving their ability to easily alter their preferences to avoid receiving future communications.

The Discussion Paper also asks whether consent should be express or whether it may be implied from a user's activities, or from an ongoing relationship with the party sending the unsolicited commercial email. The Australian law allows consent to be implied, *see* Spam Act, 2003, Schedule 2, and we believe this may be a workable solution for New Zealand. A requirement of express consent, if strictly interpreted, may pose a burden for users, thus impairing their overall online experience.

Though eBay believes implied consent is appropriate in many circumstances, we do not rely on it to notify our users of the types of information we collect, or the circumstances under which we share that information. In order to become eBay members, individuals are required to read and consent to our robust User Agreement and Privacy Policy. Both of these documents spell out in express detail the types of information eBay collects, the purposes for which it uses that information (e.g., in order to verify a user's identity thereby reducing the likelihood of fraud), and the entities to which it will disclose that information. Email addresses in particular are strongly protected, as indicated by our Privacy Policy chart. *See* Appendix to the Privacy Policy, at <http://pages.ebay.com/help/policies/privacy-appendix.html>. In short, eBay takes great care to

ensure that users' personal information, including email addresses, does not become a target for spam.

II. Address Harvesting

Valid email addresses are the oxygen of the spamming business; if they cannot be acquired in massive quantities, the practice cannot survive. Attacking the techniques by which spammers obtain lists of valid email addresses is perhaps the best way to suppress spam at its source.

“Address harvesting” software is a primary tool that spammers use to acquire email addresses in the necessary high volumes. These programs comb through online sites and collate email addresses to create massive databases of such addresses. These databases can then be used by the harvester or, more commonly, rented or sold for use by other spammers.

The Australian legislation deals with address harvesting fairly comprehensively. The law prohibits the sale of address-harvesting software, the act of harvesting email addresses, and the acquisition and use of lists of email addresses created using address-harvesting software. *See* Spam Act, 2003, ss.19-22. The U.S. CAN-SPAM Act provides more limited protections: it prohibits the transmission of spam to email addresses the sender knew were obtained through harvesting software, and outlaws the provision or selection of email addresses so obtained for use in assisting the transmission of spam. *See* 15 U.S.C. § 7704(b). eBay encourages New Zealand to consider the more complete Australian approach to combating address harvesting. Whatever provisions are included on this topic in anti-spam legislation should be without prejudice to the possibility of enforcement of other laws against the same practices.

Each one of eBay's over 100 million users has an email address. We use these addresses to help eBay identify the user's identity in order to fight fraud, and to protect the safety and integrity of our site as a whole. But this database, or relevant portions of it that correspond to buyers and sellers in a particular category of goods or services, are an extremely attractive target for harvesting. As our Privacy Policy makes clear, we employ technical and procedural safeguards to protect the data from loss or theft, and importantly, from unauthorized access. *See* Privacy Policy, Security, at <http://pages.ebay.com/help/community/png-priv.html>. But, as our Privacy Policy also makes clear, no security is perfect. Legal prohibitions on trafficking and use of address-harvesting software greatly strengthen eBay's ability to protect users' sensitive information, particularly email addresses. In turn, this helps reduce the likelihood that those email addresses will be the target of spam.

The Discussion Paper expresses concern that any prohibition on address-harvesting software, or its use, could be over-inclusive, noting that there are legitimate uses of the software. We do not believe this concern should lead New Zealand to adopt weaker or more limited prohibitions against these spammers' tools. Though there may be legitimate uses for harvesting software, illegitimate uses clearly predominate. Furthermore, a legislative prohibition in this area could be carefully targeted to minimize the risk of overbreadth. For example, the Australian legislation expressly applies only if the intent behind the supply, acquisition, or use of the address-harvesting software or lists of harvested addresses is for spamming. If defendants have a

legitimate purpose, then they are not captured by the legislation. *See* Spam Act, 2003, ss.20(2); 21(2); 22(2). New Zealand could consider a similar approach.

III. Enforcement

The Discussion Paper seeks comment on a variety of issues related to enforcing possible anti-spam legislation. While some of the issues address the types of penalties and the scope of investigators' powers, we focus on the question of who may bring an action. The Discussion Paper appears to contemplate that a government agency would be empowered to bring suit for violations, rather than incorporating a private right of action into the legislation.¹ eBay strongly supports this option. Government agencies should have the resources to conduct the often complex and protracted investigations needed to develop strong cases for enforcement proceedings. Generally, individuals will not be in a position to do this. Likewise, granting a private right of action to any individual harmed risks inundating the legal system with marginal or even meritless claims. This will do nothing to impede the flow of spam, but will create collateral costs to society. eBay agrees that the New Zealand Commerce Commission would be a suitable agency to play an anti-spam enforcement role similar to that played by the United States Federal Trade Commission under CAN-SPAM, *see* 15 U.S.C. § 7706(a), and the Australian Communications Authority under the Spam Act of 2003. *See e.g.*, Spam Act, 2003 s.26.

The U.S. approach contains an additional enforcement mechanism that New Zealand should consider. CAN-SPAM also gives Internet service providers ("ISPs") and website operators the ability to bring enforcement claims against spammers who carry out their activities over their networks or by harvesting e-mail addresses from their sites. *See* 15 U.S.C. § 7706(g). Entities whose business it is to provide email service or to route email traffic are particularly vulnerable to injury from high volumes of spam in a way that most individuals are not. The U.S. law recognizes this, and also empowers services such as eBay to vindicate the privacy interests of our users by bringing civil claims against harvesters who target our site. A limited private right of action in favor of such entities, combined with the possibility of enforcement actions by the Commerce Commission, could provide a more potent deterrent against spam. In the same vein, New Zealand should consider including criminal, as well as civil, penalties against spammers. This is also a feature of U.S. law that aims to maximize disincentives for spamming. *See* 18 U.S.C. § 1037.

eBay thanks the Ministry of Economic Development for the opportunity to submit these comments, and looks forward to working with the Government throughout this important policy development process. If we can provide further information, please do not hesitate to call upon us.

¹ We note however, the remedies section of the Discussion Paper states "[o]ther possible remedies include the ability to seek injunctions against the actions of spammers as well as the ability of victims to seek compensation or damages and the ability to seek exemplary damages." Discussion Paper, at 21. While not entirely clear, this suggests the Government may be contemplating a private right of action for individuals harmed by spam.

Respectfully Submitted by:

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