



**Consumer Federation of America**

## The OECD Guidelines for E-Commerce Consumer Protection: After 10 Bad Years, It's Time for A Change

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Strengthening Consumer Protection in the Internet Economy

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The details of the massive explosion of products and practices in the digital economy that place consumer interests at grave risk have already been noted and will be discussed in detail over the next couple of days. Digital products, mobile computing, consumer-to-consumer auctions, social networking, behavioral advertising, to mention the most obvious, have exploded in an environment where there is inadequate protection of privacy, the abuse of personal information, lack of transparency about basic product information, uncertainty about product rights, complaints about payment schemes, and ambiguity of dispute resolution. Therefore, at the outset of the conference I want to offer a different perspective, step back from the details and focus on the big picture. I will address why public policy has failed to provide the consumer protection to ensure that the digital economy promotes the public interest and why the framework for establishing consumer protection can and must change quickly. Now is the moment to shift the fundamental framework on which consumer protection in cyberspace stands in order to ensure a more effective regime and secure a more stable footing for economic activity.

I suggest that we have failed to provide the necessary public policies to protect consumer interests in the decade since the Guidelines on E-Commerce Consumer Protection were issued because that decade was the crescendo of casino capitalism, the height of market fundamentalism. In the past decade the claim of the efficient market hypothesis, which asserts that the outcome of the market is always superior to regulation and any attempts to regulate e-commerce, will slow innovation, dominated the policy landscape, as it had never done in the past.

However, the efficient market hypothesis is buried, if not dead, beneath the rubble of the financial system. Policy makers in the consumer protection arena should challenge the efficient market hypothesis as vigorously in consumer protection as it has been challenged in the financial markets. The threat of inadequate consumer protection in the digital economy, the systemic risk of inadequate consumer protection parallels the problem of inadequate prudential regulation in the

financial sector perfectly. The key to the financial system and the key to the commercial system of exchange is trust. Destroy trust and the system ceases to be able to play its vital role in the economy. The digital engineers in cyberspace, like the financial engineers on Wall Street or in the City in London, can be wildly productive when they empower consumers or frighteningly destructive, if they undermine trust in commerce. Just because some engineer can design a product or sales practice does not mean it is in the public interest. We have learned all too painfully that it does not mean that product is even in the private interest.

A year ago, under cross examination before the U.S. House of Representatives, Alan Greenspan, one of the most famous advocates of the efficient market hypothesis and most powerful architects of the financial system that was collapsing, admitted that,

Those of us who looked to the self-interest of lending institutions to protect shareholders' equity, myself included, are in a state of shocked disbelief... I made a mistake in presuming that the self-interests of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms."

Since Greenspan made that public admission, he has all but disappeared from the public policy debate over financial sector reform. Other leading advocates of market fundamentalism, like Richard Posner, the most prominent thinker in the Chicago School of Law and Economics, have admitted "A Failure of Capitalism."

We in the public interest movement have always believed that the pursuit of private profit is not always synonymous with the public good, but Greenspan's admission goes one step further. The pursuit of private profit may not even be synonymous with the private good.

- **The lesson we must learn from this is that regulation is not a tool for the *ex post* clean up of the occasional market problem, as the now defunct efficient market hypothesis would have us believe, regulation is the *ex ante* prophylaxis to prevent pervasive and dangerous market failure.**

We must build digital commerce on the fundamental observation that *caveat emptor*, buyer beware, will simply not work as a principle to regulate commerce in a space where the technology is beyond the ken of the average consumer. Consumers are hopelessly outgunned in the digital technology arms race and neither the private interest of e-companies nor the invisible hand of the market will do the job for us. The escalating technologies of surveillance and the increasingly complex layers of warning have simply rendered consumer sovereignty ineffective in cyberspace. Public policy must set the parameters within which technology can operate, not visa versa.

We can frame the issue in terms of contemporary economic analysis as follows:

- We have a pervasive problem of information asymmetry that e-companies exploit for private profits at the expense of the public.
- The perverse incentives are so strong that there is little chance that self-restraint will control the abuse.
- The inequality of capacity between sellers and buyers is so great that market forces

and technology cannot protect consumers.

- The moral hazard of creating distrust is so great that in order to ensure trust in digital transactions, public policy must create an infrastructure of basic consumer rights.

There are four broad areas in which the infrastructure of consumer protection must be restored and these principles of consumer protection must apply across all platforms – fixed and mobile, digital and physical. .

The privacy of consumers must be protected or they will hesitate to enter into transactions. Commercial black mail, give us the information, or we will shut off the commerce, will eventually backfire. Individual companies may prosper, but the ecology of digital commerce will be polluted.

Consumer rights must be clearly defined, particularly for digital products, but also for physical products transacted digitally. Consumers need to know exactly what it is they are buying, what they can do with it, where it will work and how they can exercise those rights. Society must define digital rights before companies impose technologies to manage them.

The definitions and oversight of unfair business practices, insufficient product disclosure, misleading advertising, and payment schemes, must be updated to provide meaningful protection for consumers in a world of instantaneous, global commerce.

These rights must be enforceable in a reasonably consistent manner throughout cyberspace and physical space to prevent regulatory forum shopping and arbitrage that creates a race to the bottom in consumer rights. That means consumer rights to dispute resolution and redress must be consistent across sectors and nations. We should create a race to the top by allowing consumers to seek redress in the most consumer-friendly jurisdiction (not least consumer-friendly) that was involved in the transaction.

Just as the growth of mass marketing in the 1950s undermined the traditional buyer seller shop relationship and gave rise to the redefinition of product liability in the 1960s, the rise of digital markets must give rise to the redefinition of consumer rights in the cyber age. Just as it was foolish for the U.S. Securities and Exchange Commission to allow the big banks to set their own capital requirements because even the professional staff of the agency could not understand the complexities of the risk the new products were creating, so too it is a mistake to allow e-commerce companies to set the terms and conditions of privacy and digital rights without clear direction of public policy.

It has been a decade since the Guidelines for E-Commerce Consumer Protection and there is no time to waste in getting to work on building a durable system of consumer protection in cyberspace that will secure the future of digital commerce. We need to worry less about inhibiting innovation and more about ensuring trust; we need to rely less on self-regulation and more on prudential regulation. We can only succeed in effectively reforming consumer protection in cyberspace if we base regulatory reform on an intellectual foundation that recognizes and embraces the positive role that consumer protection must play in the digital economy.