



Jessica L. Rich
Office of the Director
Bureau of Consumer Protection

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

May 16, 2015

Elise Frejka, Esq.
Frejka PLLC
733 Third Avenue
New York, NY 10017

In Re: *RadioShack Corporation, et al.*, No. 15-10197 (BLS) (Bankr. D. Del.).

Dear Ms. Frejka:

For decades, the Federal Trade Commission (“FTC”) has acted to protect consumer privacy. Among other laws, the FTC enforces Section 5 of the Federal Trade Commission Act (“FTC Act”), which prohibits unfair or deceptive acts or practices. I am the Director of the FTC’s Bureau of Consumer Protection (“BCP”) and am writing to express BCP’s concerns¹ about the possible sale of certain consumer personal information currently in the possession of RadioShack Corporation (“RadioShack”) as part of the bankruptcy proceeding.² It is our understanding that this information is subject to a sale hearing before the Honorable Bankruptcy Judge Brendan L. Shannon on May 20, 2015. As the court-appointed Consumer Privacy Ombudsman, we request that you consider these comments when drafting your report and that you attach this letter to your report when you submit it to the court.

RadioShack and Its Privacy Policies

The facts as we understand them are as follows: RadioShack sold consumer electronics, including mobile devices, and other merchandise through brick-and-mortar stores and online. In the course of conducting its business, RadioShack collected personal information from millions of consumers, including name, physical mailing address (billing and shipping), telephone number, email address, credit or debit card number,³ and purchase history⁴ for over 117 million

¹ Please note that the views expressed herein do not necessarily reflect the views of the Federal Trade Commission or any individual Commissioner.

² *In re RadioShack Corporation, et al.*, No. 15-10197 (BLS) (Bankr. D. Del.). For purposes of this letter, RadioShack is defined to include RadioShack Corporation and its seventeen affiliated debtors in their jointly administered Chapter 11 bankruptcy cases.

³ RadioShack has represented that credit and debit card information in its possession was modified through marking or hashing after 120 days, thereby making it unreadable.

customers. RadioShack states that its current database contains consumer information collected over many years and that the overall accuracy of the data is uncertain, as many of the data entries may be duplicates or not current.

RadioShack collected this information from consumers under one of at least two different privacy policies it has disclosed during bankruptcy proceedings. The first, published on the www.radioshack.com website at the petition date of the bankruptcy filing, states in relevant part:

Personally identifiable information

Personally identifiable information may include information that you provide to us by requesting information, when registering for special offers or programs or when you purchase products online. This may include your name, address (including billing and shipping addresses), telephone number, e-mail address, organization, city, state and zip code. We may use this information, to process and ship orders, to contact you about the status of your order, to contact you with answers to your questions, or to provide information about new and exciting products, services, promotions and corporate-related information. We may use mailings, telephone calls and e-mail to contact you.

Information sharing and disclosure

Agents, employees and contractors of RadioShack who have access to personally identifiable information are required to protect this information in a manner that is consistent with this Privacy Policy and the high standards of the corporation.

- Information about you specifically will not be used for any purpose other than to carry out the services you requested from RadioShack and its affiliates. All of our affiliates have agreed to maintain the security and confidentiality of the information we provide to them.
- **We will not sell or rent your personally identifiable information to anyone at any time.**⁵
- We will not use any personal information beyond what is necessary to assist us in delivering to you the services you have requested.
- We may send personally identifiable information about you to other organizations when:
 - We have your consent to share the information (you will be provided the opportunity to opt-out if you desire). For example, if you opt-in for emails we will share this information with our marketing provider.

⁴ RadioShack has represented that purchase history was retained for a period of three years unless the consumer obtained a service plan or warranty, in which case the purchase history was retained indefinitely. During the last five years, however, RadioShack has retained all purchase history to comply with litigation holds.

⁵ This statement has appeared on a version of the radioshack.com privacy policy since at least April 2004.

- We need to share your information in order to provide the product or service you have requested. For example, we need to share information with credit card providers and shippers to bill and ship the product you requested.
- We are required to do so by law, for example, in response to a court order or subpoena.

(Emphasis added).⁶

Another RadioShack privacy policy, displayed to consumers on various signage in RadioShack stores, contained similar language restricting the sale of personal information:

We Respect Your Privacy

We Do Not Sell Our Mailing List

The information you give us is treated with discretion and respect. **We pride ourselves on not selling our private mailing list.** From time to time, we may send you information from our company or from select, responsible companies that may join with RadioShack to bring you special offers.

If you no longer wish to receive offers and information, please call us at 1-800-843-7422 or visit us at www.RadioShack.com. (Emphasis added).⁷

For the period covered by these privacy policies, RadioShack thus clearly and expressly represented that customer information would not be rented or sold to third parties.

The representations RadioShack made to its customers about the privacy of their information, including name, address, telephone number, email address, and purchase history, would likely be considered very important to many customers. We understand that the purchase history for sale from the RadioShack database includes 21 categories of information.⁸

⁶ RadioShack Online Privacy Policy, 2014, *available at* <http://www.radioshack.com/privacy-policy/privacy.html>.

⁷ *See* STATE OF TEXAS'S LIMITED OBJECTION TO SALE OF PERSONALLY IDENTIFIABLE INFORMATION OF ONE HUNDRED SEVENTEEN MILLION CONSUMERS, ECF Dkt. No. 1393, Exh. C.

⁸ The Commission has acted in previous instances to address privacy issues presented by the sale or disclosure of purchase history information that is sensitive. *See FTC v. Toysmart*, No. 00-11341-RGS (D. Mass. 2000), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/x000075/toysmartcom-llc-toysmartcom-inc> (consent order relating to sale in bankruptcy of children's information, including shopping preferences); *In the Matter of MTS, Inc., d/b/a Tower Records/Books/Video*, No. C-4110 (F.T.C. 2004) (consent order settling charges that Tower Records misrepresented the privacy, confidentiality, and security of consumers' personal information, including past purchase histories, on its website); Letter from Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection to Reed Freeman (Mar. 12, 2010), *available at* <http://www.ftc.gov/os/closings/100312netflixletter.pdf> (letter to counsel for Netflix, Inc. closing staff investigation regarding concern that release of movie viewing datasets could be re-identified and expose customer identity and film viewing histories and preferences); and Letter from David C. Vladeck, Director, Bureau of Consumer Protection to Jane Horvath, Google, Inc. (Sept. 2, 2009), *available at* <http://www.ftc.gov/os/closings/090903horvathletter.pdf> (expressing concern regarding potential online behavioral

Consumers who provided their personal information to RadioShack would likely be very concerned if it were to be transferred without restriction to an unknown purchaser for unknown uses.

Potential Sale or Transfer of Personal Information

We understand that RadioShack's customer information constitutes a potentially valuable asset. We are concerned, however, that a sale or transfer of the personal information of RadioShack's customers would contravene RadioShack's express promise not to sell or rent such information and could constitute a deceptive or unfair practice under Section 5 of the FTC Act.⁹

The Commission has brought many cases alleging that the failure to adhere to promises about information privacy constitute a deceptive practice under the FTC Act.¹⁰ These cases include *FTC v. Toysmart*,¹¹ in which the Commission sued an online toy retailer which had filed for bankruptcy and sought to auction the personal information it collected from its customers. The Commission alleged that the sale of personal information constituted a deceptive practice because the company had represented in its privacy policy that such information would never be shared with third parties.¹²

We have similar concerns about the potential deceptive nature of the transfer of customer information in this case. We recognize, however, that bankruptcy presents special

advertising or secondary use of consumer search, purchase, and reading history associated with Google Books project).

⁹ 15 U.S.C. § 45.

¹⁰ See, e.g., *In the Matter of Snapchat, Inc.*, No. C-4501 (F.T.C. 2014) (consent order), available at <http://www.ftc.gov/enforcement/cases-proceedings/132-3078/snapchat-inc-matter>; *Facebook, Inc.*, No. C-4365 (F.T.C. 2012) (consent order), available at <http://www.ftc.gov/os/caselist/0923184/index.shtm>; *FTC v. ControlScan, Inc.*, No. 1:10-cv-00532-JEC (N.D. Ga. 2010) (Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief), available at <http://www.ftc.gov/os/caselist/0723165/index.shtm>; *In the Matter of Google, Inc.*, No. C-4336 (F.T.C. 2011) (consent order), available at <http://www.ftc.gov/os/caselist/1023136/index.shtm>; *In the Matter of Chitika, Inc.*, No. C-4324 (F.T.C. 2011) (consent order), available at <http://www.ftc.gov/os/caselist/1023087/110617chitikacmpt.pdf>.

¹¹ First Amended Complaint for Permanent Injunction and Other Equitable Relief, No. 00-11341-RGS (D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartcomplaint.htm>.

¹² *Id.* Since the *Toysmart* case, the Bureau has sent letters similar to this one, advocating on behalf of consumers whose personal information was subject to potential transfer or sale in bankruptcy proceedings. See Letter from Jessica L. Rich, Director, FTC's Bureau of Consumer Protection to The Honorable Shelley C. Chapman, United States Bankruptcy Judge, Bankruptcy Court for the Southern District of New York. (May 23, 2014), available at <https://www.ftc.gov/public-statements/2014/05/mission-letter-jessica-l-rich-director-bureau-consumer-protection-filed> (letter to bankruptcy court judge expressing concern that potential sale of student personal information may violate Bankruptcy Code and Section 5 of the FTC Act); Letter from David C. Vladeck, Director, FTC's Bureau of Consumer Protection to Michael St. Patrick Baxter, Esq., et al. (Sept. 14, 2011), available at http://www.ftc.gov/sites/default/files/documents/public_statements/protection-personal-customer-information-held-borders-group/110914bordersletter.pdf (letter to bankruptcy court-appointed Consumer Privacy Ombudsman noting potential Section 5 concerns associated with selling personal information in a manner inconsistent with privacy policy representations); Letter from David C. Vladeck, Director, FTC's Bureau of Consumer Protection to Peter Larson, et al. (July 1, 2010), available at <http://www.ftc.gov/os/closings/100712xy.pdf> (setting forth concerns about the transfer of personal information about subscribers to gay male youth-oriented XY Magazine to a new owner of the business).

circumstances, including the interest in allowing a company to get back on its feet – or alternatively, to marshal remaining assets for its creditors – consistent with any promises made to customers. *Toysmart* is instructive on this point. There, the Commission entered into a settlement with the company allowing the transfer of customer information under certain limited circumstances: 1) the buyer had to agree not to sell customer information as a standalone asset, but instead to sell it as part of a larger group of assets, including trademarks and online content; 2) the buyer had to be an entity that concentrated its business in the family commerce market, involving the areas of education, toys, learning, home and/or instruction (*i.e.*, the same line of business that Toysmart had been in); 3) the buyer had to agree to treat the personal information in accordance with the terms of Toysmart’s privacy policy; and 4) the buyer had to agree to seek affirmative consent before making any changes to the policy that affected information gathered under the Toysmart policy. These conditions served to protect consumer interests by ensuring that the data would be used consistent with Toysmart’s promises by an entity that was essentially operating as a new owner of the business, as opposed to a “third party” who was merely the highest bidder in a winner-take-all auction that may not have a reputational interest in handling the information in the same manner.

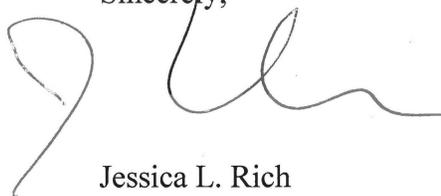
We believe the *Toysmart* precedent is an appropriate model to apply here to third parties. In this case, consumers provided personal information to RadioShack with the expectation that RadioShack might use it, for example, to make new offers of interest to consumers, but not to sell or rent it. As in *Toysmart*, our concerns about the transfer of customer information inconsistent with privacy promises would be greatly diminished if the following conditions were met:

- The customer information is not sold as a standalone asset;
- The buyer is engaged in substantially the same lines of business as RadioShack;
- The buyer expressly agrees to be bound by and adhere to the terms of RadioShack’s privacy policies as to the personal information acquired from RadioShack; and
- The buyer agrees to obtain affirmative consent from consumers for any material changes to the policy that affect information collected under the RadioShack policies.

As an alternative, we believe it would be appropriate for RadioShack to obtain affirmative consent from its customers before it transfers the data. The consent process would allow customers to make their own determination as to whether a transfer of their information would be acceptable to them. For consumers who do not consent, their data would be purged.

Thank you for this opportunity to express our concerns. We appreciate your consideration of these comments. If you have any additional questions about this matter, please contact Jamie Hine at (202) 326-2188 or jhine@ftc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "JL Rich", written in a cursive style.

Jessica L. Rich