



April 2, 2012

National Telecommunications and Information Administration
1401 Constitution Avenue NW
Room 4725
Washington, DC 20230

Submitted via email to privacyrfc2012@ntia.doc.gov

Comments to the National Telecommunications and Information Administration
on
“Multi-stakeholder Process To Develop Consumer Data Privacy Codes of Conduct”
Docket No. 120214135–2135–01

Thank you for the opportunity to comment on the Administration’s proposal to create a multi-stakeholder process to develop codes of conduct to protect the privacy of consumers’ data in the digital context. Before turning to that topic, however, it is necessary to stress the need for comprehensive privacy legislation. The Administration is to be commended for proposing a Consumer Privacy Bill of Rights and for calling for baseline privacy legislation in the white paper, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Innovation in the Global Digital Economy*.

However, the Administration must not rest with a mere call for legislation. Consumer Watchdog urges the Commerce Department to offer draft privacy legislation as soon as possible. Calls for action in policy papers are easy. The test of commitment is to translate high-minded principles like the Consumer Privacy Bill of Rights into real legislative language. Moreover, actual draft legislation would help move the multi-stakeholder process forward. Consumer Watchdog strongly urges you to draft privacy legislation before you convene the multi-stakeholder process.

NTIA’s call for public comment first asks for comment on topics that would be appropriate for the stakeholders to consider. It then asks for comments about how the multi-stakeholder process would work. Consumer Watchdog believes these priorities are backwards. First the stakeholders must determine how to guarantee that the process is legitimate. That means procedures must be fair, transparent and credible. In February, under the leadership of the World Privacy Forum, eleven of the nation’s leading civil liberties, privacy and consumer groups issued baseline principles to ensure a fair multi-stakeholder process. Consumer Watchdog signed those principles and strongly endorses them. We are including them at the end of these comments.

Consumer Watchdog believes that the most vexing issue the multi-stakeholder process faces is the different levels of financial resources that will be available to support stakeholders’ involvement. A quick analysis suggests that well-financed industry participants would easily overwhelm consumer and public interest representatives. In fact many smaller businesses such as start-ups and apps developers might well find it as difficult to maintain a seat at the table as

representatives from civil society.

One solution would be to seek grants from appropriate funding foundations that could offer stipends for participants' travel. Another possibility would be to seek money from the larger corporate participants that could go to a fund to provide travel expenses. In order to maintain credibility, the fund would have to be administered by a neutral third party. For example, the Rose Foundation has had experience administering *Cy Pres* money from class action suits that went toward privacy projects. Perhaps they could administer a fund comprised of corporate contributions to provide resources for underfunded stakeholders. If the multi-stakeholder process is to be seen as credible, then it would be to industry's advantage to help ensure that all stakeholders can take part.

Other ways to level the playing field include holding face-to-face meetings in different locations. For instance the W3C (World Web Consortium) Tracking Protection Working Group held its first meeting in Cambridge, MA, the second in Santa Clara, CA, and the third in Brussels, Belgium. A fourth is scheduled for April 10-12 in Washington DC. In between, the working group has communicated through an email listserv with vigorous discussions and a weekly hour-and-a-half conference call.

You ask for comment on which stakeholders should participate. Consumer Watchdog believes that anyone who asserts that he or she is a stakeholder is a stakeholder. However, it would be reasonable to require stakeholders to submit a brief position paper before joining the process.

Email, the Web and conference calls are technologies that can facilitate discussions among stakeholders. Verbatim transcripts can be helpful, but they are costly. Minutes are generally adequate. Meetings could be recorded or video taped, so that the exact record could be checked when necessary. Videos of the meetings could be posted on the web to ensure transparent process.

Stakeholders should follow whatever means they normally use to communicate their actions to the public; this could range from blogs to news releases to press interviews. Actions of the group should be communicated in consensus documents that include dissenting points of view when appropriate.

Consumer Watchdog believes that the stakeholders must decide which substantive topics will be considered. The criteria for that decision should be based on which issues significantly enhance consumer privacy protection and are likely to be achieved through a multi-stakeholder process. Whatever topic is chosen, the intent must be to develop a code of conduct that incorporates all of the Consumer Privacy Bill of Rights to that business sector. Applying the transparency principle to mobile apps, for instance, is but a small step. A stakeholder process would need to include all the principles in the code.

Once the process is agreed upon, Consumer Watchdog believes these topics are among those that could be the first to be considered:

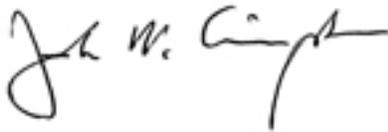
- Data collection and use practices in the mobile sector;
- Data collection and retention by search engines;
- Disclosure of government surveillance requests by online companies;
- Cloud computing privacy standards;
- Data brokers – consumer access to data and the right to correct;

- Facial recognition and facial detection software;
- Social media companies' use of consumers' personal information.

Protecting consumers' privacy in the digital age is crucial to ensuring a vibrant and commercially successful Internet. Without the sense that they control their data, consumers lose faith in the Internet. Protecting consumers' privacy builds trust, which is ultimately a win-win for businesses and consumers alike.

Consumer Watchdog pledges to make a good faith effort to help develop the multi-stakeholder process that NTIA envisions and to use the process to advance consumers' privacy protections. If the multi-stakeholder process is to succeed, it must be representative of all stakeholders and must operate under procedures that are fair, transparent, and credible. Steps must be taken to ensure all stakeholders have the financial resources necessary to participate. Falling short of these basic principles will doom the process to failure.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Simpson". The signature is fluid and cursive, with a long horizontal stroke at the end.

John M. Simpson
Privacy Project Director

Principles for Multi-Stakeholder Process

February 23, 2012

Civil society groups believe that protecting the online privacy of consumers is crucial to ensuring the availability, utility, and vitality of the Internet. For any approach to privacy to be meaningful, it must reflect fair information practices, including mechanisms to assure accountability. The US Department of Commerce is proposing a multi-stakeholder process for developing better applications of privacy principles. For the multi-stakeholder process to succeed, it must be representative of all stakeholders and must operate under procedures that are fair, transparent, and credible.

We believe the following baseline principles will provide the multi-stakeholder process the legitimacy it needs to succeed.

Principles:

1. No multi-stakeholder process can succeed unless consumer representation is robust and reasonably balanced. Only consumer representatives can determine who speaks for consumers.
2. To the greatest extent practicable, the multi-stakeholder process should occur in the open with public sessions and public documents. All substantial decisions must be made in open sessions.
3. Any stakeholder may submit proposals and those proposals must be addressed and resolved within the consensus process.
4. Participants, but not necessarily observers, must specifically identify their employer and/or the group, industry, or organization whose interest they represent.
5. There must be a fair opportunity for public engagement at all levels of the stakeholder process. Stakeholders must be allowed to communicate with members of their communities about the multi-stakeholder process in any way that the stakeholders see fit, including use of electronic processes such as web sites, social media, and other methods.
6. The formal publication of any consensus document or decision must include dissenting views and statements.

7. Decisions must be based on a fair and broad consensus among stakeholders rather than a majority vote by participants. The process should seek to resolve issues through open discussion, balance, mutual respect for different interests, and consensus.

8. A multi-stakeholder process needs to be fully informed by stakeholders from civil society. As such, in person meetings may only be scheduled if adequate resources are made available to facilitate in person participation by civil society. Otherwise, meetings may only be conducted electronically to facilitate equal participation by all stakeholders. Meeting locations must be chosen with robust input from civil society stakeholders.

9. All stakeholders must receive a copy of a draft document at least ten days prior to consideration or presentation of the document at any level of the stakeholder process.

10. At the end of 12 months or at any other time, civil society participants may decide to reevaluate the multi-stakeholder process and make recommendations for changes in rules, procedures, or process.

Signatories:

World Privacy Forum

American Civil Liberties Union

Center for Digital Democracy

Consumer Action

Consumer Federation of America

Consumers Union

Consumer Watchdog

Electronic Frontier Foundation

National Consumers League

Privacy Rights Clearinghouse

U.S. PIRG

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