

**U.S. DEPARTMENT OF COMMERCE**

**National Telecommunications and Information Administration**

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Multistakeholder Process to Develop ) Docket No. 120214135-2135-01  
Consumer Data Privacy Codes of Conduct )

**COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”)<sup>1</sup> hereby submits its comments in response to the Request for Comment (“RFC”)<sup>2</sup> issued by the National Telecommunications and Information Administration (“NTIA”) on the multistakeholder process to develop voluntary and legally enforceable codes of conduct for the protection of consumer data privacy. The codes will implement the principles set forth in the Consumer Privacy Bill of Rights adopted in conjunction with the President’s Privacy and Innovation Blueprint for the handling of personal data in commercial contexts.<sup>3</sup>

We commend NTIA for its commitment to an open, transparent and consensus-driven process involving a broad array of stakeholders with interests in identifying how the Consumer Privacy Bill of Rights could apply in specific business contexts. Multistakeholder organizations have been critical to the development of the Internet and are important to its continued health and growth in a complex and dynamic digital economy.

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<sup>1</sup> NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

<sup>2</sup> See *In re Multistakeholder Process To Develop Consumer Data Privacy Codes of Conduct*, Request for Public Comments, 77 Fed. Reg. 13098 (March 5, 2012) (“RFC”).

<sup>3</sup> *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (the “Privacy and Innovation Blueprint”), released February 23, 2012., available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

In implementing the principles identified in the report, interested parties will need to work together to balance the goal of protecting consumer privacy with the objectives of preserving and enhancing innovation on the Internet. NCTA supports ordering topics for discussion in a manner that may produce success for all stakeholders. And we agree that as difficult issues arise, NTIA, in its role as convener and/or facilitator (not chair), should “help the parties reach clarity on what their positions are and whether there are options for compromise toward consensus, rather than substituting its own judgment.”<sup>4</sup> In the end, this deliberative process is designed to establish voluntary codes of conduct that can be broadly adopted by industry and that allow stakeholders to adapt the codes to protect consumers’ privacy consistent with their existing business models and as technologies and market conditions change.<sup>5</sup>

In the following discussion, NCTA addresses the first topic proposed for discussion in the multistakeholder process and outlines some of the central elements of multistakeholder forums that are conducive to achieving successful outcomes.

### **Issues to Address in the Multistakeholder Process**

NTIA seeks comment on what issues should be addressed through the privacy multistakeholder process. It proposes to focus first on the Transparency principle in the Consumer Privacy Bill of Rights, which provides that consumers have the right to “easily understandable and accessible information about privacy and security practices” at times and places that are most useful to them in gaining an understanding of privacy risks and the ability to

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<sup>4</sup> RFC at 13098; *see also Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, U.S. Department of Commerce, December 2010, at 5 (“[i]n this capacity, the government can provide the coordination and encouragement to bring the necessary stakeholders together to examine the innovative new uses of personal information and better understand changing consumer expectations – and identify privacy risks – early in the lifecycle of new products or services.”).

<sup>5</sup> Privacy and Innovation Blueprint at 27.

exercise individual control.<sup>6</sup> Our members endorse the goal of making customer choice on privacy issues simpler and easier through greater transparency. In fact, they have already incorporated privacy by design mechanisms into their services and dedicated substantial efforts to simplify notice and choice for their subscribers. Starting with the Transparency principle is a good way to produce tangible benefits for all parties early in the multistakeholder process.

We also support NTIA's specific proposal to begin with consideration of transparency in the privacy notices for mobile device applications ("mobile apps"). NTIA notes that "mobile apps are gaining in social and economic importance" and "that mobile devices pose distinct consumer data privacy issues, such as disclosing relevant information about personal data practices on a small display."<sup>7</sup> Mobile apps are indeed among the fastest growing and most pervasive services in the Internet today. This topic impacts the full panoply of stakeholders in the Internet ecosystem – consumers, app developers, content providers, search engines, wired and wireless broadband distributors, social networks and others deploying mobile technology – and is manageable in scope.<sup>8</sup>

In general, we support pursuing topics at the outset where the participant body can draw on existing work and expertise in an area and leverage those efforts. We also believe that other

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<sup>6</sup> RFC at 13099, fn 9, *citing* full statement of the Transparency principle in the Consumer Bill of Rights, Privacy and Innovation Blueprint at 14.

<sup>7</sup> RFC at 13099. The RFC finds that mobile app "practices surrounding the disclosure of consumer data privacy practices do not appear to have kept pace with [the] rapid developments in technology and business models," citing recent studies that a significant percentage of mobile apps do not provide links to privacy policies.

<sup>8</sup> Cable operators and programmers have great interest in supporting customers' use of their services on portable and mobile devices.

well-developed issues could be addressed thereafter, potentially yielding positive solutions in a reasonable timeframe.<sup>9</sup>

Data security techniques and methods of accountability are examples of issues that might be addressed after transparency. Cloud computing is a complex and multi-faceted issue but it could be broken down into discrete areas for discussion. As the process evolves and the participants learn to work together and achieve early success, the group can move forward to tackle the most difficult subject matter.

### **Implementing the Multistakeholder Process**

NTIA requests comment on how stakeholder discussions of the issues should be structured to ensure openness, transparency and consensus-building. NCTA's member companies have participated in a wide variety of multistakeholder forums. They have identified a number of features which can increase the quality of deliberations and the speed with which consensus is reached. First, they have learned that forums (like the privacy stakeholder meetings) that address matters with implications for the design or use of technology benefit greatly when the participants are experts. Substantive knowledge of the issues, the wide range of business models and legal issues, and familiarity with existing frameworks and efforts is critical. Second, industry leadership in the process of developing codes of conduct is essential to ensure the codes are technically workable, will not stifle innovation, and will result in their broad adoption.

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<sup>9</sup> For example, the Digital Advertising Alliance has established comprehensive state-of-the-art industry codes of conduct backed by accountability mechanisms and the FTC already has regulatory authority and rules established under the Children's Online Privacy Protect Act for personal information collected by online services directed to children under the age of 13 that should not be revisited at this time. It is important to avoid creating duplicative or conflicting obligations on businesses in any process that is convened.

Another important step is to create a small steering committee or executive committee which can help set agendas and guide and focus discussions which in turn promote consensus-building. In some forums, the steering committee must first approve projects before they are assigned for development in work groups, which helps the forum to channel participants' efforts into work that is most likely to meet the goal – in this case, to develop voluntary codes of conduct to which companies would be willing to subscribe. In any event, any such executive group should have a balanced composition that has a solid representation by qualified industry members.

Other hallmarks of successful multistakeholder forums include developing a clear mission statement and purpose; ensuring fair representation of interested parties – particularly those from across the industry to attract widespread participation and adherence; adopting ethical rules; and incorporating a diversity of economic and social interests. Lessons learned from other bodies also suggest that some procedural flexibility is necessary. Any outputs from the group should be data-driven and represent broad stakeholder consensus.<sup>10</sup>

The RFC specifically asks whether certain pre-requisites for participating in the privacy multistakeholder process, such as the provision of brief position papers by interested stakeholders, should be required. Although there may be merits to this approach, we have concerns it could create additional costs of participation and politicize the discussions. An alternative would be a statement of interest to identify the parties and any conflicts of interest that are being represented. Moreover, it is important to ensure that participants are accountable to the affected stakeholder community that they purport to represent and have a real and

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<sup>10</sup> See generally *Internet Governance: The Role of Multistakeholder Organizations*, Joe Waz and Phil Weiser, The Silicon Flatirons Roundtable Series on Entrepreneurship, Innovation and Public Policy, (“Waz and Weiser paper”), December 8, 2011 at 11.

verifiable process for seeking views from that stakeholder community when participating on its behalf.

In the area of maintaining transparency in the process, NTIA aptly points out that “providing timely, relevant information in an accessible manner is crucial to effective transparency.”<sup>11</sup> With regard to the internal workings of the forum, this includes providing participants with significant advance notice of issues for discussion and advance circulation of documents to allow adequate time for preparation. The participants also should maintain summary minutes of the meetings but the discussions should be off-the-record.<sup>12</sup> Non-participant stakeholders should have access to information regarding the development of codes of conduct, possibly through the provision of intermittent, publicly available progress reports.

### **Consensus-building**

Achieving consensus is a core concept of the multistakeholder process. But as NTIA acknowledges, knowing how and when to declare consensus may vary depending on the definition.<sup>13</sup> It generally does not require unanimity. But it does require identifying broad areas of agreement among the group where parties can still disagree but achieve overall consent to settle an issue and move forward in discussions. One approach that is being tested this year by the Governmental Advisory Committee (GAC) of ICANN is the concept of consensus as non-objection. Assistant Secretary Strickling recently noted that under this approach “consensus is tied to the idea of non-objection, that is, if the group reaches a position to which members do not

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<sup>11</sup> RFC at 13100.

<sup>12</sup> NCTA member companies’ experience with multistakeholder forums and standards-setting processes is that verbatim transcripts or full recordings of meetings hampers candid exchanges between the parties and impedes negotiations. We urge NTIA not to impose this requirement on the process.

<sup>13</sup> RFC at 13100.

object, it becomes the consensus view even though some members may not affirmatively support the position.”<sup>14</sup>

One key factor that should not be overlooked is the importance of identifying leaders who will promote meaningful substantive engagement and have the ability to urge stakeholders to think in a consensus-based manner.<sup>15</sup> Such leadership helps to build trust and cooperation among the group’s participants. Continuity of key participants is also another important factor in reaching consensus.

What happens if the consensus-driven process reaches a stalemate? NCTA recommends that informal mechanisms be encouraged before a situation reaches total deadlock. For example, the facilitator could, at certain points in the discussion, urge participants to conduct an informal assessment of where the divisions lie to find a path toward consensus. Formal voting should only be considered as a final backstop. This is because if anyone in attendance may cast a vote, for example, the forum will invite political campaigns to “pack the hall.” (Similarly, “efforts to ‘pack’ working groups with stakeholders advocating a particular point of view can skew the direction of a group in ways beyond the merits of the argument.”<sup>16</sup>)

Some forums consider that while all participants’ views will be considered, only those attendees who have consistently attended and participated in meetings have the right to participate in the determination of a final consensus or recommendation. In addition, the process

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<sup>14</sup> Keynote Address by NTIA Assistant Secretary Larry Strickling at Silicon Flatiron Center Conference, February 2, 2012.

<sup>15</sup> See generally Waz and Weiser paper at 9, citing roundtable participants Daniel Weitzner, Deputy Chief Technology Officer for Internet Policy, The White House, on importance of tone set by organizational leaders in “establishing an open, problem-solving culture, and finding ways to propagate these character traits throughout their organizations”; and Michael Powell, President and CEO, National Cable & Telecommunications Association, on importance of the right people to promote consensus-based thinking.

<sup>16</sup> Waz and Weiser paper at 6.

should not preclude groups of stakeholders from also meeting privately to work out potential partial agreements. This approach has proven particularly helpful in large groups with many stakeholder interests.

Given potential pitfalls in the multistakeholder process, the establishment of operating processes and procedures as the first order of business is essential. The Privacy and Innovation Blueprint anticipates that consensus will emerge on parts of a code, and that stakeholders are likely to address the most difficult issues later in the process:

At this stage, NTIA may need to work intensively with stakeholders to help them resolve their differences. NTIA's role will be to help the parties reach clarity on what their positions are and whether there are options for compromise toward consensus, rather than substituting its own judgment. To minimize the possibility that some stakeholders may draw inflexible lines that prevent consensus, the parties should discuss and set out rules or procedures at the outset of the process to govern how the group will reach an orderly conclusion, even if there is not complete agreement on results.<sup>17</sup>

We believe that this is the right approach.

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<sup>17</sup> Privacy and Innovation Blueprint at 26.

## CONCLUSION

The privacy multistakeholder process's goal is to implement the Privacy and Innovation Blueprint in a manner that protects consumers' legitimate privacy interests while encouraging continued innovation and evolving technologies and services. We support NTIA's desire to focus the process on discrete areas where consumers and businesses can benefit in a reasonable timeframe – in particular, its proposal to initiate the discussions with transparency in the context of mobile apps. We also urge NTIA to incorporate the foregoing recommendations on the procedural aspects of the multistakeholder process.

Respectfully submitted,

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