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Mr. Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave., NW Room 4725
Washington, DC 20230

Re: Comments on *Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct*, 77 Fed.Reg. 12098 (March 2, 1012)

Dear Secretary Strickling:

These comments are submitted on behalf of American Business Media ("ABM"), an association representing more than 200 business-to-business information providers, including print and digital publishers, websites, and organizers of trade shows and similar events. Producing hundreds of high-quality business-to-business publications, ABM members play an essential role in assembling and disseminating the industry-specific news and information needed by businesses and key industries in thousands of different fields worldwide.

Summary of Comments

ABM believes the multistakeholder process will best proceed and succeed if certain threshold issues concerning the scope and application of the White House's Privacy and Innovation Blueprint are clarified at the outset. In particular, ABM recommends that the White House or Commerce Department clarify early on that the Privacy and Innovation Blueprint focus on business-to-consumer (B-to-C) communications and transactions, and not business-to-business (B-to-B) communications and transactions. Without such clarification, the multistakeholder process will become unnecessarily cumbersome, as entities engaged in B-to-B communications will need to protect their interests with respect to practically every business sector. ABM believes such a clarification would be consistent with the purposes and intended scope of the Privacy and Innovation Blueprint, which clearly focuses on protection of consumers in their individual and household capacities, not in their business capacities.

In these comments, ABM addresses what issues should be addressed through the privacy multistakeholder process (issue 1), what stakeholders should participate (issue 4), and how the multistakeholder can best achieve the objective of building consensus on enforceable codes of conduct (issues 13-16).

Background

A. Business-to-Business Communications and Transactions

ABM members chiefly deal with business entities and their personnel concerning business-related matters. It has been estimated that the B-to-B industry in the United States publishes approximately 2,000 B-to-B magazines and approximately 3,500 websites. ABM members include many of the largest and best-known publishers of such magazines and websites, including, for example, Crain Communications, publisher of *Advertising Age*, and The McGraw-Hill Companies, publisher of *Engineering News-Record* and *Dodge Reports*.

B-to-B communications have long played a crucial role in our economy in providing information to the business community and in making connections among businesspeople, thereby fostering commerce and economic growth, including e-commerce. ABM members' online and offline content, trade shows and events are essential to the growth and vibrancy of United States businesses. The products and services produced by our members, both content and advertising based, are essential to businesses, their owners and their employees and contractors throughout the world, greatly enhancing their ability to obtain important technical, market and industry information that allows them to prosper.

Like other information providers, ABM members have increasingly turned to digital methods of publishing and distribution. This medium enables them to communicate quickly and effectively with their subscribers and constituents, and provides other benefits as well, including the ability to tailor information and advertising to business users' particular needs, interests and even geographic location.

In addition to their print and digital activities, many ABM members produce trade shows and events, including online informational seminars and webcasts, spanning both geographic regions and industry sectors. Such events promote commercial activity, by bringing business buyers and sellers together, allowing them particularly to obtain and share information, best practices and business contacts.

Business-to-business information providers conduct data collection and use involving different kinds of data, including, for example, technical data, industry metrics and analyses, government reports, in order to assist their business customers in their decision-making. To the extent B-to-B data collection activities include data about individuals, such information usually relates to those individuals in their *business capacities*—that is, information obtained about an individual in his or her role as an employee or representative of a business enterprise (which may include for-profit businesses, associations, non-profit entities, and other

organizations). For example, a typical piece of B-to-B data about an individual may consist of a name, job title, business name, business contact information, and particular business interest—all quite different from the data concerning individuals in their private capacities that are usually the subject of consumer privacy discussions.

B-to-B communications occur both online and offline. Especially as to *offline* collection of information, the capacity of an individual (whether he or she is acting in a professional capacity or a personal capacity) can be easily determined. While it is slightly more difficult to distinguish business and personal capacities *online*, the context in which information is collected or used usually clarifies this. For example, someone who shops at Macy's online should be presumed to be acting in a personal capacity, but someone who visits the *Engineering News-Record* website should be presumed to be acting in a business capacity—or at least, to be knowingly seeking business information, and protected by the ability to opt-out of any information collection and use in which he or she does not wish to participate. That is, much different privacy protections are appropriate for business-focused websites and contexts than for consumer websites and contexts.¹

B. Consumer Focus of Privacy Protection Initiatives

ABM understands and believes that recent White House, Commerce Department, FTC, and Congressional initiatives concerning privacy have been focused on protecting consumers in their personal and household capacities, with respect to B-to-C communications and transactions. That is, ABM does not believe that B-to-B communications are meant to be covered by these initiatives. The evidence of this includes the following:

- The impetus for many of these measures has come from consumer advocacy organizations, which have used B-to-C communications and practices (including, for example, third party B-to-C behavioral advertising) as examples for why they believe new laws or regulations are needed.
- Privacy is inherently a personal concept, and has typically not been considered to be involved with business corporations and their activities, as the Supreme Court emphasized last year in *FCC v. AT&T, Inc.*, No. 09-1279 (March 1, 2011).
- Several of the leading privacy bills in Congress specifically exempt B-to-B communications. The Kerry-McCain Commercial Privacy Bill of Rights Act, S. 799, exempts from its coverage personally identified information dedicated to contacting an individual at the individual's place of work. Rep. Clifford Stearns' proposed Consumer

¹ The context and business nature of a website, trade show, or other place where B-to-B communications occur should be the guidepost for distinguishing between B-to-B and business-to-consumer communications and transactions. That distinction should *not* be based on whether a home or office address is used, since in many fields of business, home addresses are often used for business purposes.

Privacy Protection Act, H.R. 1528, defines consumer as “an individual acting in the individual’s personal, family, or household capacity,” thus exempting B-to-B communications from its coverage.

- The White House Privacy and Innovation Blueprint clearly focuses on “consumers,” not businesspersons. Its proposed Privacy Bill of Rights is labeled as a *Consumer Privacy Bill of Rights*, and its initial report repeatedly focused on “consumer” interests, and the relationship between companies and “*their consumers*” (p. 2; emphasis added), clearly referring to B-to-C relationships.² Even to the extent that the Blueprint occasionally refers to entities outside the B-to-C relationships (for example, at page 15, where it discusses collection and sale of information by data brokers who deal with data *derived from* B-to-C communications), it does so in the context of protecting consumers in their B-to-C relationships.

Specific ABM Comments

The B-to-C Focus and Scope of the Privacy and Innovation Blueprint Should Be Clarified Before the Multistakeholder Process Begins

If, as appears clear from the Privacy and Innovation Blueprint and the processes that preceded it, the multistakeholder process is designed to develop codes of conduct for *B-to-C* data collection and use in particular business areas, that scope should be clarified at the outset. Without such a clarification, it could become necessary for B-to-B communicators, such as ABM members, to participate in practically every code-drafting process, to ensure that codes are drafted in ways that do not endanger B-to-B communications as they strive to protect the privacy of B-to-C communications.

ABM has previously submitted comments on January 28, 2011 to the Department of Commerce Green Paper, and on February 17, 2011 to the FTC, on the subject of the need for an exemption in any new privacy laws or regulations with respect to communications made in a business capacity. As discussed further therein, because of the much different considerations with respect to B-to-C and B-to-B communications, a one-size-fits-all privacy code of conduct cannot apply to both B-to-C and B-to-B communications, without interfering with important aspects of commerce, including the B-to-B communications and transactions engaged in by ABM members.

There are significantly different interests involved in collection, use and transfer of information about individuals in their private capacities, and about individuals in their business capacities. Specifically, privacy codes of conduct designed to protect consumer privacy should not cover collection and use of information obtained in a person’s *business capacity*—that is, information obtained about an individual in his or her capacity as an employee or representative of a

² See also p. 11 (referring to “a company that deals directly with consumers”); p.14 (referring to “a company-to-consumer transaction”).

business enterprise (which may include for-profit businesses, associations, non-profit entities, and other organizations).

Importantly, courts have recognized the distinction between business users and individuals acting in their personal capacities, with respect to privacy interests. Initially, it is well-recognized that neither business entities nor the individuals who act on their behalf have personal privacy rights in their business activities. "[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also* Restatement (Second) of Torts § 652I cmt. c ("A corporation, partnership or unincorporated association has no personal right of privacy."); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part, dissenting in part) ("[A] corporation has no ... right to privacy."). Indeed, the Supreme Court has recognized that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977). Many courts have found that business employees, acting as such, have little or no privacy interests in their business conduct. *E.g.*, *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y. 2006) ("Employees expressly waive any right of privacy in anything they create, store, send, or receive on the computer or through the Internet or any other computer network.").

These principles were recognized in the Supreme Court's recent decision in *FCC v. AT&T, Inc.*, No. 09-1279 (March 1, 2011), a unanimous decision written by Chief Justice Roberts, which not only cited the Restatement section quoted above, but even made fun of the assertion that a corporation might have some right of privacy.

Subjecting communications with persons in their business capacities to the same limits, rules and practice principles as apply to communications with persons in their personal capacities, especially if those rules or principles involve what are essentially opt-in requirements for collection and sharing of information, would significantly hamper the flow of business information and subsequently the flow of commerce crucial to America's economic growth and prosperity.

Business-to-business data collection occurs in many situations and hence the business capacity exemption will need to be thoughtfully considered and applied. Business people attend trade shows where they freely exchange business cards and other business contact information, with the clear expectation that they will be added to other companies' contact and marketing lists. Business people including sales personnel develop rich profiles of their business contacts, compiled not only from basic business contact information but from other internal and public sources; restricting such normal business data collection and compilation would inhibit normal business activity and place United States businesses at a competitive disadvantage. Businesses exchange and transfer business contact databases with affiliates, partners, and other businesses. All of these business collections and uses of information about business contacts raise much different issues than business collection and use of information about consumers, and hence should be treated differently.

Moreover, data privacy issues that may arise in the course of business-to-business communications and transactions are generally addressed through notice-and-choice safeguards and industry codes and customs that have developed over time, based on the needs of the business community and the pressures of the competitive marketplace. Just as the business marketplace demands that businesses take care in protecting trade secrets and other confidential information when sharing or use of such information is required, that marketplace ensures that notice-and-choice procedures and other means protect data privacy as appropriate. These are further reasons why there is no need for government to intervene and prescribe new rules in this area.

For all of these reasons, ABM submits that the multistakeholder process is primarily intended to create privacy codes of conduct governing collection, use and transfer of data derived from *B-to-C* communications, and that limitation should be expressly recognized at the outset of the process. Such a recognition can be accomplished in many ways, although the simplest would be for the Commerce Department, in facilitating the multistakeholder process, to explicitly note that the process is designed to support the Consumer Privacy Bill of Rights, and to clarify that “consumer” means “an individual acting in the individual’s personal, family, or household capacity.” This definitional and scope clarification will make clear to all participants exactly what is expected in each code of conduct, and will obviate the need for ABM and other persons and entities in the B-to-B area to attend and participate in each such code-development process, in order to ensure that B-to-B communications are not improperly covered or chilled by the various codes.

If Commerce determines that in some cases it may be appropriate for particular codes to address B-to-B communications—for example, a code of conduct for the B-to-B industry—that can be handled by allowing particular stakeholders, in particular appropriate situations, to specifically and expressly include B-to-B communications within the scope of their process. But because such situations fall outside the core purpose of the Privacy and Innovation Blueprint, and its B-to-C consumer focus, they should be exceptions. The default principle should be that the codes cover only B-to-C communications, or the use of data derived from such communications. Such limitations will clarify the process, avoid unnecessary burdens and threats on the B-to-B industry, avoid the need for peripherally affected stakeholders to participate in each code of conduct process, and promote the building of consensus on codes that protect consumer interests in privacy in B-to-C communications.

Limiting the multistakeholder process to B-to-C communications will not give the B-to-B industry a free ride in any way. Like all business entities, ABM members are subject to laws of general application, such as section 5 of the FTC Act, and to various self-regulatory and prudential business practices, such as adherence to codes of conduct and to the expectations of business users. The only effect on the B-to-B industry of an exclusion from the multistakeholder process is that efforts primarily driven by B-to-C communications will not have inadvertent and adverse consequences on the B-to-B industry, and will not require the cumbersome and expensive participation of the B-to-B industry in all code-writing efforts.

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ABM refers to its previous comments to Commerce and the FTC for more details and explanation on the distinctions between B-to-C and B-to-B communications, and the reasons why they should be treated differently in the context of privacy regulations.

Thank you for your consideration of these comments.

Sincerely,
THOMPSON COBURN LLP

By 

Mark Sableman

Attorneys for American Business Media

cc: Mr. Clark Pettit

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