

Before the
Department of Commerce
Washington, D.C.

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

COMMENTS OF
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

In response to the Department of Commerce's (the Department) request for comments regarding the upcoming multistakeholder process to develop consumer data privacy codes of conduct, the Computer and Communications Industry Association (CCIA) submits the following comments.

CCIA is an international non-profit trade association dedicated to open markets, open systems, and open networks. CCIA members participate in many sectors of the computer, information technology, and telecommunications industries and range in size from small entrepreneurial firms to some of the largest in the industry. CCIA members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue.¹

The Administration's release of its White Paper and Consumer Privacy Bill of Rights was an historic moment in the discussion of consumer privacy in America and around the world.²

CCIA is encouraged to see the Department of Commerce's dedication to multistakeholder

¹ A complete list of CCIA's members is available online at <http://www.cciagnet.org/members>.

² The White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, Feb. 2012, available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>

processes and looks forward to participating and offering the unique advice and viewpoint of our membership and the Internet industries at large.

I. Introduction

The Administration's White Paper envisioned a multistakeholder process to bring together impacted parties from across the privacy discussion with the intention of developing codes of conduct that would be tailored to the dangers and operating realities of different industries that collect data. If formally adopted by companies, those codes would be enforceable by the Federal Trade Commission. CCIA endorses this idea and looks forward to participating in the process.

As the Department of Commerce notes in its Request for Comments, a multistakeholder process carries many benefits, but also raises significant questions. In response to the concerns raised by the Department of Commerce, CCIA offers some suggestions on the procedural questions included in the RFC. Open participation is of the utmost importance, and CCIA encourages the Department to develop procedures that allow participation by a broad swath of interested parties. Various technologies and rules should be used to make sure that the participants are not restricted by geographical or temporal boundaries and that participation in the process is as wide as possible.

The RFC also asked about transparency. CCIA believes that transparency in the process is of the utmost importance. Discussions should be available to all, and recorded for later access. Comments should also be attributed to their speakers, with only a few strictly applied exceptions.

Finally, the Department had a number of questions regarding the details of finding consensus among the stakeholders. CCIA believes that broad agreement is necessary, but cautions against seeking

pure unanimity. Allowing individuals who have no interest in working together (on either side) to stall the entire process because they can veto the process will lead to a failed process.

II. Open Participation

For the process as envisioned by the Administration's White Paper to be successful, participation by a wide variety of interested parties is vital. Encouraging a diverse set of stakeholders to join in is therefore rightly a focus of the Department's Request for Comments. CCIA believes that there are definite steps that can be taken to make the process accessible and rewarding for all those who are interested.

Fundamentally, it is important to make sure that the process is not geographically or temporally bound to Washington, DC. While the capital region clearly has many parties interested in participating (CCIA among them), excluding the rest of the country by focusing on face-to-face participation to the exclusion of other means of communication will stifle the participation of others. For example, travel costs and time restrictions would serve to make attending impossible for large numbers of groups and individuals who might wish to participate.

Similarly, the Department should be mindful of temporal restrictions on participation. If the majority of the work is done on a large conference call at the same time every week, for example, some important voices may be lost simply because of time differences or conflicts. For this reason, the Department of Commerce should consider both synchronous and asynchronous modes of collaboration. Conference calls are useful tools, but so are other Internet-enabled forms of communication such as mailing lists, bulletin boards, wikis, social networks, and even video-sharing websites.

CCIA also believes in the importance of involving stakeholders of all sizes in the drafting process. While large companies are clearly important to the discussion, there is a considerable amount of innovative work being done in small companies and start-ups on the potential benefits of large scale data analysis, user privacy protection, and emerging fields like mobile privacy and facial recognition.

Inadvertently excluding those viewpoints would be harmful to the process because it would call into question its legitimacy and because the valuable contributions of these stakeholders would be lost. The Department of Commerce should make it a priority to reach out to these entities in particular and encourage their participation.

III. Transparency

Just as transparency is a vital part of privacy protection, it is integral to the multistakeholder process. Public access to the proceedings is important for two major reasons. First, it gives access to people who are stakeholders but who are unable for any reason to fully participate in the process. Not everyone is going to be able to make every conference call or in-person meeting, of course, and transparency in the proceedings is necessary to ensure that all the participants stay up to speed throughout the process.

Transparency is also important for the access it gives to people not directly involved in the process, and the legitimacy it therefore confers. The questions that will be addressed by the multistakeholder process are important for people all over the country, of course. Obviously, however, a small subset of those people will actually attempt to engage in the day-to-day interactions. For the rest of the populace, transparency is important because it provides the opportunity for those who are interested to follow progress as and when they want to. Transparency is also important for those who have no interest in following at all, in that it provides the presumption that others are following the process, thus legitimizing the work done.

On a most basic level, transparency should be accomplished by providing summaries of the meetings shortly after they happen. While it may not be necessary to give verbatim records of words spoken, there should be available at least a general summary of topics discussed and positions taken. The Department of Commerce itself, as a convener but not a participating body, may make sense as the party responsible for composing such a summary. Alternatively, provisions could be made for multiple parties

(or all parties who wish to) to submit meeting summaries, which would all be made equally available. This would provide many viewpoints for those who are curious to examine, and may help encourage consensus by exposing points of view and rationales in a new and different way.

Transparency can also be achieved through open participation. Means of discussion that are not limited by available physical space should be open to any that are interested in participating. Maintaining broad access to the process is one of the vital ways to ensure transparency.

Another important means of accomplishing transparency that is often recommended is to have attributed statements and, by and large, to avoid anonymity. CCIA in general agrees with this sentiment, but with some reservations. Attributed statements are vital for preserving transparency, and they should be the default presumption for all discussions in the multistakeholder process. Many deliberative bodies around the world, however, have recognized the need, to be used only occasionally and to be guarded against abuse, for non-attributed discussion.³ Anonymity gives some people and organizations the ability to speak frankly, to explore options that would not be on the table otherwise, or to speak as an individual, rather than as a representative of an organization. These moments can be opportunities for breakthrough in contested negotiations, and can give insight into motivations that would not otherwise be available, leading to greater cooperation.

IV. Building Consensus

The Department of Commerce also asked about methods of achieving consensus in the process, and even how consensus should be defined. In the Request for Comments, the Department notes that consensus has no single definition and that a willingness to work in good faith is integral to reaching the goals of the process. CCIA agrees with that sentiment and believes that certain procedural rules can be used to encourage that behavior.

Consensus in the multistakeholder process needs to balance the importance of giving voice to all

³ See, e.g., Chatham House Rule

participants with the goal of arriving at a code of conduct at the close. For this reason, CCIA believes that complete unanimity is an untenable proposal for a definition of consensus. Such a system would give any party on either fringe of the discussion a “heckler’s veto” over the proceedings, likely leading to no agreed upon result by the end of the process. It is hard to pinpoint a given percentage or method that should be defined as consensus, and it may be that every substantive subject that is the target of the multistakeholder process will have its own, depending on the divisiveness of the subject area, the complexity of potential solutions, or other similar issues.

One way to improve the chances of reaching consensus, however, may lie in working on discrete issues in smaller groups. By addressing smaller problems at a time in groups with only a few people involved, agreement is made easier to reach, and solutions can be presented to the larger group with the imprimatur of the members of the smaller working group. Work on the solution can be achieved more efficiently, and have a better chance of adoption by the participants of the process as a whole.

Finally, the Department of Commerce should consider whether imposing a “shot clock” or deadline would help encourage consensus building. If the parties perceive that there is no deadline by which a final decision must be arrived at, they may take it as a sign that negotiations can go on forever. Having a shot clock might encourage all participants to come to the table with realistic ideas for progress and to feel a greater pressure to work together to reach consensus. Without it, the process risks going on indefinitely while parties argue.

V. Conclusion

The process envisioned by the Department of Commerce is a brand new one, with little precedent to guide it. By learning from other multistakeholder processes in the past and developing new procedures to guide participants today, CCIA is confident that a constructive dialog can be found that leads to flexible and implementable codes of conduct that protect users’ privacy. CCIA looks forward to participating in the process.