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

Submitted via email to *privacyrfc2012@ntia.doc.gov*

Comments of the Center for Digital Democracy
to
The National Telecommunications and Information Administration
on
“Multistakeholder Process To Develop Consumer Data Privacy Codes of Conduct”
Docket No. 120214135–2135–01

The Center for Digital Democracy, one of the leading U.S. nonprofit organizations focused on consumer protection in the digital era, respectfully submits the following comments.

The Consumer Privacy Bill of Rights (CPBR), issued on February 23, 2012, potentially offers American citizens and consumers greater control of their information in the digital era. We are especially pleased that President Obama, in his letter accompanying the CPBR, underscored that “never has privacy been more important than today, in the age of the Internet...” CDD agrees with the president that the CPBR is “a blueprint for privacy in the information age.” We also endorse the administration’s acknowledgment that both off-line and online data collection, as it relates to consumer privacy, must be addressed. Accordingly, we make the following recommendations.

Need for Legislation

We have said from the beginning of this process that the reliance on multi-stakeholder negotiations to effectively protect consumer welfare, including privacy, is a flawed approach. It is doubtful, despite the good will of advocates such as CDD and our NGO colleagues, that an effective agreement that protects consumer privacy can be negotiated. We will describe some of the obstacles and challenges in this Comment. But what is required is more courageous action by the Obama Administration: the submission to Congress of draft legislation that implements the CPBR principles. The proposed new law should reflect both the CPBR Principles and the recommendations made recently by the Federal Trade Commission. The public deserves to know precisely how the administration would like to see its privacy principles implemented and enforced. Despite the difficulties of achieving Congressional passage at this time, an administration draft bill would help the public clearly understand the potential role of the CPBR to protect their privacy.

Multi-stakeholder Process

Despite our concerns, CDD has committed to work within the multi-stakeholder process. But we believe there are certain requirements and conditions necessary to ensure a meaningful set of deliberations. Among the key concepts that must be considered are scope, participation, openness, and resources.

Ensuring an Informed Discussion About the Digital Data Collection Landscape

Before any single issue is selected for an initial “negotiation,” an independent review of the data collection landscape must be conducted. All of the participants should start from a level playing field, armed with a basic understanding of the dimensions and contours of the contemporary data collection system. As the Department of Commerce, FTC, and the European Union’s Article 29 Working Party recognize, the data collection “environment” that has emerged is interconnected. One cannot easily choose a small piece of the puzzle (such as the “low-hanging fruit” of mobile privacy) to tackle, because all types of data collection and analysis are intrinsically connected to the fundamental forces shaping privacy in the commercial digital era.

As we have explained previously, the key paradigm for digital marketing and personalized data collection was first articulated in 1993, in *The One to One Future*.¹ Information collected on individual consumers, through behavioral tracking, retargeting, and other interactive techniques, form the foundation for much of the commercial online experience. Increasingly combined with off-line data integration and analysis (such as ad campaign optimization), and instantaneous sales of individual users on PC and mobile platforms, industry practices related to privacy concerns reflect a coherent framework.² Thus it is crucial that all participants, especially those stakeholders who have expertise in neither commercial online marketing practices nor in the technological methods used to foster data collection, start with the consideration of an objective—but *informed*—analysis of this system.³

¹ Don Peppers and Martha Rogers, *The One to One Future* (New York: Random House, 1993).

² Interactive Advertising Bureau, “Data Segments & Techniques Lexicon,” http://www.iab.net/guidelines/508676/data/data_lexicon. See also, generally, Interactive Food & Beverage Marketing: Targeting Children and Youth in the Digital Age—Reports,” <http://www.digitalads.org/reports.php> (both viewed 1 Apr. 2012).

³ Jeff Chester, “Cookie Wars: How New Data Profiling and Targeting Techniques Threaten Citizens and Consumers in the ‘Big Data’ Era,” in S. Gutwirth, R. Leenes, P De Hert, and Y. Pouillet, eds. (Berlin: Springer, 2012), pp. 53-78. See also Center for Digital Democracy, “Filings,” <http://www.democraticmedia.org/filings>; Joseph Turow, *The Daily You: How the New Advertising Industry is Defining Your Identity and Your Worth* (New Haven, CT: Yale University Press, 2012); Interactive Advertising Bureau, “Key Initial Deliverables From Industry-Wide Study on Marketing and Media Ecosystem 2010 Confirm Digital’s Prominence,” 23 Oct. 2007, http://www.iab.net/insights_research/iab_news_article/64401; Interactive Advertising Bureau, “From Information to Audiences: The Emerging Marketing Data Use Cases,” <http://www.iab.net/guidelines/508676/data/marketingdatause>; Interactive Advertising Bureau, “Guidelines, Standards & Best Practices,” <http://www.iab.net/guidelines> (all viewed 1 Apr. 2012).

We urge the NTIA to commission an overview paper that describes the landscape, engages in appropriate analysis, and poses thoughtful questions to promote deliberation. Such a briefing document is necessary to ensure that the stakeholders are able to identify key issues, and that any outcomes reflect (as much as possible) a thorough understanding of the consequences of any recommendation.

Multi-stakeholder Negotiations Must Address the Full Scope of the CPBR Principles at Each Stage

In order for any “code of conduct” to be developed, each issue (such as mobile applications, ethnic/racial digital profiling, youth online marketing, real-time targeting) must reflect all of the administration’s Privacy Bill of Rights. As the White House “Consumer Data Privacy in a Networked World” report explains, the CPBR are a “baseline of clear protections for consumers” that “affirms a set of consumer rights that inform consumers of what they should expect from companies that handle personal data.” Any negotiations based on addressing one or a few principles in isolation, without ensuring consideration of the other key baseline safeguards, will likely be inadequate. Discussions should be structured around the entire set of the administration’s privacy rights.

Ensuring Civil Society Participation, Especially Independent NGOs

We appreciate the administration’s commitment to ensure that nonprofit consumer, privacy, and civil liberties organizations participate fully in this process. There are a finite number of organizations working full-time in this area, and we believe that they must all be involved in the discussions. We support the “Principles for Multi-Stakeholder Process” endorsed by leading NGOs on February 23, 2012 (with the leadership of the World Privacy Forum).⁴ There must be robust civil society involvement in each deliberation, with sufficient levels of participation to ensure an effective—not marginal—contribution.

It is necessary for the administration, in structuring the deliberations, to ensure that there is a meaningful number of NGOs with consumer privacy expertise at the table. In order for this process to have any credibility, groups that are independent from any corporate funding or influence must comprise the overwhelming majority of NGO/civil society stakeholders. Organizations that rely on support from companies directly involved in the data collection industries should publicly disclose such funding. Additionally, an ethics policy for these negotiations should be developed, requiring recusal of any NGO whose financing or board governance might create a conflict of interest.

Stakeholders Should Decide the Topics, not the Administration

The administration should respect the independence of the multi-stakeholder process to identify issues for negotiation. Stakeholders should meet to identify these issues,

⁴ “Principles for Multi-Stakeholder Process,” 23 Feb. 2012, <http://www.worldprivacyforum.org/pdf/MultiStakeholderPrinciples2012fs.pdf> (viewed 1 Apr. 2012).

including the initial subjects for a potential “code of conduct.” The administration can offer suggestions and provide support, but should defer to the participants (with the help of the facilitator) to make final decisions regarding topics chosen for deliberation.

Resource Equity

We also appreciate that the administration is aware of the financial and overall resource imbalance between the non-profit NGOs and representatives of the data collection industries. U.S. consumer groups, as we are sure you are aware, are in the forefront of working for privacy safeguards in such key areas as mobile, social media, ad exchanges, and the targeting of financial and health consumers online (including youth). We are also playing a major role at the Federal Trade Commission and, with our EU NGO colleagues, in the privacy debates abroad. A number of consumer NGOs have also made a major commitment to the W3C’s Do-Not-Track Multi-stakeholder process. These negotiations will further tap the strength of many of the independent NGOs.

CDD believes that this process will not be able to achieve any politically supported outcome unless the NGO representatives have the resources to engage on a level playing field. We do not ask the government to provide direct resources, but the administration should engage in public outreach to philanthropic institutions and other non-profit donors. Funds to ensure that NGOs have adequate research capacity (to help prepare briefs on key issues), as well as adequate legal and policy representation, are required. Encouraging the development of a pool of resources that can help ensure adequate representation from NGO stakeholders, during what will be a time-intensive process, is necessary. As CDD discussed in a call with the NTIA recently, there are potential models of federal and philanthropic cooperation that could prove useful to replicate for this process.⁵

Ensuring a Transparent and Open Process

We support the NTIA’s call for an open and transparent process. In order to ensure that the goals of the multi-stakeholder process are effectively achieved, these deliberations must be public. While undoubtedly, all stakeholders will privately seek to reach out to allies and experts, the negotiations themselves must be on the record. We urge that they be Webcast, and that there is a robust mechanism put in place for both the news media and the public to be informed of the proceedings. The NTIA should craft (in a privacy-friendly way!) social media channels, including video, that promote information dissemination and help foster greater public participation.

Commit to the W3C’s Do-Not-Track Multi-stakeholder Process

The administration should clarify that it fully supports the multi-stakeholder process now underway by the World Web Consortium’s Tracking Protection Working Group. The

⁵ See, for example, National Collaborative on Childhood Obesity Research, “Membership Guidelines,” <http://nccor.org/about/membership-guidelines.php>. The White House Office of Public Engagement also has relationships with such groups. See, for example, “White House Roundtable on Livable and Sustainable Communities,” San Francisco Foundation, <http://www.sff.org/about/calendar/white-house-roundtable-on-livable-and-sustainable-communities/> (both viewed 1 Apr. 2012).

support by the White House of the Digital Advertising Alliance’s closed-door, non-transparent, and non-representative work on Do-Not-Track suggests there is a lack of serious commitment to an independent and participatory multi-stakeholder process. The Department of Commerce should immediately recognize that the WC3’s work on Do-Not-Track is part of the development of meaningful new codes of conduct.⁶

All Issues Must Be on the Table, with No Exemptions for Self-regulatory Codes

Some digital data collection trade groups have suggested, in recent Congressional testimony, that the multi-stakeholder deliberations “should target only those issues that are not subject to existing statutory regimes or self-regulatory programs.... The NTIA should not in any way interfere where there are already industry developed standards in place.” The administration should reject such a self-serving suggestion, which would deprive U.S. consumers of having fairly negotiated codes of conduct. Industry self-regulatory codes have been developed without public input, and already have drawn criticism from leading scholars. All issues must be addressed if this process is to have credibility. While existing self-regulatory codes form a useful focus of discussion, they should not be enshrined as *de facto* publicly agreed upon codes under the multi-stakeholder process.⁷

Issues related to both Children and Adolescents Should Be Addressed in Every Topic Identified for a Code of Conduct

CDD is pleased that the CPBR framework recognizes that “the principles in the Consumer Privacy Bill of Rights may require greater protections for personal data obtained from children and teenagers than for adults.... The sophistication of a company’s consumers is also a critical element of context. In particular, the privacy framework may require a different degree of protection for children’s and teenagers’

⁶ W3C, “Tracking Protection Working Group,” <http://www.w3.org/2011/tracking-protection/>; “White House, DOC and FTC Commend DAA’s Self-regulatory Program to Protect Consumer Online Privacy,” PRNewswire, 23 Feb. 2012, <http://www.prnewswire.com/news-releases/white-house-doc-and-ftc-commend-daas-self-regulatory-program-to-protect-consumer-online-privacy-140170013.html> (both viewed 1 Apr. 2012).

⁷ “Testimony of Mike Zaneis, Interactive Advertising Bureau, Before the House Subcommittee on Commerce, Manufacturing and Trade,” 20 Mar. 2012, <http://republicans.energycommerce.house.gov/Media/file/Hearings/CMT/20120329/HHRG-112-IF17-WState-MZaneis-20120329.pdf>; Pedro G. Leon, Blase Ur, Rebecca Balebako, Lorrie Faith Cranor, Richard Shay, and Yang Wang, “Why Johnny Can’t Opt Out: A Usability Evaluation of Tools to Limit Online Behavioral Advertising,” Carnegie Mellon University CyLab Technical Reports: CMU-CyLab-11-017, 31 Oct. 2011 http://www.cylab.cmu.edu/research/techreports/2011/tr_cylab11017.html; Saranga Komanduri, Richard Shay, Greg Norcie, Blase Ur, Lorrie Faith Cranor, “AdChoices? Compliance with Online Behavioral Advertising Notice and Choice Requirements,” Carnegie Mellon University CyLab Technical Reports: CMU-CyLab-11-005, 7 Oct. 2011, http://www.cylab.cmu.edu/research/techreports/2011/tr_cylab11005.html. See also, generally, Paul M. Schwartz and Daniel J. Solove, “The PII Problem: Privacy and a New Concept of Personally Identifiable Information,” *New York University Law Review* 86 (2011): 1814, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909366 (all viewed 1 Apr. 2012).

privacy interests from the protections afforded to adults due to the unique characteristics of these age groups. Children may be particularly susceptible to privacy harms.” Rather than addressing young people under a separate code of conduct, we support identifying the child and adolescent issues raised by each issue. CDD and its colleagues in the child advocacy and health communities, along with other consumer privacy NGOs, will work to ensure that such discussions are focused and address the unique vulnerabilities of youth when they are targeted online.

Independent Facilitation in a Neutral Setting Plays a Vital Role

The use of an independent and skilled facilitator, with no conflicts of interest on the issues, is vital. We recognize that the NTIA is already in advanced discussions on such an individual. To be acceptable, this person must demonstrate prior objectivity and expertise dealing with similarly intricate (and potentially contentious) issues. In addition, we urge the administration to seek out a more neutral setting for the discussions, such as the National Academy of Sciences. It is important for the success of the deliberations that the meetings be held in a manner that promotes a civil and meaningful discussion.

Concerns on the International Role for the Multi-stakeholder Negotiations and Codes of Conduct

We have grave reservations about the U.S. attempting to negotiate a “code of conduct” as the equivalent of formal law (such as in the EU) or where effective new consumer protection laws are required (such as in South America or the Asia Pacific markets). There isn’t a one-size-protects-all privacy regime that can be exported from the U.S. Each nation or region has a unique set of consumer expectations, data protection regimes, and its own robust form of digital data collection practices. U.S. companies are primarily the global leaders in establishing new forms of collection and use of consumer data. This role requires the U.S. to support meaningful consumer protection regimes reflective of the needs of other nations. It is incumbent upon the U.S. to respect independent legal frameworks, especially those that enshrine privacy as a fundamental human right. The U.S. should not attempt to pressure other nations to accept the U.S. privacy framework, based on negotiations, as a new “Safe Harbor.”⁸

We look forward to the NTIA addressing the issues raised by the commenters, the release of a proposed law implementing the CPBR, and the start of fruitful discussions of meaningful codes of conduct.

Respectfully,

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⁸ European Union, “Treaty of Lisbon: A Europe of Rights and Values,” Europa, http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm (viewed 1 Apr. 2012).