

April 2, 2012

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information
United States Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Dear Mr. Strickling,

On behalf of the members of the Software & Information Industry Association (SIIA), we appreciate the opportunity to comment on the National Telecommunications and Information Administration (NTIA) request for comments regarding the “Multi-stakeholder Process to Develop Consumer Data Privacy Codes of Conduct,” issued in the Federal Register on March 5, 2012.

As the principal trade association of the software and digital information industry, the more than 500 members of SIIA develop and market software and electronic content for business, education and consumers. SIIA’s members are software companies, e-businesses, and information service companies. As leaders in the global market for software and information products and services, our membership consists of some of the most innovative companies, ranging from some of the largest and oldest technology enterprises in the world, to many smaller and newer companies.

Commercial data privacy policy must be able to evolve rapidly to meet a continuing stream of innovations. To that end, SIIA is very supportive of the Department’s approach to enlist the collective expertise and knowledge of stakeholders in developing enforceable voluntary codes of conduct—this approach will prove to be substantially more nimble and effective than a legislative framework or a heavy regulatory approach that would prove unable to keep up with innovation.

SIIA also agrees that the U.S. Government should continue working to encourage global interoperability of privacy frameworks. Initiatives such as US-EU safe harbor, the use of binding corporate rules and the cross-border privacy initiative in APEC are major components to an interoperable international privacy regime. SIIA believes that the proposed multi-stakeholder process and codes of conduct can contribute significantly to the continuation of interoperable

data privacy regimes, and we therefore look forward to actively participating on behalf of our members and the industry broadly.

In the Administration's view, the multi-stakeholder process is intended to operate as an implementation of new privacy legislation such as the Administration's proposed privacy bill of rights. SIIA does not agree that new privacy legislation is needed at this time. The Federal Trade Commission has substantial authority to take action against actors it thinks has violated its privacy policies and is able to enforce a company's promise to abide by a code of conduct through its authority to prevent deceptive practices. As a result, SIIA believes that the multi-stakeholder process can and should proceed in the absence of new privacy legislation.

It is SIIA's view that if any new privacy legislation is enacted, it should not duplicate or apply to areas already covered under existing law. Under this principle, even if there is new general consumer privacy legislation aimed at establishing a privacy bill of rights, COPPA should continue to be the regime for children's online privacy; HIPPA for health care; GLBA for financial information; FERPA for education.

SIIA also does not endorse new privacy legislation in specific areas that are already subject to existing privacy rules. For example, we do not see a need for further privacy legislation that might impact what companies do in the institutional educational context. Furthermore, any such narrower privacy legislation should be considered separately from general consumer privacy legislation.

I. Implementing the Multi-stakeholder Process

As highlighted by the *Privacy and Innovation Blueprint*, voluntary, enforceable codes of conduct are the appropriate approach for privacy protections because they develop faster and provide more flexibility than legislation or regulation. SIIA also concurs that the Government's role in this process is as a coordinator, acting as an active convener of the many stakeholders that share the interest of continued development of the digital marketplace. The government role is not to draft codes of conduct or to prescribe regulations.

As we stated in our comments to the Department in January 2011, in response to the Draft Green Paper, SIIA agrees that the Department of Commerce, particularly the National Telecommunications and Information Administration (NTIA), is well suited to lead a multi-stakeholder process to help advance voluntary privacy codes of conduct. As the leading force within the Administration to reduce barriers to digital commerce while advocating for adequate protections for commercial data privacy, the Department is in a strong position to help guide a process that could strike a balance between privacy and continued innovation.

A legitimate multi-stakeholder process must include participation by all parties whose interests would be affected by the outcome of the deliberations. The openness and representative nature of the process will contribute to its effectiveness and legitimacy. SIIA urges the Commerce Department to provide to all parties with a stake in the outcome of the privacy deliberations that it convenes a reasonable opportunity to contribute to the discussions, present proposals and participate in the decision-making process whereby consensus is reached. An important part of its convener role, however, is to ensure that only relevant stakeholders are part of the process. To help efficiently accomplish these objectives, SIIA recommends that the multi-stakeholder processes, to the extent possible, adhere to the following characteristics:

- 1. Open and Transparent** - Maintain a commitment to openness and transparency of process and decision-making. The process could become unwieldy with too much participation. To provide for efficient consideration of proposals, SIIA suggests that industry trade associations and interest groups be invited to participate in the process to represent their constituencies.
- 2. Government as Active Convener** – The Department must play an active convener role. It must, at a minimum, select a topic for deliberation, determine a time and place for an initial meeting, invite participation at this meeting, and set expectations on a target date for an outcome. The Department should focus on areas where there has been recent discussions and activity, where stakeholders are clear and consumer expectations are at least partially developed, rather than starting from scratch. In view of the importance of a successful outcome for international credibility of the multi-stakeholder process, the timeframe for an outcome should be set narrowly.
- 3. Structure of Discussions** - The Federal Advisory Committee Act (FACA) procedures can be helpful in moving a process of interested party discussion forward to a successful conclusion. This occurred, for example, in the case of the discussions that led to the implementation of the IRS-industry agreement on electronic filing of tax returns. SIIA recognizes that the FACA approach might not be feasible in the case of multi-stakeholder consultations regarding privacy. We mention it to show that government structuring of a consultative process can produce effective results. Additionally, SIIA urges NTIA to structure the multi-stakeholder process to have a timeline for deliverables, clear criteria for what counts as consensus and a division into plenary and working groups that allows progress to be made in sub-groups.

4. **Agenda for Discussions** – The process should be open to all affected parties, but it should not preclude the submission of draft documents for review by the group. SIIA recommends that the Department build on industry self-regulation and proposed or established codes of conduct. It should also encourage parties to submit new draft codes of conduct that can form the basis of discussions.

II. Consumer Data Privacy Issues to Address through Enforceable Codes of Conduct

SIIA concurs with the recommendation established in the RFI to conduct an initial privacy multi-stakeholder process focused on a definable area where consumers and businesses will receive the greatest benefit in a reasonable timeframe, and one where stakeholders have begun to collaborate to develop practices, or to develop consensus around specific practices. To this end, we offer the following feedback on the proposed list of possible topics established in the Notice:

1. **Mobile Applications** - The provision of applications for mobile computing devices is a well-defined market for technology and content providers, with mobile apps now serving as an innovative tool for entertainment, business and education. SIIA members, as leading software and digital information providers, are leaders in the development of innovative mobile apps.

SIIA agrees that continued growth and innovation in the vibrant mobile marketplace is dependent on consumer confidence in the privacy protections provided by mobile application providers. While many mobile application developers are transparent about their collection, use, and protection of consumer data, we recognize that this is not always the case.

The suggestion to focus on mobile app. transparency is consistent with the goal of the Department of Commerce to focus on a definable area where stakeholders have begun to collaborate to develop practices, or to develop consensus around specific practices.

In fact, much work has already been done by industry and public interest groups in developing the outlines of a privacy code of conduct. In 2011, SIIA joined the Future of Privacy Forum's app privacy initiative in an effort to help develop best practices that could help to balance the needs of protecting personal information and encouraging continued growth and innovation in the mobile marketplace. This initiative, as well as many others, has made significant progress in providing guidance to app developers to increase transparency of data collection.

To maximize the effectiveness of this process, we urge the Commerce Department to limit the multi-stakeholder discussions to a narrow component of mobile applications, at most on implementation of the principle of notice and transparency.

- 2. Cloud Computing** - SIIA understands the interest of policymakers to foster growth of cloud computing, while also seeking to protect citizens against any potential harm. However, SIIA urges the Commerce Department not to attempt to use a multi-stakeholder process to develop a privacy code for “cloud computing services,” as proposed in the RFI.

Cloud computing is not a new, nor singular technology, but rather an evolving IT consumption and delivery mechanism, provisioning a wide variety of computing services from remote locations. It is an evolution of IT architecture, comprised of several very different models, including software as a service, platform as a service and infrastructure as a service, and it covers a both business-to-business service and the businesses that are built on top of cloud services and offered to the general public.

Therefore, there is no single privacy code of conduct that would apply across the board. In most cases, the rules for cloud computing follow the rules for the context in which it is operating, which should not be dealt with separately from the application of privacy rules applied in any traditional context.

In a business-to-business context, cloud computing firms provide services to businesses in particular sectors such as energy, financial service, telecommunications, health care and a wide range of others. If a company obtains computing services through an outsourcing arrangement with a cloud computing provider, they still must satisfy their privacy obligations and typically require the cloud provider to provide services that satisfy these obligations as part of their contract. There is no need for special privacy rules that apply to the cloud provider because privacy protections are gained through whatever obligations fall on the entity that has collected the data.

Broadly, cloud computing users and providers would benefit from an international privacy regime that allows for data transfers across borders. That is, one that allows data to flow back and forth in a seamless fashion from computers located in different jurisdictions. It is not practical to seek the complete harmonization of privacy rules, but it is practical for countries to recognize each other’s privacy rules to the greatest extent possible, and to accept cross-border data flows as compliant with local privacy rules when companies implement these rules through contracts or service level agreements (SLAs).

SIIA believes that any cloud discussions must treat consumer facing and back end cloud services as different contexts, and subject to separate multi-stakeholder discussions. We would be interested in exploring the feasibility of using a multi-stakeholder process for a narrow topic in the area of cross-border back-end data flows. The transfer of internal company human resources information might be a useful topic to explore for this purpose.

III. Conclusion

Thank you for the opportunity to provide input on this very important process. On behalf of our members and industry, SIIA looks forward to working closely with you to establish this process and begin developing codes of conduct. If you have any comments or questions, please do not hesitate to contact me or David LeDuc at dleduc@siia.net

Sincerely yours,

A handwritten signature in black ink that reads "Ken Wasch". The signature is written in a cursive, slightly slanted style.

Ken Wasch
President