

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5457

April 2, 2012

VIA EMAIL TO PRIVACYRFC2012@NTIA.DOC.GOV

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration (NTIA)
U.S. Department of Commerce
Herbert Clark Hoover Building
1401 Constitution Avenue, NW, Room 4725
Washington, DC 20230

**Re: *Multistakeholder Process to Develop Consumer Data Privacy
Codes of Conduct, Docket No. 120214135–2135–01***

Dear Assistant Secretary Strickling:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is pleased to submit these comments in response to the National Telecommunications and Information Administration's (NTIA) request for comment on issues which it anticipates in advance of the forthcoming multi-stakeholder process.¹ NTIA's role as a facilitator will be key as stakeholders begin discussions regarding possible concerns that might be best addressed through the development of consumer data privacy codes of conduct. The Chamber looks forward to working with NTIA on these discussions.

This multi-stakeholder process is intended to incorporate the views of all participants with the goal of generating a consensus on voluntary and legally enforceable privacy codes of conduct. NTIA has solicited stakeholder comment on what issues should be addressed in the course of the process, how to ensure open participation in the process, how to facilitate transparency, and how to build consensus that would lead to an enforceable Code of Conduct.²

¹ *Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct*, 77 Fed. Reg. 13098 (Mar. 5, 2012).

² *Id.*

Chamber members depend heavily on technology, advertising, and on the free flow of information for their continued success. Chamber member companies are engaged in global commerce and the international exchange of consumer data for a wide range of purposes, including increased product sales, expanded job creation and the protection of our customers. Chamber members and the American consumer are the joint beneficiaries of an “information economy” that more rapidly than ever before promotes efficiencies and generates new products and services that meet the public’s ever-expanding needs. Chamber members are, therefore, highly sensitive to regulations or public policy proposals that risk endangering this very delicate environment or which ignore, for the sake of momentary political satisfaction, the enormous economic potential that is served by the responsible use of consumer data.

Chamber member companies engage in “best practices,” but we also are aware that there are some outliers who delight in commercial activity that dances along the fringes of acceptable conduct. For that reason, the Chamber appreciates the goals of NTIA’s proposed multi-stakeholder process and its inherent search for a consensus that might bring about voluntary, enforceable codes that, in turn, will develop into industry best practices that should be welcomed by policymakers and promoted as a viable alternative in privacy debates occurring domestically and overseas about whether new legislation or regulations are necessary.

To that end, the Chamber has five primary comments in response to NTIA’s invitation.

1. The Chamber Believes that a Multi-Stakeholder Process Will be Most Effective if Parts of It are Conducted Publicly and Parts are Conducted in Private and Off-the-Record.

The process proposed by NTIA presumes that all of the stakeholders will be engaged in an entirely open and transparent process to identify issues and develop the contours of a voluntary code. However, the Chamber believes that allowing ad-hoc, off-the-record, smaller group meetings will foster open dialogue that will increase the odds of achieving consensus.

The first step in identifying issues of concern to both businesses and advocates should be conducted in public as suggested by NTIA. In its request for comment, NTIA has asked for suggested issues that could be addressed by the multi-stakeholder process.³ However, rather than pre-identifying the issues, the Chamber strongly believes that the multi-stakeholder process with NTIA serving as facilitator is the preferred way for identifying which issues should be addressed.

³ *Id.*

Once an issue is identified, industry should conduct private and off the record sessions to develop proposals to address the issue. Frank open, but confidential, discussions are necessary to determine a practical resolution. Businesses will not, and should not be expected to, reveal proprietary information or trade secrets about their practices in public to groups that may leak such information to the press, issue critical statements designed to influence the outcome of the deliberations, file complaints with federal agencies and/or bring class action suits against the same companies that are conscientiously engaged in the multi-stakeholder process.

The Chamber also strongly urges NTIA to place a limit of three to four issues for discussion by any one stakeholder segment (e.g., consumer groups, industry sector, etc.). It is counterproductive to bring a plate full of issues, many of them controversial, to the table for discussion and then actually believe a consensus can be achieved. This approach would be doomed from the start. Better to highlight the primary issues that are in need of resolution in a market or industry sector and then set about trying to drive consensus.

Very simply, codes of conduct are not regulatory undertakings. Discussions among companies operating in a competitive marketplace are most likely to be productive when there is ample room for private and candid discussion. As industry likely will bear the financial and administrative, and technological burdens associated with the implementation of any voluntary code of conduct, industry should be given the opportunity to draft an initial version of a code, as industry traditionally has done on existing industry codes of conduct. Then, the open multi-stakeholder process would re-engage to review and provide comment on the code. This step in the process can be open and involve all stakeholders. After all stakeholders have had a chance to comment, then industry (again in private off-the-record meetings) would finalize the code and bring it back to the multi-stakeholder group for final agreement.

2. If a Code Addresses the Original Concerns Identified by the Multi-Stakeholder Process, It Should Not be Rejected for Failure to Achieve Perfection. Perfection Must Not Be the Enemy of Progress.

Many of the issues that will likely be considered by the multi-stakeholder process are complex in nature with no obvious or easily implemented solution. The Chamber believes that in most cases progress on addressing issues should not be discarded because it does not represent a complete or perfect solution. The Chamber would anticipate that even after reviewing feedback and making all practical changes to a code, there may not be complete consensus by all the stakeholders. The Chamber would hate for this to stop approval of a code that increases protections for individuals.

3. All Categories of Stakeholders Ought to Be Required to Accompany Their Recommendations With a Cost-Benefit Analysis.

If the multi-stakeholder process is to be a serious undertaking, it is essential that all stakeholders who recommend codes demonstrate that the regulations they envision would have a positive effect on the U.S. economy and the protection of American consumers.

A positive outcome is most likely to emerge if proposed codes (and measures suggested by proponents) are in response to key questions, including:

- a) What is the evidence that the perceived problem creates any measurable financial or actual harm?
- b) Would adherence to the proposed voluntary code interfere or otherwise impair the operation of existing laws and self-regulatory practices, recognizing the harm that would result if effective approaches to consumer privacy that work today, such as Gramm-Leach-Bliley, are jeopardized?
- c) Would a voluntary code inure to the benefit of the U.S. economy as well as the protection of and availability of choices for American consumers, recognizing a consumer harm—not a benefit—may result if such code prevents business practices that enable a lower cost, safer, competitive marketplace?
- d) Would the competitive position of American signatories to a voluntary code be enhanced or degraded relative to global competitors with very different enforcement practices and cultures?
- e) What are the identifiable costs and benefits to U.S. industry and U.S. consumers that would be derived from a voluntary code that focuses on these issues?
- f) Would the adoption of a voluntary code harm domestic U.S. consumer interests?

4. The Administration Should Learn from Other Multi-Stakeholder Processes.

Prior to convening any multi-stakeholder process to develop new codes of conduct, NTIA should identify and evaluate the strengths and weaknesses of previous multi-stakeholder processes so that participants, once engaged, can benefit from the experience of the past. The Chamber believes that this level of preparation will contribute to a more efficient and productive multi-stakeholder process, once it is underway. It is the inherent responsibility of NTIA to gather this information for the benefit of all participants.

Unless otherwise indicated by industry, the NTIA process should not reexamine existing self-regulatory practices as there is no need to address items where self-regulation already exists. Instead, the multi-stakeholder process should look to those existing codes of conduct as concrete examples of the results the multi-stakeholder process is striving to achieve. The NTIA should also provide summaries of successful and unsuccessful efforts to develop codes, including, if the effort was unsuccessful, a discussion of the reasons why those efforts ultimately failed.

5. The Administration Should Adhere to its Commitment that the Government Will Not Substitute its Own Judgment When Codes of Conduct Are Developed.

The Administration has already set forth its general views in the Privacy and Innovation Blueprint.⁴ Accordingly, the Chamber agrees with NTIA that it should limit its role to facilitating the process and should avoid taking positions, either in public or in private, on substantive issues.

In advance of the beginning of the process, NTIA should clarify what is meant by the following statement in the White House's privacy blueprint: "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 that govern how the group will reach an orderly conclusion."⁵ Specifically, NTIA should address: 1) Who determines if a stakeholder's position is inflexible; 2) who would develop these rules/procedures and who would enforce them?; and 3) is there a minimum amount of time that a stakeholder would be given to formulate a position, during which time it could not be claimed that the stakeholder's deliberations constitute behavior reflective of an inflexible position?

Thank you for the opportunity to comment on the forthcoming multi-stakeholder process, and the Chamber looks forward to working with NTIA to help encourage a productive and consequential multi-stakeholder process.

Sincerely,



William L. Kovacs

⁴ The White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, Feb. 23, 2012, available at <http://www.whitehouse.gov/sites/default/files/privacyfinal.pdf>.

⁵ *Id.* at 27.