



*Promoting Convenience, Choice, and
Commerce on the Net*

The NetChoice Coalition
1401 K St NW, Suite 502
Washington, DC 20005
202.420.7482
www.netchoice.org

April 2, 2012

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration (NTIA)
U.S. Department of Commerce

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

As the National Telecommunications and Information Administration (NTIA) begins its multistakeholder process, NetChoice offers suggestions to raise the likelihood of success in reaching consensus around implementable codes of conduct.

NetChoice is an association of leading e-commerce and online companies, plus thousands of small businesses that rely on e-commerce. We work to promote the integrity and availability of the global Internet and are significantly engaged in privacy issues in the states, in Washington, and in international Internet governance organizations.

Privacy-related laws that specify how data can be collected, used, and shared can actually create barriers to legitimate online commerce. NetChoice has a long history of breaking down regulatory barriers, beginning with helping travel agents, contact lens suppliers, and real estate brokers whose online innovations clashed with legacy regulations that protect traditional business models.

In the past year, NetChoice has submitted comments to the Department of Commerce Green Paper – *Commercial Data Privacy in the Internet Economy: A Dynamic Policy Framework*, the FTC on the Preliminary FTC Staff Report – *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Business and Policymakers*, and on the review of the Children’s Online Privacy Protection Act (COPPA).

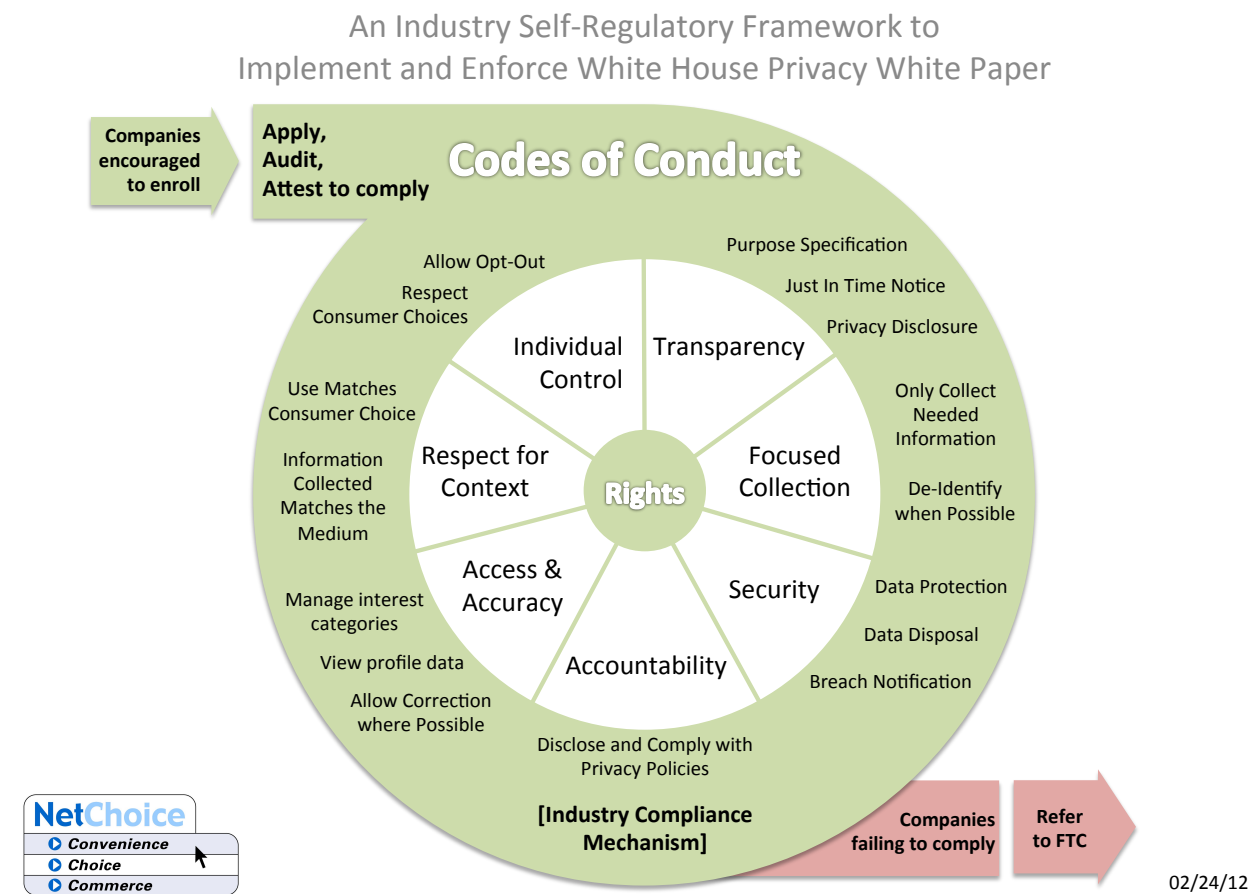
In addition, NetChoice has worked within ICANN for several years within its multistakeholder process. NetChoice’s Executive Director has three times been elected as policy chair for ICANN’s Business Constituency. He’s participated in all five meetings of the UN’s Internet Governance Forum (IGF) and is a leader at the IGF-USA.

Multistakeholder process and self-regulatory approach can succeed without Congressional legislation.

NTIA has said that Congressional action is necessary for a successful implementation of the Privacy Bill of Rights. But the creation of a self-regulatory approach for the enforcement of the Privacy Bill of Rights diminishes the need for Congressional action.

Under existing authority, NTIA can encourage companies to adopt codes of conduct. This will drive businesses into adopting a privacy policy and codes of conduct that the FTC can enforce under its existing Section 5 powers.¹

We recommend a framework built around the seven rights set forth in the Consumer Privacy Bill of Rights. This self-regulatory framework is dependent on government enforcement, but allows for growth and modification at the speed of the industry.



As seen in this conceptual overview, the Consumer Privacy Bill of Rights (Rights) forms the aspirational core that drives business conduct for data privacy. This is accomplished *without* legislation.

Codes of Conduct (Codes) enable implementation and enforcement of the Rights. Participating companies would publicly attest to implementing Codes within their business operations, including periodic compliance reviews. If a company failed to comply with the adopted Codes, the FTC and state

¹ Assistant Secretary Strickling suggested that if a company adopts a code of conduct their violation is enforceable under Section 5 of the FTC’s authority. US House of Rep. Energy & Commerce Committee Hearing, *Balancing Privacy and Innovation: Does the President’s Proposal Tip the Scale?* (Mar. 29, 2012).

Attorneys General could bring enforcement actions, as is currently the case when companies fail to honor their adopted privacy policies.

Significantly, this framework does not require legislation to establish the Consumer Privacy Bill of Rights as a matter of law.²

While this framework enables continued industry self-regulation, it relies on government in three critical ways:

1. Commerce Department coordination of a multistakeholder process to suggest Codes of Conduct for industry to consider;
2. Commerce Department encouragement for companies to adopt the codes of conduct; and
3. FTC and state Attorneys General enforcement when companies fail to honor the principles and codes they have promised to uphold.

A year ago, NetChoice recommended an industry self-regulatory framework similar to the one above that incorporated all FIPPS.³ That model has been adjusted to incorporate the new Consumer Privacy Bill of Rights.

Selecting and Framing Issues: NTIA should frame different uses of PI as different areas of discussion.

Question 2: *“What factors should be considered in selecting issues for the privacy multistakeholder process.”*⁴

Rather than focusing on the *selection* of issues, we suggest that NTIA focus on the *framing of uses*. Specifically, NTIA should frame the different uses of personal information (PI) because each use has its own discussion as different uses of PI impact people differently.

For example, the difference between using information for advertising versus its use to determine health insurance represents two different specific business contexts and, therefore, two different conversations.

If NTIA has one conversation that includes multiple uses it risks conflation of the uses and of the risks of data security breaches.

We have already seen how this conflation causes problems in privacy dialogues. In conversations involving PI both for interest-based advertising and determination of health insurance, the latter is used to justify prohibition of the former.

For example, last year at a meeting hosted by Common Sense Media⁵ to discuss privacy, the discussion of interest-based advertising occurred alongside fears concerning the use of collected personal information to deny health and housing benefits. A similar situation occurred at the 2012 State of the Net panel discussion.⁶

² See, e.g., action taken against Google and Facebook for failure to uphold promises made to consumers.

³ See NetChoice comments to the Department of Commerce Green Paper – *Commercial Data Privacy in the Internet Economy: A Dynamic Policy Framework*.

⁴ Multistakeholder Process To Develop Consumer Data Privacy Codes of Conduct, 43 Fed. Reg. 13100 (Mar. 5, 2012) (emphasis added).

⁵ *Protecting Privacy in the Digital Age*, National Press Club (Oct. 11, 2011).

⁶ *State of the Net 2012 Conference*, (Jan. 17, 2012).

Moreover, the framing of uses prevents integrating discussion of collection and security with use. For example, when speaking at the Brookings Institute, FTC Chairman Jon Leibowitz and Commerce General Counsel Cameron Kerry both conflated a discussion of privacy with data security.⁷

In an attempt to quell concerns about use of PI to determine benefits, the DAA and IAB adjusted their self-regulatory program to prohibit the use of collected information for such uses. Nonetheless, these efforts have yet to satisfy privacy hawks.

Thus, a threshold matter should be to separate the discussion into the different uses of information so that a rational, non-hyperbolic conversation about uses may proceed.

Moreover, if NTIA focuses on *selecting* without *framing* it risks discussing the selection of technologies to discuss rather than having a general discussion of how all technologies use PI. By framing properly, NTIA can maintain tech-neutrality.

Implementation Questions

NetChoice has several years of experience participating and leading several multistakeholder working groups at ICANN, including seven years of work on Whois policies. We draw on that experience in making our recommendations, on open participation, transparency, and building consensus.

Open Participation

Question 7: *What balance should NTIA seek to achieve between in-person and virtual meetings?*

This balance can best be achieved by using in-person meetings *only when necessary*. Our experience at ICANN indicates that in-person meetings are needed at two points in the multistakeholder process:

One of the initial meetings should be held in-person, so that participants can begin forming personal relationships that will be indispensable in reaching the kind of compromises needed to achieve consensus. This in-person meeting should probably not be the very first meeting, since that meeting will be consumed by administrative and process discussions.

In-person meetings may also be needed to resolve implementation details when it appears that no degree of consensus can be agreed to. It may be that a representative sub-team of the working group can be brought together for these in-person discussions, avoiding the need for all participants to travel.

Transparency

Question 8: *Which Technologies could facilitate discussions?*

Our experience with working groups in ICANN's multistakeholder process leads us to strongly endorse use of web-based discussion tools, with these key features:

A display facility to review meeting agenda, presentations, and real-time document revisions.

One-click mechanism for participants to indicate they want to comment on the current discussion point, including a counter of where they stand in the speakers queue.

One-click mechanism for online participants to indicate their choice or preference regarding the current discussion point, as in Agree/Disagree or Yes/No.

⁷ For Privacy, "Where's the Beef?" becomes "Where's the Harm?", NetChoice (July, 7, 2011), available at <http://www.netchoice.org/for-privacy-wheres-the-beef-becomes-wheres-the-harm/>.

On-line text chat to allow participation outside of spoken interventions and to convey complex thoughts or hyperlinks to other participants. With ICANN working groups, the content of text chats are usually captured and published along with meeting transcripts.

Question 9: *How should discussions during meetings be memorialized and published?*

NetChoice believes that industry participants, who would be the primary adopter of resulting Codes of Conduct, must be actively engaged in the multistakeholder process. As part of our experience with ICANN's multistakeholder processes we know the necessity and value of transparency through publication of conference call transcripts and email discussions threads.

However, when all proceedings are transcribed and published, industry participants sometimes avoid the kind of frank discussion needed to generate implementable outcomes.

First, businesses must answer to their investors and the public at large. So industry participants may avoid certain sensitive topics if discussions are published verbatim. No business wants to see the headline, "*Business XYZ Takes a Stand Against Privacy.*" So to avoid misunderstanding or misstatement of their concerns, businesses may choose to say nothing rather than participate fully.

Second, only industry participants will have the actual knowledge of whether a particular implementation detail will work for their particular business. But in an open forum, businesses must worry about exposing trade secrets and plans for new businesses. Businesses must be encouraged to discuss implementation plans without fearing that competitors or critics could misuse proprietary information.

To solve these problems while preserving transparency, NTIA should allow for off-the-record sub-groups in this multistakeholder process. These sub-groups should not be subject to representation or transparency rules, since they are inherently going to be common-interest participants who will not want public disclosure of all deliberations.

For example, a sub-group from the online social networking industry could deliberate on a particular implementation detail, then report its conclusion to the full working group. The report of this sub-group and all subsequent working group discussion would then become part of the published transcripts.

If the industry participants are given this kind of flexibility to participate at two levels, NTIA will improve the likelihood that this process will have input from "a broad set of stakeholders [that] will lend legitimacy to the code of conduct."⁸

Building Consensus

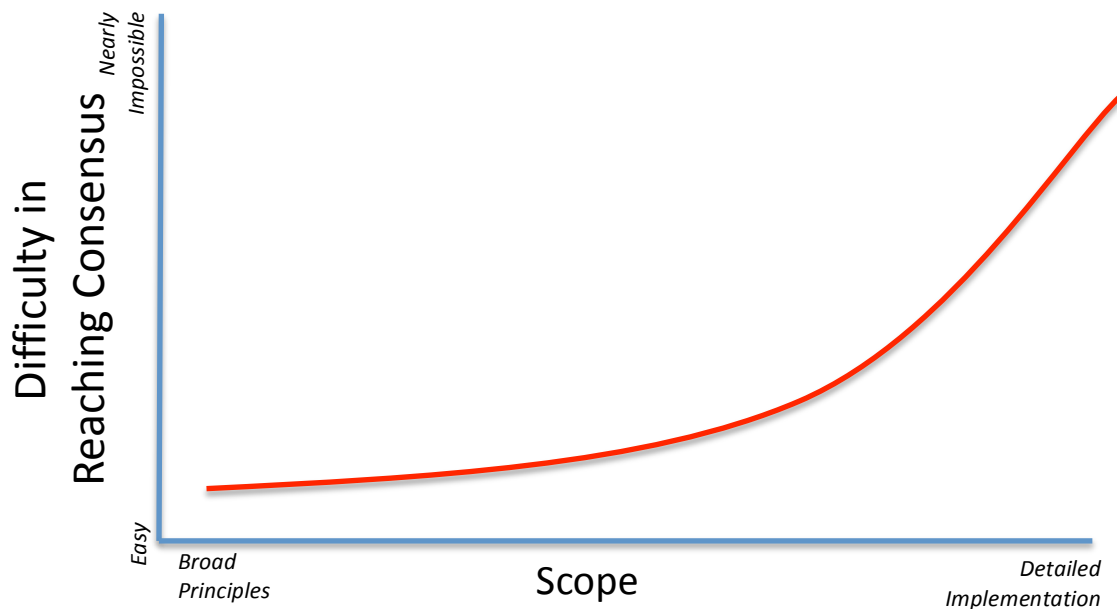
Question 13: *Are there lessons from existing consensus-based, multistakeholder processes that could be applied to the privacy multistakeholder process?*

Again drawing on our experience with ICANN working groups, it's essential to establish methods and definitions to guide the consensus-building process.

⁸ *Id.* at 13098.

By now it should be clear to all that “unanimity” is not a workable definition for “consensus,” since it allows a single participant to block all progress towards a consensus. There simply must be a range of consensus levels available to the working group.

Having a range of consensus levels is essential for a multistakeholder process to develop codes of conduct, since the difficulty in reaching any level of consensus grows as you move from agreeing upon broad principles to developing implementation details. As we have observed at ICANN, there’s an inverse relationship between detail desired and consensus achievable:



NTIA can borrow much from the consensus methodology and definitions developed by ICANN’s Generic Names Supporting Organization (GNSO) in their *Working Group Guidelines*⁹. For example, consider the levels of consensus defined by ICANN in its Standard Methodology for Making Decisions:

The Chair will be responsible for designating each position as having one of the following designations:

Full consensus - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as Unanimous Consensus.

Consensus - a position where only a small minority disagrees, but most agree¹.

Strong support but significant opposition - a position where, while most of the group supports a recommendation, there are a significant number of those who do not support it.

Divergence (also referred to as No Consensus) - a position where there isn't strong support for any particular position, but many different points of view. Sometimes this is due to irreconcilable differences of opinion and sometimes it

⁹ Annex 1: *GNSO Working Group Guidelines*, (Apr. 7, 2011), available at <http://gns0.icann.org/council/annex-1-gns0-wg-guidelines-07apr11-en.pdf>

is due to the fact that no one has a particularly strong or convincing viewpoint, but the members of the group agree that it is worth listing the issue in the report nonetheless.

Minority View - refers to a proposal where a small number of people support the recommendation. This can happen in response to a Consensus, Strong support but significant opposition, and No Consensus; or, it can happen in cases where there is neither support nor opposition to a suggestion made by a small number of individuals.

ICANN's *Working Group Guidelines* goes on to describe the method to discover the level of consensus, and also how participants can challenge the chair's determination of consensus. Both are essential elements of a multistakeholder process, especially one that addresses implementation details for a complex and controversial subject.

At a minimum, NTIA should develop and publish consensus-building guidelines before initiating the multistakeholder process.

Conclusion

Finally, NTIA's new multistakeholder process should not discourage or dismantle existing self-regulatory efforts.

Online industries already engage in multiple self-regulatory efforts to inform and protect their customers and to address many of the privacy concerns raised in the White Paper.

However, if these businesses think their efforts will become moot or overridden at the conclusion of the multistakeholder process, will they continue developing and investing in better options for consumers or just wait for the government to dictate what is "approved."

NTIA should allay these concerns and ensure that existing and ongoing industry efforts will not be mooted by the multistakeholder process.

We look forward to participating in this multistakeholder process and welcome the opportunity to expand upon our suggestions and answer any other questions that may arise.

Respectfully submitted,



Steve DelBianco
Executive Director, NetChoice



Carl M. Szabo
Policy Counsel, NetChoice

NetChoice is an association of online services and e-commerce companies, with the shared goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org