COMMENTS ON
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
REPORT ON:
CONSUMER DATA PRIVACY IN A NETWORKED WORLD
A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION
IN THE GLOBAL DIGITAL ECONOMY
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The Administration's ambitious report recommends a multistakeholder process for developing codes of conduct that would embody seven principles of a Privacy Bill of Rights. In addition, it seeks to strengthen enforcement capacities and increase international interoperability. There is much to discuss and admire in this report; it marks a clear and concerted effort to recognize the essential place of privacy protection within a robust economy. In these comments, however, I focus on the multistakeholder process for developing codes of conduct, with two suggestions aimed specifically at how best to embody the principle of "Respect for Contexts."

The United States has been criticized for its sectoral approach to privacy, for preferring to legislate (when it does legislate) according to the needs of different sectors. In my view, the advantages of this approach, when pursued sincerely, is that it aims to articulate substantive rules governing the collection and flow of information from party to party that are both pertinent and actionable. Ideally, this approach would not place the full burden on information subjects to engage, pair-wise, in contract-like relationships with each and every party with whom they interact and share information, and, in addition, the substantive rules would be tailored to the needs and concerns of the particular sectors which they govern.

Following this observation, an outcome for the multistakeholder process to develop consumer data protection codes of conduct that would meaningfully promote "respect for contexts" requires a different starting point from the one NTIA has outlined in its request for comments:

1. Multiple multistakeholder processes should be convened

First, there should be multiple multistakeholder processes reflecting different commercial sectors and different contexts in which personal information is significantly shared. Thus, there might be a multistakeholder process applying to advertising, to online information services (e.g. search engines, reference works), to social network platforms, to merchants (online and off), to education, and so forth. Companies with multiple portfolios, such as Google, might participate in multiple capacities in a variety of discussions, for example, in its capacity as an advertiser, as a search engine, as a communications service, and so forth. Accordingly, there could be one group that might include, e.g. Wikipedia, Google, WebMD, American Library Association, and other information and knowledge providers; another that might include Amazon.com, Sears, Target,

etc.; a third that might include Google, Yahoo!, Verizon, Facebook, etc; a fourth that might include Google, Omniture, Audience Science, etc; and so forth. It would be reasonable to assume that for parties acting in each of these capacities, different rule sets would apply. Other stakeholders, too, would participate in each of these in a range of capacities, also determined by the nature of respective contexts, namely, as consumers of goods and services, as researchers, as communicators, as readers, and so forth. In practical terms, and for a start, one could begin at a fairly coarse grain, or with a few of the larger, more central contexts.

Seeking a single code, one-size-fits-all, for all these different contexts seems, in the first place, destined to yield a lowest-common-denominator code that does not address the specific concerns of distinct contexts. Second, the rules for each context will more effectively reflect the relationships among the parties and the particular purposes and values of each context where the stakeholders inhabit more clearly defined, traditional roles. If social contexts are merged into a single multistakeholder process that cannot bet identified with any particular socially coherent context, how would one begin to know which are the appropriate stakeholders? Not all parties are stakeholders in all the different contexts and different stakeholders have different stakes in different contexts. In focused groupings, identifying stakeholders will make sense.

2. Voluntary adoption of codes but required fair information practices

Multistakeholder context-based processes should have two aims. One is the articulation of norms governing information practices that govern all actors in a sector, or context, whether or not they elect to participate. These substantive norms define what we might then call "fair information practices." This will prevent a race-to-the-bottom, where ruthless actors will be allowed to compete unfairly with their conscientious colleagues. History has shown, all too clearly, that marketplace alone is not the ideal mechanism for differentiating the good from the bad actors. Although these norms may be embodied in legislation, there may be other effective mechanisms for expressing them and holding them out as expectations of good practice in a sector. As such, violations can be identified as such and subject to sanction. Beyond these base-level norms that would apply across the board to multistakholder process participants and non-participants alike, participant actors might choose to adopt and be bound by more rigorous codes on a voluntary basis crafted, ideally, with all affected parties in mind and with consideration for societal and political commitments.

Respectfully yours,

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