



**DLA Piper LLP (US)**  
500 Eighth Street, NW  
Washington, DC 20004  
www.dlapiper.com

Thomas M. Boyd  
tom.boyd@dlapiper.com  
T 202.799.4361  
F 202.799.5361

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Honorable Lawrence E. Strickling  
Assistant Secretary for Communications and Information  
National Telecommunications and Information Administration (NTIA)  
Department of Commerce  
Herbert Clark Hoover Building  
1401 Constitution Avenue, N.W.  
Washington, D.C. 20230

Dear Mr. Secretary:

The following letter is in response to NTIA's March 5, 2012, request for public comment on issues that it anticipates in advance of the forthcoming multi-stakeholder process. This process, which NTIA will convene, is intended to incorporate the views of all such stakeholders in the course of generating a consensus on voluntary and legally enforceable privacy codes of conduct.

In its March 5th Request for Public Comment, NTIA solicited stakeholder comment on what issues should be addressed in the course of the process, which stakeholders should participate, how those discussions should be monitored, transparency, and building consensus that would lead to an enforceable Code of Conduct.

The National Business Coalition on E-Commerce and Privacy ("The Coalition") represents a group of business interests, including fifteen brand name American companies that depend heavily on technology and the free flow of information. These innovations contribute measurably to the efficiencies that enable us to better serve our customers. Our 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. We 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. We are, therefore, highly sensitive to regulations or public policy proposals that risk endangering this very delicate environment or that ignore, for the sake of momentary political satisfaction, the enormous economic potential that is served by the responsible use of consumer data.

Our member companies engage in "best practices," but we are also aware that there are some outliers who delight in commercial activity that dances along the fringes of acceptable conduct. For that reason, we appreciate the goals of NITA's proposed multi-stakeholder process and its inherent search for a consensus that might bring about voluntary, enforceable codes and, in turn, will serve as evidence of "a code of best practices" that will lend itself to replication throughout the business community, both domestically and overseas.

To that end, we have five primary comments in response to NTIA's invitation.



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**1. We believe 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. We believe, however, that a multi-stakeholder process that does not include private discussions is destined to fail and is not the best means to achieve consensus or to make meaningful progress on complex issues.

The first step in identifying issues of concern to both businesses and advocates should be conducted in public as suggested by NTIA. While not a formal part of such process, it should not preclude various stakeholder sectors, including industry representatives, meeting informally prior to the process to identify issues and concerns that may need to be addressed with codes of conduct. Furthermore, we do not think that issues are best identified, as NTIA has suggested in its March 5th solicitation for comment, in written responses to that invitation. Rather, they are best identified by those affected including those representing industry and consumer interests. NTIA's role should be one of a facilitator.

Once an issue is identified, industry representatives should conduct private and off the record sessions to develop proposals to address the issue. Frank, open, but confidential, discussions are necessary to determine what is practical to resolve an issue. Businesses will not, and should not, be expected to reveal proprietary information or trade secrets about their practices 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 those companies that are conscientiously engaged and actively participating in the multi-stakeholder process.

We also strongly urge NTIA to place a limit of three to four issues for discussion by any one stakeholder segment. It is counterproductive to bring a soup 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. It would be better to highlight the primary issues that are in need of resolution 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.

Once the voluntary code is developed by industry, the open multi-stakeholder process would re-engage to review and provide comment on the code. This step in the process could be open and involve all stakeholders.

After all stakeholders have had a chance to comment, industry again should conduct private off- record meetings to finalize the code and present it to the multi-stakeholder group for final agreement.



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**2. If the code addresses the original concerns identified by the multi-stakeholder process, it should not be rejected for failure to achieve perfection. We should not let perfection 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. We believe that in most cases progress on addressing issues should not be discarded because it does not represent a complete solution. We 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. We 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 that recommend codes demonstrate that the regulations they envision would have a positive effect on the US economy and the protection of American consumers.

Questions that ought to be asked and answered in the course of such an analysis should include the following, among others:

- a) What is the evidence that the perceived problem creates any measurable financial or actual harm?
- b) Would a voluntary code involving those issues interfere with or otherwise impair the operation of existing laws and existing self-regulatory practices?
- c) Would a voluntary code inure to the benefit of the US economy as well as the protection of and availability of choices for American consumers, recognizing that the denial of a lower cost, safer competitive marketplace could constitute a "harm," not a benefit?
- d) If incorporated into a voluntary code, would the competitive position of American signatories be enhanced or degraded relative to global competitors with very different enforcement practices and cultures?
- e) What are the identifiable costs and benefits to US industry and US consumers that would be derived from a voluntary code that focuses on these issues?

**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. We believe that this level of preparation will contribute to a more efficient and productive multi-stakeholder process and avoid past mistakes or



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missteps. We also believe that the appropriate role of NTIA in this process is to gather this information for the benefit of all participants.

As part of this evaluation, NTIA should exempt from this process any existing self-regulatory practices. It should also provide summaries of successful and unsuccessful efforts to develop codes, including a discussion of the reasons why those efforts ultimately proved unsuccessful. As noted, there is no need to address items where self-regulation already exists. The multi-stakeholder process can look to those existing codes of conduct as concrete examples of what the multi-stakeholder process is striving to achieve.

**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. Accordingly, NTIA 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 the following statement in the White Paper: "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". [White Paper at p. 27.] In particular, what constitutes a consensus and who will assess whether a stakeholder is being "inflexible" and how and by whom are such "rules or procedures" to be enforced?

We appreciate the opportunity to comment on the forthcoming multi-stakeholder process and we look forward to working with NTIA to help encourage a productive and consequential multi-stakeholder process.

Very truly yours,

**DLA Piper LLP (US)**

A handwritten signature in blue ink that reads "Tom Boyd".

Thomas M. Boyd  
Partner