

Before the National Telecommunications and Information Administration
U.S. Department of Commerce
Washington, D.C. 20230

In the Matter of
Multistakeholder Process to Develop
Consumer Data Privacy Codes of Conduct
Docket No. 120214135-2135-01, 120214135-2203-02

Comments submitted by the Communications and Technology Task Force of the
American Legislative Exchange Council¹

I. Introduction

These comments are submitted by the chairmen of the American Legislative Exchange Council's Communications and Technology Task Force (Task Force) in response to the request for comments by the National Telecommunications and Information Administration (NTIA) about which consumer data privacy issues should be the focus of NTIA-convened multistakeholder processes, and specific procedural considerations that NTIA should take into account when initiating a privacy multistakeholder process.

By way of background, the mission of the Task Force is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty in communications and technology through developing and promoting sound public policies in a nonpartisan partnership of America's state legislators and the private sector.

¹ These comments express the views of Rep. Blair Thoreson of North Dakota and Bartlett Cleland of the Institute for Policy Innovation in their capacities as chairmen of the American Legislative Exchange Council's Communications and Technology Task Force. The views expressed herein do not necessarily represent the views of members of the American Legislative Exchange Council, the Institute for Policy Innovation, or the State of North Dakota. The chairmen thank John Stephenson, American Legislative Exchange Council, for his assistance in submitting these comments.

The Task Force believes that constant, dynamic innovation in communications and technology presents numerous complexities that defy uniform public policy prescriptions. Government must be careful not to stifle advancement in communication and technology by imposing excessive regulation and taxation. Economic assumptions about abundances and scarcities that once guided policymakers in the past are not wholly applicable in this evolving economy. Past political assumptions about regulative knowledge and incentives are often at odds with actual experience and modern reality.

To guide policymakers through the uncharted waters of the 21st century economy, the Task Force brings together state legislators, industry representatives, and public policy experts to develop state public policy that will preserve promote economic growth, freedom, and innovation in communications and technology.

We submit these comments to assist the NTIA and other interested parties in the development of codes of conduct through an open and fair multistakeholder process.

II. Our Task Force Privacy Principles

In 2003, the Task Force adopted its Statement of Principles for Online Consumer Privacy (Statement). Nine years later, the Statement remains relevant to current privacy policy discussions. Since its adoption, the Statement has been referenced and cited by legislators and the private sector as an excellent set of guidelines for thinking about privacy issues.

We recognize that consumer privacy in the digital world is one of the important public policy issues of the 21st century. Users of technology want the ease and efficiency of their online tools, but they don't want their lives uncontrollably tracked by marketers, plagued by e-mail spam or noticed by everyone on social media networks.

At the same time, it is important to remember that the Internet has flourished due in large part to the lightly regulated environment in which it has developed and grown. Generally, self-regulation, industry-driven standards, individual empowerment and a market environment promise greater future success than intrusive governmental regulation.

To reflect these values, the Statement declares the following:

1. The private sector should lead. For electronic commerce to flourish, the private sector must continue to lead through self-regulation. Innovation, expanded services, broader participation, and lower prices will arise in a market driven arena, not in an environment that operates as a regulated industry.

2. Government should avoid undue restrictions on electronic commerce. Parties should be able to enter into legitimate agreements to buy and sell products and services across the Internet with minimal government involvement or intervention. Unnecessary regulation of commercial activities will distort development of the electronic marketplace by decreasing the supply and raising the costs of products and services for the consumer. Governments should refrain from imposing new and unnecessary regulations, and bureaucratic procedures on commercial activities that take place via the Internet.

3. The marketplace is working. The online market has responded favorably and swiftly to consumer concerns regarding the collection and use of personal information. Among other privacy improvements, studies have found that web sites are collecting less information and privacy notices are more prevalent, prominent and complete. Dynamic market forces have encouraged commercial web sites to reduce the use of third party

cookies tracking of Internet surfing behavior and third party sharing of information. What these studies demonstrate is that the market is responding to consumer concerns without burdensome government regulation.

4. To the greatest extent possible, individuals should be directing their privacy choices. The most effective privacy policies provide notice, choice, security, and access; individuals should be free to select the policy that best fits their needs.

III. The Challenges Presented by Online Privacy Issues

Legislators and regulators are struggling with the proper balance of consumer protection and economic growth. The combination of the explosive growth in the use of the Internet, the advent of social networks like Facebook and Twitter, and the spread of the mobile Internet has connected scores of people like never before, in ways inconceivable not long ago. Combine this rapid growth with consumers' desire to remain anonymous and privacy becomes one of the most challenging issues facing policymakers today.

One reason why privacy is such a challenge for policymakers is because the concept is so difficult to define. Merriam-Webster's Dictionary calls privacy "the quality or state of being apart from company or observation."² But what exactly this "quality" entails and how it is supposed to work means very different things to different people. Different cultures and social groups have different understandings about the meaning of privacy based on their knowledge and experiences.

At the same time, our ability to seclude either ourselves or information about ourselves from others has been altered in many ways due to rapidly-changing

² <http://www.merriam-webster.com/dictionary/privacy>

technologies, some of which we do not yet fully understand. New, unforeseeable technologies will only hasten additional change.

Hyperbole in the media about invasions of privacy to restrict personal freedom has not helped to improve the discourse, and may be making matters worse. Public opinion surveys by a variety of organizations show that vast majorities of Americans are concerned about online privacy.³

Regrettably, policymakers' reaction to increased public concerns about privacy has been to introduce more laws and regulations that ultimately cause more problems than they will remedy. At least half-a-dozen bills related to privacy, including a Do Not Track bill, are pending in Congress.⁴ Additionally, there have been several Congressional hearings on the topic of privacy and individual Members of Congress have called on regulators to investigate invasions of privacy. At the state level, legislators and regulators from California to Indiana to Puerto Rico are trying to address concerns about privacy with their own laws and rules.⁵ Several of these proposed laws could undermine the freedom that has long been the hallmark of the Internet by sharply limiting personal choice in the goods and services consumers can enjoy.

A study by Net Choice, a trade association representing e-commerce and Internet companies, estimates that certain government-mandated privacy regulations could cost U.S. companies \$33 billion over five years.⁶ To some this may seem inconsequential, but imposing this burden on businesses could have unintended consequences for everyone

³ <http://www.pewinternet.org/Reports/2012/Search-Engine-Use-2012.aspx>

⁴ http://www.pcworld.com/businesscenter/article/219815/congress_takes_stab_at_do_not_track_legislation.html

⁵ <http://articles.latimes.com/2011/apr/06/business/la-fi-do-not-track-20110406>

⁶ <http://www.netchoice.org/library/estimate-of-us-revenue-loss-if-congress-mandated-opt-in-for-interest-based-ads/>

who values their choices online. While large companies might be able absorb these new regulatory and compliance costs, smaller companies and startups, one of the few bright spots in the economy, could be forced to shut down or flee to jurisdictions with fewer regulations, thereby limiting consumer choices.

American consumers are also deeply skeptical that more regulation of the Internet will help. In a recent Zogby poll commissioned by the National Taxpayers Union, 76 percent agreed that “[m]ore government involvement and regulation will make the Internet worse for consumers,” while only 8 percent believe more regulation “will make the Internet better for consumers.”⁷

IV. Apply the ALEC Statement to the Multistakeholder Process

We agree that the multistakeholder process should begin with discussions of issues where NTIA and stakeholders can make progress and achieve some success, which will provide the foundations for continued engagement and success. Rather than problematic and intrusive regulations, we believe that it is better for the multistakeholder process to begin by considering the approach described in the ALEC Statement, and for the NTIA and stakeholders to examine what is working to protect consumer privacy.

It is important for all stakeholders involved in this process to remember that an entire body of law, from the Constitution’s Fourth Amendment to state consumer protection laws, has been developed and proven to be effective in protecting consumers from wrongdoers.

Moreover, online companies understand that consumers are concerned about their privacy once they log on. Online markets have responded very quickly to consumers’ concerns about privacy. Companies like Facebook, Google, and Microsoft have

⁷ <http://www.ntu.org/news-and-issues/27poll-by-overwhelming.html>

responded by providing consumers with sophisticated, easy-to-use tools specifically designed to prevent tracking, block e-mail spam, and delete the history of websites consumers visit. These companies have also published more thoroughly-developed privacy guidelines and enabled users to better control their information in the online ecosystem. Surveys show that consumers are taking advantage of these tools.⁸ Apple changed how it collects geolocation data, not because of a government mandate, but because the public expressed its concern directly to the company.⁹ Dynamic market forces have encouraged companies to alter how they collect and use information. Therefore we believe more market-based solutions to privacy concerns should be encouraged.

V. Ensuring a Fair and Open Multistakeholder Process

Although the focus of our comment is on the issues for NTIA and stakeholders to consider in the multistakeholder process, we also wish to offer ideas for the structure of the process.

We suggest that NTIA structure the multistakeholder process so that it provides decentralization, flexibility, and speed to address these policy issues affecting the Internet in a timely matter. Decentralized, open policy discussions have been the hallmark of previous successful discussions about Internet governance. It's also important for the process to be flexible to adjust the discussions as necessary. Moreover, flexibility will allow different groups of stakeholders to build consensus around discrete issues. The process must also have an inclusive approach that considers stakeholders from throughout the online ecosystem. A possible model for the multistakeholder process

⁸ <http://pewinternet.org/Reports/2012/Privacy-management-on-social-media.aspx>

⁹ <http://www.apple.com/pr/library/2011/04/27Apple-Q-A-on-Location-Data.html>

should be productive policy forums, such as ALEC or the National Conferences of State Legislatures, and successful past multistakeholder efforts, such as the Digital Advertising Alliance's Advertising Choices Program and the CTIA Privacy Guidelines for Location-Based Services.

Additionally, it is important for NTIA not to micro-manage the process with tightly-managed, centralized discussions. Such a structure could have a chilling effect on productive policy discussions by failing to take into account ideas from various stakeholders. For consumers, it makes no sense to disregard a group of stakeholders or single them out for a particular set of obligations.

VI. Conclusion

The NTIA should act consistent with these comments with respect to the development of legally enforceable codes of conduct for issues of online consumer privacy. Privacy is an important value, but that value should not come at the expense of curtailing a dynamic sector of the national economy and the freedom for consumers to protect their own privacy. Instead, we believe that the best approach to developing a code of conduct to address issues in consumer privacy entails adhering to the principles outlined in the Statement.

Respectfully submitted,

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