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April 2, 2012

National Telecommunications and
Information Administration
United States Department of Commerce
1401 Constitution Avenue, NW
Room 4725
Washington, DC 20230

Re: Docket No. 120214135-2203-02
“Multistakeholder Process To Develop Consumer Data Privacy
Codes of Conduct”

Dear Sirs and Madams:

The Centre for Information Policy Leadership (“the Centre”) appreciates this opportunity to respond to the Department of Commerce National Telecommunications and Information Administration’s Notice of Inquiry, “Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct.” The Centre commends the Department on the release of the White Paper and on the thorough and careful consideration it has given to the creation of the Consumer Bill of Rights and to the multi-stakeholder process.

The Centre’s mission is development of information policy for a digital economy that takes into account the requirements of business processing and the need for the responsible protection and use of data. It has led and participated in multi-stakeholder processes addressing numerous information privacy and security issues. It led a multi-year, international effort to develop an approach to privacy notices that would improve transparency, working with companies, technologists and privacy advocates. The Centre currently serves as facilitator and secretariat for an international group of experts representing privacy protection authorities, civil society, the academy, and business, whose goal is to develop an accountability model for privacy governance. The Centre has also been a key participant in collaborative processes related to the protected cross-border transfer of data at Asia-Pacific Economic Cooperation.

The Centre was established in May 2001 by leadership companies and Hunton & Williams LLP. It is located within the law firm of Hunton & Williams and is financially supported by approximately 40 member companies. While these comments have benefited from the insights and review of some member companies, the Centre’s views and the views expressed in this

response are its own and do not necessarily reflect those of its member companies, the law firm of Hunton & Williams LLP, or the firm's clients.

The Centre agrees that development of any code of conduct is best served by consultation with a range of stakeholders - business representatives, industry experts, advocates and regulators - who are knowledgeable about the issues, technology, business models and privacy concerns such codes are intended to address. Such broad engagement, together with an open, trustworthy process, is necessary if the codes are to be credible. However, the process must be designed to promote the open discussion and collaboration necessary to foster development of workable, effective guidance that will be broadly adopted by industry and trusted by consumers. Therefore, based on its experience in multi-stakeholder processes, the Centre provides the following comments.

- 1. The multi-stakeholder process as articulated in the Request for Comments can serve as an effective vehicle for isolating issues that should be addressed by best practice guidance. However, as set out in the White Paper, the process is not well suited to developing the best practice guidance itself.**

To be successful, a code of industry best practices must be credible. It must reflect the way the subject industry sector practically works, address the legitimate needs and concerns of both consumers and business, and allow for flexibility and evolution sufficient to serve the dynamic nature of the data environment in which it is intended to operate. Such credibility depends upon a trustworthy process that includes broad collaboration and open discussion among all interested stakeholders.

We believe that the broad and open engagement anticipated by the White Paper and the Request for Comments can work well as decisions are made about what issues of consumer data privacy are addressed. The Internet, new technologies and applications and new business models present a myriad of competing privacy concerns that could be addressed by best practices. Determining which issues should be addressed and setting priorities among them would appropriately be taken up by the full range of participants of a multi-stakeholder working group.

When applied to the actual development of enforceable best practices, however, the Centre believes an effective process requires that the business community serve as the primary drafter of codes and be allowed a closed forum in which to probe sensitive questions and test the workability of proposed approaches.

The Centre is concerned that the Administration's multi-stakeholder process, as articulated in the White Paper and the Request for Comments, potentially would submit the participants and the proceedings to such close scrutiny as to effectively discourage the open and frank debate necessary to arrive at true consensus and workable outcomes. While any process to create industry codes or guidance should be open and inclusive, it must also include ample opportunity for testing ideas, candidly airing points of concern and disagreement, and discussing matters that may involve proprietary information or controversial data practices. Such robust debate would

be discouraged by the presence of media or the possibility of a written transcript of discussions. This is particularly important when best practices will likely have a direct effect on the internal processes of companies, and will be enforceable against companies that voluntarily adopt them.

This does not mean that policymakers, experts, advocates and the public have no role in the development of best practices. The Centre urges their full engagement. Once the initial draft of best practices is developed by industry, their review and critique of the guidance, through a formal process that includes all stakeholders will be essential to the openness of the process and the trustworthiness of the agreed-upon best practices. However, it is important to bear in mind that any code of best practices must be workable, scalable and effective from the perspective of industry if there is to be the necessary broad adoption.

2. The Centre proposes a process in which industry develops the best practices guidance allowing for comment and review by advocates, experts and the public, and engagement and coordination by NTIA.

We describe the outline of a multi-stakeholder process to arrive at industry best practices below:

- Industry stakeholders would, through a consultative, consensus-driven process, develop and refine a set of industry best practices. The development of that guidance would take place in closed-door meetings that would allow for frank, robust debate.
- As anticipated by the White Paper and the Request for Comments, the industry stakeholder group would be self-selecting. It would designate a secretariat to facilitate its work.
- NTIA would make the best practices developed by industry public through a request for comment published in the Federal Register. NTIA would also convene a public workshop to discuss the draft best practices. The opportunity to provide written comment would allow for inclusion of a broader group of stakeholders than could participate in meetings. The responses to the request for comments would be publicly available.
- Based on comments received, the industry stakeholders would revise the draft best practices.
- The revised guidance would be published for a second round of comment. Based on feedback the best practices would be finalized and published.

Industry acceptance of any final set of best practices will be key if the guidance is to be broadly adopted and effective. Industry will need to determine that the best practices are workable and sufficiently flexible to be able to address evolution of technology, applications, and business models. It will need to decide where sanctions are sufficient to deter bad practices and bad actors, but not so onerous as to discourage companies from voluntarily adhering to the guidance.

3. The multi-stakeholder working group should set as a priority the development of industry best practices for accountability.

Accountability now figures prominently in almost all efforts to improve privacy guidance as an approach that provides better protection for data while allowing organizations more flexibility to use information to better respond to the demands of new technologies, consumers and the marketplace. While significant work is ongoing about what accountability means and how it works in practice, the marketplace would benefit from a clear articulation of best practices.

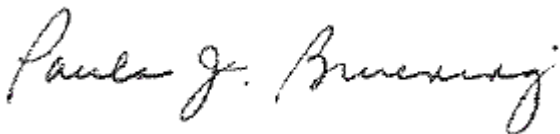
We recommend that the multi-stakeholder working group set as a priority developing such guidance. We further suggest that all participating stakeholders look to existing documents as it goes about its work, including *Getting Accountability Right With A Privacy Management Program*, to be released by the Privacy Commissioners of Canada, British Columbia, and Alberta; the Article 29 Working Party 3/2010 Opinion on Accountability¹; and the work of the international Accountability Project facilitated by the Centre.²

The Centre appreciates the opportunity to respond to this request for comments. It believes that its experience both in multi-stakeholder processes and in the subject matter of the issues to be considered through NTIA's own process can be of use to the agency as it undertakes this work. We hope that the Department will look to the Centre as a resource, and are available to elaborate on the recommendations above. Please direct any questions to Martin Abrams at mabrams@hunton.com or Paula Bruening at pbruening@hunton.com.

Yours sincerely,



Martin E. Abrams
President



Paula J. Bruening
Vice President, Global Policy

¹ http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp173_en.pdf.

² Documents issued by the Accountability Project may be accessed at <http://www.informationpolicycentre.com/resources/>.