

BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION
ADMINISTRATION

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Multistakeholder Process To Develop Consumer Data Privacy Codes of
Conduct
Request for Comments
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We welcome the opportunity to submit these comments, to the National Telecommunications and Information Administration (the “NTIA” or “Administration”) to inform its use of multistakeholder (“MSH”) processes to implement the Consumer Privacy Bill of Rights (“CPBR”).¹ We have substantial experience working in MSH processes at the intersection of policy and technology. Mulligan was an initial participant in the World Wide Web Consortiums (W3C) first effort to address privacy in 1997, the Platform for Privacy Preferences project (P3P).² While an attorney at the Center for Democracy and Technology she led and participated in several multistakeholder efforts around privacy and Internet policy. She has contributed to several technical standard-setting processes involving privacy and copyright issues.³ Her current work focuses on the relationship between the form and substance of regulations and business processes—including those aimed at technical design—to protect privacy.⁴ Doty is a Ph.D. student

¹ See Executive Office of the President, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* 9-22 (2012)(“Consumer Data Privacy”).

² See, Lorrie Faith Cranor, *Web privacy with P3P* (2002) (discussing Mulligan and other CDT’s early discussions with W3C to initiate P3P) Id. at 44; (discussing Tim Berners-Lee and Mulligan’s presentation of a P3P prototype ta the June 11, 1997 Federal Trade Commission workshop) Id. at 45

³ See for example, Ari Rabkin, Nick Doty and Deirdre K. Mulligan, *Facilitate, don't mandate*, IAB/W3C Internet Privacy Workshop, December 2010; Nick Doty and Deirdre K. Mulligan, *The Importance of Privacy Hooks for Advanced Web APIs*, W3C Workshop on Privacy for Advanced Web APIs, July 2010; RFC 3693, “Geopriv Requirements” (J. Cuellar, D. Mulligan, J. Peterson, J. Polk, J. Morris) (Internet Engineering Task Force 2004) (defining requirements for technical protocol to protect privacy of location information transmitted over the Internet); RFC 3694, “Threat Analysis of the Geopriv Protocol” (J. Morris, M. Danley, D. Mulligan, J. Peterson) (Internet Engineering Task Force 2004) (analyzing risks and threats to privacy of location information on the Internet); *Supporting Limits on Copyright Exclusivity in a Rights Expression Language Standard*, submission to OASIS Technical Committee by the Samuelson Law, Technology & Public Policy Clinic and the Electronic Privacy Information Center (EPIC) (September 2002); *geopriv Requirements* (with Jorge Cuellar, John B. Morris, Jr., Jon Peterson, and James Polk), Internet Engineering Task Force (IETF) Internet-Drafts, The Internet Society (2001).

⁴ See, Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 *STAN. L. REV.* 247 (2011); Kenneth A. Bamberger and Deirdre K. Mulligan, *New Governance, Chief Privacy Officers, and the Corporate Management of Information Privacy in the United States: An Initial Inquiry*, *Law & Policy*, Vol. 33, Issue 4, pp. 477-508, 2011;

at the UC Berkeley School of Information, an intentionally multidisciplinary program with faculty in social sciences, computer science, law, business, design, linguistics, and philosophy. The PhD program is known for producing scholars focused on the intersection of technology and society including Alessandro Acquisti, danah boyd, and Joseph Lorenzo Hall. He is also W3C's staff contact for the Tracking Protection Working Group (TPWG), which is currently in the process of standardizing Do Not Track technology and policy. Through his academic and professional work Doty participates in a variety of settings—including the Privacy Interest Group (PING), considering privacy issues across all Web standards, and privacypatterns.org, seeking to develop techniques to address privacy in technical design.

We believe that multistakeholder processes can advance the adoption of the Consumer Privacy Bill of Rights. To do so successfully such processes must be appropriately scoped, informed by clear procedural guidelines, and adequately resourced to ensure that the public interest in privacy protection is adequately (diversely and effectively) represented by individuals with requisite expertise, including expertise in relevant technologies (or access to it). We write to draw the Administration's attention to the important considerations of consistency and technology neutrality in its approach to the development of codes of conduct, and to emphasize specific factors to guide the Administration's consideration of MSH structure and process. In addition we draw the Administration's attention to two draft papers relevant to this proceeding, one on the W3C's privacy efforts and the other on experiences with privacy codes of conduct in other countries. Both address issues relevant to the MSH structure and process.

I. Context, Consistency, and Technology Neutrality

We applaud the Administration's inclusion of respect for context in the Consumer Privacy Bill of Rights.⁵ Ensuring consistency between companies' data practices and consumer expectations of information flows in specific contexts is essential to address the pervasive and invisible nature of data flows in the increasingly technology-mediated environment. Yet the proposed process may risk sacrificing *context* understood as encompassing spheres of human experience and social life to context as organized around business models or markets. We would suggest that while tailoring the Privacy Bill of Rights to discrete technologies or business defined sectors—at times represented by discrete trade associations, and populated by distinct players and economic interests—may be necessary for this work model, it risks producing fragmented and inconsistent treatment of personal information placing both privacy and innovation at risk. For example, surely mobile apps, regardless of what activities they enable, would benefit from some common adaptation of certain aspects of the Privacy Bill of Rights. Yet, apps that are designed to assist individuals with managing health and wellness information—such as crohnology.com or KidOol.com that help consumers track personal observations of daily life—and apps designed to assist users' in locating nearby shops operate in distinct *contexts* that should inform the implementation of the Privacy Bill of Rights. Clustering the MSH conversations around health related applications—at the nexus of these two dimensions— would seem more likely to produce contextually appropriate information flows.

⁵ Consumer Data Privacy at (“RESPECT FOR CONTEXT: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data. Companies should limit their use and disclosure of personal data to those purposes that are consistent with both the relationship that they have with consumers and the context in which consumers originally disclosed the data, unless required by law to do otherwise.”)

The Administration notes that strengthening privacy protections vis-à-vis both private and governmental actors is an important American priority,⁶ and that meeting the privacy expectations of individuals in their roles as citizens and consumers may require revising existing legal standards to ensure consistent treatment of personal information across various technologies.⁷ As the Administration notes consistent rules avoid unpredictable and uneven treatment across technologies that can impede innovation and fair competition, as well as undermining public trust.⁸ Unfortunately as we, and others, have noted inconsistent privacy rules are not as rare in the U.S. as the Administration suggests.⁹ Moreover, as the Administration notes, these inconsistencies in the regulatory framework frustrate individuals' privacy expectations, and undermine innovation and competition. In notable instances these inconsistencies exasperate the Courts tasked with applying privacy protections.¹⁰ For these reasons we applaud the Administration's desire to avoid fragmented and unpredictable privacy rules, and seek to avoid prescribing specific technical approaches.¹¹

The desire to attend to *context* should not be implemented in a manner that frustrates the Administration's desire to promote predictability,

⁶ Id. at 5 (“Strengthening consumer data privacy protections in the United States is an important Administration priority. Americans value privacy and expect protection from intrusions by both private and governmental actors.”)

⁷ Id. at 6 (“The Administration, however, does not recommend modifying the existing Federal statutes that apply to specific sectors *unless they set inconsistent standards for related technologies.*” (emphasis added)).

⁸ Id. at 26 (“... United States Internet policy has generally avoided fragmented, prescriptive, and unpredictable rules that frustrate innovation and undermine consumer trust.”)

⁹ See, Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 *STAN. L. REV.* 247, (2011); Digital Due Process Coalition Principles for Reform and supporting whitepaper J. Beckwith Burr, *The Electronic Communications Privacy Act of 1986: Principles for Reform*, ; Doty, Nick, Mulligan, Deirdre K., Wilde, Eric, *Privacy Issues of the W3C Geolocation API*, UC Berkeley: School of Information. Report 2010-038.

¹⁰ See e.g., *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998) noting that the statutory framework protecting electronic communications is “complex, often convoluted, area of the law.”; *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) accord.

¹¹ Id. at 24 (suggesting emulating past U.S. approaches that avoid “legal requirements that prescribe specific technical requirements”).

technology-neutrality, and, most importantly, consistency for individuals. The Administration should focus on its stated intent to develop codes to implement the Privacy Bill of Rights around spheres of human activity—*contexts*—in which various technologies may be used, and seek *technology-neutral* and *context-specific* rules that will support consumer expectations as technologies change, and create a level field to support competition and innovation. *Context* should drive privacy rules, *not* industry segmentation. This is consistent with the Digital Due Process Coalition’s press for consistent and technology neutral rules to control government access to personal information.¹²

II. Structuring Multistakeholder Processes to Ensure Openness, Participation, Transparency, and Consensus-building; and, Establishing Metrics for Success.

Questions of legitimacy— both procedural and outcome-based or input and output¹³— are inherent where public policy concerns are delegated to private sector bodies. Input and output legitimacy are not entirely separable — for example how a code is developed impacts its substance — and both require greater clarity in order for the MSH processes for privacy to fulfill the Administration’s goals.

Ensuring procedural and substantive justice¹⁴ must be explicit aims of the MSH processes. Stakeholder participation will turn in part on their

¹² The DDPC principles state in relevant part, “Establish consistent, predictable privacy protections for communications and other electronic information services used by Americans every day to handle their personal communications and operate their businesses — building user trust and supporting the full extension of Constitutional values to the networked world, while providing clarity for law enforcement and service providers”; and, “Achieve technologically neutral solutions and avoid arbitrary distinctions that become hard to apply over time, inhibit innovation, and skew the Internet marketplace.”

¹³ For an elaboration on the distinction between input and output legitimacy for technical standardization, see Werle, R, and EJ Iversen. “Promoting legitimacy in technical standardization.” *Science, Technology & Innovation Studies* (2006).

¹⁴ Lind, Edgar Allan, and Tom R. Tyler. *The social psychology of procedural justice*. Springer, 1988. <http://books.google.com/books?id=oyXZ5IM0J8MC>.

perception of the processes' legitimacy. Incomplete or weak procedural or substantive frameworks are particularly likely to reduce participation by advocacy and consumer organizations concerned that the MSH processes will be used to skirt the protections of traditional legal processes.¹⁵ Without diverse, broad, and representative participation, and outcomes that are viewed as fair (fairly decided and fairly addressing the substantive issues) the MSH will fail to garner the widespread support and adherence necessary to advance the Consumer Privacy Bill of Rights.

Determining substantive criteria is eased by the Administration's Consumer Privacy Bill of Rights. However, as acknowledged in traditional rule-making processes, there is much substance left to the process of translation and implementation. Fidelity to the Consumer Privacy Bill of Rights is therefore an important but incomplete measure of substantive success. Creating additional measures of success that speak to substance yet maximize the design space in which participants can craft contextually appropriate implementations are a challenge. The desire for consensus—or consensus-building—outcomes, as articulated in the White Paper, is a process measure that speaks, if somewhat subtly, to substance. We discuss some other potential measures below.

With respect to procedural justice, openness and transparency are important, however they are of most value where they yield participation by a diverse and representative set of players with the requisite knowledge and

¹⁵ For example, the Center for Digital Democracy writes that “the reliance on multi-stakeholder negotiations to effectively protect consumer welfare, including privacy, is a flawed approach” yet has “committed to work within the multi-stakeholder process. But we believe there are certain requirements and conditions necessary to ensure a meaningful set of deliberations. Among the key concepts that must be considered are scope, participation, openness, and resources” <http://www.centerfordigitaldemocracy.org/sites/default/files/NTIAMultistakeComments040112.pdf>; the Center for Democracy and Technology provides detailed comments on a range of procedural and substantive issues presented by the process https://www.cdt.org/files/pdfs/CDT_NTIA_Comments_Multistakeholder_Process.pdf; and, *The Civil Society Multi-Stakeholder Principles* set forth detailed procedural principles to guide participation, and decision making, at <http://www.worldprivacyforum.org/pdf/MultiStakeholderPrinciples2012fs.pdf>.

expertise to meaningfully participate. We discuss methods of addressing these needs below.

A. Substance

The Consumer Privacy Bill of Rights (CPBR) provides a substantive benchmark to guide efforts to develop voluntary and enforceable codes of conduct for addressing privacy. However, additional substantive guidance will improve the viability of these processes and the ability of stakeholders to develop codes that are aligned with the Administration's goals.

The MSH process benefits from the external benchmarks that bookend the process: on the frontend, the CPBR, and on the backend, the Federal Trade Commission, which remains free to conclude whether adherence to a given code is sufficient or insufficient for purpose of its Section 5 authority. Between these two points substantial discretion about the substance of each code rests on the judgment and expertise of the stakeholders who must determine whether a given code is a "good enough" implementation of the CPBR. Additional general guidance that speaks to the substance of the codes and specifically provides guidance on the element of context will raise the likelihood of successful processes and outcomes and limited the potential for processes to be drawn out and codes to be found insufficient.

The Administration recognizes that the legitimacy of the MSH developed code ought not—and we believe cannot—depend solely on characteristics of its process. Being "open" and "transparent" (however those terms are operationalized) are important parameters for judging a code's legitimacy, but they cannot outweigh an evaluation of the substantive merit of the public policy outcome of the process. The MSH process as envisioned leaves government with limited ability to direct the substantive details of the drafting process yet vests the case-by-case evaluation of the results with the FTC. Clarifying additional success criteria that speak to substance, not just process, will encourage participation by reducing the potential for wasted

effort. To that end we encourage NTIA to set out metrics for evaluating the substance of the codes in addition to the CPBR, which—as they should—leave ample room for variation. We believe such metrics are important both to the success of this effort and to evaluating whether the MSH model can be generalized to other areas of Internet policy-making.

Work in the area of environmental conflict resolution (ECR) provides useful guidance on metrics for substantive outcomes that retain the maximum design options for stakeholders. Three classes of outcomes related to substance have been identified and measured: 1) whether an agreement was reached; 2) the quality of agreements; and, 3) improvement in the working relationship of the participants.¹⁶ The quality of agreements was assessed based on whether the agreement: 1) was understood; 2) incorporated participants' interests; 3) could be modified when necessary; 4) addressed the key issues; 5) resolved the conflict; 6) could be implemented; and, 7) would be maintained due to participant relationships developed during the process.¹⁷

Several of these measures can be abstracted to apply to the MSH processes envisioned here and align with the goal of consensus solutions. Privacy codes of conduct may be measured on whether a code: 1) is agreed upon by diverse stakeholders; 2) comports with the Consumer Privacy Bill of Rights; 3) incorporates the various participants' key concerns; 4) resolves the core conflicts between stakeholders; 5) can be implemented and is extensible; and, 6) is likely to be updated and maintained. Finally, whether and the extent to which the process improves the working relationships among stakeholders may be an important substantive measure, as it likely signals a sense of fairness and legitimacy that goes beyond process. These metrics can serve as high-level measures of the substantive legitimacy of privacy codes of

¹⁶ Emerson, Kirk, Patricia J Orr, Dale L Keyes, and Katherine M Mcknight. "Environmental conflict resolution: Evaluating performance outcomes and contributing factors." *Conflict Resolution Quarterly* 27, no. 1 (September 2009): 27-64.

<http://onlinelibrary.wiley.com/doi/10.1002/crq.247/abstract>.

¹⁷ Emerson, 35-36.

conduct. Consensus based decision-making processes can prompt the crafting of win-win solutions and compromise. For that reason, a product of a consensus-based process may be viewed as substantively superior by some participants.

MSH processes would benefit from the identification of more detailed references to inform the detailed development of codes of conduct. In particular, the NTIA should provide additional guidance on implementing the *individual control, transparency, respect for context*, and the related *focused collection* elements of the CPBR.

Respecting context, affording individuals' "appropriate control," and providing "easily understandable and accessible information," require grounded understandings of users' comprehension and behavior. The CPBR elements do not provide straightforward answers as to which information flows, boundaries, or mechanisms for control are desirable implementations in a given context. While contextually contingent implementations of the CPBR are no doubt desirable, the MSH processes should be provided with guidance about how to approach the question of context itself. Figuring out what flows and boundaries should be privileged in a given context requires inquiry into the values of the context and needs of the individuals within it. Addressing privacy in context is a human-centered process. The MSH processes seeking to attend to the *context* element of the CPBR must embrace design methods that are user-centered rather than law-centered. They must commit resources to eliciting privacy requirements from the end-users' perspective. The MSH processes must incorporate methods and tools that will unearth and document context appropriate implementations of the other CPBR elements. Existing research, law and other positive statements of normative commitment are one important input; however, the expectations,

understandings, and desires of users must also inform context appropriate implementations of the CPBR.¹⁸

Academic research from the fields of human computer interaction, collaborative workspace computing, and values in design provide methods for identifying privacy issues and findings on implementing privacy that could supplement the *context* and related elements of the CPBR. Aspects to consider in developing privacy approaches include feedback and control; mutual exposure; and, simple abilities to switch between general states salient to privacy—for example location enabled or disabled.¹⁹ In general the effort is focused on making privacy an intuitive act that relates and is enacted seamlessly as part of underlying transactions, rather than a disruptive, time-consuming, and cognitively daunting task.

B. Process

All this is not to downplay the importance of open participation and input legitimacy. Participants and observers may have a psychological reaction to the MSH outcomes based on their interpretation of the fairness of the process (the “subjective procedural justice”) distinct from the substantive outcome.²⁰ Like a traditional regulatory process that produces rules that favor some participants’ perspectives over others’ but is often still perceived as legitimate, MSH processes must have benchmarks that look beyond

¹⁸ For an overview of work in HCI, values in design and CWSC related to privacy see, Deirdre K. Mulligan & Jennifer King, *Bridging the Gap between Privacy and Design*, University of Pennsylvania Journal of Constitutional Law (forthcoming 2012); and, Giovanni Iachello & Jason Hong, *End-user Privacy in Human-Computer Interaction*, 1 Foundation and Trends in Human-Computer Interaction 17 (2007).

¹⁹Lederer, Scott; Hong, Jason I.; Dey, Anind K.; and Landay, James A., "Personal Privacy through Understanding and Action: Five Pitfalls for Designers" (2004). Human-Computer Interaction Institute. Paper 78. <http://repository.cmu.edu/hcii/78>

²⁰ Lind and Tyler. *The social psychology of procedural justice*.

subjective judgments of the appropriateness of specific outcomes to the fairness of outcomes more generally.

At what point is a process sufficiently open or inclusive? We believe important lessons can be drawn from the sphere of Internet standardization. Consortia like the W3C and IETF use electronic participation and increasingly relaxed (if any) membership requirements to encourage broad engagement in policy related standards. However, the technical standardization process still presents many challenges to full participation by end users or even civil society participants. Financial and logistical costs, the extensive time commitment, and the technical expertise required each create barriers.²¹ MSH processes to develop privacy codes of conduct face similar hurdles.

Clearly the Administration will not impose affirmative financial barriers to participation. However, travel, time spent, and hiring of relevant expertise may all need to be subsidized to ensure diverse and effective representation of non-industry actors and potentially elements of industry that are less well resourced. There are models, such as the one used in the California Public Utilities Commission process which provides funding for travel and time,²² and technical assistance grants under environmental law that fund the retention of experts for non-regulated parties, to provide support to non-profit participants. However, even with additional resources there is likely to be a numbers problem. While the U.S. has an impressive number of non-profit organizations that focus on privacy issues, particularly when compared to other parts of the world, it is a finite group whose time and energy is already spread across multiple venues. Given their importance to a MSH initiative—both substantively and procedurally—this numbers problem is serious.

²¹ Patrick Feng “Shaping Technical Standards: Where are the Users?” in Guston, David H., and Daniel R. Sarewitz. *Shaping science and technology policy: the next generation of research*. Univ of Wisconsin Press, 2006. <http://books.google.com/books?id=12kOiesm1T0C>.

²² See in particular the CPUC Intervenor Compensation Program: <http://www.cpuc.ca.gov/PUC/IntervenorCompGuide>

Active engagement from relevant stakeholders is important for creating a consensus code that stakeholders highly regard and for creating successful ongoing working relationships between participants—many of who will be repeat players. These are two areas where a successful open consensus process aids not only the legitimacy of the process (and consequently its outcome) but also the pragmatic likelihood of adoption and maintenance. When codes of conduct are voluntary (as has been recommended in this case), then gathering the willing input of industry stakeholders is essential to seeing the codes put promptly in to use. And as technologies continue to change over time, codes of conduct will need to be enforced, updated and re-interpreted: much easier to do if the participants — including industry, regulators, consumer advocates and researchers — end the process with a good working relationship. Furthermore, we expect the FTC’s decision whether to take action against an entity adhering to a MSH-developed code of conduct will be influenced by the level and diversity of support the code has received; the FTC’s interpretation of validity through diversity and the importance of having an enforcement option to encourage industry adoption implies that adoption itself will depend on the perception of breadth of engagement in a MSH process.

III. External Factors for Facilitating Success

In addition to choice of topic and the procedural and substantive conditions of MSH processes, we believe the Administration must also attend to the equally important question of what external factors facilitate success. Technical affordances will if not determine than at least largely influence human experience of privacy. Standards are key part of the privacy story. How to build structures, scaffold for success?

Our experience with techno-policy standardization and other work to integrate values into design suggests that one important bottleneck to successful development of technical designs that incorporate complex values

such as privacy is the lack of professionals with the relevant mix of training and expertise. Security considerations in technical standards became meaningful after the development of education in the particular sub-field of security. And where decisional tools like privacy impact assessments are used in organizations lacking experience with questions of privacy, they often fail to achieve the intended effect.²³

Few civil society organizations (which already struggle with the time commitments necessary for participation in MSH processes) have the necessary technical expertise on staff to contribute to the detailed technical discussions. As noted above, in the environmental area this is addressed through the provisioning of funds for such experts to be hired. That may be an inappropriate and necessary model to adopt here as well. There are a growing number of skilled professionals with multidisciplinary and interdisciplinary knowledge about privacy that have the training and aptitude to fill such a role.

IV. Conclusion

Collaborative governance regimes consider not just the process but also the full environment. Greater substantive guidance, and measures to address barriers to participation are necessary preconditions for the success of the envisioned MSH privacy initiatives.

The need for implementations of the CPBR to reflect *context* understood as spheres of human activity, and drive consistent rules that supports users' privacy expectations, and innovation and competition, must balance against the allure of building MSH initiatives on existing industry trade associations or market segments. While it is no doubt useful to leverage preexisting structures, the broader success of the project will be undermined by

²³ See Ari Rabkin, Nick Doty and Deirdre K. Mulligan, *Facilitate, don't mandate*, IAB/W3C Internet Privacy Workshop, December 2010.

technology specific implementations that create barriers to competition, hinder innovation, and confuse consumers.