

BEFORE THE  
DEPARTMENT OF COMMERCE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Docket No. 120214135-2135-01  
Multistakeholder Process To Develop Consumer Data Privacy Codes of Conduct

Request for Comments

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COMMENTS OF  
PROFESSOR IRA RUBINSTEIN, NEW YORK UNIVERSITY SCHOOL OF LAW  
AND  
PROFESSOR DENNIS HIRSCH, CAPITAL UNIVERSITY LAW SCHOOL

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Professor Ira Rubinstein  
New York University School of Law  
40 Washington Sq. South—Room 330B  
New York, NY 10012  
(212) 998-6476  
[Rubinstein@exchange.law.nyu.edu](mailto:Rubinstein@exchange.law.nyu.edu)

Professor Dennis Hirsch  
Capital University Law School  
303 E. Broad Street  
Columbus, OH 43209  
(614) 236-6685  
[dhirsch@law.capital.edu](mailto:dhirsch@law.capital.edu)

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### Introduction

We are law professors who have studied co-regulation in privacy and related fields.<sup>1</sup> In these comments, we draw on our research in order to suggest ways in which the National Telecommunications and Information Administration (the “NTIA” or “Administration”) can best use multistakeholder (“MSH”) codes of conduct—a form of co-regulation—in order to implement the Consumer Privacy Bill of Rights (“CPBR”).<sup>2</sup>

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<sup>1</sup> See, e.g., Dennis D. Hirsch, *Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law*, 41 GEORGIA L. REV. 1 (2006); Ira S. Rubinstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 I/S, J. LAW AND POLICY FOR THE INFORMATION SOCIETY 356 (2011).

<sup>2</sup> See Executive Office of the President, *Consumer Data Privacy in a Networked World: A Framework for*

Our comments focus on two issues: First, whether weak incentives and free-rider problems will prevent companies from participating in the MSH process and/or voluntarily adopting a code of conduct, and what the Administration might do to address this. Second, the lessons that environmental covenants—a form of co-regulation practiced in the field of environmental law that is very analogous to the proposed MSH process—hold for the Administration’s proposal.

### **Overcoming the Free Rider Problem via an FTC Enforcement Strategy**

In thinking about the incentives of companies to participate in the MSH process, it is helpful to divide them into two categories: (1) those that already voluntarily adhere to an industry code of conduct (e.g., NAI, IAB, DAA, GSMA); and (2) those that do not already adhere to a code. In the absence of legislation, both groups have an incentive to refrain from participating in the MSH process.

Those in the first group drafted industry codes of conduct with no or limited consumer input. If they choose to participate in the MSH process, one can safely predict that consumer groups will seek to strengthen these existing industry codes. Thus, most firms would have a strong incentive to sit out the MSH process (or not adopt any codes that emerge) rather than make themselves subject to more restrictive rules. Those in the second group have even stronger reasons not to participate. If they have not yet promised to comply with a voluntary code then they are not subject to section 5 enforcement by the Federal Trade Commission (“FTC”) for “deceptively” failing to live up to such commitments. Were they to sign on to a MSH code they would make themselves subject to such enforcement. Thus, firms in both the first and second groups will likely have limited incentives to participate in the MSH process.

The incentives for participation as identified by the Administration include building consumer trust and favorable treatment by the FTC if there is an enforcement action. But many companies may view the gain in consumer trust as speculative or marginal and might well prefer to wait until Congress acts before subjecting themselves to a code of conduct imposing new legal obligations. Another possible incentive is the agency’s representation that, in the event of an enforcement action, it will treat favorably those companies that adhere to a code of conduct.<sup>3</sup> Of course, companies that sit out the MSH process and free ride on other firms that do participate are indifferent to being treated favorably by the FTC because they have not agreed to adhere to a code and so cannot be charged with acting “deceptively.” (And, as the Administration notes in the White Paper, the CPBR does not alter the FTC’s existing section 5 enforcement

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Protecting Privacy and Promoting Innovation in the Global Digital Economy 9-22 (2012)(the “White Paper”).

<sup>3</sup> White Paper at 24.

authority.<sup>4</sup>) In sum, the proposed framework does too little to encourage companies to participate.

Of course, new privacy legislation could change this by making the CPBR applicable to all covered entities, regardless of whether or not they participate in the MSH process. This would bring free riding to an end because companies would then either choose to follow an FTC-approved code of conduct or be subject to “the general obligations of the legislatively adopted Consumer Privacy Bill of Rights.”<sup>5</sup> Moreover, as the Administration recommends, such legislation could establish a safe harbor mechanism such that firms that comply with an MSH code receive favorable treatment in any enforcement action. This benefit, along with code’s general role in clarifying how the CPBR applies, could provide firms with significant incentives to join the MSH process and agree to abide by a relevant code.

The question, then, is how to change the incentives, and get companies to participate in the MSH process now, prior to the passage of legislation. We believe that FTC could accomplish this through a three-pronged enforcement strategy that builds on recent, creative use of both prongs of the FTC’s enforcement authority, but especially the unfairness prong.

- First, just as the White Paper suggests that new codes of conduct emerging from the MSH process, once agreed to by companies, are enforceable under section 5, so too should the FTC treat all existing codes of conduct as enforceable under section 5. This would level the playing field to some extent between firms who participate in the MSH process and those who draft their own voluntary codes. To increase the incentive to participate, the FTC should develop a policy under which firms that participate in a MSH code are entitled to favorable treatment in the event of enforcement, while firms that follow their own, presumably weaker, codes are not. Thus, to receive favorable treatment these companies, too, would have to submit themselves to a MSH process, even if this results in changes to their existing code.<sup>6</sup>
- Second, in order to incentivize firms in the second group, (i.e., those that are not subject to an existing code and that have reason to stay away from the process since participation would bring them within the scope of FTC’s section 5 “code of conduct” jurisdiction, thereby increasing their enforcement risk), the FTC should devote more resources to enforcing the U.S.-E.U. Safe Harbor Agreement

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<sup>4</sup> *Id.* at 35, note 43.

<sup>5</sup> *Id.* at 37.

<sup>6</sup> It would be useful for the FTC to conduct a study of how well existing voluntary codes comply with the new CPBR.

(“SHA”). Several thousand companies have signed on to the SHA since it came into force in 2000. In theory, this makes them subject to section 5 jurisdiction, although it was not until very recently that the FTC announced its first enforcement action against a U.S. company for violation of the SHA. If the FTC were to begin to enforce the SHA more vigorously, then participating companies would already be subject to section 5 enforcement and so would have less to lose by agreeing to a MSH code of conduct. However, because the CPBR is more rigorous than the privacy principles adopted by the SHA, the FTC should not extend favorable enforcement treatment to these companies unless they adhere to a MSH code.

- Third, the FTC can give all firms—including those who have not adopted a voluntary code and did not sign up for the SHA—a strong incentive to participate in the MSH process by embarking on a new strategy that treats the CPBR as a set of enforceable obligations, even before Congress enacts the CPBR into law. Were the FTC to pursue this strategy, the codes resulting from the MSH process would then provide an informal “safe harbor” in the sense that firms that followed such a code would know that their practices were neither deceptive nor unfair, thereby shielding them from enforcement actions. Rather, this new strategy would be aimed at firms that are not subject to enforceable codes at all.

While the first two prongs of the enforcement strategy represent existing FTC policy,<sup>7</sup> this third prong is a departure from and therefore requires some brief explanation. Of the seven principles constituting the CPBR, three of the principles—individual control, transparency, and security—have long formed the basis for FTC enforcement actions.<sup>8</sup> However, at first glance, it might seem that the remaining four principles—respect for context, access and accuracy, focused collection, and accountability—are beyond the FTC’s enforcement authority. It is important to bear in mind, however, that over the last 13 or so years, the FTC has slowly but steadily expanded its enforcement authority through innovative uses of both the deception doctrine and, especially, the unfairness doctrine.<sup>9</sup> Privacy scholars have also begun to call attention to the role of consumer

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<sup>7</sup> See, e.g., FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 14 (2012)(commenting on the MSH process for developing codes of conduct and noting: “To the extent that strong privacy codes are developed, the Commission will view adherence to such codes favorably in connection with its law enforcement work. The Commission will also continue to enforce the FTC Act to take action against companies that engage in unfair or deceptive practices, including the failure to abide by self-regulatory programs they join”).

<sup>8</sup> See Lisa J. Sotto, PRIVACY AND DATA SECURITY LAW DESK BOOK Ch. 16 (2011)(describing enforcement actions involving misrepresentation and inadequate security).

<sup>9</sup> See Andrew B. Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices* (2011), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=andrew\\_serwin](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=andrew_serwin) (describing an historical progression from “a traditional deception model” (e.g., In the Matter of GeoCities); to “an

expectations in FTC settlements such as Sony BMG<sup>10</sup> and Sears.<sup>11</sup> These and several other recent settlements reinforce the notion that the FTC could begin looking for appropriate factual scenarios in which to apply these remaining four principles of the CPBR, consistent with an evolving understanding of consumer protection.

To summarize: the goal of three-part strategy laid out above would be to place all companies on an equal footing with respect to implementing the CPBR in the near future, and to encourage all companies to participate in the MSH process, without waiting for Congress to enact a new privacy law. If all companies must abide by the CPBR, this not only solves the free rider problem but also creates a strong incentive to participate in the multistakeholder process and thereby enjoy some prospect of shaping the outcome. If this strategy is successful, companies that refuse to participate are disadvantaged because they will have to abide by a code of conduct they did not shape and that is therefore unlikely to take into account their own business models or technical capabilities.

While it is always difficult to predict how companies will respond to regulatory initiatives like this one, suffice to say that the history of privacy self-regulation in the U.S. teaches that firms are far more willing to develop and commit to follow a voluntary code of conduct when faced with a credible threat of stricter government regulation if they fail to act. In the present case, this threat is absent, at least in the short term given that this is an election year. It may be absent in the long term, too, given the difficulty

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appearance of unfairness” (e.g., In the Matter of ReveseAuction.com, Inc.); to “voluntary assumption of heightened burdens” (e.g., In the Matter of Eli Lilly and In the Matter of Microsoft); to cases in which lack of a “reasonable” level of security is deemed “unfair” even in the absence of deceptive statements (e.g., In the Matter of BJ’s Wholesale)). See also Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 290 (2011)(describing a similar progression). They conclude that in its more recent efforts to address spyware and data breaches, the FTC employed new legal standards that “were far more ambiguous, evolving and context-dependent” than what came before. The most recent case along these lines is *FTC v. Frostwire LLC*, No. 11-cv-23643 (S.D. Fla. 2011), in which the FTC alleged that it constituted an “unfair design” for a peer-to-peer file sharing service to configure its Android application so that upon installation, pre-existing files on the device were designated for sharing by default. For a preliminary description of best practices in design based on recent FTC enforcement cases, see also Ira S. Rubinstein, *Regulating Privacy by Design*, 26 BERK. TECH. L. J. 1409, 1454-56 (2012).

<sup>10</sup> See Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERK. TECH. L. J. 1158, 1218 (2007)(noting that the FTC settlement in Sony BMG is “a testament to the power of broad and flexible grants of authority that provide a basis for tailoring responses to new marketplace practices that mislead or injure consumers and materially disrupt settled consumer expectations”).

<sup>11</sup> See Bamberger and Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. at 300. The authors also stress that according to several companies they interviewed, “a key to the effectiveness of FTC enforcement authority is the agency’s ability to respond to harmful outcomes by enforcing evolving standards of privacy protection as the market, technology, and consumer expectations change”; *id.* at 273.

of enacting omnibus privacy bills<sup>12</sup> as well as Congress' poor track record enacting even narrower bills on spyware or security breach notification. Given this, the FTC should seek to use both the "deceptive" and "unfair" prongs of its existing enforcement authority, as outlined above, in order to pursue a new enforcement strategy that give firms more incentive to participate in the MSH process.

### **Environmental Covenants as a Model for the Multistakeholder Process**

The White Paper encourages companies, industry groups, privacy advocates, consumer groups, academics and a variety of government officials to participate in MSH processes to develop codes of conduct that implement the CPBR. It claims that this approach has several advantages including flexibility, speed, decentralization, and creativity. The Administration cites as a precedent the work of Internet standards groups, noting that these organizations "frequently function on the basis of consensus and are amenable to the participation of individuals and groups with limited resources" and that these characteristics "lend legitimacy to the groups and their solutions" as does the use of open and transparent processes.<sup>13</sup>

We find the analogy to Internet standards processes to be a strained one. Such standard-setting processes differ from the MSH privacy process in at least two important ways. First, the main goal of Internet standards is interoperability, which is achieved by defining protocols, messaging formats, schemas, and languages. Interoperability motivates company participation for the simple reason that unless a company's products or services interoperate with the network infrastructure, hardware, and software that make up the Internet, they're out of business. Moreover, companies with specific views on how to achieve interoperability recognize that they are far more likely to influence a standard if they are at the table than if they stay away. Thus, the goal of interoperability naturally draws participants to the table and makes them amenable to a joint solution. Second, Internet standards bodies such as the Internet Engineering Task Force (IETF) emphasize "rough consensus and running code," which is a short-hand way of saying that while everyone who participates has an opportunity to be heard, consensus requires not just verbal persuasion but evidence of two or more independently developed interoperating implementations. The IETF standards process relies on working implementations both as an objective (or at least a pragmatic) measure of expertise (which participants are worth listening to) and progress (how to know when the process is complete). It's not over until the running code sings.<sup>14</sup>

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<sup>12</sup> A number of bills were introduced between 1999 and 2001 but were never enacted. In 2010, both the House and the Senate introduced new omnibus privacy bills but so far they have not advanced.

<sup>13</sup> White Paper at 23-24.

<sup>14</sup> See The Tao of IETF: A Novice's Guide to the Internet Engineering Task Force §5.2 (2011), *available at* <http://www.ietf.org/tao.html> ("Another aspect of Working Groups that confounds many people is the fact that there is no formal voting. The general rule on disputed topics is that the Working Group has to come

The MSH process lacks both of these characteristics. As was discussed above, companies may boycott the process with relative impunity—doing so would certainly not prevent them from selling a product that both works and turns a profit. Nor is there an objective measure of success analogous to running code. Although the Administration emphasizes consensus, diversity of participation, openness and transparency as the characteristics that will ensure the legitimacy of the MSH process, the dissimilarities with the Internet standards process are worrisome.

We believe that the environmental covenants are more analogous to, and offer a better model for, the Administration's proposed MSH codes than do Internet standards processes. Environmental covenants are agreements negotiated between regulators, regulated firms and, in some cases, environmental advocates that specify what a given industry must do to improve its environmental performance. The negotiations may take place in either of two contexts: (1) where government already regulates the relevant area and the agreement, if reached, would substitute for traditional rules; or (2) where government is threatening to regulate an area but has not yet done so and the agreement, if reached, would pre-empt the threatened regulation. In both cases, the goal is to achieve greater flexibility and responsiveness to specific conditions and more rapid improvements than would otherwise occur under prescriptive government regulation (existing or threatened).

In contrast to Internet standard-setting processes, in which all participants need to achieve interoperability, the participants in an environmental covenant often come into the process with opposing goals. Industry wants to carry on its business activities and minimize the costs of pollution control. Government and environmental advocates want industry to reduce its pollution. The covenanting process forces these opposing groups to search for ways in which their seemingly incompatible goals can be reconciled or even harmonized. The MSH process that the Administration envisions is very much like this.<sup>15</sup> It will require businesses whose behavior can injure consumer privacy to negotiate with privacy advocates, state government representatives, and others who seek to protect consumer privacy. It will seek to engage these apparently opposing groups in a search for a solution that will reconcile their different interests. Negotiations of this type—in which seemingly opposed interests attempt to find a win-win solution—raise very different concerns and design issues than those that seek to set interoperable standards. We therefore believe it important that NTIA look to the

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to "rough consensus", meaning that a very large majority of those who care must agree. The exact method of determining rough consensus varies from Working Group to Working Group. Sometimes consensus is determined by "humming" -- if you agree with a proposal, you hum when prompted by the chair; if you disagree, you keep your silence. Newcomers find it quite peculiar, but it works. It is up to the chair to decide when the Working Group has reached rough consensus").

<sup>15</sup> Cf. Hirsch, *Inner Environment*, *supra* (describing the analogy between environmental damage and privacy injuries).

example of environmental covenants as an alternative basis for understanding not only the legitimacy of the MSH process, but also how best to organize it to ensure a successful outcome.

Environmental covenants are primarily employed in Europe and Japan where governments and industry sectors have negotiated many such “voluntary environmental agreements.”<sup>16</sup> Legal scholars have sought to explain why this approach sometimes achieves better solutions to environmental problems than traditional command-and-control regulations. Professor Richard Stewart offers an explanation based on the logic of Coasian bargaining principles:<sup>17</sup>

The premise is that legal rules will advance society’s welfare if they are voluntarily agreed to by all relevant interests. If those with a stake in the regulatory requirements—the regulated, the regulator, and perhaps third party environmental or citizen interests—agree on an alternative to the standard requirements, the agreement may be presumed to be superior to the standard.<sup>18</sup>

The multistakeholder process as envisioned by the Administration has something to learn from Prof. Stewart’s explanation, namely, that the legitimacy of a bargaining process turns not only on transparency and openness but on information sharing and negotiation that allows diverse parties to reach a voluntary agreement on a solution that leaves each of them better off.

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<sup>16</sup> See Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 80-86 (2001).

<sup>17</sup> On Coasian bargaining, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6–8 (1960) (arguing that in the absence of transaction costs, mutually beneficial agreements lead to an efficient outcome regardless of any initial assignment of entitlements).

<sup>18</sup> See Stewart, *A New Generation*, *supra* at 61. As Stewart, further explains:

[E]ach party to an environmental agreement will seek to maximize its share of the gains produced by the negotiated departure from standard requirements. A regulated firm or industry will seek to use the flexibility afforded by environmental agreements to reduce compliance costs and other burdens by using alternative or innovative means that would be precluded by the default requirements, gaining flexibility as to the timing of compliance investments, and reducing regulatory uncertainty . . . . For their part, the regulators and environmental and citizen group third parties will seek a higher level of environmental or other benefits than would have been obtained, as a practical matter, under the standard default requirements. Regulators may also seek to reserve the authority unilaterally to impose new requirements if new environmental problems arise or the agreement for other reasons later proves environmentally inadequate . . . . It will also be necessary to structure the negotiation and representation process so as to minimize the transaction and bargaining costs that could prevent successful negotiation.

Id. at 61-62.

In the United States, the EPA has employed two regulatory approaches that resemble environmental covenants. These are negotiated rulemaking (reg-neg) and the Common Sense Initiative. Each of these experiences holds lessons for the Administration's proposed MSH codes.

### 1. Negotiated Rulemaking

Negotiated rulemaking is a process through which a federal agency and stakeholder representatives come together to negotiate the text of a rule.<sup>19</sup> If the group reaches consensus, then the agency uses the agreement as the basis for a proposed rule. Those who favor this approach criticize traditional, notice-and-comment rulemaking for being an adversarial approach that discourages information sharing and creative problem solving and often results in litigation. They believe that negotiated rulemaking can bring the parties together to generate innovative solutions that are substantively better, more legitimate, and less likely to generate legal challenges.<sup>20</sup> EPA uses reg-neg more than any other agency.

The negotiated rulemaking experience holds many potential lessons for the Administration's MSH proposal.<sup>21</sup> For the purposes of these comments, we will focus on one of these: what the negotiated rulemaking experience can tell us about how to choose the subject matter for an MSH process. The Administration has specifically asked for comment on this issue.<sup>22</sup> Those who have studied reg-neg have thought extensively about it and their insights are relevant here.

In a foundational 1982 article, Professor Philip Harter identified the conditions that improve the likelihood that a negotiated rulemaking will result in a successful

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<sup>19</sup> U.S. EPA, *Negotiated Rulemaking Fact Sheet*; see also Administrative Conference of the U.S., *Negotiated Rulemaking Sourcebook* (1995). In reg-neg, the group functions as a federally chartered advisory committee. We recognize that the White Paper *does not* envision the formation of advisory committees under FACA nor are we suggesting that it should. Despite this important difference, we believe that the MSH process has much to learn from negotiated rulemaking and other forms of environmental covenanting.

<sup>20</sup> For a description of negotiated rulemaking, see generally Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEORGETOWN L. J. 1 (1982); Rubinstein, *Privacy and Regulation Innovation*, *supra* (describing this approach and explaining how it could be applied in the context of information privacy); Administrative Conference of the U.S., *Negotiated Rulemaking Sourcebook*, *supra* (detailed description).

<sup>21</sup> If nothing else, the mechanics of reg-neg should prove instructive. For a detailed description of these mechanics, see Administrative Conference of the U.S., *Negotiated Rulemaking Sourcebook* (1995); for a useful summary, see Rubinstein, *Privacy and Regulatory Innovation*, *supra*.

<sup>22</sup> NTIA, Request for Comments (March 5, 2012), 77 Fed. Reg. 13098, 13099-13100 (March 5, 2012).

agreement.<sup>23</sup> These conditions are also relevant to the potential success of other MSH processes. In deciding on the subject matter for the initial MSH code or codes, the Administration should examine the extent to which each subject matter area satisfies Harter's conditions for a successful MSH negotiation. Harter's conditions include:<sup>24</sup>

1. Countervailing Power: No single party can dictate the results. There is a balance of power among the parties.
2. Limited number of parties: A smaller number of parties, probably no greater than fifteen, makes possible a true give-and-take. The sector must be sufficiently organized that a few individuals can represent it.
3. Mature issues: The issues should be well-developed and "ripe" for decision.
4. Opportunity for gain: Each party must believe it can win through negotiation. There must be the potential for a win-win solution.
5. Fundamental values: Parties will not compromise on their fundamental values. Issues should not involve fundamental value choices.
6. Permitting trade-offs: Negotiations should involve multiple issues that allow parties to yield on one issue in order to gain on another. Single-issue negotiations with a binary solution are less likely to succeed.

Some of the Administration's proposed subject matter areas satisfy these conditions better than others. For example, the sector-based areas (e.g. mobile apps, cloud computing, online services for teenagers, or online services for children) are more likely to lend themselves to a limited number of participants than are the cross-cutting issues (e.g. accountability mechanisms, or the use of multiple technologies to collect personal data) in which many sectors have an interest.

Of the sector-based areas, the online services for teens and children may present more "mature" issues than new areas such as mobile apps and cloud computing where the issues are still emerging. On the other hand, online services for children may implicate more fundamental values than some other areas and this could stand in the way of a successful negotiation.

Our point here is not to provide an exhaustive analysis of how the Harter conditions apply to the Administration's proposed subject matter areas. Rather, we seek to show that the lessons learned from negotiated rulemaking can prove useful to the

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<sup>23</sup> Harter, *Negotiating Regulations*, 71 GEORGETOWN L. J. at 45-52.

<sup>24</sup> For a full list, see *id.*

Administration as it goes about selecting these subject matter areas, and to begin to illustrate how they might do so.

## 2. The Common Sense Initiative

The U.S. Environmental Protection Agency implemented the Common Sense Initiative (CSI) between 1994 and 1998. CSI sought to use a multistakeholder, consensus-based process to develop “cheaper, cleaner and smarter” approaches to environmental regulation.<sup>25</sup> Sector-based sub-committees developed consensus recommendations on how EPA could “reinvent” environmental regulations in their particular industry in order to make them less costly and more protective. Where a committee reached agreement on such a recommendation, EPA considered using it to revise existing rules. The sub-committees consisted of representatives from industry, national and local environmental organizations, environmental justice and community groups, state, local and federal governments, and labor unions.<sup>26</sup> This make-up is quite analogous to the one that the Administration envisions for its multistakeholder process.

Studies conclude that CSI’s results were largely disappointing.<sup>27</sup> Despite four years of work and hundreds of hours of meetings, the effort yielded only five complete projects and only eight that, once implemented, could be expected to have direct benefits to the environment.<sup>28</sup> Many of the sub-committee recommendations were tepid proposals to conduct research or provide some kind of education rather than bolder ideas for regulatory reinvention.<sup>29</sup> The Initiative’s main accomplishments were “improved stakeholder relationships, better mutual understanding and co-learning, and progress in trust building.”<sup>30</sup> However, it is questionable whether, in the absence of meaningful rule revisions, these results warranted the level of effort expended.<sup>31</sup>

The CSI experience is relevant for the current proposal because it shows some of the

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<sup>25</sup> See generally, Kerr, Greiner, Anderson & April, Inc., *Analysis and Evaluation of the EPA Common Sense Initiative* (July 29, 1999) (study funded by US EPA); Cary Coglianese & Laurie K. Allen, *Building Sector-Based Consensus: A Review of EPA’s Common Sense Initiative* (2003), Scholarship at Penn Law, Paper 107.

<sup>26</sup> Coglianese & Allen, *supra*, at 3.

<sup>27</sup> *Id.*, at 7 (“Taken together, these reviews suggest that CSI was generally tall on ambition but short on meaningful and measurable accomplishment”).

<sup>28</sup> *Id.*, at 8.

<sup>29</sup> *Id.*

<sup>30</sup> Kerr, et al., *supra*, at ii.

<sup>31</sup> Coglianese & Allen, *supra*, at 11.

“limitations of consensus as strategy for making policy decisions”<sup>32</sup> and offers lessons on how to make multistakeholder, consensus-based processes work better. Some important lessons from CSI, drawn from the studies of this experimental program, are as follows:

- It is vital to develop ground-rules at the beginning, rather than counting on each multistakeholder group to develop its own ground-rules. Such ground rules should cover, among other things, the nature of consensus, the development of agendas, the expected level of participation, approaches to resolving conflicts, and the removal of participants who are unduly obstructing the process.<sup>33</sup>
- The definition of consensus should not require unanimity as this can lead to extensive delays and a “veto-oriented” approach to negotiation. Instead, the program should define a more flexible form of consensus that seeks “broad and inclusive” agreement but allows the process to move forward even in the absence of unanimity. For example, where the group cannot reach unanimous agreement the process could allow dissenting stakeholders to express a minority view that is reflected in the final, written product.<sup>34</sup>
- Those CSI sub-committees that utilized trained neutral facilitators performed better than those that did not.<sup>35</sup> Future MSH processes, such as the one that the Administration is currently proposing, should consider using trained neutral facilitators for all negotiations.
- The lack of specific deadlines contributed to the slow pace of negotiations. Once EPA imposed deadlines this “helped to galvanize action.”<sup>36</sup> Future MSH processes should consider setting deadlines at the outset.
- The NTIA’s request for comments asks how the Administration can ensure diverse participation where some interested parties have fewer resources than others.<sup>37</sup> This issue arose in the CSI context. Smaller environmental and community groups needed technical support in order to participate effectively. The initiative did not provide for such support and this impaired the negotiation

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<sup>32</sup> *Id.* at 12.

<sup>33</sup> Kerr, et al., *supra*, at 42.

<sup>34</sup> *Id.*, at 37-38.

<sup>35</sup> *Id.*, at 43.

<sup>36</sup> *Id.*, at 44.

<sup>37</sup> NTIA, Request for Comments, 77 Fed. Reg. at 13100.

process. Future MSH processes should provide technical trainers, selected by the under-resourced groups themselves, as a part of the program structure. With such training, smaller groups can feel more confident about the technical details and so be more willing to take the risks needed to reach an agreement.<sup>38</sup> The Administration should also consider providing under-resourced groups with direct grants for travel and other participation-related expenses.

## **Conclusion**

Multistakeholder processes are an innovative and potentially useful way to develop enforceable codes of conduct. They can bring together diverse groups in order to forge consensus on important policy issues. Yet they can also prove difficult to implement and their success is by no means guaranteed.

In these comments, we have argued that the “free-rider” problem poses a substantial obstacle for the Administration’s MSH proposal and have suggested a three-pronged enforcement strategy to mitigate this problem. We have further argued that environmental covenants, not Internet standards, provide the most analogous and instructive models for the proposed MSH codes. We have drawn on the U.S. experience with environmental covenants – negotiated rulemaking and the Common Sense Initiative – to identify some useful lessons for the Administration’s MSH process. We hope that the Administration finds these comments to be helpful as it continues its important work on MSH codes of conduct.

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<sup>38</sup> Kerr, et al., *supra*, at 44.