

Remarks of Cameron Kerry
General Counsel, Commerce Department
at the Brookings Institution:
A New Framework for Consumer Data Privacy Protections
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-As Prepared for Delivery-

I am pleased to be here to discuss how we can advance consumer data privacy, and truly excited to team up today with Jon Leibowitz.

In the 1990s, the Department of Commerce worked with the FTC and the White House to develop the framework that guided regulation of e-commerce over the past 10 years. In that time, the leadership of the FTC has been a tribute to the value of independent agencies.

As the Commerce Department re-entered this arena, we have worked in partnership with Jon, his colleagues and superb staff. We found complementary roles and converging viewpoints: FTC has a consumer protection mandate, but recognizes that consumers benefit from business innovation; our Department's mandate is to promote foreign and domestic commerce, but business depends on consumers' trust.

Many of you know that, last March, the Obama Administration announced support for legislation to create baseline consumer data privacy protections through a "consumer privacy bill of rights."

We believe that protections in a baseline consumer data privacy law should be flexible, enforceable at law, and serve as the basis for the development of enforceable codes of conduct. These codes must specify how the principles contained in the "bill of rights" would apply in specific business contexts.

I want to talk today about how a multi-stakeholder process can shape broad principles articulated as consumer rights and business obligations into enforceable codes of conduct that state with specificity how those principles apply in particular markets or contexts.

The Administration believes that the flexibility provided by multi-stakeholder processes offers the most effective solution to the challenges posed by a rapidly changing technological, economic, and social environment. We need a process that allows industry to be responsive to changing consumer expectations, and enables stakeholders to identify privacy risks early in the development of new products and services. We need a process that is nimble enough to respond quickly to consumer data privacy issues as they emerge, and can address privacy issues in new technologies and business practices without the need for additional legislation. Legislation and regulation do not move at Internet speed.

Multi-stakeholder processes are not an untested idea.

Groups such as the Internet Engineering Task Force (IETF) and the World Wide Web Consortium (W3C) have used transparent, consensus-driven processes to set a wide range of Internet related technical standards. These processes have been successful, in part, because stakeholders share an interest in solving the underlying challenges. Today the standards for basic Internet communications protocols that support trillions of dollars in global commerce each year are developed through these consensus-driven processes.

The 1990s Internet policy framework began with a series of multi-stakeholder events and forums that informed policy and prompted self-regulatory action. Major web sites agreed to post privacy policies, the nascent online advertising industry developed a code of conduct, and the FTC enforced adherence to these voluntary practices.

The FTC's current work on Do-Not-Track carries on this model, and I applaud the leadership of Chairman Leibowitz, as well as browser developers, privacy advocates, and others, to provide options for greater control over personal information.

The two key characteristics of a successful multi-stakeholder process for a wide variety of privacy challenges — including data security, and Do-Not-Track — are legitimacy and flexibility.

Legitimacy means that the broad array of stakeholders affected by consumer data privacy have a chance to be heard — and actually are heard. The process we envision will put industry leaders at the table alongside consumers, privacy advocates, state regulators, and academics. We want to engage all of them in a dialogue about how to guarantee the privacy consumers have a right to expect, while enabling businesses to develop new technologies, products, and services.

Flexibility ensures that the process allows for innovation and is adaptable to changes in technology and services in the digital economy. The issues will touch on technology, business needs, individual values, U.S. law, and international law and policy among many other things. The process needs to accommodate these different considerations.

What will the Federal government's role be in this process? As I said in our Green Paper last December, "more than self-regulation is needed."

At this point, we see a need for government to take initiative to convene stakeholder discussions. We are convinced that Executive Branch involvement as a facilitator will inject energy, legitimacy, and urgency to get stakeholders moving.

Let me say what the Federal government will *not* do as part of the multi-stakeholder process. The Federal government will not be a gatekeeper that decides who may or may not participate. The Federal government will not hold the pen in writing industry codes of conduct. The government will not force anyone in the private sector to adopt them.

The Federal government is also not the only viable convener. If trade associations, consumer groups, companies, or others step forward to create a forum with a nudge from the government, that's welcome.

So, how do we begin?

The Department of Commerce will initiate the process by working with private sector stakeholders, consumer groups, privacy advocates, and government partners to identify specific arenas where privacy practices are unclear and clear rules would benefit consumers and businesses. The end goal is to produce an enforceable code of conduct that receives FTC approval.

In keeping with the Obama Administration's commitment to transparency and openness, we will make the process visible and accessible to all. Participation will be open to anyone with an interest in defining the code of conduct who is willing to work hard toward consensus. We will ask participants to submit written positions, answer specific questions, and draft potential codes of conduct in advance, so that meeting attendees and remote viewers can grapple with difficult issues.

The Department will enlist stakeholder participation by issuing public notices that describe the issues in play, and announce times, dates and places for public meetings. And, we will provide opportunities for remote participation, including live streaming video of the meetings, and options for viewers around the world to post their reactions.

The Department of Commerce will help run an open process, but industry stakeholders or independent third parties will hold the pen when drafting the codes.

The Federal Trade Commission's role in the multi-stakeholder process will be essential. So I am especially pleased that Chairman Leibowitz is here today.

We believe that effective enforcement will benefit from legislation that grants the FTC clear authority in the commercial data privacy area. Granting the FTC explicit authority to enforce principles in the consumer privacy bill of rights will strengthen the Commission's role in consumer data privacy policy. And, if companies know the FTC can enforce baseline protections, that provides an incentive to define codes of conduct.

Under our proposal, the Federal Trade Commission will be an active participant in the multi-stakeholder process, and we will look to the FTC for its voice and expertise from the very beginning of the discussion. It will be the FTC's job to determine whether a particular code of conduct sufficiently implements the statutory requirements. Simply promising to abide by a code of conduct will not be enough.

We do not intend to wait for legislation. We will begin to identify pressing privacy issues that can benefit from multi-stakeholder processes. We will continue discussions with the FTC about how, with statutory baseline protections, the Commission may approve codes of conduct and provide certainty to companies that their privacy policies put them in good standing. And, we can begin to convene these groups to bring new energy and urgency to a conversation that is long overdue.

So, I want to conclude by asking each of you to join us in the challenging work to come. The great innovators of the digital world have created economic and social opportunities that we could never have imagined only years ago. But, to continue to be a place of innovation and opportunity, the Internet must also be a place where the deeply held value privacy is respected.

Most of you are the kind of stakeholders who will help develop these enforceable codes of conduct and give clear instructions to the industries that engage us online. We need your participation and your best thinking.

These will not be easy conversations and I expect there will be no easy consensus. But the multi-stakeholder process cannot work without you.

Thank you.