

NTIA Requests Comments on the Development of Consumer Data Privacy Codes of Conduct

The National Telecommunications and Information Administration (NTIA) is requesting [comments](#) on consumer data privacy issues that should be included as part of legally enforceable consumer data privacy codes of conduct, as well as procedures for the development of such codes.¹ Comments are due on or before **March 26, 2012**.

On February 23, 2012, the White House released [Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy](#), which included a Consumer Privacy Bill of Rights setting forth the principles that should govern the handling of personal data in commercial sectors.² Pursuant to that Framework, NTIA is tasked with convening a multistakeholder process for the development of legally enforceable codes of conduct addressing how the Consumer Privacy Bill of Rights will apply in specific business contexts.

The Request is NTIA's first step in that process. NTIA seeks public comment from "all stakeholders with an interest in consumer data privacy, including the commercial, academic, and civil society sectors, and from federal and state enforcement agencies."³ NTIA's role in the privacy multistakeholder process will be "to provide a forum for discussion and consensus-building among stakeholders," and to help the stakeholders "reach clarity on what their positions are and whether there are options for compromise toward consensus, rather than substituting its own judgment."⁴

A company's decision to adopt a code of conduct will be voluntary.⁵ However, if a company affirmatively commits to follow a code, NTIA stated that it expects the commitment will be legally enforceable, provided the company is subject to the jurisdiction of the Federal Trade Commission (FTC).⁶ NTIA stated that the FTC will likely have the authority to enforce the code

¹ *Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct*, National Telecommunications and Information Administration, Request for Public Comments, 77 Fed. Reg. 13098 (March 5, 2012) (Request).

² *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, White House Report (February 2012) (Framework), available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

³ Request at 13098.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* The FTC's jurisdiction covers the "organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described

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under 15 U.S.C. § 45, which gives the FTC authority to prevent deceptive acts or practices.⁷

NTIA requests comments on the topics below.

I. Which Consumer Data Privacy Issues Should Be Addressed By the Codes of Conduct?

NTIA intends to conduct an initial privacy multistakeholder process focused on a “definable area where consumers and businesses will receive the greatest benefit in a reasonable timeframe.”⁸ The Request cites “transparency” as a possible starting point because, according to NTIA, there was “broad agreement” among commenters on the Department of Commerce’s December 2010 “Privacy and Innovation Green Paper” that transparency is “a key element of protecting consumers’ privacy.”⁹

Thus, NTIA seeks comment on whether it should convene an initial stakeholder process to “facilitate the implementation of the Transparency principle in the privacy notices of mobile device applications (‘mobile apps’).”¹⁰ The “Transparency principle” is one of the seven privacy rights set forth in the White House’s Consumer Privacy Bill of Rights.¹¹ It provides, in relevant part, that “[c]onsumers have a right to easily understandable and accessible information about privacy and security practices.”¹² NTIA stated that a “common set of practices” that implement the Transparency principle “could provide guidance to mobile apps developers, operating systems, and apps stores, as well as better inform consumers about how mobile apps use personal data.”¹³

NTIA also seeks comments on other potential topics, including, but not limited to:

- other issues associated with mobile apps in general;
- mobile apps that provide location-based services;

in section 57a(f)(4) of this title, and common carriers.” Federal Trade Commission Act, 15 U.S.C. § 46(a).

⁷ Request at n.3.

⁸ *Id.* at 13099.

⁹ *Id.* See also *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, The Department of Commerce Internet Policy Task Force (December 2010), available at http://www.ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf.

¹⁰ Request at 13099.

¹¹ Framework at 1.

¹² *Id.*

¹³ Request at 13099.

- cloud computing services;
- mechanisms for accountability in the implementation of the Consumer Privacy Bill of Rights;
- online services directed towards teenagers and/or children;
- trusted identity systems; and
- the use of multiple technologies to collect personal data.

II. How to Implement the Multistakeholder Process?

NTIA seeks comment on how the multistakeholder process should be structured to ensure openness, transparency, and consensus-building. Possible areas for comment include, among others:

- How can NTIA promote participation by a broad range of stakeholders?
- Should there be pre-requisites for participating in the process consistent with the principle of openness?
- How can NTIA ensure transparency in the process?
- How can NTIA facilitate broad public review of codes of conduct during their development?
- What procedures should stakeholders follow to explain their decisions?
- How to define consensus?
- How can NTIA encourage stakeholders to reach consensus?

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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