



June 4, 2010

The Honorable Rick Boucher
Chairman
Subcommittee on Communications,
Technology, and the Internet
2187 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Cliff Stearns
Ranking Member
Subcommittee on Communications,
Technology, and the Internet
2370 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Boucher and Ranking Member Stearns:

Thank you for the opportunity to provide feedback on the discussion draft of the Internet privacy bill circulated in early May. We appreciate the work that you and other members of the subcommittee and the full Energy and Commerce Committee have put in to develop an Internet privacy bill. Federal legislation can go a long way toward ensuring that Fair Information Practices are used by all whom collect, transmit, store and otherwise use personal information collected online. This bill helps in that effort, although we wish to share some concerns and suggestions that arose after reviewing the discussion draft.

In the comments that follow, we provide suggested language, where practical.

The bill is not technology neutral.

The bill primarily focuses on Internet collection of information, and seems to presume in Section 3 clauses (a)(2)(A)(ii) and (a)(5)(i) that non-Internet collection is done via written means. However, the scope of the Internet is broader than websites alone – email and distributed computing are two mechanisms that may collect information over the Internet. Covered entities that collect information via a smart phone or other Internet-supported means may or may not have a website on which to post a notice. Other devices, such as phones and television, can collect information and tailor consumer experiences in ways that don't fit the website model.

Regardless of the means of collection, the legislation should not be directed to only regulating the Internet. Rather, it should be focused on collection of information by electronic or non-electronic means. This would be a more technology-neutral approach to the goal of the legislation, which is to protect privacy. Therefore, we recommend that the bill take a more technology-neutral approach.

For these reasons, we recommend revising the bill to be more technology neutral. It should be clear from the bill that collection of information via other means is covered, including mobile technologies, cloud computing, and other technologies that use the Internet. One such approach for a technology neutral format would be to substitute “by any non-electronic

means” for “any means that does not include the Internet.” Similarly, we recommend that references to the Internet be replaced with “electronic means” or another phrase to better encompass possible future technologies. Perhaps a definition of the Internet that included language explicitly *not* limiting it to standard websites would help address this problem.

Non-Internet collected information

In Section 3, clause (a)(2)(A)(ii), the bill requires entities that collect information by means other than the Internet to provide written notice before engaging in such collection. There is a presumption behind this requirement that a written notice will be a practical means of providing notice to a consumer and that written notice is consistent with how the information would be collected. In other words, written notice is provided because the consumer would be writing the information to be collected. This is impractical for many non-internet forms of collection — for example one that would take place over the phone.

We suggest that non-internet collection of information should require a notice presented in a means similar to how the information is collected. For instance, if collected via phone, an audio notice (or text if the phone is equipped for it and the consumer uses texts) makes more sense than a written notice. We recommend changing the current language “the privacy notice required by this section shall be made available to an individual in writing” to “the privacy notice required by this section shall be made available to an individual in writing or by other appropriate means.” Such a change could also cover those individuals who may have difficulty easily accessing a written notice.

Notice language

An important requirement for having notices used by consumers is to make them readable and understandable. The bill is silent on what steps are necessary to make these notices readable, understandable and usable. Such steps include separating information collection notices from other notices such as terms of service or EULA language. This would make it more difficult for a privacy notice to be reduced to simply another box to check on the way through a Web Site or other service. It may be appropriate for there to be a set of standards for all such notices, or a series of standards that varies depending on the industry sector making the collection. We recommend that the bill include a provision to have the FTC determine, in consultation with relevant stakeholders and experts, what the proper usability standards should be for notices covered by this bill. Reviewing existing standards and best practices should indicate at least some of the guidance that the FTC can issue on this point.

Reliance on Anonymization

There is a concern that the bill relies too heavily on anonymization as a means of protecting covered information. Anonymization is an inexact, highly context-dependent technique. It is more appropriately viewed as a mitigation of risk, one that may or may not prove sufficient by itself. To better reflect this aspect of information management, we think it better to use

the term “de-identified” to refer to information that has had information removed or obscured to hide someone’s identity. We recommend you substitute de-identification for anonymized (and to make similar changes for other forms of the words de-identify and anonymize).

While limited amounts of de-identified information may resist re-identification, combining groups of de-identified information can make such information re-identifiable; De-identification by itself should not remove all obligations to protect the resulting data. At a minimum, we recommend that public release of de-identified information be prohibited.

Sensitive Information

While group affiliations can be valuable information for marketing purposes, some group affiliations may expose consumers to possible bias. We recommend that group affiliations — particularly those that may reveal political, ethnic and/or religious affiliations — be added to the definition of sensitive information in Section 2, paragraph (10).

Affirmative Consent Definition

It is not clear from the bill as written what is intended by granting affirmative consent. While it can be interpreted as simply an active choice to consent (e.g., an opt-in choice), it could be that the committee has other additional measures in mind for granting affirmative consent. It would help increase clarity if some examples of affirmative consent were included in the bill, perhaps in the definition section.

Covered Information Definition

Under subparagraph H in the definition of covered information it is unclear if a pseudonym that identifies a specific individual, without having knowledge of the identity of that individual, qualifies as covered information or not. The last clause of that sentence makes both interpretations possible.

Operational Purpose Definition

Under subparagraph B of the operational purpose definition, it is unclear whether the committee intends to exclude all sales from the definition of an operational purpose or if specific kinds of sales are to be excluded from the definition.

Exemptions for non-Internet collection of information

There appears to be conflicting notice exemption language where non-Internet collection of information is concerned. Clause (2)(a)(ii) of Section 3 requires this collection to include notice in writing, but paragraph (5) in the same section appears to exempt non-Internet collection from notice requirements. While it can be interpreted that paragraph (5) is



intended for a very specific purpose, the construction of the bill leaves this language open to other interpretations. Some clarification of this apparent contradiction would be helpful.

Thank you for considering our comments. We look forward to a continued dialog with you. If you have any questions, please feel free to contact us directly, or through Cameron Wilson, Director of Public Policy for ACM, at 202-659-9711, cameron.wilson@acm.org.

Sincerely,

Eugene H. Spafford, Ph.D., D.Sc.
Chair
U.S. Public Policy Council of the
Association for Computing Machinery

Stuart Shapiro
Chair
Security and Privacy Committee
USACM

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