

**PRIVACY RECOGNITION FOR PROCESSORS SYSTEM
PARTICIPATION OF THE UNITED STATES**

**UNITED STATE APPLICATION TO PARTICIPATE IN THE APEC PRIVACY
RECOGNITION FOR PROCESSORS SYSTEM**

**CROSS BORDER PRIVACY RULES SYSTEM JOINT OVERSIGHT PANEL
FINDINGS REPORT**

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Overview and Purpose

Paragraph 7.2 of the Charter of the APEC Cross Border Privacy Rules and Privacy Recognition for Processors System Joint Oversight Panel (herein “Charter”) identifies the core functions of the Joint Oversight Panel (JOP) and instructs the JOP to “Engage in consultations with those Economies that have indicated an intention to participate in the CBPR and/or PRP Systems and issue a report as to how the conditions set out in paragraph 2.1 and/or 3.1 respectively have been met.”

Conditions set out in paragraph 3.1 of the Charter require that the following be submitted to the Chair of the Electronic Commerce Steering Group (ECSG):

- A letter of intent to participate in the Privacy Recognition for Processors System
- Confirmation that a Privacy Enforcement Authority in that Economy is a participant in the Cross Border Privacy Enforcement Arrangement (CPEA)
- Confirmation that the Economy intends to make use of at least one APEC-recognised Accountability Agent subject to the procedures outlined in paragraph 7.2 of the Charter
- An explanation of oversight and enforcement mechanisms available to ensure the effective oversight of processors recognised under the PRP

Following is a findings report that details the consultative process undertaken with members of the United States and explains how each of the conditions set out in paragraph 3.1 of the Charter have been met.

Once finalised, this report is to be circulated to all member Economies by the APEC Secretariat and made publicly available on the APEC website as well as the CBPR System website.

Summary of Findings

In a letter dated 10 February 2017, the United States provided the Chair of the APEC Electronic Commerce Steering Group (ECSG) its Notice of Intent to Participate in the PRP System. The letter contained confirmation of the following:

1. The Federal Trade Commission, a Privacy Enforcement Authority in the United States, is a participant in the Cross Border Privacy Enforcement Arrangement (CPEA).
2. The United States intends to make use of at least one APEC recognised Accountability Agent subject to the procedures outlined in paragraph 7.2 of the Charter.

Appended to the Notice of Intent letter, were the following documents:

1. A narrative description of the relevant domestic laws and regulations that may apply to any PRP certification-related activities of an Accountability Agent operating within the United States’ jurisdiction and the enforcement authority associated with these laws and regulations (Annex A);

2. A narrative explanation of oversight and enforcement mechanisms available to ensure the effective oversight of processors recognised under the PRP System in the United States (Annex B); and
3. A completed APEC Privacy Recognition for Processors Enforcement Map (Annex C).

Having verified the completeness of the United States Notice of Intent to Participate;

Having confirmed with representatives from the United States Department of Commerce and the Federal Trade Commission on the narrative description of domestic laws and regulations applicable to US accountability agent activities, and on the completed APEC PRP Enforcement Map;

Having verified with the Administrators of the APEC Cross Border Privacy Enforcement Arrangement (CPEA) that the United States Federal Trade Commission, a Privacy Enforcement Authority in the United States, is a participant in the APEC CPEA;

The Cross Border Privacy Rules System Joint Oversight Panel is pleased to report that the conditions established in paragraph 3.1 (i) – (iii) of the Charter, establishing the requirements for recognition as a Participant in the APEC Privacy Recognition for Processors System, have been met by the United States.

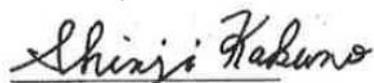
The Cross Border Privacy Rules Joint Oversight Panel invites the Chair of the APEC Electronic Commerce Steering Group to notify the United States that the conditions set out in Paragraph 3.1 of the Charter have been met, and to advise them that they are hereby considered a Participant in the PRP System.

Once the notification has been given by the Chair of the ECSG, the United States may nominate one or more Accountability Agents for APEC recognition or notify the JOP of a request by the Accountability Agent(s) for recognition under the APEC Privacy Recognition for Processors System.

Signed,



Colin Minihan
Chair, Joint oversight Panel
Attorney-General's Department, Australia



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Discussion of Findings

Letter of Intent

On 10 February, 2017, the Chair of the APEC Electronic Commerce Steering Group (ECSG) received a letter from the United States Department of Commerce, notifying of the United States' intent to participate in the APEC Cross Border Privacy Rules System.

The letter makes the following statements:

1. The Federal Trade Commission, a Privacy Enforcement Authority in the United States, is a participant in the APEC Cross Border Privacy Enforcement Arrangement (CPEA).
2. The United States intends to have at least one APEC-recognized Accountability Agent subject to the procedures outlined in paragraph 7.2 of the Charter. Appended to the letter, are the following documents:
 1. A narrative description of the relevant United States laws and regulations that may apply to any PRP certification-related activities of an Accountability Agent operating within the United States jurisdiction and the enforcement authority associated with these laws and regulations (Annex A).
 2. A narrative explanation of oversight and enforcement mechanisms available to ensure the effective oversight of processors recognised under the PRP System in the United States (Annex B); and
 3. A completed APEC Privacy Recognition for Processors Enforcement Map (Annex C).

Confirmation of CPEA Participation

In its 10 February 2017 Notice of Intent to Participate in the APEC PRP System, the United States confirmed that the Federal Trade Commission, a Privacy Enforcement Authority in the United States, is a participant in the APEC Cross Border Privacy Enforcement Arrangement (CPEA).

The JOP are able to confirm the ongoing participation of the Federal Trade Commission in the CPEA.

The FTC has been a CPEA Participant and Administrator, since the CPEA's commencement, on July 16, 2010. Further confirmation of the FTC Participation in the CPEA is found on the CPEA website: <http://www.apec.org/Groups/Committee>

Based on consultations with the FTC, as well as on confirmation by the CPEA Administrators and as noted in the CPEA website, the JOP finds that the United States meets the

corresponding requirement for Member Economy participation, as set out in paragraph 3.1 of the Charter.

Stated Intent to Make Use of APEC-Recognized Accountability Agent(s)

The United States Notice of Intent to Participate includes a confirmation that the United States expects to have at least one APEC-recognized Accountability Agent, subject to the procedures outlined in paragraph 7.2 of the Charter.

The JOP finds that this confirmation by the United States meets the corresponding requirement for Member Economy participation, as set out in paragraph 3.1 of the Charter.

Relevant Laws, Regulations and Administrative Measures which may Apply to CBPR-PRP Certification-Related Activities of an Accountability Agent Operating in the United States

Annex A of the United States Notice of Intent to Participate outlines the laws and regulations and administrative measures which may apply to the APEC PRP certification-related activities of an Accountability Agent operating within the United States. Annex A also details the enforcement authority associated with these laws, regulations and administrative measures.

There are several ways in which Accountability Agents may make representations within the APEC PRP System. For instance, by signing and submitting the Accountability Agent APEC Recognition Application, the applicant represents that the answers contained in their Application are true. By making public their Recognition Application, APEC-recognized Accountability Agents also make representations that the answers contained in the document are true.

The public representations made by applicant Accountability Agents and by APEC-recognized Accountability Agents are enforceable under Section 5 of the FTC Act, 15, U.S.C. § 45. This Act gives the FTC broad authority to take action against unfair and deceptive acts and practices.

Furthermore, any organisation that publicly displays a seal, trademark or other symbol indicating its participation in the APEC PRP System, or causes its name to appear on a list of APEC-recognized Accountability Agents, is making an enforceable representation that it complies with the APEC PRP System requirements applicable to an APEC-recognized Accountability Agent.

The representations of compliance made by an Accountability Agent that has failed to comply with the CBPR system requirements may constitute unfair or deceptive acts or practices in violation of Section 5 of the FTC Act.

Furthermore, the actions of an APEC-recognized Accountability Agent are also subject to Section 14(5) of the Lanham Act, 15 U.S.C. § 1064(5). Under this Act, the United States Patent and Trademark Office may cancel the certification mark if an Accountability Agent (a) does not control, or is not able legitimately to exercise control over, the use of such mark,

including by failing to monitor the activities of those who use the mark, (b) engages in the production or marketing of any goods or services to which the certification mark is applied, (c) permits the use of the certification mark for purposes other than to certify, or (d) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.

Oversight and Enforcement Mechanisms Applicable to PRP-Certified Processors

Annex B of the US Notice of Intent to Participate outlines a number of oversight and enforcement mechanisms that may be available in a particular economy to ensure the effective oversight of processors recognised under the PRP. It sets out the potential legal bases for the enforcement authority of the FTC over PRP certified processors. It does not address other possible enforcement mechanisms, such as enforcement under contract between the Accountability Agent and the processor, or privacy rights of action.

The FTC enforces Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive if it is likely to mislead a consumer acting reasonably under the circumstances and is likely to affect a consumer's conduct or decision regarding a product or service. An act or practice is unfair when it causes, or is likely to cause, substantial injury to consumers that (i) is not reasonably avoidable by consumers themselves; and (ii) is not outweighed by countervailing benefits to consumers or to competition.

A company that joins the APEC PRP System must publicly declare that it will comply with the PRP program requirements and must make these program requirements publicly accessible. If the company fails to comply with any of these program requirements, its public representation of compliance may constitute an unfair or deceptive act or practice subject to Section 5 enforcement.

Various practices may violate Section 5 of the FTC Act, 15 U.S.C. § 45, and subject a company to an enforcement action. Such practices include, but are not limited to:

- a. Making a public representation relating to PRP program requirements and failing to comply with the representation;
- b. displaying a seal, trustmark or other symbol on the company's website or on any other of its own publicly available documentation that indicates that it participates in the APEC PRP System and thus complies with the PRP program requirements and failing to comply; or
- c. causing the company's name to appear on a list of companies that are certified for participation in the APEC PRP System (*e.g.*, lists on the websites of participating government authorities, privacy enforcement authorities, APEC recognized Accountability Agents, or on an APEC website specifically dedicated to the operation of APEC PRP System) thereby indicating that it complies with

the PRP program requirements and failing to comply.

APEC Privacy Recognition for Processors System Requirements Enforcement Map

Annex C of the United States Notice of Intent to Participate contains the completed APEC Privacy Recognition for Processors System Requirements Enforcement Map.

This completed Enforcement Map outlines the ability of the United States to take enforcement action under applicable domestic laws and regulations that have the effect of protecting personal information consistent with the PRP System program requirements, as follows:

Public representations made by companies that have been certified under the PRP System are enforceable under Section 5 of the FTC Act, 15, U.S.C. § 45. This Act prohibits unfair or deceptive acts or practices in or affecting commerce. It gives the FTC broad authority to take action against unfair and deceptive acts and practices.

A company that joins the APEC PRP System must publicly declare that it will comply with the PRP System program requirements and must make these program requirements publicly accessible. If the company fails to comply with any of these program requirements, its public representation of compliance may constitute an unfair or deceptive act or practice subject to enforcement of Section 5 of the FTC Act.

The following practices may violate Section 5 of the FTC Act, 15, U.S.C. § 45 and subject a company to an enforcement action:

- a. Making a representation relating to any of the security safeguards and failing to comply with the representation;
- b. displaying a seal, trustmark or other symbol on the company's website or on any other of its own publicly available documentation that indicates that it participates in the APEC PRP System and thus complies with the security safeguards, and failing to comply; or
- c. causing the company's name to appear on a list of companies that are certified for participation in the APEC PRP System (eg. lists on the websites of participating government authorities, privacy enforcement authorities, APEC-recognized Accountability Agents, or an APEC website specifically dedicated to the operation of the APEC PRP System) thereby indicating that it complies with the security safeguards, and failing to comply.

Consultation Process

As instructed in the Charter and in the JOP Protocols document, the JOP engaged in consultations with relevant parties in preparation for the submission of this report to the Chair of the ECSG. These consultations aimed to obtain further details and clarifications on certain elements of the United States Notice of Intent to Participate in the PRP System, including

Annex A, Annex B, and Annex C and sought to obtain confirmation of the FTC's participation in the APEC CPEA. Consultations were undertaken with representatives of the United States Department of Commerce, Federal Trade Commission, and the administrators of the APEC CPEA. These consultations took place via email.

Suspension or Termination of Participation

Participation by the United States in the PRP System may be suspended or terminated by a consensus determination by other APEC member Economies that one or more of the following conditions have been met:

- i. Revocation, repeal or amendment of any domestic laws and/or regulations having the effect of making participation in the APEC PRP System impossible (such as repeal of a law that has the effect of protecting personal information consistent with the PRP System program requirements);
- ii. The Participant's Privacy Enforcement Authority as defined in paragraph 4.1 of the Cross-border Privacy Enforcement Arrangement ceases participation pursuant to paragraph 8.2 of the Cross-border Privacy Enforcement Arrangement; or
- iii. The oversight and enforcement mechanisms available to ensure the effective oversight of processors recognised under the PRP in that Economy cease to be available; or
- iv. Dissolution or disqualification of a previously recognized Accountability Agent where this function is provided in the APEC PRP Participant's Economy exclusively by that entity (*note: certification of those organisations only certified by that Accountability Agent will be terminated until such time as the Economy is able to again fulfil the requirement for participation in the PRP System pursuant to the process described under paragraph 1-5 of the JOP Protocols, at which time any previously-certified applicant organisations should complete a new certification process. However, existing legal obligations may remain in effect under domestic law.*)

Only APEC PRP Participating Economies may initiate a request for a consensus determination that any situation identified above has occurred.

The United States may cease participation in the APEC PRP System at any time by giving 30 days written notice (beginning from the date the notice is received) to the ESCG Chair. A PRP Participant may cease participation in the PRP System by giving three months' written notice to the ESCG Chair.

If the United States terminates participation (whether by way of withdrawal or suspension) in the PRP System, any PRP certifications performed by APEC recognised Accountability Agent in that Economy must be suspended at the same time as the cessation of the Economy's

participation in the PRP System. This requirement must be incorporated into the agreements between the Accountability Agents and any organisations they certify as CBPR-compliant. However, existing legal obligations may remain in effect under domestic law.

Re-initiation of Participation

Any APEC member Economy that has withdrawn or is suspended from participation in the CBPR System may engage in consultations with the JOP to re-initiate participation pursuant to the process described in paragraphs 1-5 of the Protocols of the JOP at any time.