

**CROSS-BORDER PRIVACY RULES SYSTEM
PARTICIPATION OF THE UNITED STATES**

CROSS BORDER PRIVACY RULES SYSTEM JOINT OVERSIGHT PANEL

FINDINGS REPORT

**Submitted to: Ms. Lourdes Yaptinchay
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OVERVIEW AND PURPOSE

Paragraph 6.2 of the Charter of the APEC Cross Border Privacy Rules Joint Oversight Panel (herein “Charter”) identifies the core functions of the Joint Oversight Panel (JOP) and instructs the JOP to “(e)ngage in consultations with those Economies that have indicated an intention to participate in the CBPR System and issue a report as to how the conditions set out in paragraph 2.2 have been met.”

Conditions set out in paragraph 2.2 of the Charter require that the following be submitted to the Chair of the Electronic Commerce Steering Group (ECSG), the Chair of the Data Privacy Subgroup (DPS) and the Chair of the JOP:

- a letter of intent to participate in the CBPR 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-recognized Accountability Agent subject to the procedures outlined in paragraph 6.2 of the Charter (*note*: the Economy need not name a specific Accountability Agent at this point, only affirm its intention to use the services of an APEC-recognised Accountability Agent once it has been identified and approved);
- with respect to Accountability Agents, a narrative description of the relevant domestic laws and regulations and administrative measures which may apply to any CBPR System certification-related activities of an Accountability Agent operating within the Economy’s jurisdiction and the enforcement authority associated with these laws and regulations and administrative measures; and
- the Completed APEC Cross-Border Privacy Rules System Program Requirements Enforcement Map and additional narrative explanation of the Economy’s ability to take enforcement actions under applicable domestic laws and regulations that have the effect of protecting personal information consistent with the CBPR System program requirements.

Following is a findings report that details the consultative process undertaken with members of the United States delegation at the ECSG and explains how each of the conditions set out in paragraph 2.2 of the Charter has been met.

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 22 May 2012, the United States provided the Chair of the APEC Electronic Commerce Steering Group (ECSG) its Notice of Intent to Participate in the CBPR 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 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 6.2 of the Charter.

Appended to the Notice of Intent letter, under Annex A and Annex B respectively, are the following documents:

1. A narrative description of the relevant domestic laws and regulations that may apply to any CBPR certification-related activities of an Accountability Agent operating within U.S. jurisdiction and the enforcement authority associated with these laws and regulations.
2. The completed APEC CBPR System Program Requirements Enforcement Map.

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

Having consulted 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 U.S. accountability agent activities, and on the completed APEC Cross-Border Privacy Rules System Program Requirements 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 2.2 (i-iii) of the Charter, establishing the requirements for recognition as a Participant in the Cross Border Privacy Rules (CBPR) 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 2.2 of the Charter have been met, and to advise them that they are hereby considered a Participant in the CBPR 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 CBPR System.

DISCUSSION OF FINDINGS

Letter of Intent

On May 22, 2012, 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 6.2 of the Charter.

Appended to the letter, under Annex A and Annex B respectively, are the following documents:

1. A narrative description of the relevant United States laws and regulations that may apply to any CBPR certification-related activities of an Accountability Agent operating within U.S. jurisdiction and the enforcement authority associated with these laws and regulations.
2. The APEC CBPR System Program Requirements Enforcement Map, completed by the United States, outlining the United States government's ability to take enforcement actions under applicable laws and regulations that have the effect of protecting personal information consistently with the CBPR System program requirements.

Confirmation of CPEA Participation

In its 22 May 2012 Notice of Intent to Participate in the APEC CBPR System, the U.S. confirms 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 has sought and obtained further confirmation of the participation of the Federal Trade Commission in the CPEA, from CPEA Administrators, namely Australia, New Zealand and the APEC Secretariat. Confirmation of participation was reiterated by representatives from the Federal Trade Commission during telephone conversations held in July 2012. It was further emphasized that 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-on-Trade-and-Investment/Electronic-Commerce-Steering-Group/Cross-border-Privacy-Enforcement-Arrangement.aspx>

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 2.2 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 6.2 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 2.2 of the Charter.

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

Annex A of the U.S. Notice of Intent to Participate outlines the laws, regulations and administrative measures which may apply to the CBPR 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.

The US provides two examples in which Accountability Agents may be subject to U.S. laws, regulations and administrative measures: as applicants for participation in the CBPR System, and as APEC-recognized Accountability Agents. 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.

There are several ways in which Accountability Agents may make representations within the CBPR 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. As well, any organization that publicly displays a seal, trustmark or other symbol indicating its participation in the CBPR 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 CBPR 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 U.S. Patent and Trademark Office may cancel the certification mark of an Accountability Agent that has authorized the use of its certification mark to convey compliance with the CBPR System program requirements, under certain circumstances. These include, but are not limited to, the following: the Accountability Agent 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, or when the Accountability Agent 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. Further circumstances are outlined in Annex A of the U.S. Notice of Intent to Participate.

APEC Cross Border Privacy Rules System Program Requirements Enforcement Map

Annex B of the U.S. Notice of Intent to Participate contains the completed APEC Cross-Border Privacy Rules System Program Requirements Enforcement Map. This completed Enforcement Map outlines the ability of the U.S. to take enforcement action under applicable domestic laws and regulations that have the effect of protecting personal information consistent with the CBPR System program requirements, as follows:

Public representations made by companies that have been certified under the CBPR 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 CBPR System must publicly declare that it will comply with the CBPR 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:

- Making a representation relating to any of the CBPR System program requirements and failing to comply with the representation;
- 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 CBPR System and thus complies with any of its program requirements, and failing to comply; or

- causing the company's name to appear on a list of companies that are certified for participation in the APEC CBPR 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 CBPR System) thereby indicating that it complies with any of the CBPR System program requirements, 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 CBPR System, including Annex A and Annex B, and sought to obtain confirmation of the FTC's participation in the APEC CPEA. Consultations were undertaken with representatives of the U.S. Department of Commerce, Federal Trade Commission, as well as with non-U.S. administrators of the APEC CPEA. These consultations took place via email and teleconference.

SUSPENSION OR WITHDRAWAL OF PARTICIPATION

Participation by the United States in the CBPR System may be suspended by a consensus determination by all APEC member Economies (excluding both the requesting Economy and the Economy in question) that one or more of the following situations has occurred:

- Revocation, repeal or amendment of any domestic laws and/or regulations having the effect of making participation in the CBPR System impossible (such as repeal of a law that has the effect of protecting personal information consistent with the CBPR System program requirements);
- The CBPR Participant's Privacy Enforcement Authority as defined in paragraph 4.1 of the CPEA ceases participation pursuant to paragraph 8.2 of the CPEA; or
- Dissolution or disqualification of a previously recognized Accountability Agent where this function is provided in the CBPR Participant's Economy exclusively by that entity (*note: certification of those organizations only certified by that Accountability Agent will be terminated until such time as the Economy is able to again fulfill the requirement for participation in the CBPR System pursuant to the process described in paragraphs 1-5, at which time any previously-certified applicant organizations should complete a new certification process. However, existing legal obligations may remain in effect under domestic law.*)

Only CBPR 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 CBPR System at any time by giving 30 days' written notice (beginning from the date the notice is received) to the ECSG Chair.

If the United States ceases participation (whether by way of withdrawal or suspension) in the CBPR System, any certifications performed by APEC-recognized Accountability Agents in that Economy must be suspended at the same time as the cessation of the Economy's participation in the CBPR System. This requirement must be incorporated into the agreements between the Accountability Agents and any organizations 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.