

**BACKGROUND PAPER ON APEC PRIVACY FRAMEWORK
PATHFINDER PROJECTS
AUGUST, 2008**

The APEC Privacy Pathfinders are a centerpiece of the August 2008 APEC Privacy Seminar. This Seminar is structured to facilitate exchange of information between stakeholders on key privacy issues and learn about effective processes for stakeholder engagement. Ideally, the seminar will foster a better understanding of the needs of stakeholders -- consumers, businesses, government and regulators -- and of current international developments in cross border privacy. The Seminar is also designed to familiarize economies and organizations with the work of the Pathfinder projects and to encourage broad engagement by facilitating active dialog and discussion among Seminar participants. The Seminar also seeks to broaden the involvement of economies in the activity of the Pathfinder projects and demonstrate the benefits of engagement in the work of the projects, especially for developing economies.

This paper is intended to provide a foundation for the work of the Seminar, particularly by familiarizing newcomers to the APEC process with the nature and goals of the APEC Privacy Pathfinder projects, the way they are carried out and the role of the Pathfinder projects as a resource for capacity building and as guidance in developing governance.

I. Introduction and Overview

Data is the digital currency that fuels the growth in many of today's economies. The goal of the APEC Privacy Framework is to facilitate responsible information flows that foster the growth of trade and e-commerce. It is designed to promote government, business and societal benefits by developing domestic markets, improving efficiencies and economic growth, and attracting foreign investment.

The APEC Privacy Framework is a practical approach to establishing accountability in the flow of data while preventing impediments to data transfer. It provides technical assistance to those APEC economies that have not addressed privacy from a regulatory or policy perspective. The Framework provides clear guidance and direction to businesses in APEC member economies on common privacy issues and proposes reasonable expectations of how information should be protected.

The Framework focuses on both domestic and international implementation of privacy standards for APEC member economies. It explores information sharing and cooperation across agencies and authorities to enable transfers of personal information across borders. The Framework also provides specific examples of privacy situations and focuses on practical and consistent information privacy protection.

The nine principles of the APEC Privacy Framework are:

- Preventing harm

- Notice
- Collection limitation
- Uses of personal information
- Choice
- Integrity of personal information
- Security safeguards
- Access and correction
- Accountability

Thirteen APEC member economies¹ have agreed to the development of this framework for flows of personal data across the region, focusing on the use of cross-border privacy rules by business.

The principles balance privacy with other relevant interests, recognizing the diversity of culture and economic development that exists within the APEC region. They are implemented through the operation of cross-border privacy rules and the oversight of accountability agents. Cross-border privacy rules, developed by companies in keeping with the APEC principles, establish the obligations to protect information. Under the APEC Framework, the obligations set out in the cross-border privacy rules travel with the data as it is transferred within the region and must be met by any entity that stores or processes that data. When the consumer believes that his or her data has been mishandled or that promises made with respect to the handling and protection of the data have not been met, the APEC approach provides for the operation of accountability agents as the consumer's first line of recourse. Accountability agents may be government bodies or independent third parties. Such a system would afford the consumer protection for his or her data, and a local system for recourse that does not entail tracking of data outside of one's home economy.

The Framework and the principles were endorsed by the APEC Ministers in 2004. Since then, work has centered on close examination of the details of the principles and mechanisms essential to the practical operation of the Framework. For example, a workshop was conducted in Mexico City in May, 2007 to come to a better understanding of the role and function of accountability agents, and in particular trustmarks, throughout the APEC region. That workshop also explored the common criteria necessary to ensure credibility of accountability agents across economies. In addition, the workshop agendas were developed to encourage participation by a broad group of economies. In particular, the work sought to include and inform economies that had not traditionally participated in the work of the Electronic Commerce Steering Group and the Data Privacy Subgroup to familiarize them with the Privacy Framework and help them understand its potential benefits and practical requirements.

¹ At the time that Ministers endorsed the Pathfinder statement, 13 economies - Australia, Canada, Chile, Hong Kong China, Japan, Republic of Korea, Mexico, New Zealand, Peru, Chinese Taipei, Thailand, United States, and Viet Nam - had indicated that they would participate in the pathfinder projects.

The Electronic Commerce Steering Group developed the Pathfinder initiative to enable APEC member economies to work together on the implementation of the APEC Privacy Framework adopted by APEC Ministers in 2004.

In 2006 Ministers endorsed the Pathfinder as a means to facilitate the goals of the APEC Privacy Framework. To further this goal, participating economies agreed to collaborate on nine projects to develop tools, resources and supporting mechanisms that further implementation. The projects also provide opportunities to test the complaint resolution processes and reviews by government suggested by the APEC Framework and Principles.

The Cross-Border Privacy Rules System

The Pathfinder is focused on facilitating the implementation and function of cross-border flows of personal information for business purposes. APEC recognizes that organizations have a strong interest in protecting the personal information of their customers, and many organizations already design their business procedures to make sure that personal information is protected. The aim of an APEC system to protect personal information is to encourage organizations to develop their own internal business rules on privacy procedures governing the movement of personal information across borders. Under the APEC Framework, businesses will develop their own cross-border privacy rules in keeping with the APEC Privacy Principles. It is these rules developed by organizations that are known as the cross-border privacy rules on which the APEC system relies.²

In addition to the Principles, APEC has identified four elements to a system for the protection of personal information that moves across borders. These four elements are:

- (a) self assessment - organizations develop rules and procedures that will protect information
- (b) compliance review - the organization's rules are checked to make sure they comply with the APEC Privacy Principles and other necessary documents.
- (c) recognition/acceptance - organizations that comply with the system must be recognized through a common process in the APEC region; and
- (d) dispute resolution and enforcement - organizations must have in place procedures for resolving complaints, including by appropriate regulators.

These business rules will apply to an organization's operations and business units throughout the APEC region. Stakeholders including government, regulators, business,

² While governments may transfer personal information across borders, and may do so for some of the same reasons as businesses (data processing, service delivery, etc.) the work of the Data Privacy Subgroup has not considered use of cross-border privacy rules by governments.

and accountability agents each have a role in the effective development and operation of the cross-border privacy rules.

Government - Governments in APEC economies create an environment for data protection international and the underlying mechanisms necessary to participate in cross border data transfers.

Regulators - Regulators create a clear understanding of the obligations within an economy and develop mechanisms to assist other privacy protection agencies in assuring the obligations that come with the data are honored in the destination economy.

Business - Businesses develop clear privacy policies that comply with the APEC Privacy Framework and comply with rules in the economies in which they collect data. They also develop cross-border privacy rules as the mechanisms to ensure that rules are enforced as data moves through the region.

Accountability Agents - Accountability agents oversee the mechanisms created by companies to ensure that the objectives of the APEC Privacy Framework are met as data is transferred within companies.

The Pathfinder

The APEC Data Privacy Pathfinder is a set of collaborative projects undertaken by APEC economies to develop and test the practical, essential elements of a system that would enable accountable cross-border data flows under the guidance of the APEC principles. The approach of the Pathfinder takes into account the differing levels of economic development and implementation of privacy protections within APEC economies.

The Pathfinder sets out a series of objectives to be achieved in this process. The Data Privacy Pathfinder Work Plan expands upon these objectives. If the projects are assessed as successful, they will lead to the establishment of a system for use of the APEC cross-border data rules.

The objectives of the APEC Data Privacy Pathfinders are to:

1. Promote a conceptual framework of principles establishing how cross-border rules should work across economies in consultation with the various parties that may be actors in the implementation and enforcement of the rules.
2. Promote consultative processes that include stakeholders -- including regulators, responsible agencies, lawmaking bodies, industry, third party privacy solutions providers and consumer representatives -- both in the creation of the rules and processes and in their operational review and optimization.

3. Promote the development of the practical documents and procedures to support cross-border privacy rules, such as self-assessment forms, review criteria, recognition/acceptance procedures and dispute resolution mechanisms.
4. Explore ways in which various documents and procedures may be practically implemented in a manner that is flexible, credible, enforceable, predictable and less bureaucratic. The work of the pathfinder in this regard must take into consideration the parties involved and the legal regimes in which they operate.
5. Promote the education and outreach necessary to allow stakeholders and potential participants to consider how to enable accountable data flows across the participating economies.

II. The Nine Pathfinder Projects

The Pathfinder projects are intended to enable APEC economies to better understand how to apply the APEC Privacy Framework to achieve responsible and accountable cross-border information flows and effective privacy protections without creating unnecessary barriers to trade. They are designed to encourage participation by a wide range of economies that may be at various stages of development. Such participation is necessary if the Pathfinder projects are to further the goal of capacity building across both developed and emerging economies. Information related to participation in the Pathfinder and in opportunities to engage in the projects is made available to non-participating economies through appropriate workshops and white papers.

The Pathfinder Process and Outreach

Each project or group of projects has a project leader or coordinator who organizes discussions and meetings (primarily teleconferences) on the project or group of projects. The project coordinator also develops a project outline using the project management template. Project participants are encouraged to use the project management template to provide an overview of the project, including the participants, its particular components, consultation strategies, and links to other work, including resources being developed elsewhere, for example, by the Organization for Economic Cooperation and Development (OECD). To assure wide accessibility of the information, it is stored on the secure section of the APEC website to facilitate access by all members of the Sub-Group.

This outreach is expected to increase at a later stage in the Pathfinder implementation. At that point, it is anticipated that an outreach strategy will be developed that might include appropriate workshops and development guides for the use of all economies, particularly those who have not actively engaged in the early development of the project but expect to implement a cross border privacy rules system at a later date.

At the meeting held June 2007 in Cairns, it was decided that APEC guest membership would be extended to the OECD Secretariat so that it can participate in meetings of the Sub-Group. The Secretariat officer responsible for the Working Party on Information Security and Privacy has actively participated in meetings to share information between the organizations.

Addition of New Pathfinder Projects

The work program for the Data Privacy Pathfinder includes a number of projects grouped across the categories of self assessment, compliance review, recognition/acceptance and dispute resolution and enforcement.³

As the Pathfinder progresses, projects may be modified or added to the work program to ensure that the initiative is meeting the needs of APEC member economies and stakeholders, as well as the objectives of the Pathfinder.

Engagement in the Pathfinder Process

The Pathfinder projects anticipate extensive participation by a wide range of stakeholders. While business has taken the lead role throughout the development of the Framework, the Pathfinder will involve heightened participation by regulators, civil society, governments and subject matter experts. Engagement will be fostered through workshops and development guides. This multi-stakeholder character of the process will ensure that outreach is broad and that the results of this process address the concerns of the range of stakeholders throughout the APEC region.

Timetable

It is the goal of the Pathfinder process is to have developed and tested the elements of a cross border privacy rules system will be developed and tested by the end of 2008. Key projects have been completed and testing will begin following the August 2008 meeting in Lima. Additional work is needed to examine the governance structures for the cross-border privacy rules system and the relationship of the cross border privacy rules system and domestic privacy laws. While significant progress is underway, roll out of an entire system is not anticipated in 2009.

A Review of the Projects

Project 1: Self-assessment guidelines for business.
Led by the International Chamber of Commerce

This project will develop a standard self-assessment guidance document for use by organizations participating in the APEC system of cross border privacy rules. This

³ The four categories reflect the four elements of a cross-border privacy rules system identified by the Electronic Commerce Steering Group Data Privacy Subgroup.

guidance document will enable companies to conduct an internal inventory of their data practices that will assist them in implementing cross-border privacy rules.

The leader of this project is the International Chamber of Commerce. Australia, Canada, and the United States are participants, as well as Hong Kong China, Japan, Mexico, Thailand and Vietnam (in observer roles).

Project 2: Trustmark (accountability agent) guidelines.

Led by the United States

This project will develop the recognition criteria that private sector accountability agents must meet in order to participate in the APEC cross-border rules program. The project will develop guidelines to ensure the accountability agent's independence and ability to render a fair decision based on the facts presented, a process for compliance review, dispute resolution procedures, and ability to enforce program requirements. [Note: The recognition criteria being developed in this project are in addition to those specific programmatic requirements for accountability agents created in Project 3 (see below).]

Australia, Canada, the ICC, Hong Kong China, Japan, Mexico are participants, as are Thailand, Vietnam, Chinese Taipei (in an observer roles).

Project 3. Compliance review process of cross-border privacy rules

Led by the International Chamber of Commerce

This project will develop guidelines for accountability agents to use when assessing an organization's compliance with the APEC Privacy Principles as attested to in the Self-Assessment Questionnaire (Project 1). This process will assist accountability agents in implementing the APEC privacy framework by creating a process through which a company's cross-border privacy rules can be reviewed.

Participants include Australia, Canada, the ICC, Hong Kong China, Japan, Mexico are participants, as are Thailand, Vietnam, (in observer roles).

Project 4. Directories of compliant organizations - to be developed

Project 5. Data Protection Authority and Privacy Contact Officer Directory

Led by Australia

This project will establish and maintain a directory of relevant data protection authorities, supervisory authorities and/or privacy contact officers in APEC economies. The purpose of this directory will be to assist data protection authorities and privacy contact officers in locating appropriate counterparts in the event of the need to handle a cross-border privacy complaint. The project has looked at similar projects undertaken by the OECD and the International Conference of Data Protection and Privacy Commissioners as examples of how this directory might be developed.

Participants in this project include Canada, Hong Kong China, the ICC, the United States, Peru and Vietnam.

Project 6. APEC Cooperation Arrangement for Cross-border Privacy Enforcement.

This project will develop a cooperative arrangements between relevant enforcement authorities that will facilitate exchange of information and increase and promote cross-border cooperation in investigation and enforcement. This project anticipates a multilateral privacy cooperation framework. This framework is intended to facilitate voluntary cross border cooperation in appropriate cases between APEC privacy enforcement authorities responsible for enforcing the cross-border privacy rules.

Participants include Canada, Hong Kong China, the ICC, the United States, Vietnam, New Zealand and Peru

Project 7. Template Request for Assistance Form
Led by Australia

This project will develop a template form for use by relevant data protection authorities in determining the appropriate course of action in providing investigative assistance as outlined in Project 6. This template will ensure basic categories of information are provided to data protection authorities to assist them in determining the most appropriate course of action, including referral for resolution at a lower level of the cross-border privacy rules responsive regulation pyramid.

Participants include Canada, Hong Kong China, the ICC, the United States, New Zealand and Vietnam.

Project 8. Guidelines and procedures for responsive regulation in cross-border privacy rules systems - to be developed

This project will develop guidelines and procedures to assist in determining at which stage of the cross-border privacy rules responsive regulation pyramid a cross-border complaint should be handled and identify the triggers for escalating a complaint to a higher level of the pyramid. Australia, Canada, the ICC and the United States are participants, as are Hong Kong China and Vietnam as observers.

Project 9. Pilot program to test and implement the results of the projects leading to the testing of a complete system.
Led by the United States

Project 9 will develop and implement a pilot project between interested economies for the implementation and testing of a cross-border privacy rules system in the APEC region. This project will test the outputs of the capacity-building projects 1-8. Project 9 will complement the work of the other projects.

Canada, Hong Kong China, the ICC, Mexico, and Vietnam are participants in this project; Chinese Taipei and Australia participate as observers.

III. Role of the Pathfinder Projects in Capacity Building

Participation in the work of the pathfinders may be of particular benefit to participants from emerging economies that wish to build and demonstrate an environment conducive to safe data transfer and processing, that provides protections for consumers in the processing and storing of data, and that makes available effective recourse when data is mishandled, lost, or not treated in accordance with the obligations in law and policy that come with the data.

By participating in building the tools set out in the Pathfinder objectives, emerging economies will begin to understand the elements necessary for an infrastructure that supports the successful operation of the Framework principles. Working through the pathfinder projects will provide opportunities for emerging economies to consider a wide range of questions related to implementation of the APEC framework including, for example:

- What processes and procedures must be in place to work with accountability agents?
- What is required to establish the necessary government function to assure consumers have a responsible, responsive place where complaints can be heard and resolved?
- How do governments establish and maintain relationships and protocols for working with foreign governments to resolve consumer disputes?
- What will government need to do to establish guidelines and procedures for handling cross-border complaints?
- What kind of self-assessments will companies and organizations in my economy need to conduct? What requirements will they need to fulfill?
- What will be required of accountability agents to assure their independence and credibility? What benefits will self-assessments offer participating companies?

To optimize the benefits made possible by implementation of the APEC process, the elements of the framework must be widely adopted and adhered to throughout member economies. The wider its adoption and the more extensive its reach, the greater the APEC region's capacity and potential as a destination for data processing. Without significant, robust adoption of the APEC principles in a manner that earns the trust of companies, consumers and governments, trans-border data flows in the region will encounter roadblocks and the promise and benefits of APEC privacy framework will be compromised.

By participating in these exercises, emerging economies will get an in-depth, detailed look at the elements of APEC implementation that must be put in place, focused training and information on how that can be accomplished in emerging economies. Businesses in

those economies will understand how APEC implementation will help them avoid the impediments created by new regulations and how information collected and transferred avoids accruing new obligations as it moves through the region for processing. Rather, the cross-border rules create for business a structure and process and pre-empt fear of data misuse or loss by demonstrating that it is under control, obligations related to it are honored, and disputes about its handling are settled effectively. Working on the projects with other similarly situated economies on the Pathfinder projects will demonstrate these benefits in practical terms, and make available tools and resources for initiating work toward implementation. Finally, participation by economies will provide opportunities for collaboration, sharing of information and testing of ideas.

IV. Pathfinder Projects as a Guide to Establishing Privacy Governance for Companies

The APEC Privacy Framework recognizes that economies in the APEC region are at different stages of economic development and development of legal regimes related to data protection and security. Some APEC economies have sophisticated data protection regimes already in place, while others may have yet to establish governance for information protection either in law or through self regulation or other non-governmental systems.

In some instances, companies that are the recipients of data for processing may be located in economies with no data protection regime. The APEC principles provide all economies, no matter what the status of the development of their legal protections, with a common approach to governing data transfers.

Companies in economies with minimal or no data protection regime will need to demonstrate their understanding of the principles in the APEC framework and their ability to meet the obligations those principles impose on processors of data. For example, a company may receive data that has obligations related to choices consumers have made about its use for certain purposes. Such a company will be required to attest that it understands how the concept of choice works under the APEC framework, and is sufficiently knowledgeable and technically equipped to meet the choice obligations that come with the received data.

Participation in the Pathfinder projects will provide emerging economies with insight and in-depth information about how cross-border privacy rules work, and what companies will need to understand and be qualified to do in order to meet the requirements of data transferred under APEC cross-border privacy rules.