

June 25, 2010

Office of Policy Analysis and Development
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 2023

Dear Colleagues:

I'm writing in response to the Notice of Inquiry re Information Privacy and Innovation in the Internet Economy. In particular, I'm writing to recommend that the Department of Commerce consider advocating for stricter laws governing the use of personal information combined with the provision of a Safe Harbor program. This is a regulatory strategy under which a federal statute explicitly recognizes differences in industry performance by treating safe harbor participants more favorably than non-participants. This approach builds upon the safe harbor program outlined in COPPA. Although COPPA's safe harbor program was well intended, it suffers from a low rate of adoption due to a lack of regulatory flexibility and failure to sufficiently differentiate statutory compliance from program participation.

Properly implemented, a robust safe harbor program could afford the ideal environment to foster innovations in privacy protection while allowing as much flexibility as possible for industry innovation. Critical to the success of a new Safe Harbor program would be differential treatment between firms that chose to participate and those that do not. The DOC should promote what is sometimes referred to as a "co-regulatory" approach, with the right balance of carrots and sticks to incentivize businesses to participate while providing them the space and means to influence the regulatory process. Safe harbor benefits would be limited to firms demonstrating superior performance and would not be available to other covered entities that merely meet the default statutory requirements. This co-regulatory approach is more fully described in my article, "Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes" which is available online at <http://ssrn.com/abstract=1510275>.

Thank you.

Sincerely,

Ira Rubinstein

Senior Fellow, Information Law Institute, NYU School of Law