Association for Competitive Technology

January 16, 2001

Ms. Sheila A. Ramming
National Association of Attorneys General
Project Assistant for Science and Technology
Health Care Fraud and Finance
750 First Street, N.E., Suite 1100
Washington, D.C. 20002

Re: Draft NAAG Privacy Principles and Background 12/11/01

Dear Ms. Ramming:

The Association for Competitive Technology (ACT) submits the following comments in response to the Draft National Association of Attorneys General (NAAG) Privacy Principle and Background.

ACT is a national education and advocacy group for America's technology industry. Representing mostly small and mid-sized companies, ACT is the industry's strongest voice when it comes to preserving competition and innovation in the high-tech sector. ACT member companies include software developers, content providers, and IT consulting firms that care deeply about protecting privacy.

In terms of online privacy, ACT's positions are as follows:

- The IT industry recognizes that protecting personally identifiable information is important to its customers.

- Increased consumer education creates opportunities for IT firms to capitalize on "the business" of privacy and create new technologies and services directly targeted to securing a more private Internet experience

- Laws and regulations would not be able to contemplate the many activates businesses are actively pursuing to gain consumer trust. Moreover, any regulatory scheme would not be able to respond to rapidly changing consumer demands the same way that businesses can.

In the event that legislation is drafted to protect personally identifiable information, ACT believes it should be designed to foster innovation and empower consumer choice. This would mean that the legislation would recognize that *market* forces dictate that technology firms implement protection of personally identifiable information. Any privacy law or regulation must include notice and choice provisions that of minimum burden. Moreover, legislation must not create a scheme that would decrease the effects of consumers' choice by allowing for a myriad of confusing state privacy laws. Finally, ACT does not support legislation that would hinder innovation by proscribing rules for particular privacy enhancing measures or providing for private right of actions in addition to Federal enforcement.

In reviewing the NAGG draft proposals, we particularly troubled with the notion that comprehensive privacy legislation is necessary. We are also concerned with the exclusion of a safe harbor for companies that voluntarily implement privacy programs.

Comprehensive privacy legislation is unnecessary

The IT industry is acutely aware of the necessity to protect the privacy of its customers and clients. Indeed, a significant number of companies have taken the initiative to create programs that incorporate features like notice and choice. These steps were taken in direct response to consumer demand. The bottom line is that web surfers have reduced switching costs to zero. If someone does not feel comfortable at a site, they can leave by simply entering a new URL. This has gotten the attention of the industry and forced them to act.

In addition to what IT companies are doing, there are several methods available to *consumers* to protect their personally identifiable information. Examples include reliable and tested privacy seal programs, surf sites that have posted privacy policies that agree with their needs, use secure browsers that identify safe sites and use software that allows them to manage the delivery and protection of their personal information.

Privacy policies are becoming standardized (see e.g., P3P), marketing institutions are supporting ethical standards, policy guidelines and public pledges of privacy.
To protect children against the fringe few on-line websites that might abuse the marketplace, the FTC has the full force of law to bring abusers to judgment; effective (April 2000), the United States Federal Trade Commission has the right to bring enforcement actions and impose civil penalties for violations of privacy law. This on-line protection is more protection than children have in the off-line world such as when children go to events, clubs or teams and fill-out so-called "membership" cards or sign-up sheets.

Due to the speed in which consumer demand changes, privacy legislation would be obsolete as soon as it was signed into law. On the other hand technology is capable of responding to the market in nearly "real time." Therefore, companies utilizing privacy technology will be better suited to be flexible and accurately meet consumer demand.

The NAAG Privacy Principles and Background do not offer protection for companies that have steps to protect privacy

Privacy violators deserve to be punished. Indeed, there are laws on the books that attach liability for deceptive trade practices. As stated above, many Internet companies (some of which are the most visited sites) have gone to great lengths to protect the privacy of their visitors and thereby exposed themselves to liability if they fail to live up to their promises.

The NAAG Privacy Principles and Background fail to acknowledge this effort. In fact, the enforcement principles discussed in Section 5 suggest that there should be rights of redress, despite the efforts of the companies. Moreover, the NAAG enforcement principles appear to dismiss the FTC's self regulation proposal, after citing it as a basis for including enforcement as a "core principle." ACT suggests that companies that have demonstrated the commitment to protecting privacy be rewarded with a "safe harbor" protection from liability.

"Comprehensive" privacy legislation could give consumers false security

If legislation is enacted with the notion that it will be primary element that will protect privacy, consumers could be lulled into a false sense that they will be protected. Privacy legislation laden with notice, choice, and enforcement (and layered with a myriad of state laws) will result in a decrease demand for consumer education on how to protect privacy. The result will be disastrous. The emphasis for protecting privacy must remain on increasing the need for educating consumers of the steps they must take to protect their personal identifiable information.

Privacy Legislation will stifle experimental business models, shortchanging the Internet

A number of IT companies, particularly Internet Service Providers (ISPs) have built business models around "trading" free products or services for a user's personal information. The ISP model is just the tip of the technological iceberg, as is evidenced by sites such as the New York Times site which trades news for user information.

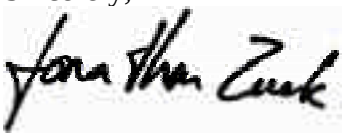
The proposed privacy principles do not contemplate this relationship. Indeed, it raises questions such as: If a user agrees to give information in return for free services and then demands to opt in, does the provider still have to deliver the product or service? Constraining this relationship risks jeopardizing the true power of the Internet and will lessen its value to consumers.

Conclusion

ACT applauds NAAG for taking the time to address privacy. ACT's members take the protection of privacy very seriously. However, we recommend that NAAG review the efforts of the IT community and the plethora of consumer empowerment tools already available in the marketplace before advocating privacy legislation.

We appreciate the opportunity to participate and thank you for you consideration of our comments on this important issue. If you have any questions about the matters raised above, please feel free to contact me at (202) 331-2130

Sincerely,



Jonathan Zuck
President