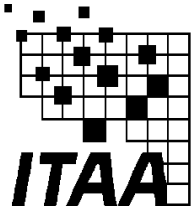

January 10, 2001

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:

Thank you for your invitation to comment on NAAG's Draft Privacy Principles. We appreciate the opportunity for input on this important issue.

As the leading association of the Internet industry, the Information Technology Association of America (ITAA) represents 450 direct and 26,000 affiliate members throughout the U.S. who produce products and services that unleash the extraordinary promise of the networked economy. We are firmly convinced that the continued growth of the "information economy" depends on providing consumers with tools to exercise their individual privacy rights and preferences, and we have invested substantial time and energy over the past three years to accomplish that goal.

We believe that privacy proposals under consideration should be measured against the yardstick of the following four general tests:

- Technology Neutrality - Rules for privacy should not change depending upon the medium used to collect information.

- Empower consumers - To the maximum extent possible, consumers should be empowered to make their own privacy choices. Individual privacy preferences vary greatly; so government regulation would be hard pressed to address the many variations of individual preference.

- Uniformity - In a networked economy, the exchange of information is an essential component to commerce. The interests of the Constitution's Commerce clause are served by having uniform national privacy rules.

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- Proportionate Penalties - Penalties must be proportionate to actual consequences. Proposals for private rights of actions and minimum penalties raise the specter of trial lawyers using lawsuits to target Internet companies for even innocent mistakes.

ITAA is concerned that by encouraging precipitous and unnecessary regulatory steps intended to enhance privacy, the NAAG Principles may actually give consumers fewer choices and, as technology changes, less privacy. By clinging to technologically obsolete formulas, rather than incorporating the beneficial attributes of Internet communications, NAAG's draft principles could undermine rather than advance the consumer interest.

1. The NAAG Privacy Principles Relies on a Technologically Obsolete Standard

To the maximum extent possible, consumers should be empowered to make their own privacy choices using the advantages of online technology. Individual privacy preferences vary greatly, and government regulation would be hard pressed to address the numerous variations of individual preference.

The "Clear and Conspicuous" notice standard embraced by the draft principles is a text based, technologically inappropriate standard for the online world. As a standard for measuring font sizes in print advertisement, it belongs in a world where the publisher, not the consumer, determines how information will be displayed. This text based "privacy prospectus" approach to notice ignores the potential to convey far more effectively information to online consumers through Internet tools.

A standard offering more meaningful protections for consumers would incorporate the Platform for Privacy Preferences (P3P) protocol being developed by the World Wide Web Consortium. The P3P will give users greater control over their personal information and enhance trust between Web services and individual users:

- P3P will allow web sites to inform users of site privacy practices and automate, when appropriate, consumer decision-making based on these practices.

- P3P will allow consumers to express their privacy preferences, communicate those preferences to web sites in a machine readable format, allow users to locate privacy policies easily, and enable web sites to inform users about their privacy policies before consumers release personal information.

- Finally, P3P will allow consumers to make decisions based on a web site's privacy practices, without having to read the privacy policies at every site they visit.

The debate over online "opt-in" and "opt-out" will similarly be mooted in time by technology as consumers set their browser's preferences to alert them when any exchange of personally identifiable information does not comply with their own preferences. Rather than expecting consumers to wade through the legalese of a website "privacy prospectus," consumers will be better served by having the opportunity to direct their browser to have an automated dialog with each website they visit.

2. The NAAG Privacy Principles Threaten the Internet with a Cacophony of conflicting State Laws

In a networked economy the exchange of information is an essential component to commerce. The interests of the Constitution's Commerce clause are served by having uniform national privacy rules. An Internet economy will not prosper with numerous different, potentially conflicting privacy rules. Federal law should pre-empt state and local privacy laws that would interfere with interstate commerce.

Under the NAAG principles there is a real risk that Internet commerce would be stymied by conflicting standards. For example, security and access principles are often at odds with other. One state could mandate security requirements that would conflict with another state's requirements for consumer access to information. Primary enforcement responsibility should continue only with the Federal Trade Commission, not with scores of potentially conflicting local enforcement bodies.

3. The NAAG Principles' Penalties must be proportionate to the actual consequences

The draft principles fail to clearly state that awards for damages will not be in excess of actual damages, or the benefit derived by the violator. Already Internet companies have been targeted by lawsuits with absurd theories:

- A trial lawyer in Texas sued Yahoo for $50 billion under the state's "anti-stalking" law for using cookies.
- A major law firm specializing in class actions sued two Internet companies in December because they "violated" the Federal Electronic Communications Privacy Act and the Computer Fraud and Abuse Act by placing cookies on the hard drives of consumers' computers.

Several bills on Capitol Hill to regulate online privacy would let trial lawyers target Internet companies with questionable lawsuits for even innocent mistakes of privacy policies. These bills include “private rights of action” - a green light to trial lawyers to bombard the Internet industry with still more class action suits. Some would impose arbitrary statutory damages that have no apparent relationship to either the potential harm caused, or benefit derived from privacy violations.

Privacy violators certainly deserve to be punished – and existing law provides for punishment of deceptive trade practices. The ninety plus percent of the most visited websites that have posted privacy policies have, of course, already voluntarily exposed themselves to liability if they fail to live up to their promises. These Internet companies have responded in “Internet time” to market place pressures to provide consumers information on privacy.

As an alternative course, I hope that NAAG will support the development of consumer empowerment tools that let individual Americans, not government bureaucrats, define and implement online privacy preferences.

Thank you for your careful consideration of these important issues. If you have any questions about the matters raised above, please feel free to contact me (703/284-5340; hmiller@itaa.org), or Mark Uncapher (703/284-5344; muncapher@itaa.org) of my staff.

Sincerely,

Harris N. Miller
President
ITAA