

COMMENTS OF THE FUTURE OF PRIVACY FORUM

INTRODUCTION

The Future of Privacy Forum (“FPF”) respectfully submits these comments regarding the North American Energy Standards Board’s (“NAESB’s”) Model Business Practices for Third Party Access to Smart Meter-Based Information (“Model Business Practices”).¹ FPF applauds the NAESB Retail Electric Quadrant (“REQ”) Data Privacy Task Force for its focus on smart grid privacy concerns and appreciates the opportunity to provide this input.

We hope that our experience with consumer privacy issues generally, and smart grid privacy in particular, is useful for the NAESB. Specifically, we provide comments herein on the notice and choice provisions of the Model Business Practices, which, in light of more modern notice and choice mechanisms, appear as if they may be overly-restrictive, favoring static notice mechanisms that have been proven to be ineffective in informing consumers and empowering their choices. In addition, the Model Business Practices are silent on the fundamental issue of whether Distribution Companies will operate under principles of non-discrimination so that consumers can easily access their information via their home networks, via home energy managers they install, or via new and innovative services that may prove to be essential to consumer engagement with the smart grid. Accordingly, we recommend the Model Business

¹ The Future of Privacy Forum (“FPF”) is a think tank that promotes improvements in data privacy. It is led by privacy leaders Jules Polonetsky and Christopher Wolf. Its Advisory Board is comprised of Chief Privacy Officers, privacy scholars, and consumer advocates.

FPF is recognized as a thought leader and expert resource on smart grid privacy issues in particular. FPF convened the first smart grid privacy conference last year in Washington, DC. With the Privacy Commissioner of Ontario, it published a White Paper entitled “Smart Privacy for the Smart Grid: Embedding Privacy into the Design of Electricity Conservation.” FPF also operates a smart grid privacy resource center at www.smartgridprivacy.org.

The views expressed herein are not necessarily those of the supporters and Advisory Board of FPF.

Practices affirm Distribution Companies' commitment to provide Third Parties offering new and innovative smart grid technologies with the ability to offer their services to consumers.

FPF URGES THE ADOPTION OF A MORE FLEXIBLE NOTICE AND CHOICE PRIVACY FRAMEWORK THAN THE MODEL BUSINESS PRACTICES PROPOSE

The smart grid offers the promise of technology that will enable consumers to have greater access to useful data about energy consumption, permitting increased energy efficiency and environmental benefits. It also may facilitate more efficient consumer usage of Home Area Networks that encompass a wide array of household utility and entertainment options. Because of the innovations the smart grid may afford, Distribution companies and third-party companies must have flexibility, subject to transparent practices and consumer control, to put newly available data streams to innovative and beneficial uses.

FPF agrees with the fundamental formulation in the Model Business Practices that both Distribution Companies and Third Parties “provide a conspicuous and clear notice” to consumers. REQ. 22.3.2.1.1 and 22.3.2.2.1. FPF also agrees that consumer “authorization” should consist of “informed consent.” REQ. 22.2.xt (containing the definition of “authorization”). However, the detailed aspects of the Model Business Practices appear to rely too heavily on outdated notions of notice and choice.

We suggest modifications to the notice and choice proposals that, based on our experience, will make them more useful and will not stymie innovation. Regarding notice, the Model Business Practices specify that notice should be provided “before Smart Meter-Based Information is received, used, retained, or shared with other parties” and should identify the

information “received, used, retained, or shared.” REQ. 22.3.2.2.1. We support the language in the Model Business Practices as it does not expressly mandate a specific form of notice.

However, what is lacking is an indication that the Model Business Practices welcome innovative notice practices, including just in-time notices, such as the use of self-regulatory seals and symbols that convey useful information to consumers.² We suggest the Model Business Practices adopt such an approach, even if just in accompanying commentary providing examples of how notice could be given.

Otherwise, some may interpret the provision as reflective of historical, often criticized notice practices, that involve static, boilerplate statements relegated to websites or billing statements. Those approaches are sometimes criticized as not providing meaningful notice. Consumers sometimes do not read website privacy policies or annual mailings.³ Businesses

² For example, a group of media and marketing associations – including the Better Business Bureau (BBB), the Direct Marketing Association (DMA), and the Interactive Advertising Bureau (IAB) – recently introduced the “Advertising Option Icon.” The icon appears on online advertisements and allows a consumer to find out about online behavioral advertising, learn about the data practices associated with advertisements he receives, and opt out of receiving certain targeted advertisements. *See* <http://www.aboutads.info/participants/icon/>. Another example of just in-time notice is used by Microsoft and many other software developers to help receive information from consumers after software crashes. When a computer program crashes and restarts, the software company often sends the user a message asking if the user would like to share a report regarding the crash with the software company in order to help the software company improve its products.

³ *See, e.g.,* FEDERAL TRADE COMMISSION, PRELIMINARY FTC STAFF REPORT, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS 19-20 (Dec. 2010), *available at* <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf> (“[C]onsumers face a substantial burden in reading and understanding privacy policies and exercising the limited choices offered to them.”); FELICIA WILLIAMS, INTERNET PRIVACY POLICIES: A COMPOSITE INDEX FOR MEASURING COMPLIANCE TO THE FAIR INFORMATION PRINCIPLES 17-18 (2006), *available at* <http://www.ftc.gov/os/comments/behavioraladvertising/071010feliciawilliams.pdf> (examining privacy policies of Fortune 500 companies and finding that only one percent of the privacy policies were understandable for those with a high school education or less and thirty percent required a post-graduate education to be fully understood); Aleecia McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, I/S: J. L. AND POL. FOR THE INFO. SOC’Y, (2008), *available at* <http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf> (finding that the national opportunity cost for just the time to read privacy policies is approximately \$781 billion).

should be able to adapt notices to the specific service at issue and consumers' education levels, interest in the subject, and time demands. Accordingly, companies collecting the data must be guided by principles that allow them flexibility to empower the entire range of consumers with respect to the protection of personal data. The concept of notice in the Model Business Practices should be clarified so that it is not viewed as too rigid and rooted in historical and ineffective practices to protect consumers or to enable valuable uses of data to benefit consumers.

On the principle of "choice," we believe the list of examples in REQ.22.3.3.1.2 of how a Retail Customer's consent can be captured is not reflective of the broad array of options that a Distribution Company would have at its disposal to document a customer's consent. We believe that the examples listed parenthetically, including "writing, time stamped audio recording, [and] electronic signature" could, in some circumstances, serve to create unnecessary consumer burdens. Clear and meaningful consumer choice mechanisms are important, but for some innovative uses of data, it may also be important for mechanisms to be flexible and easy for consumers to exercise. Accordingly, we suggest eliminating this list or clarifying that it is not exhaustive. We recommend against foreclosing other viable, but less complicated, documentation methods that may be appropriate in some cases.

Similarly, the Model Business Practices only have a consent carve out for Distribution Companies engaged in "commonly accepted practices." Service Providers who have obtained consumer consent to perform a service for the consumer should have a similar "commonly accepted practices" carve-out. For example, a Service Provider acting with consent to perform a service should not need to obtain further consent to share information with one of its vendors

who helps perform a billing function. Service Providers should also have some flexibility provided the collection and use of the Smart Meter-Based Information is consistent with notice and choice principles and consumer expectations.

We support the definition of “authorization” found in REQ.22.2.xt, as we believe that the concept of informed consent is vital to any clear and meaningful consumer consent. However, throughout the Model Business Practices, the use of the word “authorization” is frequently modified to require, for example, “express authorization” (REQ. 22.3.3.2.2) or “explicit authorization” (REQ. 22.3.7.1.1). We believe that the concept of authorization should be consistent throughout the document and that the concept of informed consent as discussed in the definition of “authorization” provides an appropriate framework to provide consumers with clear and meaningful choices about the use of their data while giving Distribution Companies and Third Parties the flexibility to implement appropriate and innovative choice mechanisms.

Furthermore, the Model Business Practices otherwise might require more than just “informed consent.” Specifically, such “informed consent” must also be consistent with “Governing Documents” and the “Applicable Regulatory Authority.” Obviously, FPF agrees that governing statutes and regulations be followed. But, “Governing Documents” also includes “tariffs, contractual agreements, Distribution Company Operational Manuals and other relevant models and operational procedures.” RXQ.0.2.xx. It is important to ensure that these do not impose stale and rigid paradigms of consent on service providers.

Accordingly, the entire process of notice and opt-in consent as outlined in the Model Business Practices could potentially be cumbersome and burdensome to consumers, and it may not provide flexibility for businesses to obtain prompt and timely consent for new and innovative

services. A workable consent mechanism should be made available to consumers in the setting in which they are likely to be making privacy decisions, and this mechanism should fit the circumstances of the transaction. Especially with the advent of new communication technologies, the idea that notice and choice should be limited to a statement and an affirmative agreement to disclose information is antiquated.

Distribution Companies and third-party companies should be able to develop user interfaces, dashboards, and Internet widgets that allow for consumer interaction and in-time notice about how data is used. A company might develop a dashboard that can display energy usage for a consumer and give the consumer the ability to see and decide within the application exactly what data the consumer is willing to share, with whom the consumer is willing to share this data, and for what specific purposes the consumer is willing to share the data.⁴ The current Model Business Practices do not necessarily include sufficient flexibility to allow for this sort of creative approach to notice and consent.

In sum, we believe the proposed notice and choice framework has the potential to prevent consumers both from understanding how their data is collected and used and realizing the potential benefits of the smart grid by making information sharing with third-party companies unduly burdensome. We urge the NAESB to encourage Distribution Companies and Third Parties meaningfully to engage users and receive permission for information sharing. Notice should not be a static document or website consumers ignore, and choice should not only involve

⁴ See, for example, the Google “dashboard” that offers consumers a view into the data associated with their accounts. It is designed to offer transparency and control by summarizing the data associated with each product used when a user signs in, and it provides links to control personal settings, available at <https://www.google.com/accounts/ServiceLogin?service=datasummary&continue=https://www.google.com/dashboard/&followup=https://www.google.com/dashboard>.

a consumer expressly authorizing a disclosure consistent with unknown and potentially rigid “Governing Documents” (i.e., particularly those not reflecting statutory regimes and regulatory requirements). Instead, any guidance should more clearly provide flexibility for companies to tailor creative notice to consumers at appropriate times and for consumers to exercise choices based on the circumstances and requirements of a specific information practice.

**FPF URGES THAT THE MODEL BUSINESS PRACTICES
EMBRACE INNOVATIVE USES OF SMART GRID DATA**

FPF believes that new and innovative features coming with the development of the smart grid will be critical to engaging consumers and helping to manage energy use. This innovation will come not only from Distribution Companies, but also from third-party companies who will use newly available data to manage consumer energy use and provide additional value-added services to consumers. The Model Business Practices acknowledge in the Summary that “[b]y enabling access to Smart Meter-Based Information, innovative consumer products will be developed which will give Retail Customers more insight and control over their energy usage.” FPF believes other innovative uses will also be developed for smart grid data.

The key for innovation to flourish are new products and services that add value to consumers’ lives. Distribution Companies and third-party companies must be able to meaningfully engage consumers to demonstrate to them the value of new services and to secure their fully informed permission for the use of their data. To achieve these goals, these companies must be able to develop and test new and better ways of communicating with consumers to successfully help them understand the choices available to them. Consumer engagement with

the smart grid must be a priority, allowing consumers to easily access their smart grid data and approve the use of their data for new and innovative services.

CONCLUSION

The Future of Privacy Forum commends the NAESB for taking the initiative to tackle the difficult privacy issues associated with transitioning to a smart grid. One of the major privacy issues across every industry today is how to provide consumers with notice of how their data is being collected and used and then how to allow consumers to exercise meaningful choices about this collection and use. In many industries, notice/consent models are stuck in the past – providing inflexible, complex paper or online notice and requiring consumers to either complete an online form (often a simple tick box) or submit a paper form to signal consent.

As our nation's electrical infrastructure transitions from the past to the future, it is vital that the accompanying privacy regime transition as well. We urge the NAESB to support standards that will protect consumers, but that will also allow electric utilities and third-party companies to communicate, interact, and engage with consumers. Both goals can be met through a regime that embraces businesses' ability to provide consumers with clear and relevant notice at key moments and meaningful choices that are not unnecessarily onerous for either consumers or businesses. We believe the Model Business Practices are a good starting point but that they could be better tailored to meet these goals. FPF would be pleased to work with NAESB and other parties to assist further in the development of privacy guidance that will help the smart grid reach its potential.

April 27, 2011

Respectfully submitted,

/s/ Jules Polonetsky

Jules Polonetsky

Director

The Future of Privacy Forum

919 18th Street, Suite 925

Washington, DC 20006

(202) 713-9466

julespol@futureofprivacy.org