



**Asia-Pacific
Economic Cooperation**

Advancing Free Trade
for Asia-Pacific **Prosperity**

APEC Cross-Border Privacy Rules System Fostering Accountability Agent Participation for Participants, Developing Economies, and MSMEs Benefit Workshop

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Produced by
Shannon Coe
U.S. Department of Commerce, International Trade Administration

For
Asia-Pacific Economic Cooperation Secretariat
35 Heng Mui Keng Terrace
Singapore 119616
Tel: (65) 68919 600
Fax: (65) 68919 690
Email: info@apec.org
Website: www.apec.org

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BACKGROUND

Endorsed by APEC Leaders in 2011, the Cross-Border Privacy Rules (CBPR) System is a data privacy certification that companies can participate in to demonstrate compliance with internationally-recognized data privacy protections reflected in the APEC Privacy Framework. To date, nine member economies are in various stages of implementing the CBPR System: Australia, Canada, Chinese Taipei, Japan, Republic of Korea, Mexico, the Philippines, Singapore and the United States.

Member economies have identified establishing Accountability Agents as a key challenge to fully implementing the CBPR System. This workshop was undertaken to examine the steps APEC and member economies can take to expand the CBPR System and to increase the establishment of Accountability Agents by increasing the understanding of the Accountability Agent criteria, studying various models for Accountability Agents – from private sector to government authorities – and discussing ways to enhance and mitigate costs of certification and of establishing Accountability Agents. The workshop was held in two sessions, with the first session held in Honolulu, Hawaii, where participants examined aspects of the Accountability Agent mechanism and developed recommendations for member economies to enhance the CBPR System. The second session was held at SOM3 in Puerto Varas, Chile, and focused on examining the recommendations developed from Session One.

Session One: June 2019

INTRODUCTION

The introductory presentation provided an overview of the CBPR certification process from a participating company's perspective. A representative from a CBPR-certified company provided background on the company's operations in over 170 jurisdictions and the various goods and services it provides that rely on or facilitate the use of data. The presenter discussed the benefits of CBPR-certification, including that CBPR certification: improves the company's ability to move data across borders in an accountable manner; fosters trust to individuals, regulators, clients and business partners; helps the company establish policies and procedures for regional and global compliance; and provides the company an ability to demonstrate good faith efforts at compliance in the case of a regulatory action.

The presenter detailed the process that a company must undertake to maintain a CBPR certification. The presenter stressed the importance of a company reviewing its internal processes before submitting for certification, including to establish where the company should certify and which data sets it should cover; to map the company's data to determine where it is, how it is used, and who has access; and to determine the controls on the use of data, such as how it is secured and what mechanisms are provided to give individuals rights. Using this information, the company would then complete the self-assessment questionnaire and submit the evidentiary requirements to the Accountability Agent for review. The company and the Accountability Agent engage in an interactive, iterative and collaborative process to determine if the company has met the certification requirements which would

result in the grant of the certification. Once granted, the Accountability Agent monitors the company's compliance with the CBPR requirements, including by requiring the company to report any changes that would impact its certification and by conducting annual recertification.

The presenter made recommendations for how to grow and scale the system, observing that policy-makers and regulators need to offer clear incentives for companies and Accountability Agents to participate and to provide more certainty around the sustainability of the CBPR System. The presenter further observed that the CBPR System needs to be able to evolve as the technological or regulatory environment changes, participation needs to be affordable, and intake and assessment procedures should be standardized as much as possible to facilitate replication. Finally, the presenter recommended that the CBPR System would benefit by creating interoperability or mutual recognition with other economies to establish broader zones for the free flow of data.

MORNING BREAKOUT SESSION

Session One: Evidentiary requirements

In session one, representatives from three Accountability Agents provided information about how companies may demonstrate compliance with each of the fifty program requirements. Session one participants developed three recommendations for updating the CBPR program requirements: 1) to update program requirement #39¹ to require that the mechanism by which a certified company obligates all entities within scope of its CBPR certification is both enforceable and keyed to its obligations pursuant to its CBPR certification; 2) to update program requirement #46² to require contracts rather than permitting other measures to ensure compliance with CBPR requirements when data is transferred to a third party for processing on the certified company's behalf; and 3) to require program requirement 46 to apply to all transfers of data to third parties, not just to transfer to third parties for processing on the certified company's behalf. Session one participants further recommended that policy-makers and regulators explore the interoperability between existing and prospective domestic privacy certification

¹ Program requirement #39: What measures do you take to ensure compliance with the APEC Information Privacy Principles? Please check all that apply and describe.

- Internal guidelines or policies (if applicable, describe how implemented) _____
- Contracts _____
- Compliance with applicable industry or sector laws and regulations ____ • Compliance with self-regulatory applicant code and/or rules ____
- Other (describe) _____

² Program requirement #46: Do you have mechanisms in place with personal information processors, agents, contractors, or other service providers pertaining to personal information they process on your behalf, to ensure that your obligations to the individual will be met (check all that apply)?

- Internal guidelines or policies _____
- Contracts _____
- Compliance with applicable industry or sector laws and regulations _____
- Compliance with self-regulatory applicant code and/or rules _____
- Other (describe) _____

programs and the CBPR System to ensure compatibility and promote broader implementation. Finally, session one participants recommended that the CBPRs.org compliance directory be made interoperable with Accountability Agent platforms to facilitate compliance directory updates and to create efficiencies in reporting on CBPR participation.

In the Q&A session, points were made about how the CBPR System could add value in combination with a domestic certification by expanding the reach of a certification to other economies that recognize or participate in the CBPR System. It was further noted that the CBPR System adds value for regulators by requiring Accountability Agents to investigate and adjudicate individual complaints against certified companies. Finally, in response to the recommendation to update program requirements, it was noted that participating economies would need to undertake a domestic consultation process to determine how any revised program requirements would apply and be enforceable against companies that are already certified.

Session Two: Dispute Resolution and Reporting

In session two, a representative from a dispute resolution service provider and a representative from an Accountability Agent led a discussion regarding the practical aspects of dispute resolution and requirements for dispute resolution under the CBPR System. The presenter described elements necessary for effective privacy dispute resolution, including trained staff with appropriate expertise, a secure and accessible complaint portal, demonstrated impartiality and independence, transparent rules, and accurate statistical reporting. Participants also noted the benefits of dispute resolution, including that complaints can help companies identify compliance issues; a robust process can build trust with consumers; simple complaints can be quickly resolved; a dispute resolution process can help create a record for more complex matters; and complaints can be referred to a regulator in appropriate cases.

The Accountability Agent participant noted that as reflected in a recent annual report regarding complaint statistics³, many submitted complaints were not relevant in that they don't relate to a certified company's participation in the CBPR System, and others were outside of the program scope. The Accountability Agent representative noted that if a complaint is related to a security issue, it would be expedited. Multiple economies discussed the need to examine within their own jurisdictions how the CBPR System requirement to have a dispute resolution mechanism might interact with a regulator's authority to resolve individual complaints, though the benefit of having multiple avenues of redress was noted. Session two participants recommended that member economies investigate ways to improve consumer education regarding the avenues for enforcing consumer rights under the CBPR System.

³[file:///C:/Users/Shannon%20Coe/Downloads/Appendix%20F%20Complaint%20Statistics%20and%20Case%20Notes%202018%20\(1\).pdf](file:///C:/Users/Shannon%20Coe/Downloads/Appendix%20F%20Complaint%20Statistics%20and%20Case%20Notes%202018%20(1).pdf)

AFTERNOON BREAKOUT SESSION

Session Three: Certifications and Technology

In session three, a representative of an Accountability Agent demonstrated how technology is used in the CBPR certification process. Using a test website, the Accountability Agent representative demonstrated how a company would use its online portal to obtain a CBPR certification, including to identify the scope of a certification, complete and submit a CBPR-intake questionnaire, upload supporting documentation, and interact with the Accountability Agent during the review process to determine that all program requirements have been met. The online platform further provides a tool to help companies map the data covered by a CBPR certification by helping companies identify types and sources of data, methods of collection and purposes of processing. The Accountability Agent participant demonstrated how the online platform facilitates meeting other CBPR System requirements and promotes accountability, including by providing a reporting tool about a company's activities, creating a record for a participating company that can be shared or used in an audit, providing a platform for communication between the Accountability Agent and a participating company which involves multiple users on each end, and for managing the annual recertification process.

Session three participants discussed various possibilities for using technology to further enhance the certification process. Suggestions include to create connections between Accountability Agent online platforms and cbprs.org to enhance transparency and reporting, to create a ticketing system to enhance the dispute resolution process, and to merge different certification mechanisms, for example, to merge a domestic certification with the CBPR System so a company could obtain both certifications through one process.

Session Four: The AA Application: Different AA models and Using International AAs

In session four, a representative of an Accountability Agent described the Accountability Agent application process, with a focus on using different Accountability Agent models, i.e. private or public sector. Session four participants also noted the ability for Accountability Agents to certify companies in other member economies and discussed the requirements for doing so. One suggestion was for a Member Economy and the Accountability Agent to demonstrate how relevant laws would apply to such an arrangement. Clarity on this issue will be useful for Member Economies that encounter difficulties in appointing an Accountability Agent. In this session, the presenter walked participants through the Accountability Agent application describing how each of 15 recognition criteria may be fulfilled using examples from previously approved applications.

Session four participants had two recommendations: the first recommendation is to extend the certification period for both companies, which is currently only one year, and Accountability Agents, which has an initial term of one year and then is valid for two years. It was noted that some other existing privacy certifications are valid for several years and that the one-year certification under the CBPR System is a deterrent for some companies. The second recommendation was to eliminate the requirement for Accountability Agents to release, in anonymized form, case notes on a selection of resolved complaints illustrating typical or significant interpretations and notable outcomes. Among other concerns, it was noted that the small number of complaints and participating companies makes it difficult to maintain anonymity.

Closing Panel: The Road Ahead

This panel included policy makers, regulators and current and prospective Accountability Agents to discuss current issues and recommendations related to Accountability Agents and the CBPR System. Speakers noted the benefits of the CBPR System for bridging different systems in the region, noting that every member economy has its own unique system. Speakers also talked about the benefit of the CBPR System to regulators, both in terms of facilitating compliance with privacy rules and resolving consumer disputes which can overwhelm regulators in volume. Each member economy shared their experience and plans for implementing the CBPR System, including establishing Accountability Agents, raising consumer awareness and business participation, and recognizing the CBPR System under domestic law as a transfer or compliance mechanism. Accountability Agent participants noted opportunities for Accountability Agents to enhance coordination, expand participation and coordinate messaging.

RECOMMENDATIONS

Based on the discussions, member economy participants developed the following recommendations for further consideration:

1. Program requirements should be reviewed and updated with a view to ensuring that the CBPR System remains agile and current. Member economies should review and develop procedures for updates, e.g. how to implement new program requirements for participating companies, also considering the nature of the updates and whether they are clarifications or material changes. Specific recommended updates include updating program requirements around onward transfers, including a breach notification requirement and extending the certification term from one year to reduce costs for MSMEs. Member economies should consider how to communicate updates.
2. Member economies should clarify the value proposition of CBPRs. Specifically, member economies should share information on the relationship between domestic law and the CBPRs and examine where efficiencies can be created, e.g. obtaining a domestic certification and CBPRs in one process. Members should coordinate to communicate the value of CBPRs more effectively.

3. Members should explore how to use technology to enhance the certification process and the system. Some specific suggestions include developing a common certification platform for use by Accountability Agents and linking Accountability Agent certification software to the CBPRs.org website to automate the administration of the CBPRs.
4. Member economies and Accountability Agents should share best practices in dispute resolution and enhance consumer education about redress. Member economies and Accountability Agents should share information about different avenues for consumer redress across jurisdictions. Member economies should provide information to better inform consumers about redress options to be included on the website.

Session Two: August 2019

Workshop Session Two provided an opportunity to discuss the recommendations developed in Session One, specifically Recommendations 1-3 described above. These discussions were facilitated by 3 panels of expert speakers from member economies, industry, civil society and current and prospective Accountability Agents.

Panel One: The Cross-Border Privacy Rules System: A Living System

This panel of experts from industry and civil society discussed the benefits and challenges of updating the CBPR System and developed specific recommendations for member economies to consider. Noting that the 9 APEC Privacy Framework Principles remain relevant, panelists discussed how the principles might be further implemented in the CBPR program requirements, noting the following specific suggestions:

- The CBPR System includes access and correction, but APEC should consider including requirements regarding deletion, data retention and data portability;
- Principle VII on Security Safeguards could be bolstered by including a breach notification requirement; and
- Principle I on Preventing Harm could be enhanced by explicitly requiring privacy impact assessments and privacy by design.

Panelists also discussed specific recommendations for updating CBPR program requirements relating to data transfers, specifically regarding program requirements #39 and #46 (see above section on Workshop Session One, breakout session one for further discussion). It was also noted that program requirements #48⁴ and #49⁵ should be made obligatory consistent with the rest of the program requirements. Other updates to consider include a recommendation that member economies

⁴ Program requirement #48: Do you require your personal information processors, agents, contractors or other service providers to provide you with self-assessments to ensure compliance with your instructions and/or agreements/contracts? If YES, describe below.

⁵ Program requirement #49: Do you carry out regular spot checking or monitoring of your personal information processors, agents, contractors or other service providers to ensure compliance with your instructions and/or agreements/contracts? If YES, describe.

examine their laws to identify commonalities that may be used to further update the program requirements.

In the Q&A session, there was a discussion regarding how program requirement updates would be implemented considering that there are companies already certified to current program requirements. An Accountability Agent representative discussed their experience when updating internal procedures, noting that they provide notice and a time period for implementation. In response to a question regarding the length of a certification, it was noted that annual recertification is expensive and can be onerous. Recommendations to address the concerns include to trigger review based on a material change rather than requiring a mandatory annual review, extending the life cycle to two years, or requiring an annual “check-up” rather than a full annual recertification. Finally, panelists discussed whether emerging technology would necessitate changes to the CBPR System, noting that the existing principles seem flexible enough to accommodate new technology but that legitimate interest processing may be helpful to consider when it is impracticable to apply notice and choice.

Panel Two: Enhancing the Value of a CBPR Certification

This panel of experts from member economies, privacy regulators, and industry discussed steps that could be taken to enhance the value of a CBPR certification and to promote broader adoption by organizations. Member economy participants discussed implementation of the CBPR System in their economies and described different initiatives to encourage uptake by companies, such as providing choice of assessment bodies to assess company applications, waiving the application fees for the first year to attract MSMEs, and recognizing CBPRs as a data transfer mechanism under domestic legislation. Participants also discussed the benefits of aligning domestic requirements, including domestic certification, with CBPRs to facilitate application and assessment of both domestic and CBPR certifications. Participants also expressed interests in exploring ways to broaden the reach of CBPR certification participants (e.g. non-APEC regions). Finally, participants discussed how regulators view favorably participation in a privacy certification program like CBPRs in the event of an enforcement action. In this regard, updates to CBPR program requirements were reminded as a possible way to make the system more attractive to businesses by aligning the requirements and actual practices.

Panel Three: The Future of Accountability Agents

This panel was composed of representatives from a current and a prospective Accountability Agent discussing how to enhance cooperation among Accountability Agents and the benefits of doing so. Participants noted that there is currently a process underway to establish an Accountability Agent consortium to provide a forum for cooperation. Among issues that could be undertaken by the consortium include coordination of a shared CBPR trademark, as well as joint educational outreach and capacity building. Participants noted the benefits in bringing together privacy certification experts, including to advise on and implement updated program requirements and to coordinate dispute resolution. Participants also discussed aligning existing certifications to reduce costs and demonstrate compliance with

multiple regimes through a single process, as well as the benefits of using software toolkits for the certification process and automated certifications.

CONCLUSION AND NEXT STEPS

The workshop brought together various CBPR stakeholders to exchange best practices on implementing CBPRs, including establishing Accountability Agents. Participants further identified several recommendations for member economies to enhance and expand the CBPR System. This report will be presented to the Data Privacy Subgroup for further consideration