

**CROSS-BORDER PRIVACY RULES SYSTEM JOINT OVERSIGHT PANEL**

**RECOMMENDATION REPORT ON APEC RECOGNITION OF SCHELLMAN &  
COMPANY, INC.**

**Submitted To:** Shannon Coe

Chair, Joint Oversight Panel

May 16, 2019

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## EXECUTIVE SUMMARY

In July 2012, the United States formally commenced participation in the Cross-Border Privacy Rules (herein ‘CBPR’) System. Pursuant to Paragraph 5 of the *Protocols of the Joint Oversight Panel*, the United States was then eligible to accept applications for recognition by one or more Accountability Agents operating within its jurisdiction. At that time, the U.S. Department of Commerce invited those organizations interested in serving as an Accountability Agent in the United States to notify the Department of their intent to seek APEC recognition and submit a completed application for initial review to the Department of Commerce. On November 08, 2018 the Department of Commerce received an application from Schellman & Company, Inc. (herein ‘Schellman’) for APEC recognition.

### SCOPE OF CONSULTATION PROCESS

Pursuant to Paragraph 6.2 of the *Charter of the Joint Oversight Panel*, members of the JOP<sup>1</sup> began a consultative process with representatives from Schellman and the United States Federal Trade Commission (a participant in the Cross-Border Privacy Enforcement Arrangement) to:

- Confirm the enforceability of an organization’s CBPR obligations once certified as CBPR compliant by Schellman;
- Confirm Schellman’s location and the relevant Enforcement Authority;
- Confirm that Schellman meets the recognition criteria as identified in the *Accountability Agent Application for Recognition*;
- Confirm Schellman makes use of program requirements that meet the baseline established in the CBPR system; and
- Confirm Schellman has provided the necessary signature and contact information.

The following Recommendation Report was drafted by members of the JOP pursuant to paragraphs 15-18 of the *Protocols of the APEC Cross-Border Privacy Rules System Joint Oversight Panel*.

RECOMMENDATION OF THE JOINT OVERSIGHT PANEL

*Having verified the United States is a participant in the APEC Cross Border Privacy Rules System and has demonstrated the enforceability of the CBPR program requirements pursuant to the information provided in Annex B of the United States Notice of Intent to Participate;*

*Having verified Schellman is in the United States and is subject to the enforcement authority described in Annex A of the United States Notice of Intent to Participate;*

*Having verified with the Administrators of the APEC Cross Border Privacy Enforcement Arrangement (CPEA) that the United States Federal Trade Commission, a Privacy Enforcement Authority in the United States, is a participant in the APEC CPEA;*

*Having determined, in the opinion of the members of the Joint Oversight Panel, that Schellman has policies in place that meet the established recognition criteria and makes use of program requirements that meet those established in the CBPR system, and;*

*Having verified Schellman has provided the required signature and contact information;*

*The JOP recommends APEC member Economies consider the conditions established in 6.2 (ii) of the Charter of the Joint Oversight Panel to have been met by Schellman and to grant Schellman's request for APEC recognition to certify organizations within the United States and under the jurisdiction of the United States Federal Trade Commission as compliant with the CBPR system pursuant to the established guidelines governing the operation of the CBPR system.*

**Submitted by the Joint Oversight Panel:**

Shannon Coe  
Chair, Joint Oversight Panel  
U.S. Department of Commerce, United States

Evelyn Goh  
Member, Joint Oversight Panel  
Personal Data Protection Commission, Singapore

Shuji Tamura  
Member, Joint Oversight Panel  
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## REQUEST FOR CONSENSUS DETERMINATION

APEC member Economies are asked to make a determination as to Schellman's request for recognition, taking into account the JOP's recommendation. Any APEC member Economy has the right to reject the request of an applicant Accountability Agent for recognition for failure to meet any of the recognition criteria required in the *APEC Accountability Agent Recognition Application*. When making this determination, any APEC member Economy may request additional information or clarification from Schellman or the JOP. If no objection is received within the deadline for consensus determination as established by the ECSG Chair, the request will be considered to be approved by the ECSG. Should member Economies determine that Schellman has met the necessary criteria, APEC recognition will be limited to one year from the date of recognition, one month prior to which, Schellman may re-apply for APEC recognition if it so wishes, following the same process described herein.

## I. ENFORCEABILITY

*Is the Applicant subject to the jurisdiction of the relevant enforcement authority in a CBPR participating Economy?*

### **Recommendation**

The JOP is satisfied that Schellman is subject to the jurisdiction of the United States Federal Trade Commission (FTC), a participant in the Cross-Border Privacy Enforcement Arrangement (CPEA).

### **Discussion**

In its *Notice of Intent to Participate*, the United States described its enforcement authority as follows:

*To become a recognized APEC Accountability agent, an applicant must complete and sign the Accountability Agent APEC Recognition Application...By publicly posting its Recognition Application, a recognized APEC Accountability Agent further represents that the answers contained in the document are true.*

*In addition, any organization that publicly displays a seal, trademark or other symbol indicating its participation in the CBPR System or causes its name to appear on a list of recognized APEC Accountability Agents, is making an enforceable representation that it complies with the requirements applicable to a recognized APEC Accountability Agent.*

*If an APEC-recognized Accountability Agent subject to the jurisdiction of the Federal Trade Commission (FTC) fails to comply with any of these requirements, its representations of compliance may constitute unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. The FTC has broad authority to take action against unfair and deceptive acts and practices.*

*Furthermore, if an APEC-recognized Accountability Agent authorizes the use of its certification mark, 15 U.S.C. §1127, to convey compliance with the CBPR program requirements, under Section 14(5) of the Lanham Act, 15 U.S.C. § 1064(5), the U.S. Patent and Trademark Office may cancel the certification mark if the Accountability Agent (a) does not control, or is not able legitimately to exercise control over, the use of such mark, including by failing to monitor the activities of those who use the mark, (b) engages in the production or marketing of any goods or services to which the certification mark is applied, (c) permits the use of the certification mark for purposes other than to certify, or (d) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.*

The JOP has confirmed that Schellman is subject to the regulatory oversight and enforcement authority of the United States Federal Trade Commission (herein 'FTC') since it is a Florida-

based for profit entity. The JOP has further confirmed that the FTC is a participant in the Cross Border Privacy Enforcement Arrangement (herein 'CPEA') and that the United States is a recognized participant in the APEC CBPR System. Schellman agrees that should it receive APEC recognition, it will publicly indicate its participation in the CBPR System including allowing its name to appear on a list of recognized APEC Accountability Agents. Schellman agrees to post all CBPR-certified companies online as well as the applicable CBPR program requirements. The Schellman Certification service logo is a service mark of Schellman that should only be used on the granting or extending of a CBPR certification. The JOP has verified that Schellman has completed and signed the *Accountability Agent APEC Recognition Application*.

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## II. RECOGNITION CRITERIA

The *Accountability Agent Application for Recognition* requires applicants to describe how each of the 15 Accountability Agent Recognition Criteria have been met using the Accountability Agent Recognition Criteria Checklist. Following is an overview of each listed requirement and recommendation of the sufficiency of each based on the information submitted to the JOP by Schellman.

### **Conflicts of Interest (Recognition Criteria 1-3)**

1. *Applicant Accountability Agent should describe how requirements 1(a) and (b) in Annex A of the Accountability Agent Application for APEC Recognition have been met and submit all applicable written policies and documentation.*
2. *Applicant Accountability Agent should submit an overview of the internal structural and procedural safeguards to address any of the potential or actual conflicts of interest identified in 2(b) of Annex A of the Accountability Agent Application for APEC Recognition.*
3. *Applicant Accountability Agent should describe the disclosure/withdrawal mechanisms to be used in the event of any actual conflict of interest identified.*

### **Recommendation**

The JOP is satisfied that Schellman meets Recognition Criteria 1-3.

### **Discussion**

Schellman submitted their documentation on the Policies and Procedures on their internal processes to ensure that certification standards are applied in an impartial manner. The JOP has confirmed that Schellman is required to apply its certification standards in an impartial manner. The JOP has confirmed that the Schellman Certification logo is a services mark of Schellman and may not be used in connection with any product or services that is not within the scope of the CBPR certification. The service mark should only be used upon the granting or extending of a CBPR certification. Title 15, Chapter 22, Subchapter I, § 1064 of the United States Code permits the Federal Trade Commission to request that the United States Patent and Trademark Office cancel this service mark on the grounds that the holder of the mark “discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.” (See U.S. Notice of Intent to Participate, Annex A, “[I]f an APEC-recognized Accountability Agent authorizes the use of its certification mark, 15 U.S.C. §1127, to convey compliance with the CBPR program requirements, under Section 14(5) of the Lanham Act, 15 U.S.C. § 1064(5), the U.S. Patent and Trademark Office may cancel the certification mark if the Accountability Agent (a) does not control, or is not able legitimately to exercise control over, the use of such mark, including by failing to monitor the activities of those who use the mark, (b) engages in the production or marketing of any goods or services to which the certification mark is applied, (c) permits the use of the certification mark for purposes other than to certify, or (d) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.”)



Regarding requirement 1, Schellman, as an Accountability Agent, commits that all decisions are not influenced by outside parties and that certifications are conducted in an impartial manner. Furthermore, Schellman does not outsource any activities related to the certification services, and any such activities are performed by Schellman employees.

Regarding requirement 2, Schellman performs an annual Independence Review which helps to identify, analyze and document the possibilities for conflicts of interests. Part of this review requires employees to disclose personal relationships of any Applicants organization or Participants organization on an annual basis.

Regarding requirement 3, Schellman commits to disclose all relevant information when it receives an inquiry or is asked for explanation from the JOP or APEC member economies concerning possible conflict of interests in order to ensure that there is no such conflict of interest. When Schellman receives a certification, they have committed to assessing and reassessing if the certification poses a threat to impartiality.

**Program Requirements (Recognition Criterion 4)**

*Applicant Accountability Agent should indicate whether it intends to use the relevant template documentation developed by APEC or make use of Annex C of the Accountability Agent Application for APEC Recognition to map its existing intake procedures program requirements.*

**Recommendation**

The JOP is satisfied that Schellman meets Recognition Criterion 4.

**Discussion**

Schellman has committed to utilize the template documentation of Annex C of the Accountability Agent APEC Recognition Application to map their existing program requirements to the established CBPR program requirements. Schellman intends to use a narrative form of the APEC-endorsed template which will be made enforceable by the public commitments of Schellman as an Accountability Agent and the companies Schellman certifies in accordance with this certification. The FTC has authority in the United States to enforce such commitments on Schellman and the CBPR-certified companies.

**Certification Process (Recognition Criterion 5)**

*Applicant Accountability Agent should submit a description of how the requirements as identified in 5 (a) – (d) of Annex A of the Accountability Agent Application for APEC Recognition have been met.*

**Recommendation**

The JOP is satisfied that Schellman meets Recognition Criterion 5.

**Discussion**

Schellman has documented their internal procedures for assessing an applicant organization’s policies and practices to confirm their compliance with the CBPR system requirements. In its application, Schellman explained the following outline of its certification process:

- 1) Schellman will perform an initial review and assessment of the applicant’s compliance based on their responses from the completed Intake Questionnaire;
- 2) Schellman will perform one or more testing procedures that includes inquiry, observation and inspection of the documentation;
- 3) Schellman then provides an Information Request List that documents the findings regarding compliance with the Intake Questionnaire;

- 4) Schellman then reviews and verifies any required changes as outlines in the Information Request List;
- 5) Upon successful conclusion of the above-listed steps, Schellman will certify that the applicant is in compliance with their program requirements.

### **On-going Monitoring and Compliance Review Processes (Recognition Criteria 6, 7)**

*Applicant Accountability Agent should submit a description of the written procedures to ensure the integrity of the certification process and to monitor the participant's compliance with the program requirements described in 5 (a)-(d) in the Accountability Agent Application for APEC Recognition.*

*Applicant Accountability Agent should describe the review process to be used in the event of a suspected breach of the program requirements described in 5(a)-(d) in the Accountability Agent Application for APEC Recognition.*

### **Recommendation**

The JOP is satisfied that Schellman meets Recognition Criteria 6, 7.

### **Discussion**

Schellman has documents of its internal procedures to ensure integrity of its certification processes and to monitor compliance of the certified organization. As Schellman explains in the application documents, it has established monitoring and compliance review mechanisms. These mechanisms include following functions and procedures:

- 1) Schellman compiles an audit report that will include the Applicant's level of compliance with program requirements.
- 2) Participants are monitored throughout the certification period to ensure compliance with the program. The monitoring process may include periodic reviews of the Participant's privacy notice for updates or modifications. It may also include a review of any matters disclosed on the Participant's website, other than the privacy notice. Where changes or modifications occur that are not compliant with the program requirements, or result in significant changes, the re-certification process will be immediately implemented as described below, which may include short-notice or unannounced audits.
- 3) Where there are reasonable grounds to believe that a Participant has engaged in a practice that may constitute a breach of the program requirements, an immediate review process will be triggered whereby verification of compliance will be carried out. In these situations, the Dispute process, as outlined in the Accountability Agent application narrative provided by Schellman.

### **Re-Certification and Annual Attestation (Recognition Criterion 8)**

*Applicant Accountability Agent should describe their re-certification and review process as identified in 8 (a)-(d) in the Accountability Agent Application for APEC Recognition.*

#### **Recommendation**

The JOP is satisfied that Schellman meets Recognition Criterion 8.

#### **Discussion**

The JOP has confirmed that Schellman requires an annual re-certification at which time Schellman investigates whether the Participant is meeting and/or exceeding Schellman's Program Requirements. In addition, if the Participant notifies Schellman of a change or Schellman detects a change outside the annual re-certification cycle, the change will be verified by Schellman immediately.

### **Dispute Resolution Process (Recognition Criteria 9, 10)**

*Applicant Accountability Agent should describe the mechanism to receive and investigate complaints and describe the mechanism for cooperation with other APEC recognized Accountability Agents that may be used when appropriate.*

*Applicant Accountability Agent should describe how the dispute resolution process meets the requirements identified in 10 (a) – (h) of Annex A, whether supplied directly by itself or by a third party under contract (and identify the third party supplier of such services if applicable and how it meets the conflict of interest requirements identified in sections 1-3 of Annex A) as well as its process to submit the required information in Annexes D and E.*

#### **Recommendation**

The JOP is satisfied that Schellman meets Recognition Criteria 9, 10.

#### **Discussion**

The JOP has confirmed that Schellman has an existing customer dispute resolution program to receive and investigate complaints about participants and to resolve disputes between complainants and participants. Following is an overview of Schellman's dispute resolution process as provided in its application for recognition:

- 1) Schellman receives and records the complaint and record and then reviews the commitments that the Participant has made under the CBPR Program Requirements. The form by Schellman that will be available to consumers will also request the complainant to provide consent before Schellman shares their personal information with the program Participant the complainant is filing a dispute about.

- 2) The consumer receives a confirmation from Schellman that the complaint has been received within five business days;
- 3) The nature and duration of the investigation will vary depending on the complaint that was submitted, and the consumer will receive an update at minimum once per month on the status of their complaint;
- 4) Once the complaint is resolved, Schellman will send an email notice to both the complainant and the Participant notifying them of closure of the complaint;
- 5) If noncompliance is found Schellman will contact the Participant outlining the noncompliance and remediation;
- 6) Finally, Schellman will then provide a written notice of complaint resolution to the complainant and the Participant.

### **Mechanism for Enforcing Program Requirements (Recognition Criteria 11-15)**

*Applicant Accountability Agent should provide an explanation of its authority to enforce its program requirements against participants.*

*Applicant Accountability Agent should describe the policies and procedures for notifying a participant of non-compliance with Applicant's program requirements and provide a description of the processes in place to ensure the participant remedy the non-compliance.*

*Applicant Accountability Agent should describe the policies and procedures to impose any of the penalties identified in 13 (a) – (e) of Annex A.*

*Applicant Accountability Agent should describe its policies and procedures for referring matters to the appropriate public authority or enforcement agency for review and possible law enforcement action. [NOTE: immediate notification of violations may be appropriate in some instances].*

*Applicant Accountability Agent should describe its policies and procedures to respond to requests from enforcement entities in APEC Economies where possible.*

### **Recommendation**

The JOP is satisfied that Schellman meets Recognition Criteria 11-15.

### **Discussion**

The JOP has confirmed that Schellman has a mechanism in place to enforce its program requirements, has established procedures to remedy non-compliance, impose penalties and notify public authorities, where appropriate. Following is an overview of these procedures as provided in Schellman's application for recognition:

1. Schellman has the authority to enforce its program requirements against clients, or Participants, through contract/JAL. Schellman has the authority to suspend, withdraw, or reduce the scope of a certification under just cause and as a result of reasonable evidence.
2. Schellman has adequately outlined the mechanisms and scenarios upon which a certification can be suspended, including through complaints, monitoring, or persistent issues which have not been remedied in a timely fashion.
3. Under suspension, the client's certification is temporarily invalid. Included within the JAL are the enforceable arrangements regarding the suspension of the certification to help ensure, that in case of suspension, the client refrains from further promotion of its certification and use of the Schellman certification seal. Schellman will make publicly accessible the suspended status of the certification.
4. Schellman acknowledges they are required to refer the violation to the Federal Trade Commission, where a reasonable belief is pursuant to its established review process that a client's failure to comply with the APEC CBPR System has not been remedied within a reasonable time, so long as such failure to comply can be reasonably believed to be a violation of applicable law. Schellman will respond to requests from enforcement entities in APEC Economies that reasonably relate to that Economy and to the CBPR related activities of Schellman.
5. If the determination is to withdrawal the certification, Schellman, as included in the JAL, has enforceable arrangements with the Participant concerning conditions of withdrawal, ensuring upon notice of withdrawal of certification that the client discontinues its use of all advertising matter that contains any reference to a certified status.
6. Upon request by any party, Schellman will correctly state the status of certification of the participant, or client, as being suspended, withdrawn, or reduced.

### III. CASE NOTES AND STATISTICS

*Will the Applicant provide relevant information on case notes and statistics as outlined in Annexes D and E of the Accountability Agent Application for APEC Recognition?*

#### **Recommendation**

The JOP is satisfied that Schellman meets the Case Notes and Statistics requirements as stipulated in Annexes D and F of the *Accountability Agent Application for APEC Recognition*.

#### **Discussion**

The Accountability Agent Recognition Criteria require applicants to attest that they have a process for releasing, in anonymised form, case notes on a selection of resolved complaints illustrating typical or significant interpretations and notable outcomes. Schellman has agreed to make use of the case note template in Annex D of the *Accountability Agent Application for APEC Recognition* to annually send anonymised case notes to APEC member Economies as a condition of their recognition.

In addition to case notes, APEC Member Economies have identified complaint statistics as a valuable part of a transparent and accountable complaints handling system that can help paint a picture of how the CBPR program is operating and will promote understanding and confidence in the system. Annex E of the *Accountability Agent Application for Recognition* contains the minimum elements APEC member Economies determined are necessary to realize these benefits. These elements include:

- Number of complaints received during the year with a comment by the Accountability Agent on the significance of the number.
- Complaints processed during the year broken down by the outcome.
- When the Accountability Agent has made findings upholding complaints, further statistical information should be given about the outcomes and any subsequent enforcement action.
- Comment on the significance of the complaints outcomes.
- Statistics should be provided as to the type of complaints, including the subject matter of the complaint and characterization of the complainants and the respondents and comment on the significance of the reported figures.
- An indication as to any quality measures used in relation to the particular CBPR program.

## SIGNATURE AND CONTACT INFORMATION

By signing this document, the signing party and agrees to the findings of the Joint Oversight Panel contained herein and attests to the truth of the information provided to the Joint Oversight Panel pursuant to the Application for APEC Recognition.

DocuSigned by:  
  
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**[Signature of person who has authority to commit party to the agreement]**

**[Typed name]: Avani Desai**

**[Date]:**6/26/2019

**[Typed title]: President**

**[Typed name of organization]: Schellman & Company, LLC**

**[Address of organization]: 4010 W Boy Scout Blvd, Suite 600, Tampa, FL 33607**

**[Email address]: avani.desai@schellman.com**

**[Telephone number]: 1.866.254.0000 ext. 140**

APEC recognition is limited to one year from the date of recognition. Each year one month prior to the anniversary of the date of recognition, the Accountability Agent must resubmit this form and any associated documentation to the appropriate government agency or public authority or as soon as practicable in the event of a material change (e.g. ownership, structure, policies).

**NOTE: Failure to comply with any of the requirements outlined in this document may result in appropriate sanctions under applicable domestic law.**