

**CROSS-BORDER PRIVACY RULES SYSTEM AND PRIVACY
RECOGNITION FOR PROCESSORS JOINT OVERSIGHT PANEL**

RECOMMENDATION REPORT ON CONTINUED APEC RECOGNITION OF
SCHELLMAN & COMPANY, INC. AS AN ACCOUNTABILITY AGENT
FOR THE CBPR AND PRP SYSTEMS

Submitted To: Mr. Julio Pertuzé

Chair, Digital Economy Steering Group

June 2, 2020

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EXECUTIVE SUMMARY

In July 2012, the United States formally commenced participation in the Cross-Border Privacy Rules (herein ‘CBPR’) System. In November 2017, the United States formally commenced participation in the Privacy Recognition for Processors (herein ‘PRP’) 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. On May 31, 2019, Schellman & Company, Inc. (herein ‘Schellman’) received endorsement for APEC recognition as an Accountability Agent for the CBPR and PRP Systems.

Pursuant to Paragraph 36 of the APEC Cross Border Privacy Rules System Policies, Rules and Guidelines (herein ‘Policies, Rules and Guidelines’), the first APEC recognition is limited to one year from the date of recognition and for two years thereafter, one month prior to which, an Accountability Agent may re-apply for APEC recognition, following the same process as the original request for recognition. Paragraph 36 also stipulates that during this time the Accountability Agent’s recognition will continue. On April 08, 2020, the United States Department of Commerce received an application from Schellman to continue to be recognized as a CBPR System and PRP System Accountability Agent in the United States. After having reviewed the completeness of this application, the JOP found that Schellman continues to meet the requirements to serve as an Accountability Agent in the United States. Schellman’s continued recognition as an Accountability Agent will be valid for two years from the date of endorsement.

SCOPE OF CONSULTATION PROCESS

Pursuant to Paragraph 6.2 of the *Charter of the Joint Oversight Panel*, members of the JOP consulted 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 and/or PRP obligations once certified as CBPR and/or PRP 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* for both the CBPR and PRP Systems;
- Confirm Schellman makes use of program requirements that meet the baseline established in the CBPR and PRP Systems; and
- Confirm Schellman has provided the necessary signature and contact information.

The following Recommendation Report was drafted by members of the

JOP.RECOMMENDATION OF THE JOINT OVERSIGHT PANEL

Having verified the United States is a participant in the APEC Cross Border Privacy Rules System and Privacy Recognition for Processors System and has demonstrated the enforceability of the CBPR and PRP program requirements pursuant to the information provided in Annex B of the United States' Notices of Intent to Participate in the CBPR and PRP Systems;

Having verified Schellman is in the United States and is subject to the enforcement authority described in Annex A of United States' Notices of Intent to Participate in the CBPR and PRP Systems;

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 and PRP Systems, 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 continued 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 and PRP Systems pursuant to the established guidelines governing the operation of the CBPR and PRP Systems.

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
Ministry of Economy, Trade and Industry, Japan

REQUEST FOR CONSENSUS DETERMINATION

APEC member Economies are asked to make a determination as to Schellman's request for continued recognition as an Accountability Agent, 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 Digital Economy Steering Group (herein 'DESG') Chair, the request will be considered to be approved by the DESG. Should member Economies determine that Schellman has met the necessary criteria, APEC recognition will be limited to two years 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 and PRP 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 and PRP Systems 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 and PRP 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 and PRP Systems. Schellman agrees that should it receive continued APEC recognition, it will continue to publicly indicate its participation in the CBPR and PRP Systems including allowing its name to appear on a list of recognized APEC Accountability Agents. Schellman agrees to continue to post all CBPR and PRP-certified companies online¹ as well as the applicable CBPR and PRP program requirements.² The Schellman Certification service logo is a service mark of Schellman that should only be used on the granting or extending of a CBPR and PRP certifications. The JOP has verified that Schellman has completed and signed the *Accountability Agent APEC Recognition Application*.

¹ <https://www.schellman.com/apec-certificate-directory>

² <https://www.schellman.com/apec/CBPR and PRP-process#requirements>

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

The JOP has confirmed that Schellman has policies and procedures to ensure that it will be free of actual or potential conflicts of interests in performing its duties under the CBPR and PRP Systems. Schellman conducts all activities related to CBPR and PRP certifications inhouse, and Schellman's Conflicts of Interest policy applies to all of its employees. The Conflicts of Interest policy forbids employees from engaging in certification services if the employee's actions or personal interests pose a threat to the impartiality of the process. Threats to impartiality are broadly defined and include financial self-interest; an employee reviewing his/her own work, for example reviewing advice provided as a consultant; familiarity and "trusting" a client instead of auditing the evidence; and acting under threat or coercion.

The JOP has confirmed that Schellman's Conflicts of Interest policy requires employees to disclose on an ongoing basis any situation or position, including outside employment by the employee or any member of the employee's immediate household, which may create a conflict of interest. Additionally, employees are required to complete an annual independence review and disclose any potential conflict of interests, which are reviewed by human resources and management. If a potential conflict of interest is identified, Schellman will mitigate the threat, for example by removing an employee from a certification assessment, or withdraw from the engagement, as appropriate. Per the Conflict of Interest policy, Schellman documents how it eliminates or minimizes such threats as a result of the annual independence review.

The JOP has confirmed that Schellman has structural safeguards in place to prevent conflicts of

interest. Employees handling sales and who may collect a sales commission are not permitted to be part of the team providing certification services. In addition, Schellman will not provide consulting or technical services related to the development of applicant or participant organizations' data privacy practices or procedures, its privacy notice or statement or to its security safeguards. Finally, Schellman does not offer internal audits to certified clients or perform any activities that would provide the appearance that Schellman is employed by an applicant or participant organization.

The JOP has confirmed that Schellman's Conflicts of Interest policy forbids the affiliations (as described in the Accountability Agent Application) between Schellman and its employees and any applicant or participant organizations that threaten the impartiality of a certification will also be reviewed under the Conflicts of Interest policy. If a conflict of interest arises that can be cured by the existence of a safeguard, Schellman will disclose to the JOP the existence of the affiliation between an applicant organization or participant organization and audit personnel and will include an explanation of the safeguards and how these safeguards do not compromise the ability to render a fair decision to the applicant organization or participant organization. Finally, Schellman will disclose to the JOP activities that might on their face have been considered a conflict of interest but did not result in withdrawal, including a description of the reasons for nonwithdrawal and the measures to avoid or cure any potential prejudicial results stemming from the actual or potential conflict of interest.

The JOP has confirmed that Schellman publishes information about certification standards and the certification process on the Schellman website (<https://www.schellman.com/apec/cbpr-process#requirements>).

Any entity maintaining a registered trademark in the United States is required by law to apply certification standards in an impartial manner. The JOP has confirmed that the Schellman Certification logo is a services mark of Schellman and may only be used upon the granting or extending of a CBPR and PRP certifications. The FTC may request that the U.S. Patent and Trademark Office cancel Schellman's trademark 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 and PRP 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.")

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[s] for APEC Recognition to map its existing intake procedures to CBPR and PRP 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 and PRP 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 and PRP-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 Applications for APEC Recognition for the CBPR and PRP Systems 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 and PRP 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 then provides an information request list to request documents in support of the responses to the questionnaire;
- 3) Schellman will perform one or more testing procedures that includes inquiry, observation and inspection of the documentation and questionnaire responses;

- 4) Schellman then reviews and verifies compliance with the certification requirements;
- 5) Upon successful conclusion of the above-listed steps, Schellman will certify that the applicant is in compliance with their program requirements.

The JOP has confirmed Schellman will provide relevant details of participant organizations for the CBPR and/or PRP compliance directory.

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) of Annex A in the Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems.

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) of Annex A in the Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems.

Recommendation

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

Discussion

The JOP has confirmed that Schellman has procedures to ensure the integrity of its certification processes and to monitor compliance of participant organizations throughout the certification period. Schellman's monitoring process may include periodic reviews of the participant's privacy notice for updates or modifications, and it may also include a review of any matters disclosed on the participant's website, other than the privacy notice. Where Schellman identifies changes or modifications that are not compliant with the program requirements, or result in significant changes, Schellman will immediately conduct a re-certification process, which may include short-notice or unannounced audits.

Where there are reasonable grounds to believe that a participant organization has engaged in a practice that may constitute a breach of the program requirements, Schellman will contact the participant organization outlining the details of the noncompliance that require remediation and the required timeframe for completion, which shall not exceed a period of six (6) months or the due date of the annual recertification. During the review, the certificate will be suspended. The participant organization is required to provide evidence of remediation within the required timeframe for the certification to be re-instated. If the Participant fails to provide sufficient evidence, during the required timeframe, or is not responsive, the certification will remain suspended.

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) of Annex A in the Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems.

Recommendation

The JOP is satisfied that Schellman meets Recognition Criterion 8.

Discussion

The JOP has confirmed that Schellman requires an annual re-certification which will follow the same procedures conducted during the initial assessment as described above. In addition, if the participant organization 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 in the Accountability Agent Applications for APEC Recognition for the CBPR and the requirements identified in 10 (a) – (d) of Annex A in the Accountability Agent Applications for PRP Systems, 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 on complaints.

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 and PRP 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 participant organization 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 organization notifying them of closure of the complaint;
- 5) If noncompliance is found Schellman will contact the participant organization outlining the noncompliance and remediation;
- 6) Finally, Schellman will then provide a written notice of complaint resolution to the complainant and the participant organization.

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 in the Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems.

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 participant organizations, through contract. 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 or MSA/SOW are the enforceable arrangements regarding the suspension of the certification to help ensure, that in case of suspension, the participant organization 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 participant organization's failure to comply with the APEC CBPR and PRP Systems 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 and PRP related activities of Schellman.
5. If the determination is to withdraw the certification, Schellman, as included in the contract, has enforceable arrangements with the participant organization 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 the Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems?

Recommendation

The JOP is satisfied that Schellman meets the case notes and statistics requirements as stipulated in the Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems.

Discussion

For the CBPR System, the Accountability Agent Recognition Criteria 10 (g) & (h) require Accountability Agents to have a process for making publicly available statistics on the types of complaints and the outcomes of such complaints (see Annex E of the *Accountability Agent Application for APEC Recognition*), and a process for releasing, in anonymized form, case notes on a selection of resolved CBPR-related complaints illustrating typical or significant interpretations and notable outcomes (see Annex D of the *Accountability Agent Application for APEC Recognition*). The JOP has confirmed that Schellman will make publicly available information on the number of complaints and outcomes of such complaints and release case notes on a selection of important complaints. Schellman has agreed to make use of the templates in Annexes D and E of the *Accountability Agent Application for APEC Recognition* to annually send this information to APEC Member Economies as a condition of their recognition.

For the PRP System, the Accountability Agent Recognition Criteria 10(d) requires that Accountability Agents to have a process for making publicly available statistics on the types of PRP-related complaints and the outcomes of such complaints (see Annex D of the *Accountability Agent Application for APEC Recognition for the PRP System*). The JOP has confirmed that Schellman will make publicly available information on the number of complaints and outcomes of such complaints and will use the template in Annex D.

In its first year of recognition, Schellman had not certified any companies and received no complaints. Therefore no statistics or case notes were filed.

SIGNATURE AND CONTACT INFORMATION

By signing this document, the signing party 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 Accountability Agent Applications for APEC Recognition for the CBPR and PRP Systems.

[Signature of person who has authority to commit party to the agreement]

[Typed name]:

[Date]:

[Typed title]:

[Typed name of organization]:

[Address of organization]:

[Email address]:

[Telephone number]:

The first APEC recognition for an Accountability Agent is limited to one year from the date of recognition. Recognition will be for two years thereafter. 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.