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

RECOMMENDATION REPORT ON APEC RECOGNITION OF HITRUST AS AN ACCOUNTABILITY AGENT FOR THE CBPR AND PRP SYSTEMS

Submitted to: Mr. Julio Pertuze
Chair, Digital Economy Steering Group
May 12, 2020
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EXECUTIVE SUMMARY

In 2012, the United States formally commenced participation in the Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (herein CBPR) System. Pursuant to Paragraph 5 of the Protocols of the CBPR Joint Oversight Panel, the United States was then eligible to nominate one or more Accountability Agents for APEC recognition.

In 2017, the United States formally commenced participation in the APEC Privacy Recognition for Processors (PRP) System. Pursuant to Paragraph 5 of the Protocols of the PRP Joint Oversight Panel, the United States was then eligible to nominate one or more Accountability Agents for APEC recognition.

In December 2019, the U.S. Department of Commerce received an application from HITRUST Services Corp. (herein HITRUST) to serve as an APEC Accountability Agent for the CBPR and PRP Systems. After having reviewed the completeness of the application, the U.S. Department of Commerce forwarded the submission to the JOP on December 17, 2019.

SCOPE OF CONSULTATION PROCESS

Pursuant to Paragraph 7.2 of the Charter of the Joint Oversight Panel, members of the JOP\(^1\) began a consultative process with representatives from HITRUST to:

- Confirm the enforceability of an organization’s CBPR and/or PRP obligations once certified as CBPR and/or PRP compliant by HITRUST;
- Confirm HITRUST’s location and the relevant enforcement authority;
- Confirm that HITRUST meets the recognition criteria as identified in the Accountability Agent Application for Recognition for both the CBPR and PRP Systems;
- Confirm that HITRUST makes use of program requirements that meet the baseline established in the CBPR and PRP Systems; and
- Confirm that HITRUST has provided the necessary signature and contact information.

The following Recommendation Report was drafted by members of the JOP.

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\(^1\) Members of the JOP are: Shannon Coe, Department of Commerce, United States; Shuji Tamura, Ministry of Economy, Trade and Industry, Japan; and Evelyn Goh, Personal Data Protection Commission, Singapore.
RECOMMENDATION OF THE JOINT OVERSIGHT PANEL

Having verified the United States is a participant in the APEC Cross Border Privacy Rules (CBPR) and Privacy Recognition for Processors (PRP) Systems 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 HITRUST is located in the United States and is subject to the oversight and 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 HITRUST 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 that HITRUST has provided the required signature and contact information;

The JOP recommends that APEC Member Economies consider the conditions established in 7.2 (ii) of the Charter of the Joint Oversight Panel to have been met by HITRUST and to grant HITRUST’s request for APEC recognition of HITRUST 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 HITRUST’s request for 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 HITRUST or the JOP. If no objection is received within the deadline for consensus determination as established by the DESG Chair, the request will be considered to be approved by the DESG. Should Member Economies determine that HITRUST has met the necessary criteria, APEC recognition will be limited to one year from the date of recognition, one month prior to which, HITRUST 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 HITRUST 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 Notices of Intent to Participate\(^2\), the United States identified its enforcement authorities as the FTC and the United States Patent and Trademark Office, as well as described their respective enforcement functions:

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, trustmark or other symbol indicating its participation in the CBPR [or PRP] System[s], 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 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 [or 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 HITRUST, headquartered in Frisco, Texas, United States, is subject to

\(^2\) U.S. Notices of Intent to Participate in the CBPR and PRP Systems are available at cbprs.org.
the regulatory oversight and enforcement authority of the FTC as a for profit entity doing business in the United States. The JOP has further confirmed that the FTC is a participant in the CPEA\(^3\) and that the United States is a recognized participant in the APEC CBPR and PRP Systems.\(^4\) HITRUST has confirmed that it will apply in the United States for CBPR and PRP trademarks for use by participant organizations, and therefore is subject to the U.S. Patent and Trademark Office’s authority over use of the trademarks. HITRUST agrees that should it receive APEC recognition, it will publicly indicate its participation in the CBPR and PRP Systems, including allowing its name to appear on a list of recognized APEC Accountability Agents. HITRUST agrees to publish on its website the applicable CBPR and PRP program requirements and will post all CBPR and PRP-certified companies on its website and on http://cbprs.org/compliance-directory/cbpr-system/. The JOP has verified that HITRUST has completed and signed the Accountability Agent APEC Recognition Application.

**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 Applications for APEC Recognition for the CBPR and PRP Systems 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 Applications for APEC Recognition for the CBPR and PRP Systems.**

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 HITRUST meets Recognition Criteria 1-3.

**Discussion**

The JOP has confirmed that HITRUST 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. HITRUST’s Organizational Conflict of Interest Policy includes procedures to address potential or actual conflicts of interest. The Conflict of Interest Policy requires the company itself as well as officers and assessment/certification staff to disclose to the legal department all relationships, transactions, positions (volunteer or otherwise) or circumstances that could contribute to a conflict of interest and to update the disclosure form immediately upon becoming aware of a new potential conflict of interest. Such disclosures must be signed and certified by the employees and updated immediately upon becoming aware of any new potential conflicts of interest. If there is a potential or actual conflict of interest with a client, HITRUST’s legal team will examine whether the potential or actual conflict may be mitigated, for example through excluding employees from a project. If a conflict cannot be mitigated, the company or that

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\(^4\) Documents pertaining to U.S. participation in the CBPR and PRP Systems can be found here: http://cbprs.org/documents/.
employee shall recuse him or herself from the matter.

HITRUST has a two-stage certification process, and the JOP has confirmed that HITRUST has structural and procedural safeguards to avoid potential or actual conflicts of interest at both stages of review. HITRUST contracts with approved third-party assessor firms to work directly with the applicant organization during the certification process, and per the terms of agreement with HITRUST, third-party assessor firms are subject to the same requirements regarding avoiding potential or actual conflicts of interest as are required of HITRUST and its employees as described above. HITRUST’s policies provide that no assessor firm can be involved in the certification process if they have done consulting for an applicant organization in the past year.

HITRUST personnel undertake a second stage review of the third-party assessor’s report. HITRUST’s organizational structure separates its sales team from the assurance and compliance team, and HITRUST does not provide consulting services. HITRUST’s contract with applicant and participant organizations also includes an attestation by the organization that HITRUST has not provided consultant services, is not indirectly or directly affiliated with HITRUST, and there is no potential or actual conflict of interest between the parties that has not been reported to the JOP for approval of institutional safeguards.

HITRUST has confirmed that it will notify the JOP of affiliations with an applicant or participant organization which may be cured by the existence of structural safeguards and provide an explanation of the safeguards in place to ensure that the affiliation does not compromise HITRUST’s ability to render a fair and impartial decision with respect to the application or participant. Finally, HITRUST has confirmed that it will notify the JOP of withdrawals of HITRUST from CBPR or PRP engagements because of a conflict as well as for activities that may have appeared to be a conflict of interest but did not result in a withdrawal.

Any entity maintaining a registered trademark in the United States is required by law to apply certification standards in an impartial manner. HITRUST has confirmed that it will seek a certification mark in the United States for use by organizations it certifies for CBPR and/or PRP, and HITRUST will therefore be required to apply its certification standards in an impartial manner. The FTC may request that the U.S. Patent and Trademark Office cancel HITRUST’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 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.”).

HITRUST has confirmed that it will publish the CBPR and PRP certification standards on its website and report to the FTC or other appropriate public authority certifications of new applicant organizations, audits of participating organizations and dispute resolutions.
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 HITRUST meets Recognition Criterion 4.

Discussion

In consultation with the JOP, HITRUST has modified program requirements of its existing security and privacy certification system, HITRUST CSF®, to establish program requirements that they have mapped to the established CBPR and PRP program requirements using Annex C of the Accountability Agent APEC Recognition Application.

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 HITRUST meets Recognition Criterion 5.

Discussion

The JOP has confirmed that HITRUST has a comprehensive process to assess whether an applicant organization’s policies and practices meet the CBPR and PRP program requirements. HITRUST contracts with third-party assessors to perform the initial review of an applicant organization, which includes verifying the organization’s self-assessment against the program requirements and performing testing procedures, such as site visits, interviews and systems testing. The third-party assessor verifies whether the applicant organization meets the CBPR and/or PRP program requirements and submits a report outlining its methods and findings to HITRUST. HITRUST reviews the report to ensure the assessment was properly done and the requirements are met. Based on this review, HITRUST issues a report to the applicant organization outlining the organization’s compliance status and identifying corrective action plans and appropriate timelines to implement the corrections. HITRUST confirms that it will verify that an organization complies with all relevant requirements before certifying that
The JOP has confirmed HITRUST’s commitment that if all requirements are met, HITRUST will issue the certification and will provide details 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 HITRUST meets Recognition Criteria 6 and 7.

**Discussion**

The JOP has confirmed that HITRUST has written procedures for on-going monitoring and compliance review processes which ensure the integrity of the certification process described above. HITRUST requires applicant and participant organizations to agree via a user agreement to allow HITRUST to audit a participant’s systems during the period of certification, and the user agreement also obligates the participant organization to continuously monitor its systems and procedures for compliance and promptly report any event which may call into question a participant organization’s continued compliance with the CBPR and/or PRP program requirements. Events that require reporting include any change to the information the participant organization provided to HITRUST or the third-party assessor to obtain a certification; a breach of privacy or security; any changes in systems or procedures that implicate the organization’s certification; or any acquisitions or divestitures which affect its systems. HITRUST has also committed to monitoring press releases and news reports for information regarding participant organizations that might impact their certification.

Furthermore, HITRUST’s user agreement provides that HITRUST will investigate a suspected instance of noncompliance and may suspend a certification during the investigation or revoke the certification depending on the findings. Per the agreement, HITRUST will notify a participant organization immediately of any known non-compliance with the certification standards and will respond in a manner which is proportional to the harm or potential harm of the violation. HITRUST will notify the participant organization if any corrective actions need to be made and the time period in which they must be completed. Per the terms of HITRUST’s agreement with
participating organizations, HITRUST will revoke a CBPR and/or PRP certification if a participant organization fails to meet the program requirements, and HITRUST will report the revocation to the FTC and the JOP.

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 HITRUST meets Recognition Criterion 8.

Discussion

The JOP has confirmed that HITRUST will require participant organizations to agree to undergo an annual assessment of compliance with CBPR and/or PRP program requirements. HITRUST will undertake the assessment process in its entirety as outlined in response to Recognition Criterion 5 above and will provide the participant organization with a report of the findings and any corrections that need to be made to correct non-conformities consistent with the process outlined in response to Recognition Criterion 7 above.

The JOP has confirmed HITRUST’s user agreement requires immediate review if HITRUST is notified of a change outside of the annual certification cycle and to re-assess the participant organization’s compliance with the CBPR and/or PRP program requirements. Any corrections to non-conformities will be made consistent with the process outlined in response to Recognition Criterion 7 above.

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 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 HITRUST meets Recognition Criteria 9 and 10.

Discussion

The JOP has confirmed that HITRUST has committed to contracting with a third-party to receive, investigate and resolve CBPR and PRP-related complaints regarding participant organizations. HITRUST will publish on its website guidance on how to submit CBPR and PRP-related complaints, as well as the contact information for the FTC.

The JOP has confirmed that HITRUST has a process for resolving disputes outlined in its External Dispute Resolution Policy (DR Policy). Per the DR Policy, complaints can be submitted through its third-party dispute resolution service, Lighthouse Services, Inc., or directly to HITRUST, in which case the complaint will be forwarded directly to the Legal or Compliance Department. When submitting a complaint, a complainant will be asked for his/her consent to use their personal information during the investigation.

HITRUST will confirm receipt of the complaint generally within two business days. Upon receipt of a complaint, either Lighthouse or HITRUST will obtain statements from all parties involved, determine if the alleged violation is in the scope of the CBPR or PRP requirements and notify the complainant. Lighthouse or HITRUST will promptly investigate the complaint, documenting all evidence and interviews and completing an investigation report. HITRUST confirms that the information related to the complaint and the investigation will remain confidential.

If the investigation reveals that a participating organization is not in compliance, HITRUST will inform the organization if it needs to make corrections, and if the organization does not make the necessary corrections within a reasonable time, HITRUST will revoke the participating organization’s certification and/or report the issue to the FTC in the case of a violation of law.

The JOP has confirmed HITRUST will notify the outcome of the investigation to the complainant and the participating organization in writing. HITRUST will make public statistical data on the types and outcomes of complaints received, and it will communicate the data to the FTC and the JOP and issue complaint case notes on a selection of resolved CBPR-related complaints on an annual basis. Finally, HITRUST commits to cooperating with other Accountability Agents when appropriate and where possible although HITRUST does not currently have any clear policy for it.

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 HITRUST meets Recognition Criteria 11-15.

Discussion

The JOP has confirmed that HITRUST enforces the CBPR and PRP program requirements
through contract with the applicant organization, which requires that participant organizations
must comply with all program requirements and notify HITRUST of any events that may bring a
participant organization out of compliance.

The JOP has confirmed that HITRUST maintains a process to notify participant organizations
immediately of non-compliance with CBPR and/or PRP program requirements and for requiring
participant organizations to remedy the non-compliance within a stated time frame that is
dependent on the corrective action.

The JOP has confirmed that HITRUST’s policies and its contract with participant organizations
provide that it will remove or suspend a participant organization, including its right to display the
CBPR or PRP certification mark, when it has not complied with the CBPR or PRP program
requirements and failed to remedy non-compliance within a specified time period. HITRUST’s
policies further provide that it will suspend the use of the certification mark during any
investigation. HITRUST commits to publicizing the participant organization’s non-compliance
and has policies and procedures to refer violations to relevant public authorities where
appropriate.

Finally, the JOP has confirmed that HITRUST commits to responding to requests from
enforcement entities in APEC Economies that reasonably relate to the Economy and to the
CBPR or PRP-related activities of HITRUST, where possible.
II. 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 HITRUST 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 HITRUST 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. HITRUST 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 Criterion 10(d) requires that Accountability Agents have a process for making publicly available statistics on the types of CBPR-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 HITRUST will make publicly available information on the number of complaints and outcomes of such complaints and will use the template in Annex D of the Accountability Agent Application for APEC Recognition.
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]:

APEC recognition is limited to one year from the date of recognition. 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.