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DEPARTMENT OF COMMERCE

Office of the Secretary

National Telecommunications and Information Administration

International Trade Administration

National Institute of Standards and Technology

Docket No. 100921457-0457-01

RIN 0660-XA20

Global Free Flow of Information on the Internet

AGENCY: Office of the Secretary, U.S. Department of Commerce; National Telecommunications and Information Administration, U.S. Department of Commerce; International Trade Administration, U.S. Department of Commerce; and National Institute of Standards and Technology, U.S. Department of Commerce.

ACTION: Notice of Inquiry.

SUMMARY: The Department of Commerce's Internet Policy Task Force is examining issues related to the global free flow of information on the Internet. Specifically, the Department seeks public comment from all stakeholders, including the commercial, academic, and civil society sectors, on government policies that restrict information flows on the Internet. The Task Force seeks to understand why these restrictions have been instituted; what, if any, impact they have had on innovation, economic development, global trade and investment; and how best to address negative impacts. After analyzing the comments responding to this Notice, the Department intends to publish a report which will contribute to the Administration's domestic policy and international engagement on these issues.

DATES: Comments are due on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted by mail to the National Telecommunications and Information Administration at U.S. Department of Commerce, 1401 Constitution Avenue, NW, Room 4701, Washington, DC 20230. Submissions may be in any of the following formats: HTML, ASCII, Word (.doc and .docx), .odf, .rtf, or .pdf. Online

submissions in electronic form may be sent to freeflow-noi-2010@ntia.doc.gov. Paper submissions should include a three and one-half inch computer diskette or compact disc (CD). Diskettes or CDs should be labeled with the name and organizational affiliation of the filer and the name of the word processing program used to create the document. Comments will be posted at <http://www.ntia.doc.gov/internetpolicytaskforce/gffi/index.html>.

FOR FURTHER INFORMATION CONTACT: For questions about this Notice contact: Chris Hemmerlein, Office of International Affairs, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Room 4706, Washington DC 20230; telephone (202) 482-1885; email chemmerlein@ntia.doc.gov. Please direct media inquiries to NTIA's Office of Public Affairs at (202) 482-7002.

SUPPLEMENTARY INFORMATION:

Background:

Recognizing the vital importance of the Internet to U.S. prosperity, education and political and cultural life, the Department of Commerce has made it a top priority to ensure that the Internet remains open for innovation. The Department has created an Internet Policy Task Force (Task Force) to identify leading public policy challenges in the Internet environment. The Task Force leverages expertise across many bureaus at the Department, including those responsible for domestic and international information and communications policy, international trade, cybersecurity standards and best practices, intellectual property, business advocacy, and export control. This is one in a series of inquiries from the Task Force. Other reviews include Internet privacy, cybersecurity, and online copyright protection issues. The Task Force may explore additional areas in the future.

The Department of Commerce launched the Internet Policy Task Force to identify and examine the impact that restrictions on the flow of information over the Internet have on American businesses and global commerce. Businesses, emerging entrepreneurs and consumers alike benefit from the ability to transmit information quickly and efficiently both domestically and internationally. The Department aims to assist industry, and other stakeholders to operate in varying Internet environments and to identify policies that will advance economic growth and create jobs and opportunities for the American people.

Many countries have recognized that the free flow of information over the Internet is integral to economic growth and vibrancy, as well as to the promotion of democratic values that are essential to free markets and free societies. In 2008, members of the Organization for Economic Co-operation and Development (OECD) issued the Seoul Declaration on the Future of the Internet Economy. The Seoul Declaration, signed by 39 governments and the European Community, called for governments to foster creativity in the development, use and application of the Internet, through policies that “maintain an open environment that supports the free flow of information, research, innovation, entrepreneurship and business transformation.”¹

¹ The Seoul Declaration was signed by Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan,

Many governments continue to place restrictions on these flows despite recognizing the value of the free flow of information on the Internet. Some governments create specific restrictions based upon articulated reasons, including consumer protection and public safety. At times, however, such restrictions, or their implementation, may place undue burdens on businesses or Internet users. Governments may also restrict information flows as a way of promoting or protecting local businesses, such as by developing restrictions that mostly impact foreign competitors or by applying them on an unequal basis. In other cases, governments may wish to restrict information flows as a way of limiting access to certain types of information that are not themselves illegal, but that may contain objectionable political or social content. In some cases, laws, policies and rules restricting information flows may be vaguely articulated, inconsistently enforced, pretextual, or created without transparent and open processes. Government regulators may have difficulty in consistently applying laws or rules that are not clearly written or that have been developed without prior public comment. In such circumstances, business may also have difficulty ensuring their practices comply.

Contribution of this NOI to the Internet Policy Task Force:

Responses to this Notice will assist the Task Force in preparing a report on the global free flow of information on the Internet. This report will examine the impact that restrictions on the free flow of information on the Internet have on innovation, global economic growth, trade, and investment. The Task Force's report may include policy options and recommendations for general regulatory, legislative, self-regulatory and voluntary steps that will enhance the free flow of information online. The Task Force anticipates that the dialogue launched by this document and the research conducted will contribute to Administration-wide policy positions and global discussions related to the Internet economy. The work of the Task Force has been and will continue to be closely coordinated with other agencies, including the State Department, as described below.

The Impact of the Global Free Flow of Information on Commerce:

The ability to freely and efficiently distribute information on the Internet is at the very core of modern consumer, business, political and educational activity. Between 1999 and 2007, the United States economy enjoyed an increase of over 500 percent in business-to-consumer online commerce.² Taking into account business-to-business transactions, online commerce accounted for over \$3 trillion dollars in revenue for U.S. companies in 2007.³ The economic benefits provided by the information economy increased even during the recent economic downturn. During 2008, industry analysts estimate that sales by the top 100 online retailers grew 14.3

Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Senegal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America, and the European Community. The Seoul Declaration for the Future of the Internet Economy, June 2008, available at <http://www.oecd.org/dataoecd/49/28/40839436.pdf>.

² U.S. Census Bureau, "E-Stats," May 28, 2009.

³ *Id.*

percent.⁴ In contrast, the U.S. Census Bureau estimates a 0.9 percent decrease in total retail sales over that time period.⁵

In 2009, U.S. mobile commerce sales grew over 200 percent, reaching \$1.2 billion.⁶ Analysts expect this impressive growth in mobile commerce to continue in 2010.⁷ Businesses have found this growing market to be extremely lucrative, as evidenced by the estimated \$3.8 billion that they will spend on mobile advertising in 2010.⁸

Likewise, the free flow of information on the Internet has a significant impact on the types of technologies that consumers use to communicate, absorb, and process data. For example, integrated application stores on handheld devices have simplified how individuals purchase software over the Internet, and are projected to accrue \$6.2 billion in consumer spending in 2010 alone.⁹ Similarly, mobile VoIP software is growing in popularity and is estimated to be responsible for nearly \$29.57 billion in annual global sales by 2015.¹⁰

The free flow of information on the Internet also has an impact on global commerce generally. Many small and medium sized businesses and entrepreneurs utilize new technologies and applications, such as VoIP, social networking and cloud computing services, to run their businesses more efficiently and to gain access to information, which allows them to compete effectively.

The U.S. Government's Involvement in the Information Flows Issue:

The Department of Commerce has played an instrumental role in developing policies that facilitate commerce over the Internet. Over the past two decades, the National Telecommunications and Information Administration (NTIA), in its role as principal adviser to the President on telecommunications and information policy, has worked closely with other agencies of the U.S. Government on these issues. In 1993, the White House formed the Information Infrastructure Task Force, chaired by the Secretary of Commerce, which was tasked with developing telecommunications and information policies to promote the growth of the Internet. Since then, NTIA has facilitated the U.S. Government's participation in a variety of international agreements, including the OECD and the above-referenced Seoul Declaration on the Future of the Internet Economy, as well as the outcomes of the United Nations World Summit on the Information Society (WSIS), which aims to develop worldwide access to

⁴ Mark Brohan, *The Top 500 Guide*, INTERNET RETAILER, <http://www.internetretailer.com/2009/05/29/the-top-500-guide> (June 2009).

⁵ U.S. Census Bureau, QUARTERLY RETAIL E-COMMERCE SALES: 4TH QUARTER 2008 (Feb. 16, 2010), Table 4.

⁶ Katie Deatsch, *U.S. M-Commerce Sales to Hit \$2.4 Billion This Year*, ABI Research Says INTERNET RETAILER, <http://www.internetretailer.com/2010/02/16/u-s-m-commerce-sales-to-hit-2-4-billion-this-year-abi-researc> (Feb. 16, 2010).

⁷ *Id.*

⁸ Khan, et. al., *Mobile Advertising: An In-Depth Look at the Future of Mobile Advertising*, J.P. MORGAN/NORTH AMERICAN EQUITY RESEARCH, https://mm.jpmorgan.com/stp/t/c.do?i=E8283-B8&u=a_p*d_423260.pdf*h_2tvncakf (June 4, 2010).

⁹ *Gartner Says Consumers Will Spend \$6.2 Billion in Mobile Application Stores in 2010*, GARTNER NEWSROOM, <http://www.gartner.com/it/page.jsp?id=1282413> (January 18, 2010).

¹⁰ *Mobile VoIP Posed to Become the Principle Transport for Various Access Technologies*, INFOTECH, <http://it.tmcnet.com/news/2010/05/20/4799884.htm> (May 20, 2010).

Information and Communications Technologies (ICTs) by 2015. In addition, NTIA continues to play a leading role in other international venues such as the International Telecommunication Union (ITU), the Internet Governance Forum (IGF), and the Internet Corporation for Assigned Names and Numbers (ICANN).

The International Trade Administration (ITA) strengthens U.S. competitiveness abroad by helping shape industry-specific as well as general trade policy to assist U.S. companies and helps create trade opportunities through the removal of market access barriers. ITA also promotes U.S. exports, particularly by small and medium-sized enterprises, and provides commercial diplomacy support for U.S. business interests around the world. In addition to trade promotion, ITA enforces U.S. trade laws and agreements to prevent unfairly traded imports and to safeguard the competitive strength of U.S. businesses. ITA also works to improve the global business environment and helps U.S. organizations compete at home and abroad.

The National Institute of Standards and Technology (NIST) contributes significantly to the development of Internet security and interoperability standards, guidelines, best practices, and security measurement capabilities and tools. NIST actively engages with industry and academia to advance the state-of-the-art in information technology networking in such applications as cyber security and encryption, among the critical underpinnings of information flows over the Internet for American businesses and global commerce. NIST accelerates the development and deployment of Internet systems that are reliable, usable, interoperable, and secure, and conducts research to develop the measurement and standards infrastructure for the emerging Internet technologies and applications that will support future economic growth and vibrancy.

The Commerce Department has worked in a number of international fora to develop guidelines that foster international trade. ITA administers the U.S.–European Union (EU) Safe Harbor Framework, which facilitates U.S. companies' compliance with the requirements of the 1995 EU Directive on Data Protection for transferring data outside of the European Union. ITA also administers the U.S.-Swiss Safe Harbor Framework, which was implemented in 2009. The Department played a significant role in launching the Trilateral Committee on Transborder Data Flows in 2009 and is involved in bilateral Internet commerce policy initiatives with India, Japan, China, Korea and other key countries.

The United States Trade Representative (USTR) has addressed cross-border data issues in varying degrees in all recent major trade agreements, including World Trade Organization (WTO) agreements and Free Trade Agreements (FTA). One of the main 'modes of delivery' of services on which WTO members and FTA partners make binding trade commitments is cross-border trade, the importance of which has grown with the growth of globally interconnected broadband networks. The main commercial beneficiaries of such commitments have been data-centric services—telecoms, computer processing, and more recently, content-based services, for whom data flows are at the heart of their commercial offerings. Accordingly, governmental prohibitions or restrictions on data flows significantly undermine the value of a trade commitment, and in some cases could be actionable under trade law. Drafters of the 1994 WTO General Agreement on Trade in Services recognized the importance of this issue and included a provision ensuring that service suppliers covered by a Member's specific sectoral commitment (which vary country by country) would have the right to access public telecommunications

networks in order to move information within and across borders and access data contained in data bases in the territory of any Member. To date, despite recognition of related problems in many countries, there has never been a case brought to formal dispute settlement.

The Department of State's Office of Communications and Information Policy (CIP) advocates international policies for expanded access to information and communications technologies, improved efficiency in the worldwide ICT and telecommunications market through increased reliance on free-market forces, and fair opportunities for U.S. companies to participate in this sector internationally. CIP leads U.S. delegations to multilateral organizations like the ITU and also coordinates bilateral consultations on Internet and telecom policies with several key countries, including India, Egypt, China, Japan and the EU.

The Net Freedom Taskforce is the Department of State's internal policy coordinating group on issues of global Internet freedom. The taskforce is co-chaired by State's Under Secretary of Economic and Agricultural Affairs and State's Under Secretary of Democracy and Global Affairs. The NetFreedom Taskforce works to increase access to uncensored content over the Internet and other connection technologies, in addition to monitoring and responding to threats to Internet freedom as they arise. This is accomplished through frequent engagement with civil society and business, programming support for initiatives that improve Internet Freedom and government-to-government consultations with both countries of concern and countries with similar perspectives on this issue.

REQUEST FOR COMMENT:

In developing this Notice, the Internet Policy Task Force conducted listening sessions with a range of companies and civil society organizations. Those conversations shaped the questions described below. The Task Force now seeks detailed comments from all stakeholders on their experiences in sharing and exchanging information through the Internet worldwide. It seeks to understand the specific nature of restrictions that exist with respect to the free flow of information, the rationale given for the restrictions, and whether and how these restrictions have influenced business decisions relating to innovation, trade or investment. It also seeks comment on how to best mitigate any negative impacts by using trade agreements and other tools that might foster international cooperation on Internet policy.

The questions below are intended to assist in framing the issues and should not be construed as a limitation on comments that parties may submit. The Department invites comment on the full range of issues that may be presented by this inquiry. Comments that contain references, studies, research and other empirical data that are not widely published should include copies of the referenced materials with the submitted comments.

1. Types of Restrictions on the Free Flow of Information on the Internet

In the United States and numerous countries around the world, the Internet has flourished as an economic and social innovation motivated by the complementary goals of encouraging the free

flow of goods and services and the commitment to freedom of expression. At the same time, governments may place restrictions on the types of information available over the Internet in their jurisdiction for a number of reasons, including protecting consumers or the property rights of users. Numerous countries, for example, have laws prohibiting certain activities online, including the dissemination of child pornography, intellectual property infringement and the sending of unsolicited email.¹¹ Some governments restrict Internet access by only allowing access to the Internet through a government controlled access point, or by requiring the installation of filtering software on user computers.¹² The most restrictive governments require Internet users to be registered or licensed by a government authority before being permitted access to the Internet. Governments can also impede the flow of information online by openly blocking particular websites, or by using technical measures, including infiltrating and exploiting computer systems with targeted viruses and by employing distributed denial-of-service attacks.¹³

Many restrictions on the flow of information on the Internet, both those accepted by stakeholders as legitimate and others, are implemented at the level of Internet intermediaries, such as Internet service providers (ISPs). Such restrictions may require ISPs or other intermediaries to take affirmative steps to block or filter information flows. Some countries require ISPs to block material, remove content in response to take-down notices, or remove search results. In some circumstances governments may also impose civil or criminal liabilities on intermediaries, including content hosts and Internet service providers.

In addition to restrictions focused on illegal content, governments have also blocked or prohibited the presence of certain types of Internet services or applications within their borders. Governments may also ban or heavily regulate foreign service suppliers from establishing a commercial presence in their country. The widespread growth of new data distribution mechanisms, such as social networking applications and VOIP services, for example, have prompted some governments to block or restrict the services or underlying software.

The Task Force seeks to understand what types of restrictions on the free flow of information on the Internet are present in different countries, what the stated policy objectives are when governments place restrictions on the flow of information and what impact such restrictions have on innovation, on trade and on investment in those countries. In particular, the Task Force seeks to understand the circumstances under which such restrictions become unduly burdensome on businesses and consumers in relation to the accepted public policy benefit, if any, of the restriction.

- What restrictions are there on the global free flow of information on the Internet due to government laws or regulations?
- What types of restrictions are most prevalent and in what markets?
- What impact, if any, do these restrictions have on investment and trade?

¹¹ See, e.g., Italian Personal Data Protection Code (Legislative Decree no. 196 of 30 June 2003); Australia's Spam Act 2003.

¹² *Overview of Internet Censorship*, OpenNet Initiative, <http://opennet.net/about-filtering> (2010) (Last accessed Aug. 30, 2010).

¹³ Deibert; Palfrey; Rohozinski; Zittrain, ed., *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (MIT Press 2010), at 6.

- What types of restrictions are most readily accepted as legitimate by the business community?
- What impact, if any, do these restrictions have on the types of Internet services and applications available to consumers, both locally and globally?
- Have such restrictions led companies to avoid certain markets altogether?
- What are some of the articulated policies or governmental objectives used to support such restrictions?
- Are the restrictions clearly linked to specific government objectives? Are the restrictions developed in a transparent manner?
- In what countries have businesses experienced restrictions on Internet information flows?
- Are such restrictions applied evenly to local and foreign businesses?
- How can the Department of Commerce and the federal government as a whole assist U.S. entities in gaining greater access to new markets?
- What role, if any, can the Department of Commerce play in helping to reduce restrictions on the free flow of information over the Internet?

2. Identifying Best Practices

Governments may attempt to pursue public policy objectives by placing restrictions on the free flow of information over the Internet. The challenge faced by every government is to strike a balance between the stated need for such action, the burden placed on stakeholders as a result of such restriction, and the social and economic benefits derived from the Internet. Most importantly, governments must craft national policies in a manner that recognizes the global nature of the Internet and therefore seek solutions that empower users to protect themselves where possible. The increasing accessibility of different types of information over the Internet as well as the development of new types of communications tools such as VoIP, social networking, blogging, and micro-blogging can provide businesses and entrepreneurs with valuable opportunities to engage in new business practices to stimulate economic growth and further innovation.

- Are there alternatives to government-mandated restrictions on the flow of information on the Internet that can realize legitimate policy objectives?
- Are there any best practices or baseline criteria for the development, articulation, and enforcement of policies restricting information flows that should be pursued by governments? For example, what are some best practices for governments to follow to secure their domestic Internet infrastructure, while minimizing restrictions on the free flow of information for their citizens?
- How should governments assure adequate levels of procedural due process and transparency to users, publishers and intermediaries when there is a determination that restricting the free flow of information is necessary?
- How effective are local restrictions given the global nature of the Internet and the possibility of individual users circumventing government regulations?

3. Impact of Restricted Internet Information Flows on Innovation, Trade and Commerce

Restrictions on the flow of information over the Internet may adversely impact service, content, and application providers and the Internet users who depend upon them. Some businesses, in the face of such restrictions, may opt to avoid or leave certain markets altogether. At times, businesses may limit or modify their product or service offerings in particular markets in order to comply with local requirements. In addition, if a government's Internet policies are non-transparent or unclear, businesses may alter their product development, trade and investment strategies.

The rise of globally-accessible cloud computing services – everything from Web-based mail and office productivity suites, to more general purpose computing, storage and communications services available through the cloud – raise a new set of questions regarding local restrictions that countries may impose on services accessible, though not physically located, in their country. Cloud services realize economies of scale and redundancy through flexible location of user data and processing capability. Internet users, in many circumstances, have no knowledge of or control over the precise location of the services they are receiving or the physical location of their data in cloud environments.

- What are the economic impacts of government restrictions on the free flow of information? Please provide examples of the economic impact of such restrictions on individual businesses or on specific industries.
- Is it possible to quantify the impact that such restrictions have had on specific businesses or industries and in what markets?
- What role have individual countries' restrictions on the free flow of information on the Internet played in a business's decision to enter or remain in a market?
- Are there examples of situations where businesses have not invested or conducted business in a country because of such restrictions? What impact, if any, do these restrictions have on the types of Internet services and applications available to consumers, both locally and globally?
- Do local restrictions on Internet information flows impact the ability of businesses to innovate and to develop uniform products, services or standards?
- How do local restrictions on the free flow of information affect the development of cloud computing services?
- How are traditional notions of jurisdiction, venue and choice of law evolving as services are offered on a global basis and data storage varies based on efficiency, rather than only legal, considerations?
- Are there specific examples of how local restrictions have impacted a business's global practices?

4. The Role of Internet Intermediaries

Internet intermediaries play a vital role in the flow of information on the Internet by serving as a link between information producers and information users. Internet intermediaries provide access to, host, transmit or index information created by third parties, or provide Internet-based

services to third parties.¹⁴ Internet intermediaries include website hosts, blogging site hosts, social media sites and other services that allow individuals to provide and post information to be hosted online. The services Internet intermediaries provide are integral to the growth and vitality of the Internet because they allow widespread user participation with minimal upfront costs or technical resources.¹⁵

Governments must balance the interests of users who post information on the Internet, and other parties who access the user-generated material. In seeking to prevent the distribution of objectionable or illegal material, many governments have looked to Internet intermediaries to serve a role in implementing governmental restrictions on information. However, the burden of screening, analyzing and carefully filtering each piece of user-generated information is a task beyond the resources available to most Internet intermediaries. Moreover, if governments burden intermediaries with excessive or ill-defined responsibility for content not their own, then they will have no choice but to exercise harmful restrictions on the free flow of information, goods and services online. Governments therefore need to consider the effectiveness of requiring intermediaries to enforce or implement information restrictions against the costs that may deter intermediaries from operating in particular jurisdictions or from creating new Internet business models.

Governments have struck this balance differently in different countries. Some governments place affirmative obligations on Internet intermediaries to monitor or filter user posted content, while others provide an incentive for self-monitoring in exchange for immunity from otherwise applicable law.¹⁶ Some governments regulate the Internet with the same laws that apply to traditional print and broadcast media, and treat intermediaries like traditional publishers and thus as legally responsible for information posted on the Internet, even by third parties.

Under U.S. law, traditional print and broadcast media may be liable for certain defamatory content in their publications only if a print or broadcast publisher exercised some editorial control. Congress was concerned that application of this law to Internet intermediaries would discourage Internet service providers from exercising any control over content posted on their services, such as removing profanity from chat room postings, for fear of being held liable for these postings.¹⁷

¹⁴ *The Economic and Social Role of Internet Intermediaries*, OECD (April 2010) at 10, available at <http://www.oecd.org/dataoecd/49/4/44949023.pdf>.

¹⁵ *Human Rights Challenges Facing the Technology Industry Before Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. (March 2, 2010) (Testimony of Daniel J. Weitzner, Associate Administrator for Policy Analysis and Development, National Telecommunications and Information Administration, United States Department of Commerce), available at http://www.ntia.doc.gov/presentations/2010/Weitzner_Final_03022010.pdf.

¹⁶ *Overview of Internet Censorship*, *supra* at <http://opennet.net/about-filtering> (Last accessed Aug. 30, 2010).

¹⁷ See Daniel J. Weitzner, *National Telecommunications and Information Administration (NTIA) Position Paper*, OECD Workshop, *The role of Internet intermediaries in advancing public policy objectives*, available at <http://www.oecd.org/dataoecd/17/31/45543576.pdf>; see also Comments of Representative Cox, 141 Cong. Rec. H8469-70 (1995).

To address this issue, Congress passed Section 230 of the Communications Decency Act of 1996 (a common name for Title V of the Telecommunications Act of 1996).¹⁸ Prior to the enactment of Section 230, an intermediary could only be certain of avoiding liability if it exercised no oversight at all over material posted or accessed by users. Congress recognized that this discouraged content-filtering that users might want, such as the creation of pornography and profanity-free, child-safe spaces. Section 230 does not require intermediaries to determine whether information posted by users is illegal, rather the immunity granted by Section 230 encourages them to do so without fear of being held liable for content posted by third parties.¹⁹ There are, however, exceptions to the immunity rule and any intermediaries knowingly hosting illegal content can be held liable. Section 230 has spurred rapid growth in new Internet services and applications by allowing Internet service providers, Website hosts, social network sites, and others from worrying about potential liability for information stored on or moving across their networks, thus ensuring a flexible environment for innovation and growth.

U.S. law provides similar protection for intermediaries in the context of federal copyright law. Section 512 of the Digital Millennium Copyright Act (DMCA) creates a conditional safe harbor from copyright infringement liability for qualified Internet intermediaries serving as “mere conduits” for content.²⁰ While the DMCA does not require qualified Internet intermediaries to affirmatively ferret out each and every instance of copyright infringement on their services, it does require that Internet intermediaries comply with a “notice and takedown” system. This notice and takedown system is intended to provide a streamlined and effective way for copyright holders to notify Internet intermediaries of identified instances of infringement so that infringing content can be expeditiously removed. The notice and takedown system of the DMCA, like the immunity granted in Section 230, is one way a government may strike a balance where objectionable or illegal content is removed, while preserving the ability of Internet intermediaries to continue to provide their vital services.

- What is the impact of third party liability laws on businesses’ abilities to operate in global markets? How do businesses approach these differing liability regimes?
- To what extent do various governments’ third party liability laws allow for immunity with exceptions for Internet intermediaries? How useful are such laws?
- Are there specific principles or factors that governments should take into account when dealing with content restrictions and the intermediaries who might be in a good position to monitor postings and remove illegal or objectionable content?
- How might governments promote innovation in the provision of new intermediary services (*e.g.*, by granting immunities), while at the same time encouraging responsible conduct by those same intermediaries?

5. Trade Agreements

Trade and investment rules exist in WTO commitments, FTAs, and other international treaties or agreements. The WTO addresses the free flow of information in multiple ways. For example,

¹⁸ P.L. 104-104, codified at 47 U.S.C. § 230.

¹⁹ See generally, Comments of Representative Cox, 141 Cong. Rec. H8469-70 (1995).

²⁰ Digital Millennium Copyright Act (P.L. 105-304, codified at 17 U.S.C. § 512).

Members currently abide by a moratorium on customs duties on electronic transmissions. In addition, WTO member governments allow cross-border trade in services through commitments made in the General Agreement on Trade in Services, FTAs, and other international treaties or agreements, which support trade in digital products or ease restrictions on market access for certain information communication technology products and services.

- How might bilateral or multilateral trade or other agreements promote the free flow of information over the Internet?
- How might these agreements promote transparency and the provision of due process in the creation and application of government restrictions to the free flow of information online?
- With respect to cloud or other Web-based services, are there specific trade disciplines that can enhance market access for all providers and increase legal certainty for potential users?
- What other affirmative trade obligations related to the free flow of information over the Internet should be considered?

6. International Cooperation

There are several intergovernmental bodies, including the International Telecommunication Union (ITU), OECD, Council of Europe, and Asia-Pacific Economic Cooperation (APEC) forum, that attempt to guide the growth of the Internet and online commerce through policy negotiations and dialogues. Multi-jurisdictional governmental organizations such as these have the benefit of being inclusive (in that by definition they represent the interests of member governments) and the potential to be authoritative. By their nature however, these organizations move at a deliberate pace, which means that fast-moving Internet issues can be difficult for them to address.

Over the past decade the private sector, civil society, and academia increasingly have engaged in regional and international activities focused on the development of cross-border Internet policy. The IGF, for example, is a multi-stakeholder forum that places private sector, civil society and academic stakeholders on an equal footing with their government counterparts for an open and spirited dialogue on Internet policy. Another case in point is the Global Network Initiative, which is a voluntary multi-stakeholder initiative, composed of several human rights organizations and three major Internet companies who together aim to address restrictions on the free flow of information on the Internet.²¹ Advocates of multi-stakeholder initiatives point out that a less formal structure can be more nimble and thus in a better position to address the fast-changing nature of Internet offerings. Multi-stakeholder initiatives can be formed around discrete issues and can be populated by interested parties on an ad hoc basis. While such organizations cannot establish law or regulation, they can accelerate the articulation of acceptable norms seen as good practices for large segments of the population.

²¹ *Global Network Initiative*, available at <http://www.globalnetworkinitiative.org/> (2010).

- Are there some multi-jurisdictional, governmental forums or multi-stakeholder, private-sector organizations that are better suited than others to develop proposals or principles to guide governments as they develop policies concerning the free flow of information on the Internet?
- What attributes should multi-stakeholder organizations or initiatives possess in order to maximize their efficacy? What makes them well-suited to develop principles and best practices to guide the private sector? Are there examples of industry best practices or codes of conduct which provide useful guidance on how businesses should deal with restrictions on the free flow of information?
- What are the pros and cons of turning to multi-stakeholder initiatives to accelerate norm development instead of international governmental bodies?
- Has private-sector support for multi-stakeholder initiatives matured to the point where governments can rely on those initiatives for the long-term?

Commenters should feel free to raise and address other governance questions as they see fit.

Dated: __September 23, 2010_____.

Gary Locke,
Secretary of Commerce.

Lawrence E. Strickling,
Assistant Secretary for Communications and Information.

Francisco J. Sánchez,
Under Secretary of Commerce for International Trade.

Patrick Gallagher,
Director, National Institute of Standards and Technology.

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