Ensuring Consumers are Protected in the Digital Era

Statement of Jeff Chester

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TTIP Stakeholder Event

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Summary: *EU and U.S. consumer groups, through the Transatlantic Consumer Dialogue, have already gone on record with USTR urging that data protection and data flow-related issues not be addressed in the TTIP negotiations. Both in the U.S. and the EU, policymakers are in the process of reviewing and potentially revising their respective privacy frameworks, making any trade agreement on the issue premature. However, the recent revelations of widespread data gathering by the U.S. and also European governments reported by the news media require a new approach for addressing digital products and e-commerce services, data flows, and data protection. We urge the USTR to call on the newly formed U.S. and EU review on privacy- and national security-related issues, which is now operating parallel to the start of the TTIP negotiations, to report its findings to the public. A thorough understanding of what data on citizens have been collected, and by whom (including by commercial entities), is required. Finally, digital products and services require a separate approach outside of the TTIP process. The civil liberties of individuals, including their right to privacy, should not be treated as just another commodity to be traded through negotiation.*

We welcome this opportunity to express to USTR our perspective regarding the role of digital products and services, data flows, and data protection in the TTIP negotiations. The Center for Digital Democracy (CDD), a Washington, DC-based nonprofit organization, represents the interests of consumers on digital media issues. CDD works to ensure that consumers are treated fairly and in a non-discriminatory manner, in terms of pricing, access, and quality of services, and that their privacy is respected and protected

(especially where vulnerable consumers, such as youth, are concerned). CDD is especially well known for its pioneering efforts to protect the privacy and well-being of children online, through its leadership effort promoting the congressional passage of the Children's Online Privacy Protection Act in 1998, and more recently for its successful campaign to encourage the FTC to strengthen COPPA's safeguards through new rules (which went into effect 1 July 2013). In addition to serving as executive director of CDD, I am currently the U.S. chair of the Transatlantic Consumer Dialogue (TACD) Information Society working group.

In our previous written and oral testimony to USTR, as well as at a series of stakeholder meetings it held, CDD strongly urged that the TTIP not include issues related to data protection and privacy.[1] We also raised concerns about the treatment of digital products and data flows in the negotiations, given their impact on consumer privacy. CDD supports the position of TACD on data protection issues, as it explained in a 5 March 2013 letter to Ambassador Ron Kirk:

> Measures related to personal information and privacy should ensure the highest level of data protection for both EU and US consumers, and permit nations to establish more robust privacy-enhancing measures that include new and evolving digital technologies. Comprehensive legislative data protection reforms are ongoing in the EU, and more privacy-friendly mechanisms are being developed in the US, therefore data flows and data protection must not be included in free trade negotiations.[2]

That statement, however, as well as my own to the USTR, was made before the public learned from news reports of widespread data collection and analysis practices involving the U.S., UK, and other governments participating in the TTIP process. As you know, a number of leading U.S. companies, including Google, Facebook, Microsoft, Yahoo, and

[1] "US Online Data Trade Groups Spin Digital Fairy Tale to USTR about US Consumer Privacy Prowess—CDD Says Privacy Out of Bounds in TTIP," 29 May 2013, http://www.democraticmedia.org/us-online-data-trade-groups-spin-digital-fairy-tale-ustr-about-us-consumer-privacy-prowess-cdd-say-0 (viewed 7 July 2013).

[2] Transatlantic Consumer Dialogue, letter to Ambassador Ron Kirk, United States Trade Representative, and Commissioner Karel De Gucht, Member of the European Commission, 5 Mar. 2013, http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=353&Itemid=40 (viewed 7 July 2013).

others, have been identified as working in some way with the so-called Prism program of the National Security Agency.[3] We note that press reports indicate that a separate U.S./EU initiative accompanying the trade talks to address the data protection and national security issues raised by the disclosure of documents and reporting will also take place.[4]

The revelations regarding U.S. and EU surveillance involving the collection of information, including the role of commercial digital data entities, has raised serious concerns. We still don't know the actual extent of the data collection practices, whether they were lawful, or the range of activities involving companies such as Google, Facebook, and Yahoo. Until the new U.S. and EU group examining privacy in the light of the Prism and related disclosures makes a report to the respective governments and the public, data and e-commerce-related trade matters should not be addressed by the negotiators. The public on both sides of the Atlantic deserves a full and frank discussion of what actually transpired, and what policies or safeguards might be required as a consequence.

Digital trade matters, however, require a separate track. The civil liberties of individuals, including their right to privacy, should not be treated as just another commodity to be traded through negotiation. Digital products and e-commerce services, as well as data

[3] Timothy B. Lee, "Report: NSA asked Verizon for Records of All Calls in the U.S.," Wonkblog, 5 June 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/05/nsa-asked-verizon-for-records-of-all-calls-in-the-u-s/; Glenn Greenwald and Ewen MacAskill, "NSA Prism Program Taps in to User Data of Apple, Google and Others," *The Guardian*, 6 June 2013, http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data; "NSA Slides Explain the PRISM Data-collection Program," *Washington Post*, 29 June 2013, http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/; Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davies and James Ball, "GCHQ Taps Fibre-optic Cables for Secret Access to World's Communications," *The Guardian*, 21 June 2013, http://www.guardian.co.uk/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa; Angelique Chrisafis, "France 'Runs Vast Electronic Spying Operation Using NSA-style Methods,'" *The Guardian*, 4 July 2013, http://www.guardian.co.uk/world/2013/jul/04/france-electronic-spying-operation-nsa (all viewed 7 July 2013).

[4] Ian Traynor, "NSA Leaks: UK Blocks Crucial Espionage Talks between US and Europe," *The Guardian*, 5 July 2013, http://www.guardian.co.uk/world/2013/jul/05/us-blocks-espionage-talks-europe-nsa-prism (viewed 7 July 2013).

flows, inextricably involve the personal information of individuals. We urge USTR to adopt a process where the goal of fostering commerce and economic growth is accompanied by an inclusive, twenty-first-century approach to policymaking in the public interest. A diverse EU and U.S. task force, including NGOs, commercial representatives, independent experts and trade policymakers, should be tasked with identifying the most effective way to address digitally related trade issues.

In my previous submission to USTR, I explained why data protection should not be part of the TTIP.[5] To summarize, both the EU and U.S. are in the process of formally reviewing their data privacy regimes. The EU, where a proposal is before its Parliament, is far ahead of the U.S. in the legislative process. The Obama Administration has not yet released even a draft of legislation that would implement its Privacy Bill of Rights.[6] Moreover, the EU's approach to privacy as a fundamental Human Right is widely viewed by U.S. consumer groups as a much more effective approach to data protection than the consumer-harm regime of the U.S. While some claim that the U.S. has a more robust enforcement regime on privacy, a close look reveals that American online companies—even those under a 20-year FTC Consent Decree—routinely expand their data collection practices without any restraint. In the U.S., consumers confront a growing risk to their privacy as providers gather, analyze, and operationalize massive amounts of online and offline data, including from mobile, geo-location, and social media sources. While the EU does not offer a privacy panacea, the U.S.—unfortunately—has a long way to go before its system can be considered the equivalent of the EU.[7]

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[5] "Statement of Jeff Chester, Executive Director, Center for Digital Democracy, Public Hearing before the Trade Policy Staff Committee on the Transatlantic Trade and Investment Partnership (TTIP), USTR," 29 May 2013, http://www.centerfordigitaldemocracy.org/sites/default/files/USTRCDDtestimony052913_0.pdf (viewed 7 July 2013).

[6] Danny Weitzner, "We Can't Wait: Obama Administration Calls for A Consumer Privacy Bill of Rights for the Digital Age," The White House Blog, 23 Feb. 2012, http://www.whitehouse.gov/blog/2012/02/23/we-can-t-wait-obama-administration-calls-consumer-privacy-bill-rights-digital-age (viewed 7 July 2013).

[7] There has been widespread criticism of the U.S. and EU Safe Harbor agreement covering data sharing, including from leading U.S. privacy groups. See, or example, "World Privacy Forum Issues Critical Report on US Commerce Department's Privacy Activities," Privacy Lives, 23 Nov.

CDD respectfully urges the USTR to support a full discussion of the privacy issues raised by the news media related to national security; to allow the policymaking process related to privacy now underway on both sides of the Atlantic to conclude before a trade negotiation addresses data protection, e-commerce, or data flows; and to support a open and diverse multistakeholder approach to digital products and services on a separate negotiating track.

Finally, CDD wants to underscore its support for TACD's call for the creation of a formal consumer advisory board for the TTIP process, as well as meaningful transparency for the public.

2010, http://www.privacylives.com/world-privacy-forum-issues-critical-report-on-us-commerce-departments-privacy-activities/2010/11/23/ (viewed 7 July 2013).