

BACKGROUND PAPER ON U.S. INTERNET COMPANIES' CODE OF CONDUCT

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Not for use or release prior to issuance of the Code of Conduct in December.**

The U.S. Internet Companies' Code of Conduct is slated to be issued on December 4. It has been in preparation well over a year with an informal working group that consists not only of Internet companies, but some human rights advocates, Internet freedom experts and responsible investment groups, and is aimed at providing some guidance to Internet companies to help them deal with the human rights impacts of their business decisions involving foreign governments. The Code takes on special significance in the context of the Yahoo! case of last year, where Yahoo!'s policy of providing Internet user identification information to the Government of China was successfully challenged by Human Rights USA on behalf of a number of journalists and human rights and democracy advocates who were arbitrarily arrested and subjected to long-term detention and torture simply for exercising their free press and free speech rights on the Internet. Yahoo! took the position in court, and before three Congressional hearings, that they were obliged to provide any information requested to comply with Chinese law as a condition for doing business in that country, and also that they could not control and should not be held responsible for the actions of their Chinese affiliates and subsidiaries.

It would be nice to be able to report that the 18 month effort that went into the development of the Code of Conduct would provide a basis for preventing these kinds of abuses by U.S. Internet companies with respect to their operations abroad, and most especially in countries like China with highly repressive regimes that monitor and restrict use of the Internet for improper political purposes. Sadly, that is not the case. There are serious problems and limitations with the proposed Code that make it highly unlikely that it will be an effective tool for preventing further significant human rights abuses regarding monitoring and control of the Internet by repressive governments like China. While it certainly is a positive sign that the U.S. Internet companies recognize the existence of the problem, and have taken some initial steps to deal with it in a more productive way, the reality is that the Code does not provide either

sufficiently clear and strong standards that would produce more ethical results, or the type of monitoring and enforcement mechanism that would encourage effective compliance.

Among some of the key deficiencies and limitations of the Code of Conduct are the following:

- The Code expresses general support for the basic principles of freedom of expression and privacy in the use of the Internet, and for the goal of preventing government restrictions on Internet use and access, but does not provide the type of specifics that would require these broad principles to be applied in a meaningful way. For example, the Code encourages companies as a general principle to protect freedom of expression when dealing with repressive governments. But it does not go the necessary one step further by explicitly prohibiting disclosure of Internet user information, or the sale of products and technology that would allow repressive governments to conduct their own Internet monitoring activities.

- While expressing general recognition of the important role that private companies must play in the process, the Code seeks to evade responsibility by stressing that the primary responsibility for insuring protections from unwanted controls on Internet freedom rests with governments. It would make far more sense for the Code to suggest that while government action also may be an essential element, U.S. companies must take primary responsibility so that their own actions do not significantly contribute to human rights abuses, irrespective of what governments may or may not do.

- The Code focuses on freedom of expression and privacy issues of the type presented by the Yahoo!'s Internet user disclosure policy, but does not adequately reach and regulate other types of Internet company policies and actions, including sales of products that can be used for Internet monitoring purposes by recipient governments, that have an even wider potential for producing human rights abuses on a systemic basis.

- Several key companies, including Cisco Systems, that was identified in Congressional hearings this past summer as marketing and selling to China critical equipment designed to facilitate and support their Internet monitoring efforts, have removed themselves from the Code of Conduct process, so that they presumably remain outside the reach of the Code and remain free to continue policies and actions that significantly contribute to major human rights abuses involving Internet monitoring. Absent Congressional action Cisco and other like minded companies they will continue their marketing, export and information sharing activities that place Internet users in jeopardy.

- No meaningful method for monitoring or assuring adherence to the general principles is provided, other than a general reference to the future

development of procedures and mechanisms in various aspects of company operations to ensure observance of the standards, and accountability for violations. In essence, the companies are left to their own devices to deal with observance of the standards, a fatal flaw even if the standards provided had been more specific and more meaningful. Without an effective enforcement mechanism, the Code is no more than a vague expression of hoped for results.

In sum, the Code of Conduct will not in its present form prevent the type of human rights abuse caused by Yahoo!'s Internet disclosure policies and actions in China. Nor will it prevent even more widespread and systemic human rights abuses of the type caused by Cisco Systems in providing Internet monitoring technologies to China. Most significantly, even if clearer and more effective standards were provided, the Code does not incorporate the type of enforcement and compliance mechanisms that would encourage observance and prevent and punish violations. At best, it is a palliative – an expression of general support for the very broad principles of free expression on the Internet, and limited governmental interference on use of the Internet, that no one can quarrel with. At worst, it is a convenient excuse that the U.S. Internet companies can cite to, to demonstrate that they are conscious of the problem, and to imply that they are taking adequate steps to deal with it. Eighteen months of effort by the working group assigned the task of developing the Code should have produced far more meaningful and effective results, and provided much clearer guidance to Internet companies about what specific forms of policies and actions place the human rights of Internet users at serious risk, and should be stopped for that reason.

We all understand and recognize the critical role that the Internet has come to play on an increasing basis in communications and information sharing, and consequently in the development and support of democracy and human rights on a worldwide basis. The important place of the Internet in the internationalization of the world community deserves much more from the U.S. Internet companies than the very general and empty expression of support for the principle of free expression that this Code of Conduct provides.