

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

RECOMMENDATION REPORT ON APEC RECOGNITION OF BBB NATIONAL PROGRAMS, INC.,

**Submitted To:** Vunnaporn Devahastin

Chair, Digital Economy Steering Group

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## EXECUTIVE SUMMARY

In July 2012, the United States formally commenced participation in the Cross-Border Privacy Rules (herein ‘CBPR’) 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. At that time, the U.S. Department of Commerce invited those organizations interested in serving as an Accountability Agent in the United States to notify the Department of their intent to seek APEC recognition and submit a completed application for initial review to the Department of Commerce. 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. On September 03, 2020, the Department of Commerce received an application from BBB National Programs, Inc. (herein ‘BBB National Programs’) for APEC recognition under the CBPR and PRP Systems.

### SCOPE OF CONSULTATION PROCESS

Pursuant to Paragraph 7.2 of the *Charter of the Joint Oversight Panel*, members of the JOP<sup>1</sup> began a consultative process with representatives from BBB National Programs 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 compliant by BBB National Programs;
- Confirm BBB National Programs’ location and the relevant Enforcement Authority;
- Confirm that BBB National Programs meets the recognition criteria as identified in the *Accountability Agent Applications for Recognition for the CBPR and PRP Systems*;
- Confirm BBB National Programs makes use of program requirements that meet the baseline established in the CBPR and PRP systems; and
- Confirm BBB National Programs 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 (CBPR) and Privacy Recognition for Processors (PRP) 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 Notice of Intent to Participate;*

*Having verified BBB National Programs is in the United States and is subject to the enforcement authority described in Annex A of the United States Notice of Intent to Participate;*

*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 BBB 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 BBB National Programs has provided the required signature and contact information;*

*The JOP recommends APEC member Economies consider the conditions established in 7.2 (ii) of the Charter of the Joint Oversight Panel to have been met by BBB National Programs and to grant BBB National Programs' request for 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:**

Nasreen Djouini  
Representative of the Chair of the Joint Oversight Panel  
U.S. Department of Commerce, United States

Evelyn Goh  
Member, Joint Oversight Panel  
Infocomm Media Development Authority, Singapore

Matsumoto Nobuyuki  
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 BBB National Programs' request for recognition, 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 Applications for the CBPR and PRP Systems*. When making this determination, any APEC member Economy may request additional information or clarification from BBB National Programs 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 BBB National Programs has met the necessary criteria, APEC recognition will be limited to one year from the date of recognition, one month prior to which, BBB National Programs 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 BBB National Programs 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, trustmark or other symbol indicating its participation in the [CBPR and PRP] system or causes its name to appear on a list of recognized APEC Accountability Agent, 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 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 BBB National Programs is subject to the regulatory oversight and enforcement authority of the United States Federal Trade Commission (herein 'FTC') since it is a 501(c)(6) entity that provides membership benefits to its for-profit members. 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 System. BBB National Programs agrees that should it receive APEC recognition, it will publicly indicate its participation in the CBPR and PRP System including allowing its name to appear on a list of recognized APEC Accountability Agents. BBB National Programs agrees to post all CBPR and PRP certified companies online as well as the applicable CBPR and PRP program requirements. The BBB National Programs Certification service logo is a service mark of BBB National Programs that should only be used on the granting or extending of a CBPR and PRP certification. The JOP has verified that BBB National Programs has completed and signed the *Accountability Agent APEC Recognition Application*.

## II. RECOGNITION CRITERIA

The *Accountability Agent Application for APEC Recognition for the CBPR and PRP Systems* 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 BBB National Programs.

### **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 BBB National Programs meets Recognition Criteria 1-3.

### **Discussion**

BBB National Programs submitted their documentation on the Policies and Procedures on their internal processes to ensure that certification standards are applied in an impartial manner. The JOP has confirmed that BBB National Programs is required to apply its certification standards in an impartial manner. The JOP has confirmed that the BBB Certification logo is a services mark of BBB National Programs and may not be used in connection with any product or services that is not within the scope of the certification. The service mark should only be used upon the granting or extending of a certification. Title 15, Chapter 22, Subchapter I, § 1064 of the United States Code permits the Federal Trade Commission to request that the United States Patent and Trademark Office cancel this service mark 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.”



Regarding criteria 1 and 2, the JOP has reviewed the BBB National Programs Employee Conflict of Interest Policy and the APEC CBPR Supplement attached as Appendix A and Appendix B to its application. The JOP confirms that as an Accountability Agent, BBB National Programs has written policies in place so that its decisions are not influenced by outside parties and that certifications are conducted in an impartial manner. BBB National Programs' policies include safeguards that prohibit its certification employees from having a direct or indirect affiliation with any applicant organization or participant organization that would prejudice the ability of the employee to render a fair decision. These policies include a prohibition on certification employees being involved in sales activities relating to an applicant or participant. BBB National Programs' written policies include that it will report and review potential or actual conflicts of interest and the recusal process, in order to notify the Joint Oversight Panel of mitigated conflicts along with an explanation of the specific mitigation procedures used to ensure that it remains free of actual or potential conflicts of interest. At no time will any Director or Officer of BBB National Programs direct an employee to engage in:

- consulting or technical services related to the development or implementation of participant organization's or applicant organization's data privacy practices and procedures;
- consulting or technical services related to the development of its privacy policy or statement;
- consulting or technical services related to its security safeguards; or
- sales activities related to an applicant or participant organization.

Regarding criterion 3, BBB National Programs' policies provide for mitigation and that it notify the Joint Oversight Panel of such mitigation along with an explanation of the specific mitigation procedures used to ensure that it remains free of actual or potential conflicts of interest.

#### **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 for the CBPR and PRP Systems to map its existing intake procedures to CBPR and PRP program requirements.*

#### **Recommendation**

The JOP is satisfied that BBB National Programs meets Recognition Criterion 4.

#### **Discussion**

BBB National Programs has committed to utilize the template documentation of Annex C of the Accountability Agent APEC-endorsed CBPR and PRP program requirements.

#### **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 BBB National Programs meets Recognition Criterion 5.

#### **Discussion**

Upon approval of application, BBB National Programs has committed to document their internal procedures for assessing an applicant organization's policies and practices to confirm their compliance with the CBPR system and PRP system requirements. In its application, BBB National Programs explained the following outline of its certification process:

- 1) BBB National Programs will perform an initial review and assessment of the applicant's compliance based on their responses from the completed Intake Questionnaire;
- 2) BBB National Programs will perform one or more testing procedures that includes an outcome report of the inspection to be attested by the applicant organization;
- 3) BBB National Programs will then award a Certification Icon identifying the organization's participation in the CBPR and/or PRP system;
- 4) BBB National Programs will only allow CBPR approved participants to display the Certification Icon on Privacy Statements approved by BBB National Programs as part of

this certification while PRP participants may display the Certification Icon on those Privacy Statements governed by the privacy policies within scope of the certification.

- 5) The BBB National Programs Certification Icon is directed to a confirmation page that states whether the organization is 1) in good standing in the program; 2) the scope of the organization's participation and 3) instructions on how to file a complaint using BBB National Programs' Dispute Resolution Procedure.

### **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 BBB National Programs meets Recognition Criteria 6, 7.

### **Discussion**

BBB National Programs has documents of its internal procedures to ensure integrity of its certification processes and to monitor compliance of the certified organization. As BBB National Programs explains in the application documents, it has established monitoring and compliance review mechanisms. These mechanisms include following functions and procedures:

- 1) Self-Reporting: All Participants will be required to notify BBB National Programs of any changes to the policies and practices within the scope of the CBPR and/or PRP certification prior to implementation for review against the relevant program requirements.
- 2) Real-time website monitoring throughout the year: All reviewed and approved privacy notices within scope of a CBPR certification and/or PRP system will be monitored to detect and track changes.
- 3) Third party reporting: BBB National Programs will receive and investigate all complaints against Participants using BBB National Programs' dispute resolution process.

- 4) Participants are monitored throughout the certification period to ensure compliance with the program. Where there are reasonable grounds to believe that a Participant has engaged in a practice that may constitute a breach of the program requirements, an immediate review process will be triggered whereby verification of compliance will be carried out.

If through this review, BBB National Programs identifies an actual breach of one or more program requirements, the participant will be sent a warning letter followed by a 10-business day notice to cure any non-compliance. If the Participant fails to correct the identified non-compliance within this period, they will be suspended from the program until such time as the changes required to bring them back into compliance have been made. During this time, the use of the BBB National Programs Certification Icon will be revoked and the compliance directory will be updated to reflect that they are no longer an active participant.

### **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 BBB National Programs meets Recognition Criterion 8.

### **Discussion**

The JOP has confirmed that BBB National Programs requires an annual re-certification at which time BBB investigates whether the Participant is meeting and/or exceeding BBB National Programs' Program Requirements. In addition, if the Participant notifies BBB National Programs of a change or BBB National Programs detects a change outside the annual re-certification cycle, the change will be verified by BBB 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 BBB National Programs meets Recognition Criteria 9, 10

## **Discussion**

The JOP has confirmed that BBB National Programs 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 BBB National Programs' dispute resolution process as provided in its application for recognition and in its Dispute Resolution Procedure Rules (Appendix C of BBB National Programs' application):

- 1) **Review of Complaint**—Upon contact by a potential Complainant, BBB National Programs will identify initial information about the potential complaint and will seek additional information needed to determine eligibility. BBB National Programs will open a Case when it determines that the complaint is eligible for resolution under the Procedure.
- 2) **Verification & Eligibility**—BBB National Programs will take reasonable steps to verify the identity of the complainant, including: collecting (?) information to support complainant's allegations; making a good faith effort to resolve the complaint; and ensuring that the complainant's allegations have not been previously resolved by procedure, or by court action, arbitration, or other form of dispute settlement.
- 3) **Process**—BBB National Programs will notify the complainant within ten (10) days of the receipt of a complaint of the following actions:
  - (a) docket the complaint as a Case. BBB National Programs will then request a response from the Respondent within ten (10) days of opening the case.
  - (b) If BBB National Programs concludes that additional information is needed to sustain a complaint, it shall promptly request the information from the complainant. If the complainant fails to provide the requested information within five (5) days, BBB National Programs may advise the complainant that it cannot process the complaint and that it will be closed.
  - (c) Once BBB National Programs concludes that a complaint is not eligible for reasons other than a lack of information, it shall advise the complainant that BBB National Programs cannot process the complaint and that it will be closed. Where appropriate, BBB National Programs may provide the complainant with the name

and address of another organization, agency, or group that may have jurisdiction over the complaint.

- 4) Decision—For those complaints deemed eligible, BBB National Programs shall make commercially reasonable efforts to provide a written Decision to the Parties within ten (10) days after receipt of all information as provided by the Parties. The Decision shall state whether and why corrective action is or is not necessary and if it is, provide a commercially reasonable time frame for such action to be implemented. If BBB National Programs determines no further action by the Respondent is required, it will notify the Parties and close the Case. If BBB National Programs determines that changes to the participant’s privacy policies or practices are necessary to correct any noncompliance with the CBPR and/or PRP Program Requirements, BBB National Programs requires that the participant indicate whether and how it will comply with the Decision within five (5) days of its receipt of the Decision. BBB National Programs will report non-compliance to the FTC.
  
- 5) Publication of Complaint—BBB National Programs shall annually report complaint statistics and anonymous case notes to the APEC CBPR and/or PRP system Joint Oversight Panel. This Report will be published on the BBB National Programs APEC CBPR and PRP system web pages and shall:
  - (a) Provide a statistical summary of the number and nature of contacts from the public and the actions taken by BBB National Programs with respect to or those contacts.
  
  - (b) Provide a statistical summary of the number and nature of complaints deemed ineligible for processing during the period, including the specific reason for a determination of ineligibility.
  
  - (c) Provide case notes on a selection of resolved complaints illustrating typical or significant interpretations and notable outcomes pursuant to the requirements of APEC Accountability Agent Recognition Application.

**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 BBB National Programs meets Recognition Criteria 11-15.

## **Discussion**

The JOP has confirmed that BBB National Programs has a mechanism in place to enforce its program requirements, that it has established procedures to remedy non-compliance, and that it will impose penalties and notify public authorities, where appropriate. Following is an overview of these procedures as provided in BBB's application for recognition:

1. BBB National Programs has the authority to enforce its program requirements against participants, through terms of participation that are signed by participant. BBB National Programs has the authority to suspend, withdraw, remove certification icon from privacy statements under just cause and as a result of reasonable evidence of policy violation.
2. BBB National Programs has adequately outlined the mechanisms and scenarios upon which a certification can be suspended or withdrawn, 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 through the certification icon are the enforceable arrangements regarding the suspension of the certification to help ensure, that in case of suspension, the client refrains from further promotion of its certification and use of the BBB National Programs certification seal. BBB National Programs will update its compliance directory to reflect that the organization in violation is no longer an active participant.
4. BBB National Programs acknowledges it is required to refer the violation to the FTC, where a reasonable belief is pursuant to its established review process that a client's failure to comply with the APEC CBPR or PRP System 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. BBB National Programs will respond to requests from

enforcement entities in APEC Economies that reasonably relate to that Economy and to the CBPR or PRP related activities of BBB National Programs.

5. If the determination is to withdraw the certification, BBB National Programs, as included in the terms of participation and through the certification icon, has enforceable arrangements with the Participant concerning conditions of withdrawal. These enforceable arrangements include ensuring upon notice of withdrawal of certification that the Participant discontinues its use of all advertising matter that contains any reference to a certified status. BBB National Programs will update its compliance directory to reflect that the organization in violation is no longer an active participant. BBB National Programs' directory reflects whether participants are in good standing or not.



### III. CASE NOTES AND STATISTICS

*Will the Applicant provide relevant information on case notes and statistics as outlined in Annexes D and E of the Accountability Agent Application for APEC Recognition for the CBPR and PRP Systems?*

#### **Recommendation**

The JOP is satisfied that BBB National Programs meets the Case Notes and Statistics requirements as stipulated in Annexes D and E of 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) and 10(h) require applicants to have a process for making publicly available statistics on the types of complaints and the outcomes of such complaints (see Annex E), and a process for releasing, in anonymized form, case notes on a selection of resolved complaints illustrating typical or significant interpretations and notable outcomes (see Annex D). The JOP has confirmed that BBB National Programs 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. The JOP has confirmed that BBB National Programs will annually send anonymized case notes pursuant to the requirements of Annex D of the *Accountability Agent Applications for APEC recognition for the CBPR and PRP Systems* to APEC member Economies as a condition of their recognition.

## SIGNATURE AND CONTACT INFORMATION

By signing this document, the signing party and 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 Application for APEC Recognition for the CBPR and PRP Systems.

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**[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. 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.**