

U.S. Chamber of Commerce Draft Comments to Colombia Superintendency of Industry and Commerce on the Draft External Circular to "Add a Third Chapter to Title V of the Single Circular" (International Data Transfers)

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, including members supporting jobs for thousands of Colombian citizens. We are firm supporters of a productive U.S.- Colombia relationship and our members are representative of the vital business community that contributes substantially to increasing jobs and growth in both Colombia and the United States.

We welcome the chance to comment on the Draft External Circular to "Add a Third Chapter to Title V of the Single Circular" International Data Transfer ("Circular") and appreciate the Superintendency of Industry and Commerce's efforts to provide further clarity regarding international transfers as it was ascribed to do under Article 19 of Law 1581 of 2012. The Chamber supports the development of clear, consistent data privacy regimes that protect consumers while promoting innovation through the movement of data. We have listed below some suggestions to the Circular in order to help meet those goals. We are at the disposal of the Superintendency of Industry and Commerce to assist in the development of a regulation that ensures protection of the public's privacy through the enhancement of the Colombia's data privacy regime in a manner that is efficient, flexible, practical, and allows for the continued innovative development that maintains and grows benefits to consumer, regulators, and businesses alike.

We recommend the Circular first prioritize the movement of data. We encourage leveraging existing international best practices like those found in the Organization for Economic Co-operation and Development¹ and Asia Pacific Economic Cooperation² a a guidepost for developing regulation for e-commerce and interactions within the digital economy. We believe the ability to move data across borders can coexist with strong data protection rules. A data transfer framework that facilitates cross-border data flows will enable Colombian businesses of all sectors and sizes to reach new customers in foreign markets inexpensively and manage relationships with foreign clients. Colombian consumers will also be able to access the newest and most innovative services and goods.

Definition of Personal Data

Law 1581 of 2012 defines personal data as "any information linked to or associated with one or more specific or determinable natural persons." In the context of international transfers addressed in this Circular, we recommend that the Superintendency of Industry and Commerce clarify that the Circular applies only to individuals who are residents of Colombia and that the intention is not to include foreigners visiting Colombia or traveling to Colombia on behalf of foreign corporations.

¹ See <http://www.oecd.org/internet/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm> for "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data."

² See <http://www.cbprs.org/> for more information on the APEC cross-border privacy rule system.

Otherwise, extending this regulation in such a broad scope would make regular economic exchanges increasingly difficult and could deter foreign companies from conducting business in Colombia.

We also suggest adding to the Circular that for purposes of international transfers personal data only includes data or processed data sets related to reasonably identifiable individuals and does not include de-identified or anonymized data. Many types of data collected are de-identified and/or aggregated in such a way that it would take great expense and time to determine the identity of the individual and therefore cannot reasonably be accomplished. Therefore it is highly unlikely that the individual whose data has been de-identified and/or aggregated will ever be identified.. Narrowing the language, however, will serve to encourage greater use of privacy enhancing technologies such as anonymization and de-identification.

Adequacy Determination

The Circular only permits the transfer of personal data to countries found to provide adequate levels of data protection, unless express consent is obtained from the individual who owns the personal data. We believe that concepts of country-level “adequacy” are often problematic, inconsistent, and deter innovation. While there is a list of factors listed in Section 3.1, it is unclear how the factors were applied to each of the countries listed and how it was determined that the countries met these factors. It is also unclear why certain other countries, including the United States, did not meet the adequacy standards in Section 3.1 of the Circular.

We would welcome the opportunity to establish that the United States meets the adequacy standard or to obtain a declaration of conformity. By limiting data transfers to the countries listed in the circular, which does not include the United States, Colombia will find it more difficult to interact with the global digital economy and will deprive its citizens of the products and services they seek. It is essential that all determinations are made in a transparent and timely manner. We also suggest creating guidelines requiring the collection of stakeholder input in order to create a fully informed assessment.

Thank you for the opportunity to comment. We welcome the opportunity to discuss these points further with the Superintendency of Industry and Commerce.