



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

July 31, 2017

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.

The Chamber supports the development of clear, consistent data privacy regimes that protect consumers while promoting innovation through the movement of data. We welcome the Superintendency of Industry and Commerce’s engagement and efforts to provide further clarity regarding international transfers. In particular, we support the addition of the United States to the list of countries with an adequate level of private data protection in the new Draft External Circular. By expanding the list of countries able to receive data transfers, Colombia will find it easier to interact with the global digital economy and provide its citizens of the products and services they seek.

While we applaud the expansion of this list, we caution that concepts of country-level “adequacy” are often problematic, inconsistent, and deter innovation. It is vital that data regulations enable a broad spectrum of mechanisms that are interoperable with other international transfer mechanisms to enable the flow of data around the globe. Adherence solely to the concept of “adequacy,” which is no longer a standard for modern data protection, may hinder innovation and disincentive foreign investment. Further, adequacy is a difficult concept to enforce and put into practice as it takes significant time and resources.

Given that modern data flows and economic activity are global, we encourage the Superintendency to continue to consider cross-border transfer mechanisms that mirror those that are available in other jurisdictions and regions and that extend beyond intra-company transfers. The Asia Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (CBPR) framework¹ can serve as a guidepost, which have already been subscribed to by the United States, Canada, Mexico, South Korea, and Japan. Such mechanisms secure a high level of protection for personal data that is being transferred even, at times, to countries that have no or minimal data protection laws in place. Furthermore, a variety of data transfer mechanisms would

¹ See <http://www.cbprs.org/> for more information on the APEC cross-border privacy rule system.

have the added benefit of stimulating foreign investment in Colombia, particularly by multinationals with large technological and data driven operations which are significantly enabled by the existence of such mechanisms. In this way, carefully drawn cross-border transfer mechanisms align with Colombia's international trade and investment strategy reflected in the U.S.-Colombia Free Trade Agreement.

Colombia can also look to widely-accepted concepts of "standard contractual clauses" and "global corporate standards" or "global corporate rules" (known in Europe as "Binding Corporate Rules" or "BCRs"). Companies that implement these rules agree to a legally binding personal data protection code of conduct to implement appropriate safeguards for the cross-border transfer of personal data. These rules prevent risks resulting from data transfers to third countries by having mechanism in place to ensure a high level of protection by requiring effective review processes, training, complaint handling processes, and approval from the data protection authority. Such rules ensure data protection is integrated in every aspect of the business operation by harmonizing corporate practices related to data protection and bringing data protection compliance to the forefront of every employee's day-to-day management of personal data.

Further, we recommend clarification around Law 1581 of 2012's definition of personal data, currently defined 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. 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 anonymized 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.

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.