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FOR INFORMATION
POLICY LEADERSHIP
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November 15, 2010

Office of the Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Re: Docket No. 100921457-0457-01

Dear Sirs and Madams:

The Centre for Information Policy Leadership (“the Centre”) appreciates the opportunity to respond to the Department of Commerce (“the Department”) Notice of Inquiry, “Global Free Flow of Information to the Internet.” The Centre commends the Department for initiating this inquiry and for the important work it has undertaken to address this critical issue.

The Centre’s mission is development of sound information policy for a digital economy. It has led projects addressing numerous information privacy and security issues including privacy notices, global flows of data, accountability-based governance, development of privacy law in emerging economies, and government’s use of private sector data. The Centre has worked extensively with Asia Pacific Cooperation (“APEC”) and the Organization for Economic Cooperation and Development (“OECD”) on issues of privacy and data protection.

The Centre was established in May 2001 by leadership companies and Hunton & Williams LLP. It is located within the law firm of Hunton & Williams and is financially supported by approximately 40 member organizations. The Centre’s views and the views expressed in this response are its own and do not necessarily reflect those of its member companies, the law firm of Hunton & Williams LLP, or the firm’s clients.

In response to the Department's Notice of Inquiry, the Centre submits the following comments:

1. The Department of Commerce should lead the effort to develop an integrated, coordinated approach to information policy that positions the United States as a global leader in policy development and implementation and that promotes the free flow of data.

The global free flow of data powers innovation, collaborative research, free expression, and communication services. It makes possible the administration of international organizations and the distributed data processing that enables round-the-clock access to online retail products, services and customer care. Recognizing this tremendous value, businesses, advocates and trade associations have invested significant time and effort to develop policies that would mitigate impediments to the global free flow of information. Without such guidance, organizations lack both a clear understanding of government expectations related to their own data governance and a platform for dealing with non-U.S. business partners. Moreover, without a consistent U.S. policy, government representatives are challenged in their ability to effectively advocate for the U.S. on these issues in international forums.

Government agencies must work toward and promote consistent, integrated, coordinated domestic information policy that advances the global free flow of data. U.S. policy should position it as a leader in addressing this issues, take into account the concerns of individuals and businesses, and accommodate law enforcement in a reasonable fashion.

The Centre urges the Department of Commerce to lead such work, and commends the Department for issuing this inquiry to address the issue. The Centre hopes that issuance of this inquiry signals the beginning of a redoubled effort in this regard.

2. United States information policy should focus on data and its application rather than on any particular technology

U.S. information policy should focus on data and its applications rather than on technology. In a period of rapid change, emerging technologies can highlight important issues related to the free flow of data – often with some urgency. As a result, it is tempting to legislate or orient guidance to emerging technologies. Doing so, however, can lead to solutions either of very limited effect, or that in some way skew the development of a technology or model going forward. Moreover, given the rapid rate of technological change, such narrowly focused regulation or guidance can often become obsolete even before it is passed or issued. Experience has shown that solutions that apply to information and its uses rather than technologies are instead effective, flexible and lasting.

3. The need to remove barriers to the global free flow of information is an infrastructure issue with economic implications for both industry and for the United States.

Removing impediments to the free flow of information is an infrastructure issue that should take high priority for government. Just as open transport routes to keep goods moving to where they are needed are necessary the continued viability and growth of business, implementing national policies that secure and protect the robust flow of data is imperative to maintaining U.S. global economic leadership.

The ability of organizations to implement their own global infrastructure to collect, share, analyze, process and protect information is essential to U.S. economic growth and competitiveness in a digital marketplace. To serve its customers, a U.S. firm may rely on servers located in Asia, Europe and North America; networks that link those servers; and secure mobile communications. Government should take steps to ensure that it does not impose unreasonable or unnecessary impediments to organizations' ability to create and use such infrastructures internally or among the firms with which it does business. Government-imposed impediments to the flow of information across those infrastructures can limit the ability of organizations to meet customer demands and meet legal requirements.

One example of a government-imposed impediment to the free flow of information is the ability of law enforcement and national security officials to tap into data streams without due process. Such a policy may compromise an organization's ability to ensure the privacy of data it collects and processes in accordance with business agreements and legal requirements. It has also been recognized as affecting the ability of U.S. vendors to successfully attract business outsourcing clients.¹ U.S. policy that requires improved, appropriate government transparency about the nature of its access to data about individuals companies maintain, transfer and process would represent an important step toward mitigating the effect of U.S. policies about government access to data collected by private sector companies. Such U.S. policy would also serve as a useful example for trading partners who are developing their own approaches.

¹ This issue is discussed in detail in the context of restrictions placed on the flow of information by provinces in Canada in a paper authored by Fred H. Cate, "Provincial Canadian Geographic Restricts on Personal Data in the Public Sector," submitted to the Bilateral Committee on Transborder Data Flows, 2008, <http://www.hunton.com/resources/sites/general.aspx?id=330> (last accessed November 15, 2010).

4. The United States must maintain a leadership role in international forums where issues affecting the global free flow of information are addressed and resolved.

The policy created and decisions taken in international forums will influence not only our trading partners but also U.S. domestic information policy. The U.S. needs to play a consistent, ongoing, active role in international organizations where information policy is developed. Relevant agencies should be supported with the resources necessary to participate actively and consistently in such forums as APEC, the OECD, and the appropriate government bodies in Europe and Latin America. The allocation of resources should reflect the need for knowledgeable, experienced staff and ongoing, in-person engagement.

In participating in the work of these forums, it is particularly important that the U.S. ensures that the principles established to govern data promote streamlined, harmonized models that avoid additional layers of requirements that add cost and do not necessarily enhance protection or promote robust data flows. The Centre encourages the Department to look to the work on privacy that is being carried out at APEC as a model for international information policy. The APEC Privacy Framework² encourages implementation of effective rules that foster robust cross-border flows and use of data by enhancing protections for data while minimizing bureaucratic burdens.

Moreover, the Centre encourages the Department of Commerce to pay particular attention to the efforts of advocates, regulators and international organizations as they move toward alternative approaches to information policy. These approaches show great promise and in many cases are designed to provide the rigor and flexibility necessary to address the realities of 21st century data flows and uses. To further the global free flow of information, it will be important, however, that the intended flexibility is maintained and that these new models incorporate definitions and terminology in such a way that their adoption enhances the environment for innovation and clears the way for the movement of data across borders.³

² “The APEC Privacy Framework,”

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~APEC+Privacy+Framework.pdf/\\$file/APEC+Privacy+Framework.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~APEC+Privacy+Framework.pdf/$file/APEC+Privacy+Framework.pdf) (last visited November 15, 2010).

³ One such example is the movement toward accountability and privacy by design models for privacy and data protection. As these models are further developed, it is important that definitions and implementation guidance be created in a way that is not unnecessarily prescriptive and that enhances the flexibility of these models and their ability to address the way data is collected, processed, stored and shared.

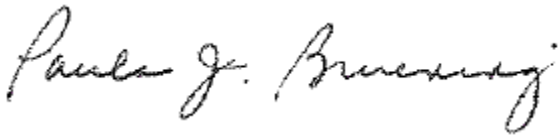
Conclusion

The Centre appreciates this opportunity to respond the Department of Commerce's Notice of Inquiry on the Global Free Flow of Information on the Internet. We hope that the Department will look to the Centre as a resource as it moves forward with this important work. We are available to provide further information or to elaborate on the recommendations above. Please direct any questions to Martin Abrams at mabrams@hunton.com or Paula Bruening at pbruening@hunton.com.

Yours sincerely,



Martin E. Abrams
Executive Director



Paula J. Bruening
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