Report on the Trilateral Committee on Transborder Data Flows

North American Leaders Summit

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Introduction

The Trilateral Committee on Transborder Data Flows was established in 2008 to further the goals of the Security and Prosperity Partnership (SPP). The SPP was launched by the leaders of Canada, Mexico and the United States of America (U.S.) in March 2005. This non-binding partnership was formed based on the principle that our security and prosperity are mutually dependent and complimentary. The SPP was created to provide a flexible means for dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of Americans, Canadians, and Mexicans.

In April 2008, the Statement on the Free Flow of Information (Statement) was signed by representatives from Canada, Mexico and the United States under the Security and Prosperity Partnership of North America (SPP) and is now operating as part of the North American Leaders' Summit. The Statement affirms that sustained economic growth is dependent on a "transparent legal, policy and regulatory environment that permits the free flow of information across borders and facilitates its use for the conduct of trade and commerce."

In furtherance of these goals, the signatory countries established the Trilateral Committee on Transborder Data Flows (Committee). The Committee is composed of government representatives from Canada, Mexico and the United States and has been working in consultation with the business communities, civil and law societies, and academia in each country to identify and address impediments to electronic information flows across borders that affect economic growth. The purpose of the Committee is to provide strategic direction for addressing these problems and increase recognition of the importance of free information flows in supporting a growing and efficient North American market.

What are Transborder Data Flows?

Transborder Data Flow (TBDF) is defined by the United Nations Centre on Transnational Corporations as "the movement across national boundaries of computerized, machine-readable data for processing, storage or retrieval."[1] Although this definition was developed in 1982, and is technically outdated, it is also the most frequently referred to in present-day research and studies. Other definitions of TBDF, while also useful, are more specific than the one above and tend to focus on categories of TBDF, rather than on a holistic definition. While the concept of TBDF has not changed significantly since the early 1980s, new technologies and government regulations have affected its application to businesses. Additionally, the importance of TBDF to the international economy has increased dramatically.

Technological advances and ever-increasing efficiencies applied to existing technologies have expanded the scope of TBDF. Today, almost every industry sector dealing with trade in goods and services handles TBDF. The rapid globalization of the world economy, coupled with ongoing advancements in information communication technologies (ICTs), has allowed companies to take advantage of economic benefits realized through trade in services and facilitated by TBDF. Technological innovation has also increased the modes and channels through which information can be sent and received. Three major ICT advances have been identified as having a direct impact on the volume and types of TBDF, and are essential to increasing trade in services globally.[2] These are:

1. The development of the Internet.
2. The digitization of service functions.
3. The codification of information into formats which allow it to be manipulated easily

[1] *Transnational Corporations and Transborder Data Flows: A Technical Paper* – Page 8
United National Center on Transnational Corporations (UNCTC) Published: 1982
Website: http://unctc.unctad.org/data/e82iia4a.pdf

[2] *Economic Impact for Canada of Impediments to North American Data Flows (Final Report – Version 2.0).* Systemscope: Information Management and Transformation Partnerships. Published: July 5th 2009.

As a result of these major ICT modernizations, firms are transferring data across country borders for a variety of new purposes. In today's globalized economy, firms transfer data across borders for many reasons, including the following:

- To centralize functions like data storage, call centres, data processing, and data management
- To purchase ICT services from the lowest cost or most technologically advanced provider
- To develop integrated global supply chains
- To share knowledge within an industry or between offices of a global firm
- To enter foreign markets without necessarily having established a physical presence there

When data is being moved across borders, either domestically or internationally, a number of factors influence the ability to place that information *within* another jurisdiction. Both the stakeholders involved in the sending and receiving of information, and the type of information being moved can affect the ease with which data is transferred. As discussed in a report entitled, *Economic Impacts for Canada on Impediments to North American Data Flows*, companies conducting business across borders must comply with various regulatory requirements under each jurisdiction. There are five major types of regulatory instruments which impact or impede TBDF.[3] These are:

1. Privacy Laws
2. Anti-Spam Legislation
3. Anti-Money Laundering & Terrorism Financing Legislation
4. Anti-Offshoring Legislation
5. National Security Legislation

These areas of legislation are based on socio-cultural, national security and economic concerns facing the North American economy. Some of these measures create barriers to the free movement of data, which can have a negative impact on the

[3] Ibid.

economy. This does not mean that the regulatory instruments are not important or should be removed. However, policy makers and legislators should consider what changes could be made to reduce the impediments while still achieving policy and legislative objectives.[4]

The following sections will highlight some of the trends, benefits, and impediments of TBDF that the Committee has identified over the course of the consultation process and from the research papers that have been prepared.

[4] Ibid.

Trends & Usages of TBDF

The ubiquitous nature of TBDF results in its varied application across virtually all industry sectors. Most industries use TBDF in some capacity to streamline business processes, improve market access, and maintain relevancy in today's quick-evolving business landscape. It is important to understand how various industry sectors utilize TBDF and the resulting trends associated with the movement of data across borders, in order to recognize impediments to data flow and their potential economic impact. This report discusses the trends, benefits, and impediments identified in the following sectors: government outsourcing, finance, telemarketing, market research, retail, travel and tourism, health, and education.

Three major trends in TBDF currently impact these industry sectors:

- the growth of e-commerce
- increased outsourcing/offshoring, and
- advances in ICTs

E-commerce solutions have been largely adopted by sectors that concentrate on direct sales to consumers, such as retail trade, accommodation and food services, educational services, arts and entertainment, and recreational sectors. According to a study commissioned by Industry Canada, sales to buyers outside of Canada represent about 19% of total online sales in the private sector. This means that close to 1/5 of e-commerce transactions by Canadian companies involve TBDF.[5]

Business outsourcing has quickly become a significant trend in the trade of new services, resulting in increased competitiveness within the outsourcing market and increased data flows between nations. A CD Howe Institute report found that Canada is tied with Mexico as the second best destination for US outsourcing (India being in first place). Cost, language and geographical proximity are several reasons why Canada is an attractive outsourcing option for US companies. Outsourcing to neighbouring countries is often called nearshoring.

[5] Ibid.

OECD researchers have identified three types of technological change that have been important to increased trade in services:

1. The development of the internet. The internet, alongside international telecommunications networks and IT hardware, has created linkages between and within markets that did not exist previously.
2. The digitization of service functions, such as the ability to provide information or advice electronically rather than in person or in hardcopy.
3. The rendering of information into formats which allow it to be used by people with varying levels of digital literacy.

As information technology services become more advanced and less expensive, firms are able to separate these peripheral business functions from their core business functions and outsource them. This allows firms to focus resources and efforts on its core business, which enables growth. A 2007 report by Statistics Canada provided evidence that investment in advanced ICTs results in productivity growth for Canadian business. The positive impacts experienced by businesses that implement advanced ICTs create a strong incentive to eliminate impediments to ICT adoption.

Advancement in ICT's and the globalization of the economy have made TBDF beneficial to increasing growth, profitability, and relevance within industry sectors. A business's ability to adapt to rapidly changing marketplaces by carrying out business functions across multiple jurisdictions is a cornerstone to their success.

It is therefore the responsibility of governments, both local and national, to foster a regulatory/legislative environment which enables business to perform these transborder data activities in as unobstructed a way as possible.

Economic Benefits & Impediments to TBDF

Economic Benefits to TBDF

Transborder data flows are providing economic benefits to industries, businesses and organizations that are able to adapt and change their internal practices to take advantage of ICT's developments and emerging technologies. Below are some of the economic benefits that have been raised during the consultation phase. Unfortunately, the lack of quantitative data on TBDF and cross-border electronic commerce limits the measurement of these benefits and the identification of barriers to TBDF at the North American level.

○ *Economies of Scope*
- The ability to centralize functions such as data storage, processing, and management, in one location to reduce costs and take advantage of specialization within the firm.

○ *Increased Trade in Information and Communications Technologies and Services Fuels Market Growth*
- As trade in ICTs takes place, prices are reduced and the market expands. This increased globalization and growth creates new activities and new companies that are engaged in cross-border trade and investment.

○ *Leveraging global supply chains by outsourcing support functions allows for renewed focus on core business*
- Outsourcing tasks that would otherwise need to be done in-house at either lower levels of effectiveness or at a higher cost enables firms to focus on their core functions. This leads to a more effective use of internal resources and promotes firm growth.

○ *Access to Knowledge*
- The growth of knowledge-based industries within the North American economy has elevated the importance of a firm's ability to effectively manage, create and disseminate knowledge within their organization. A firm's ability to successfully control their information holdings is crucial to their success within their market.

○ *International Growth Opportunities*
- Through the use of TBDF, companies are able to enter foreign markets without necessarily having a physical presence there. This can result in significant cost savings and the ability to enter certain markets that may not have been economically viable if a physical presence were required.

○ *Increased Productivity*
- TBDF allows for multifaceted use of technology, which enables firms to improve their ability to maintain and share knowledge amongst their employees, which can increase

individual productivity. Increases in productivity by enabling workers to use their skills effectively, contributes to the company's bottom line.

○ *Stimulate Innovation*

- The ability to share data across borders, both between and within companies, fuels research and development and brings about additional ways of doing business, while providing new opportunities for emerging business models. Access to customer data allows businesses to analyze the success of past business ventures and develop new and innovative approaches to better address customer needs or internal processes.

In order for businesses to realize these benefits, governments must focus on ways to improve policy and regulatory environments to encourage free flow of electronic information across borders.

Impediments to TBDF

While TBDF's extensive presence in business operations has been beneficial to North American (and global) markets, some industry sectors are experiencing costly barriers to the free flow of data across borders. These impediments have been found to be largely regulatory in nature. Often legislation in one jurisdiction differs from another, resulting in a lack of harmonization. Other times, a specific jurisdiction has placed restrictions on the movement of various types of data.

The following table summarizes the types of regulatory instruments that affect TBDF, the nature of impediments they generate, and which sectors these impediments to TBDF impact.

Classification of Industry Sectors Impacted by TBDF[6]

Sector	Type of Regulatory Instruments					Nature of Impediments		
	Privacy Laws	Anti-Spam Legislation	Anti-Money Laundering	Anti-Offshoring	National Security	Restrictions on Outsourcing or Data Mobility	Lack of Harmonization	Concern about Unauthorized Access of Sensitive Data
Government Outsourcing	X			X	X	X		X
Financial Institutions	X	X	X		X		X	X
Telemarketing	X				X		X	X
Market Research and Analytics	X	X			X		X	X
Retail, Travel & Tourism (B2C)	X	X			X		X	X
Health	X			X	X	X	X	X
Education	X			X	X	X	X	X

The table suggests that many industries face impediments caused by a lack of legislative harmonization and fears of unauthorized access to data. The industries facing restrictions on outsourcing and data mobility are populated by larger firms and often include more government involvement.

○ *Domestic Regulations as Inadvertent Impediments to TBDF*

[6] Ibid.

- Domestic regulations are not developed with the intent of impeding trade, but they often do have an impact on trade flows. The absence of a legal framework can also act as an impediment to TBDF if it reduces consumer trust.
- The lack of an effective privacy framework in Mexico has the potential to serve as an impediment to TBDF. Without a privacy framework in Mexico, confidence in the government's ability to protect personal information is vulnerable. If an effective privacy regime were to be adopted, the business community's confidence, both import and export-wise, would improve to a point where it would benefit the North American economy. It should be noted that over the course of the present reporting period, Mexico has made considerable progress by introducing several pieces of legislation.

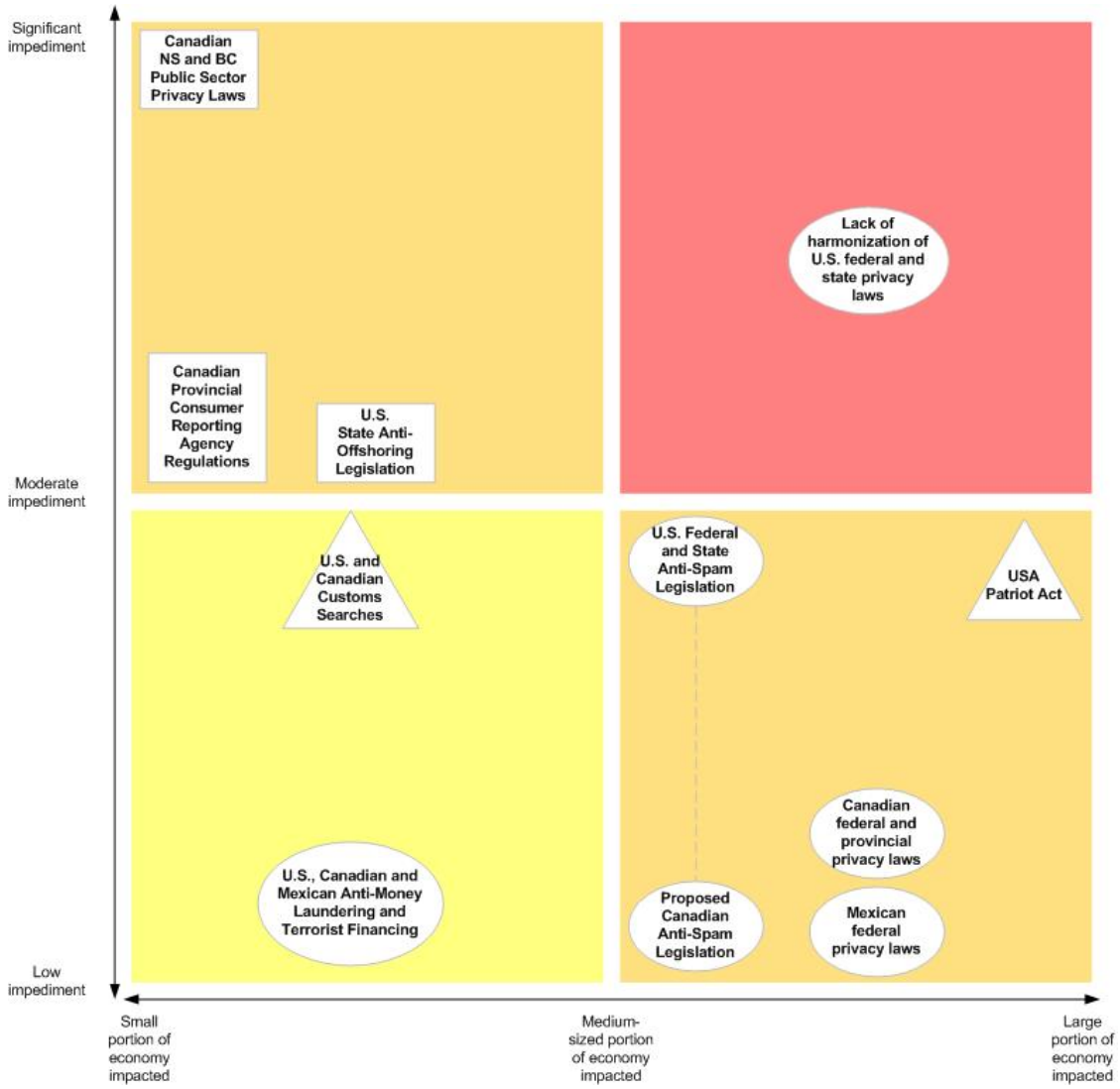
○ *Restrictions on Outsourcing or Data Mobility*
- Privacy Laws & Anti-Offshoring Legislation are primarily responsible for this impediment to TBDF. When businesses are restricted from outsourcing functions related to data management to other jurisdictions or when restrictions are placed on the location of that data, this can result in higher labour and data storage costs to the business.

○ *Lack of Harmonization*
- Privacy, Anti-Spam, and Anti-Money Laundering & Terrorism Financing Laws are largely responsible for this impediment to TBDF. Lack of harmonization can result in an inability to determine which law governing the movement of data applies in which scenario. Expenditures associated with complying with different laws in each jurisdiction can increase the costs of doing business across country borders. These costs include increased legal and administrative fees, revenue lost from the inability to serve interested clients, and expenses due to inadvertent non-compliance.

○ *Concern about Unauthorized Access of Sensitive Data by Foreign Governments*
- National Security Laws, such as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT), have caused concern that data stored abroad will be accessed by the government of the nation in which it is stored. While the USA PATRIOT Act does not create a restriction on the movement of data across borders, misperceptions surrounding it appear to be negatively impacting data flows.

A pictorial depiction of the effect of various impediments to TBDF is provided on the next page.

DEGREE OF ECONOMIC IMPACT OF VARIOUS IMPEDIMENTS[7]



Legend	
□	Regulatory measures involving restrictions on outsourcing or data mobility
○	Regulatory measures involving lack of harmonization
△	Regulatory measures involving concerns about unauthorized access of sensitive data by foreign governments

[7] Ibid.

Work of the Trilateral Committee on Transborder Data Flows

The Framework of Common Principles for Electronic Commerce (the Framework) was signed by Ministers from Canada, Mexico and the United States in 2005 as part of the Security and Prosperity Partnership of North America (SPP). The Framework endeavours to enhance public-private collaboration in order to ensure the continued growth of the North American online marketplace.

The Information and Communications Technologies and E-Commerce Working Group (ICT and EC Working Group) was launched in 2005 to increase security and enhance prosperity among Canada, Mexico and the United States through greater cooperation and information sharing.

It is understood that international trade depends on the seamless and uninterrupted flow of information across companies, jurisdictions and borders. To serve as a catalyst for the development of electronic commerce and online business in North America, Canada, Mexico and the United States signed a *Statement on the Free Flow of Information and Trade in North America* in February, 2008. The Statement aims to address current uncertainties in the online marketplace related to the use of electronic information in support of transborder trade. In addition, the Statement formally established a Trilateral Committee on Transborder Data Flows under the ICT and EC Working Group to address regulatory issues which inhibit cross-border trade that involves computerized information flows.

The work of the Trilateral Committee is led by Industry Canada, the Ministry of Economy in Mexico, and the Department of Commerce and Federal Trade Commission in the United States. Representatives of each government are working toward an increasingly seamless flow of information across borders. The governments of Canada, the United States and Mexico have been focusing on opportunities for regulatory harmonization and convergence to facilitate the removal of barriers to TBDF that companies, in particular SMEs, face when trying to compete in the North American marketplace.[8]

[8] *Economic Impact for Canada of Impediments to North American Data Flows (Final Report – Version 2.0).* Systemscope: Information Management and Transformation Partnerships. Published: July 5th 2009.

Consultation Forums

Since September 2008, the Committee has held three Consultation Forums, one in each of the three SPP member countries. The Consultation Forums included members of each country's governments, business community, civil society and academia. The objective of these Forums was to create a dialogue between these stakeholders in order to identify and address issues pertaining to transborder data flows (TBDF). The Forums also sought to understand how impediments to TBDF affect not only day-to-day operations within businesses, but also the marketplace and the overall economy of North America.

i. Trilateral Committee on Transborder Data Flows: Inaugural Consultation Forum & Meeting - (Washington, DC – September 2008)

This inaugural meeting provided a venue in which members of each country's business, legal, civil, and academic communities could voice their concerns, share ideas, and raise important issues concerning the free-flow of information across borders.
As a result of this important first forum, Committee members began several collaborative efforts to identify impediments to TBDF and to assess their economic impact. The "Questionnaire on the Cost of Impediments to Transborder Data Flows" (also referred to as "The Micro-Economic Study") was designed to collect essential information from the business community in the SPP member countries. The goal of this questionnaire was to identify trends and business specific costs that result from impediments to TBDF. Committee members also agreed to begin exploring the use of outside experts in drafting a macro-economic study on the impact of restrictions of TBDF.

ii. Second Consultation Forum & Meeting – Mexico City (February 2009)

The Committee heard from representatives of the business communities from each of the SPP member countries. A number of those business representatives were in charge of Latin American portfolios, and therefore provided a regional perspective on the challenges they face regarding TBDF.

This second meeting provided an opportunity for the Committee to discuss the progress made on a number of collaborative efforts in progress since the meeting in Washington. Initial samples from the "Questionnaire on the Cost of Impediments to Transborder Data Flows" were presented to the Committee, and it was determined that additional measures needed to be undertaken to ensure an increased response rate from the business community.

The proposed macro-economic study gained momentum since the Washington meeting. Representatives from Industry Canada established an agreement with an independent firm of experts to study the economic costs of impediments to TBDF, with the final report to be presented at the third meeting in Ottawa (June 2009).

iii. Third Meeting – Ottawa, Canada (June 2009)

The third and final meeting marked the end of the consultation phase between government officials and the other stakeholders. It focused largely on the impact of privacy legislation on the free-flow of information across borders. This impediment (or perceived impediment) is being addressed by the Office of the Privacy Commissioner of Canada (OPC). The OPC published guidelines in January 2009 titled "Processing Personal Data across Borders"[9], which has led to increased understanding and less concern from individuals about cross-border data transfers.

Presentation of the results of the micro and macro economic research papers were made to participants and resulted in valuable discussion. Power Point presentation decks summarizing the highlights of both research papers are available at Industry Canada's Trilateral Committee site.

There was discussion surrounding the perceptions and impacts felt by members of the business community regarding two major laws: PIPEDA and the USA Patriot Act. It was agreed that education and outreach by governments to North American businesses and State/Provincial legislators clarifying these laws may provide a better understanding

[9] *Processing Personal Data across Borders*. Published by the Office of the Privacy Commissioner of Canada. Website: http://www.priv.gc.ca/information/guide/2009/gl_dab_090127_e.cfm Published: January 2009

of how businesses are realistically affected by these laws, and potentially enable business efficiencies and expansion in North America.

Outcomes of the Consultation Sessions

Studies Conducted

Micro-Economic Study – Questionnaire on the Cost of Impediments to Transborder Data Flows

Building on previous efforts by the Committee, Industry Canada, in collaboration with the International Association of Privacy Professionals (IAPP) re-issued the Questionnaire to members of the North American business community in an effort to attain a higher response rate. The Questionnaire sought to identify the tangible impacts that restrictions on TBDF produce, and further how such restrictions affect businesses within the North American market. The Questionnaire also endeavoured to identify the impact of rules and regulations affecting cross-border trade, specifically on those industries which rely heavily on information flows across borders.

The results are as follows:

- Nearly half of all respondents (128 respondents in total) indicated being affected by some regulatory measures such as PIPEDA, the USA Patriot Act, or Federal Consumer Protection Law (Mexico).
- The Questionnaire indicated the occurrence of misperceptions within the business community regarding the USA Patriot Act, and how the lack of clarity surrounding this piece of legislation has resulted in lost opportunities.

Macro-Economic Study – The Economic Costs of Impediments to Transborder Data Flows

Industry Canada engaged an outside firm (Systemscope) to assess the economic impact of impediments to TBDF on the Canadian economy. The firm produced a report which provided useful information on the way TBDF has evolved into the economic pillar it is today, the benefits and costs of using TBDF, the regulatory measures which impact TBDF, and how these measures impact the North American business community and market.

The report's authors noted that there was insufficient data to conduct a complete macro-economic analysis of impediments to TBDF on the Canadian economy. The report provides available evidence from anecdotal and qualitative data, as well as quantitative examples, to provide an initial impact assessment of the benefits of TBDF and the economic costs when they are impeded.

As noted in PrivacyScan, "The point that may be the most significant outcome of this study…is the recognition that there is a distinction between policy and procedure and that, therefore, many perceived regulatory impacts of TBDF may be due to a failure of organizations to closely examine the real intent and impacts of a regulatory measure and to properly assess how the regulatory measure is in fact meant to be applied."[10]

Overall Findings

Consistency, Clarity and Cooperation from Government are Needed

The Consultation Forums provided the Committee with an improved understanding of the private sector's concerns regarding impediments to TBDF. Consistency, clarity and cooperation between the governments of Canada, Mexico and the United States are central to the growth and prosperity of the online marketplace in North America. Outreach to the private sector is essential to clarify perceptions of certain key pieces of legislation, and action is required by government to ensure consistency within and amongst these Acts.

Commencing in fall 2009, the members of the Committee will work together to develop a comprehensive outreach initiative. Through this initiative, governments will endeavour to work with industry associations to educate their members regarding TBDF. Part of this outreach strategy will include an online series of scenarios illustrating how the business community is managing TBDF in their operations.

[10] *PrivacyScan: Tri-lateral meeting on transBorder data flows shows scant information on real effect of privacy concerns, by growing business frustration over provincial laws.* Written by Murray Long Website Address: http://www.privacyscan.ca/ Published: June 23rd 2009. (Page 6)

Cooperation between and within country governments is vital to the advancement of electronic commerce within their individual economies, and throughout the North American marketplace.

Opportunity Costs are Real and Disproportionately affect Small Businesses

On a case-by-case basis, companies are experiencing marked cost burdens in doing business in multiple jurisdictions. Although different industry sectors are impacted to varying degrees by barriers to TBDF, these costs have rendered some firms unable to take full advantage of economies of scale/scope in their business undertakings.

Barriers to TBDF also seem to impose a disproportionate cost on small businesses. The macro-economic study by Systemscope noted that the costs of complying with regulatory requirements can be up to five times as high for companies with 1 to 4 employees than for larger companies with more than 100 employees. Similarly, in the United States, a 2005 study by the Small Business Administration found that the regulatory cost per employee was at least 45% higher for very small business (less than 20 employees) than for large business. It was determined that some of costs resulting from TBDF impediments could be high enough that Small and Medium-Sized Enterprises (SMEs) choose not the export their services or pursue similar opportunities in other countries/jurisdictions. The incremental cost of complying with the regulations of one or more jurisdictions may present too high of a barrier to entry for SMEs and may result in them choosing not to do business in certain markets.

Small businesses (those with less than 50 employees) currently generate approximately 26% of Canada's GDP. In the United States, small businesses (fewer than 500 employees) provide approximately half of non-farm, private real GDP.[11] Given the importance of SMEs contribution to the North American economy and the increased burden that compliance with regulatory requirements places on their cost structure, it is important to focus on attempting to eliminate or reduce those cost burdens which

[11] *The Small Business Economy: A Report to the President*. Small Business Administration. United States Government Printing Office, Washington: 2009.

affect the ability of small business to compete effectively in the North American marketplace.

Recommendations

Based on the findings resulting from the consultation process and the research conducted over the last year, the Committee is proposing a set of recommendations in response to the issues raised by the stakeholders from various communities who participated in the Trilateral Committee's consultation meetings.

It should be noted that the issues raised in this report will need to be addressed at the national and North American levels, under the guidance of the North American Leaders' Summit. As such, the Trilateral Committee proposes to continue its work in addressing these issues as it does constitute an effective collaboration and communication forum among the three countries, between governmental officials and stakeholders from the business, policy, academia and civil society representatives and / or organizations.

Outreach and communication: Increase the awareness and understanding of current privacy regimes by the development and implementation of a communication and outreach strategy (at the National and Trilateral levels) targeting the business community, especially SME's.

- Partner with business associations in each country to implement the outreach strategy
- Develop on-line reference material to explain aspects of TBDF that would reduce misperceptions linked to the (perceived) complexity of policy rules and regulations.
- Maintain the consultation and information gathering function of the Trilateral Committee to provide an on-going forum through which stakeholders can voice their concerns related to TBDF
- Promote safe e-commerce strategies by supporting research on complementary issues to TBDF such as Identity Management (IdM)

Clarity: Produce and make available accurate and updated information on the respective policy regimes (country and province / state)

- Share information on current policies that affect TBDF and provide links to research on evolving legislation

- Develop a web series of Frequently Asked Questions related to TBDF. Encourage stakeholders to submit additional questions that arise
- In cooperation with the private sector, develop a list of research topics to help build qualitative and quantitative data on TBDF and it's impacts on specific sectors
- Develop a strategy directed at SMEs to clarify how to overcome barriers to TBDF
- Encourage and share information on emerging trends and ICT development that are influencing TBDF by changing the way business and consumers are operating, such as cloud computing, Internet of Things, the evolution of Web 2.0, etc.
- Support the collection of statistics on TBDF and cross border electronic commerce to improve identification of barriers to TBDF
- Identify what is being researched and discussed at the international level at fora such as APEC, OECD, ITU, EU, etc., regarding transborder data flows and how ever-evolving ICTs are presently affecting sectors who rely on TBDF

Cooperation: Continue to consult regularly to discuss impediments to TBDF in North America and options for overcoming them

- Hold regular staff-level consultations between government representatives to discuss barriers to TBDF and how to resolve them
- Consult periodically with industry representatives from Canada, Mexico, and the United States to identify new constraints to TBDF
- Consult with other government departments or agencies that are committed to like-work
- Share information on issues related to TBDF in other international fora such as APEC, OECD, ITU, EU, etc.

Work Plan for the Trilateral Committee on Transborder Data Flows - 2010

January 2010 – March 31st 2010

Trilateral Cooperation

- Develop and share a calendar of events comprised of meetings/conferences occurring at the domestic, national and international levels which are important to the issue of transborder data flows
- Establish a working meeting to discuss 2010 research plan and coordinate outreach efforts

Outreach and communications strategy

- Develop comparable websites in each country with information on the Trilateral Committee and its work, as well as research and events related to transborder data flows (TBDF), and evolving legislative frameworks
- Share 2009 Trilateral Committee report with policy officials and stakeholders
- Work with relevant industry associations to develop a research and outreach strategy

Research

- Identify and encourage research focused on TBDF sectoral best practices, benefits and barriers, including what is underway or planned in academia, the private sector, or multilateral fora with regards to TBDF, data privacy, online security, and identity management (IdM)

April 1st – June 30th

Trilateral Cooperation

- Coordinate Trilateral Committee websites with updated FAQs pertaining to each country
- Establish a working meeting to organize SME outreach and communications strategy

Outreach and communications strategy

- Publish a webseries of Frequently Asked Questions related to TBDF. Encourage stakeholders to submit additional questions to the Committee
- Conduct outreach to SMEs with relevant associations in each country

Research

- Consult with associations regarding sectoral research

July 1st – September 31st

Trilateral Cooperation

- Update on progress on research and coordination with other government departments and associations
- Coordinate planning and logistics of fall conference/symposium

Outreach and communications strategy

- Share new information obtained through websites, research and outreach to SMEs
- Plan Fall conference/symposium to share sectoral research on TBDF

Research

- Update on ongoing research

October 1st – December 31st

Trilateral Coordination

- Establish working meeting to discuss direction for research, outreach and communications for 2011
- Discuss creation of a2010 Report on the Trilateral Committee to summarize the work performed and resulting outcomes, and recommendations going forward

Outreach and communications strategy

- Continue to update websites
- Hold conference/symposium to share sectoral research and publish research on each country's website

Forward Planning

- Develop a 2011 outreach strategy, consider stakeholder feedback
- Identify research areas which would be relevant to our stakeholders

List of Participating Stakeholders

Government
Industry Canada
Office of the Privacy Commissioner of Canada
Canadian Embassy in Washington DC
Department of Foreign Affairs and International Trade (Canada)
United States Department of Commerce
Federal Trade Commission (USA)
United States Department of State
United States Trade Representatives (various)
United States Department of Treasury
Federal Institute of Access to Information (IFAI – Mexico)
Mexican Internet Association (AMIPCI – Mexico)
Ministry of the Economy – Mexico
Ministry of Communications and Transportation – Mexico

Private Sector (Civil Society, Law Society, Academia included)
AccessPrivacy – HB Global Advisors Corp.
ADP
Barreau du Quebec
BBVA Bancomer Bank (Mexico)
Bell Canada
Blake, Cassels & Glaydon LLP, Barristers & Solicitors (Patent & Trademark Agents)
British Columbia Freedom of Information and Privacy Association
Canadian Advanced Technology Association (CATA)
Canadian Bankers Association (CBA)
Canadian Bar Association
Canadian Chamber of Commerce (CCC)
Canadian Commercial Corporation
Canadian Internet Policy & Public Interest Clinic, University of Ottawa (Faculty of Law)
Canadian Manufacturers and Exporters (CME)
Canadian Marketing Association (CMA)
Canadian Wireless Telecommunications Association (CWTA)
Center for Applied Cybersecurity Research, University of Indiana
CGI
Cisco Systems Canada Co.
Conseils Ledjit Inc.
Cornerstone Group of Companies
eBay Canada
EDS Canada
Environics Analytics
Environics Communications Inc.
Faculty of Law, University of Ottawa

GE Water & Process Technologies
Google Canada
Heenan Blaikie
Hewlett-Packard Co.
Hunton & Williams LLP
IBM Canada Ltd.
IDC Canada Ltd.
Indigo Books & Music
Information Technology Association of Canada (ITAC)
International Association of Privacy Professionals (iapp)
Intrawest ULC
The Law Office of Kris Klein
London Life Insurance Company
MasterCard Canada Inc.
MBNA Canada Bank
McArthur Consulting Group
McInnes Cooper
MercadoLibre (eBay Mexico)
Microsoft Canada
Murray Long & Associates Inc.
Nortel Networks Ltd
Nymity Inc.
Option Consommateurs
Oracle Corp.
Public Interest Advocacy Centre
Research in Motion Limited (RIM)
Retail Council of Canada
Re-Think Strategic Consulting Inc.
Sales Force
Schulich School of Business, York University
Scotiabank
Sun Microsystems of Canada Inc.
Supply Chain and Logistics Canada (SCL Canada
Systemscope
Telus
Temple Scott Associates (TSA)
TransUnion
University of British Columbia
Visa
Wal-Mart Stores, Inc.

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Annex 1 – Canadian Privacy Framework

Privacy Legislation in Canada [12]

Two federal laws

Canada has two federal privacy laws, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*.

The *Privacy Act* took effect on July 1, 1983. This Act imposes obligations on some 250 federal government departments and agencies to respect privacy rights by limiting the collection, use and disclosure of personal information. The *Privacy Act* gives individuals the right to access and request correction of personal information about themselves held by these federal government organizations.

Individuals are also protected by the *Personal Information Protection and Electronic Documents Act* (PIPEDA) that sets out ground rules for how private sector organizations may collect, use or disclose personal information in the course of commercial activities. The law gives individuals the right to access and request correction of the personal information these organizations may have collected about them.

Initially, PIPEDA applied only to personal information about customers or employees that was collected, used or disclosed in the course of commercial activities by the federally regulated private sector, organizations such as banks, airlines, and telecommunications companies. The Act now applies to personal information collected, used or disclosed by the retail sector, publishing companies, the service industry, manufacturers and other provincially regulated organizations. The Act does **not** apply to the personal information of employees of these provincially regulated organizations.

The federal government may exempt organizations or activities in provinces that have their own privacy laws if they are substantially similar to the federal law. PIPEDA will continue to apply in those provinces to the federally regulated private sector and to personal information in inter-provincial and international transactions by all organizations engaged in commercial activities.

Oversight of both federal Acts rests with the Privacy Commissioner of Canada who is authorized to receive and investigate complaints.

[12] Taken directly from the Office of the Privacy Commissioner of Canada's Fact Sheet on Privacy Legislation in Canada website: http://www.priv.gc.ca/fs-fi/02_05_d_15_e.cfm#contenttop
Accessed: September 2 2009.

Provincial and Territorial Laws

Every province and territory has privacy legislation governing the collection, use and disclosure of personal information held by government agencies. These acts provide individuals with a general right to access and correct their personal information.

Oversight is through either an independent commissioner or ombudsman authorized to receive and investigate complaints.

How privacy is protected in the private sector

PIPEDA applies to all organizations engaged in commercial activities unless the federal government exempts an organization or activity in a province that has substantially similar legislation to the Act.

British Columbia, Alberta and Quebec are the only provinces with laws recognized as substantially similar to PIPEDA. These laws regulate the collection, use and disclosure of personal information by businesses and other organizations and provide individuals with a general right of access to, and correction of, their personal information. Ontario, meanwhile, has adopted privacy legislation to protect personal health information which has been recognized as substantially similar.

Sector-Specific Legislation Dealing with Privacy

Several provinces have passed legislation to deal specifically with the collection, use and disclosure of personal health information by health care providers and other health care organizations.

Several federal and provincial sector specific laws include provisions dealing with the protection of personal information. The federal *Bank Act*, for example, contains provisions regulating the use and disclosure of personal financial information by federally regulated financial institutions. Most provinces have legislation dealing with consumer credit reporting. These acts typically impose an obligation on credit reporting agencies to ensure the accuracy of the information, place limits on the disclosure of the information and give consumers the right to have access to, and challenge the accuracy of, the information. Provincial laws governing credit unions typically have provisions dealing with the confidentiality of information relating to members' transactions. There are a large number of provincial acts that contain confidentiality provisions concerning personal information collected by professionals.

Annex 2 – Mexican Privacy Framework

Introduction

Data protection in Mexico has undergone several developments in recent years. In 2008 the developments reached relevant success with two main constitutional amendments and one Law Project related directly to personal data protection and the privacy regime.

Legislative Procedure

Amendment to constitutional article 16

On November 25th 2008 a project of law was presented to the Senate, with the purpose of setting the recognition to the right of personal data protection as fundamental and autonomous. The ruling was approved on December 4th 2008, and subsequently the bill was presented to the Mexican Congress.
The bill was then sent to the Constitutional Commission of the Mexican Congress on December 9th 2008. The bill was read and approved on December 11th 2008 resulting in the passage of legislation, upon which it was sent to the Congress of every state in the country.

Amendment to constitutional article 73

Within the same context, on March 27th 2007 a project was presented to the Mexican Congress to amend constitutional article 73. This proposed amendment had the purpose to provide the Federal Congress with faculties to rule in matters related to data in possession of private individuals and its protections.

The project was approved unanimously on September 20th 2007. Afterwards, on September 25th, the project was sent to the Constitutional Commission and Legislative Studies to continue with the legislative procedure. The Senate approved the final amendment on December 4th 2008, which resulted in the bill being sent to the Congress of every state in the country. On March 19th 2009, the Senate counted the states votes and signed the approval of the law, which then was published on April 30th 2009 on the Official Gazette of the Federation.

The amendments to constitutional articles 16 and 73 set forward the basis for the executive branch of the federal government to be in position to present a law initiative of data protection. A working group lead by the Ministry of the Interior debated with private sector representatives matters related directly to the content of the law.

Law project: Personal data protection by private individuals

Taking into account the previous data protection law's initiatives, the Ministry of the Economy and the Federal Institute of Access to Public Information collaborated with the Mexican Congress to create a new bill. The draft of the bill was also discussed with representatives of the Federal Government and with the private sector in order to have a balance between regulators and the future regulated entities.

The aim of the proposed bill is to regulate the legal treatment of personal data held by private individuals. Establishing that its observance is obligatory in the Mexican national territory and its main purpose is to guarantee privacy and the right to self-determination. The bill takes into account international standards for privacy protection, namely the accountability principle established by the Asia-Pacific Economic Cooperation (APEC). This principle states that the person or entity controlling the data should be accountable for complying with measures which give effect to the principles stated above.

It is also proposed that the Ministry of the Economy will be in charge of spreading the knowledge of the functions, powers and obligations related to protection of personal information within national and international private enterprises and trade activity in Mexico. The Ministry will also promote fair commercial practices related to personal data protection as an income of digital economy and national economic development.

With these actions, Mexico has taken the first steps in recognizing the right to personal data protection as a fundamental and autonomous right.

Presently, Mexico waits for the approval of a Personal Data Protection Law by its Congress which will undoubtedly provide both the citizens and data controllers, with juridical certainty and security as well as guarantying that personal information will not be distributed, traded or disseminated without taking into account the privacy notice.

http://www.edigital.economia.gob.mx/TBDF.htm

Annex 3 – Privacy Framework of the United States of America

An Overview of Federal Privacy-Related Regulations in the United States

In the United States, there are a number of Federal laws that contain provisions that protect consumers in the commercial privacy area.[13]

I. Federal Trade Commission

The Federal Trade Commission has broad authority in the commercial privacy area, including the enforcement of the following laws:[14]

The Federal Trade Commission Act (FTC ACT), 15 U.S.C. § 41 et. seq.
Section 5 of the FTC Act conveys broad authority to the FTC to combat "unfair and deceptive" business practices. The FTC uses this broad authority to protect consumer privacy interests where deceptive and unfair business practices result in harmful privacy violations. For violations of Section 5 of the FTC Act, the FTC may obtain injunctive relief, monetary remedies in the form of consumer redress and disgorgement of ill gotten gains, and other appropriate equitable relief. 15 U.S.C. § 53(b).

Fair Credit Reporting Act (FCRA) (15 U.S.C. §§ 1681-1681(u), as amended). The FCRA protects information collected by consumer reporting agencies such as credit bureaus, medical information companies, and tenant screening services. Information in a consumer report cannot be provided to anyone who does not have a purpose specified in the Act. Companies that provide information to consumer reporting agencies also have specific legal obligations, including the duty to investigate disputed information. Also, users of the information for credit, insurance, or employment purposes must notify the consumer when an adverse action is taken on the basis of such reports. Further, users must identify the company that provided the report, so that the accuracy and completeness of the report may be verified or contested by the consumer.

Gramm-Leach Bliley Act (GLBA) (Pub. L.106-102, 113 Stat.1338, codified in relevant part at 15 U.S.C. §§ 6801-6809 and §§ 6821-6827, as amended) Title V, subtitle A, of this Act requires the FTC, along with several other agencies, to issue regulations (see 16 CFR Part 313) ensuring that financial institutions protect the privacy of consumers' personal

[13] This document does not purport to provide a complete picture of privacy protections available to consumers in the United States, as it does not include state laws and the numerous self-regulatory codes that could apply in electronic commerce. In addition, the summaries included in this document are not necessarily comprehensive; nor do they include all applicable exceptions to general rules. They are not intended to be relied on as legal advice and should not be used as statements of law in the context of legal proceedings. This document is not an official US government document, nor is it an official document of any US government branch or agency.

[14] This list is not intended to be exhaustive, but rather, it provides a summary of several of the key laws enforced by the FTC relating to privacy. In addition to the laws summarized, the FTC also enforces laws relating to telemarketing and spam that impact consumer privacy issues.

financial information. Such institutions must develop and give notice of their privacy policies to their own customers at least annually and before disclosing any consumer's personal financial information to an unaffiliated third party. Financial institutions must give notice and an opportunity for that consumer to "opt out" from such disclosure. The subtitle also requires the FTC and other agencies to issue regulations (see 16 CFR Part 314) for the safeguarding of personal financial information. The Act also limits the sharing of account number information for marketing purposes. Subtitle B of Title V prohibits obtaining customer information of a financial institution by false pretences. The FTC enforces these provisions with regard to entities not specifically assigned by the provision to the Federal banking agencies or other regulators.

The Children's Online Privacy Protection Act (COPPA) (15 U.S.C. §§ 6501-6506)
COPPA protects children's privacy by giving parents the tools to control what information is collected from their children online. Under COPPA's implementing Rule (codified at 16 C.F.R. Part 312), operators of commercial websites and online services directed to or knowingly collecting personal information from children under 13 must: (1) notify parents of their information practices; (2) obtain verifiable parental consent before collecting a child's personal information; (3) give parents a choice as to whether their child's information will be disclosed to third parties; (4) provide parents access to their child's information; (5) let parents prevent further use of collected information; (6) not require a child to provide more information than is reasonably necessary to participate in an activity; and (7) maintain the confidentiality, security, and integrity of the information.

II. Other Agencies

Other U.S. government agencies enforce laws relating to consumer privacy issues. For example, the Department of Health and Human Services enforces the Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104-191 §§ 262 & 264). HIPAA applies to "covered entities" that are providers of care, payers of claims, or clearinghouses that support those functions who engage in electronic claims transactions. HIPAA is implemented by several rules, including a Privacy Rule that permits disclosure of individually identifiable information for treatment, payment, and health care operations, but otherwise prohibits disclosures except as authorized by the Rule. Such disclosures must be limited to the minimum necessary to achieve the purposes of the disclosure.

In addition to HIPAA, other Federal agencies enforce laws that relate to consumer privacy, including the Federal Communications Commission, which, among other laws, enforces the Communications Act of 1934 (as amended by the Cable Communications Policy Act of 1984 (CCPA) and the Telecommunications Act of 1996), 47 U.S.C. § 151 et seq. This law protects the privacy of consumer information collected by telecommunications carriers.

Annex 4 – Outcomes Report from Inaugural Meeting in Washington, DC (Sept 2008)

Trilateral Committee on Transborder Data Flows: Inaugural Meeting Outcomes Report

I. Background and Introduction

In April, 2008, a Statement on the Free Flow of Information (Statement) was signed by representatives from Canada, Mexico and the United States under the Security and Prosperity Partnership of North America (SPP). The Statement affirms that sustained economic growth is dependent on a "transparent legal, policy and regulatory environment that permits the free flow of information across borders and facilitates its use for the conduct of trade and commerce." The Statement identifies the essential elements of such an environment to include:

1. Expanded or enhanced regulatory cooperation in areas that have an impact on cross-border data flow, notably in relation to the enforcement of rules for the protection of personal privacy.

2. The identification and mitigation of impediments to the free flow of information that unnecessarily impede cross-border trade or impose an unreasonable burden on the business community.

3. The application of transparent and non-discriminatory policy, legislative and regulatory measures in cross-border trade in North America notably in relation to the global sourcing of business processes across North America.

In furtherance of these goals, the signatory countries established the Trilateral Committee on Transborder Data Flows (Committee). The Committee is composed of government representatives of each of the three SPP member countries and has been working in consultation with the business communities in each to identify and address impediments to electronic information flows across borders that affect economic growth. The purpose of the Committee is to provide a vision and strategic direction for addressing these problems as well as visibility on the importance that information flows freely in support of a growing and efficient North American market.

The following are the outcomes of the Committee's first meeting, held on September 25 at Hunton & Williams, LLP in Washington D.C. The Committee heard from representatives of all three countries' business communities as well as from Fred Cate, Professor of Law and Director, Center for Applied Cybersecurity Research, at Indiana University and Kris Klein, Attorney, The Law Office of Kris Klein in Ottawa, Ontario.

II. Outcomes

A. Collective Actions

Committee members have begun several collaborative efforts to identify impediments to transborder data flows and to assess their economic impact. In July 2008, Industry Canada, Mexico's Ministry of the Economy, and the United States Department of Commerce solicited the assistance of the business community in their respective countries in identifying and analyzing such impediments. The resulting "*Questionnaire on the Cost of Impediments to Transborder Data Flows*" was designed to collect essential information for the purpose of this study. In addition to the micro-economic information gathered in the questionnaire, Committee members are considering the commission of a companion macro-economic study that would address the aggregate cost associated with such impediments.

i. Questionnaire on the Cost of Impediments to Transborder Data Flows:

- The Committee agreed to revise and re-circulate the questionnaire in order to broaden the scope of participation. Suggestions to clarify questions or proposals for additional questions are currently being solicited by industry. It was agreed that interested parties should send comments to Eric Futin at Industry Canada (Futin.Eric@ic.gc.ca) and cc Julio Vega at Mexico's Ministry of the Economy (jcvega@economia.gob.mx) Michael Smith at the U.S. Department of Commerce (Michael.Smith@mail.doc.gov) and Joshua Harris at the U.S. Department of Commerce (joshua.harris@mail.doc.gov).
- Committee members agreed that all submissions will be treated as "business proprietary" and that each country will reference the relevant legal protections afforded to any information provided in the text of the revised questionnaire. All data compiled will be anonymized in the Committee's subsequent findings report.
- It was agreed that responses from the revised questionnaire will be received no later than December 19, 2008.

ii. Potential Macro-Economic Study:

- Committee members agreed to begin exploring the use of outside experts in drafting a paper on the macro-economic impact on the restriction of transborder data flows. If such a paper is undertaken, it is anticipated that it would be submitted for consideration by Ministers in 2009 along with any final recommendations made by the Committee.

B. Country-Specific Initiatives:

In addition to the collaborative economic studies being undertaken or considered, Committee members agreed to take steps to clarify the applicability of the various regulations identified by industry as relevant to transborder data flows.

i. Canada:

- Produce clarifying documentation[15] on the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and its application to transborder data flows.
- Identify relevant staff within Industry Canada and/or the Office of the Privacy Commissioner to answer industry questions regarding the same.
- Post a hyperlink on Industry' Canada's website to a paper produced for the Committee by Kris Klein of the Law Office of Kris Klein entitled *Applying Canadian Privacy Law to Transborder Flows of Personal Information from Canada to the Unites States: A Clarification*.

ii. Mexico:

- Provide legislative summaries and updates.
- Provide links to the Mexican Software Industry Association website.

iii. United States:

- Post a hyperlink on the SPP.gov website to a paper produced for the Committee by Fred Cate of the University of Indiana and the Centre for Information Policy Leadership entitled *Provincial Canadian Geographic Restrictions on Personal Data in the Public Sector*.
- Investigate the regulations for transborder data transfers involving U.S. federal government data, and provide an overview of such regulations.

III: Mexico, 2009

Mexico has agreed to host the next Committee meeting, tentatively scheduled for the week of February 2, 2009. Mexico will work with other members of the Committee on specific location place and date. Committee members anticipate reporting on the results of the revised questionnaires as well as introducing a draft overview of each country's legal regime as it applies to transborder data flows.

[15] Representatives from the Privacy Commissioner's Office informed the Committee of their work on a PIPEDA FAQ designed to answer commonly asked questions.

IV: Canada, 2009

Canada will host the third meeting of the Tri-lateral committee to finalize consultation and reporting on results. This meeting is scheduled to take place in late spring 2009 (Date and location TBD).

Annex 5 – Outcomes Report of 2nd Meeting in Mexico City, Mexico (February 2009)

Trilateral Committee on Transborder Data Flows: Second Meeting Outcomes Report

Mexico City, Mexico

I. Background and Introduction

The following are the outcomes of the Trilateral Committee on Transborder Data Flow's second meeting, held on February 4th at BBVA BANCOMER, Mexico City.

This meeting is following the work undertaken under the Statement on the Free Flow of Information (Statement) signed on February, 2008, by representatives from Canada, Mexico and the United States as part of the Security and Prosperity Partnership of North America (SPP), and of the initial meeting in Washington D.C. on September 25th, 2008. http://www.spp.gov/links.asp

Meeting proceedings:
The Committee heard from representatives of all three countries' business communities, including some of the representatives in charge of Latin American portfolios, therefore, providing a regional perspective as well. Representative from the 3 countries have also been able to assess progress made since the Washington meeting.

II. Outcomes

A. Collective Actions

Committee members acknowledge the lack of responses to the "*Questionnaire on the Cost of Impediments to Transborder Data Flows*". Nevertheless, it was agreed that the initial results of this work will be useful in the continued assessment and are indicating trends regarding the movement of TBDF in North America and identified some of the challenges faced by the private sector companies. The Committee recognize that this is the first attempt to compile such information.
To date, the number of companies that participated in the latest version of the Questionnaire are listed below, by country:

Country	Number of respondents for the second version of the questionnaire.
Mexico	1
Canada	9
The U.S.	7

B. Country-Specific Initiatives:

Canada

- Forward the scope of work used for the macro-economic study put in place in Canada to the other countries, for them to establish similar work on comparable grounds.

- Prepare third phase of the consultation process to be held in Canada, in May 2009.

Mexico

- Develop and post on-line an overview of the progress made on the roll out of the current Mexican privacy regime legislation.

- Develop a strategy to increase awareness about privacy rights and Mexican privacy regulation among the private sector firms; presenting the value added of establishing a sound privacy regime for Mexico that would create the necessary trust and confidence to operate in the Global Internet Economy.

- In collaboration with the Canadian and U.S. embassies, develop an informational event in Mexico that would highlight and promote the SPP's work on transborder data flows as well as pending Mexican regulation regarding the same. The event would target private firms in Mexico and firms dealing in Mexico.

U.S.A.

- Develop an overview of the various U.S. privacy regulations, including a review of the State legislation to be posted on the SPP and Department of Commerce websites.

- Develop FAQ's on the regulatory framework (similar to the Canadian FAQs).

- Develop a series of scenarios / vignettes providing examples of how businesses are managing transborder data in their operations legislation to be posted on the SPP and Department of Commerce websites.

III: Canada, 2009

Canada will host the third meeting of the Tri-lateral Committee to finalize consultation and reporting on results that will be presented to Ministers. Meeting is scheduled for May 11th, 2009, in Ottawa.

Annex 6 – Outcomes Report of the 3rd Meeting in Ottawa, Ontario (June 2009)

3rd Stakeholder's Meeting of the Trilateral Committee on Transborder Data Flows

I. Background and Introduction

The Statement on the Free Flow of Information (Statement) was signed by government representatives from Canada, Mexico and the United States in April 2008, under the Security and Prosperity Partnership of North America (SPP). The Statement affirms that sustained economic growth is dependent on a "transparent legal, policy and regulatory environment that permits the free flow of information across borders and facilitates its use for the conduct of trade and commerce."

The Trilateral Committee on Transborder Data Flows (Committee), comprised of government representatives from the three SPP member countries, was established in order to promote the Statement's goals. The Committee has been working in consultation with stakeholders in all three countries, including the business community, law and civil society and academia to identify and address impediments to electronic information flows across borders which affect economic growth.

The purpose of the Committee is to provide a vision and strategic direction for addressing these issues, as well as increase visibility of the importance of free-flowing information in support of a growing and efficient North American market.

The following are the outcomes of the Committee's third and final meeting under the consultation process[16]. Held on June 15th, 2009 at the Government Conference Centre in Ottawa, Ontario, the Committee heard from stakeholders within the three SPP countries, including representatives of the business community, as well as law and civil society and academia.

II. Outcomes

A. Collective Actions

Committee members in conjunction with outside experts have completed several collaborative efforts identifying impediments to transborder data flows and assessing their economic impact.

[16] The Trilateral Committee met on two occasions prior to the meeting held in Ottawa. The inaugural meeting in Washington DC in September 2008 officially launched the process of consultations with stakeholders. The second meeting was held in Mexico City in February 2009.

i. Micro-Economic Study - Questionnaire on the Cost of Impediments to Transborder Data Flows

● Building on previous efforts by the Trilateral Committee, Industry Canada, in collaboration with the International Association of Privacy Professionals (IAPP) re-issued the "*Questionnaire on the Cost of Impediments to Transborder Data Flows*" (Questionnaire) to members of the North American business community in an effort to attain a higher response rate.

● The Questionnaire sought to identify the tangible impacts that restrictions on transborder data flows produce, and further how such restrictions affect businesses within the North American market. Additionally, the Questionnaire also endeavoured to recognize the impact of rules and regulations affecting cross-border trade, specifically on those industries which rely heavily on information flows across borders.

● The survey was conducted between April 21 & 28, 2009 and yielded 128 respondents (77.3% from the United States, 22.7% from Canada, 0% from Mexico[17]). Based on the responses to the Questionnaire, the Committee was able to identify a number of important trends, including the following;

1. Nearly half of all respondents indicated being affected by some regulatory measures such as PIPEDA, the U.S. Patriot Act and Federal Consumer Protection Law (Mexico).
2. The Questionnaire indicated the occurrence of misperceptions within the business community regarding the U.S. Patriot Act and PIPEDA, and how the lack of clarity surrounding this piece of legislation has resulted in lost opportunities.

● The majority of Questionnaire respondents were predominantly comprised of large-business stakeholders. This disparity resulted in minimal data relevant to how restrictions on transborder data flows impact North American Small-Medium Enterprises (SME's).

● Analysis and synthesis of data and findings is presently ongoing. A detailed report is forthcoming. (Power Point presentation to be posted on the web)

ii. Macro-Economic Study – Systemscope: The Economic Costs of Impediments to TBDF

● Systemscope assessed the economic impact of TBDF on the Canadian economy by performing an extensive literature review, targeted interviews with stakeholders and experts, economic analysis, and finally, a descriptive report on the current state of TBDF.

● Systemscope produced an extensive report (Report) which provided useful information on the way TBDF has evolved into the economic pillar it is today, the benefits and costs of using TBDF, the regulatory measures which impact TBDF, and how these measures impact the North American business community and market.

● The Report's authors noted that there was insufficient data to conduct a complete macroeconomic analysis of the impediments to TBDF on the Canadian Economy. Systemscope provided Industry Canada with available evidence from anecdotal and qualitative data, as well as quantitative examples, to provide an initial impact assessment of the benefits of TBDF and the economic costs when they are impeded.

[17] It should be noted that IAPP members are predominantly from the United States and Canada.

● The final version of the Systemscope report, "Economic Impact for Canada of Impediments to North American Data Flows", will be forthcoming on Industry Canada's Trilateral Committee on Transborder Data Flows: Ottawa Meeting site. (Power Point presentation to be posted on the web).

B. Regulatory Updates:
Presentations were given by government representatives from each of the three countries covering their respective current regulatory framework and initiatives:

i. *Canada*
● Presentation from the Office of the Privacy Commissioner of Canada focused primarily on the PIPEDA Guidelines and on additional legislative measures being introduced under Bill C-27[18].

ii. Mexico
● Presentation was given by the Ministry of the Economy & the Federal Institute of Access to Information. The presentation discussed recent constitutional amendments pertaining to access to information, data protection (Article 6), recognition of the protection of personal data as a fundamental right (Article 16) and the creation of a single protection law, overarching personal data possessed by particulars in Mexico (Article 73).
● Mexico is presently advocating a strong partnership between the public and private sectors to increase awareness and education surrounding their new privacy regime.
● Mexico will try to create a new flexible, credible, enforceable, predictable and less bureaucratic standard (of data protection) that meets international models.

iii. United States
● Information Paper by the US Federal Trade Commission (FTC) – "*An Overview of Federal Privacy-Related Regulations in the United States*". Paper discussed the various Federal laws within the United States that contain provisions which protect consumers in the area of privacy. (Report is available on the US SPP site)
● Presentation delivered by the FTC – "*US Federal Trade Commission Privacy Framework*". Presentation provided an overview of the different provisions of the FTC, how it defends and protects consumers, and the tools it provides to consumers in order to be able to protect themselves. The presentation also discussed the FTC's strategy to combat identity theft.

III. Meeting Proceedings
● Meeting was facilitated by Industry Canada.
● Six presentations delivered from members of the business sector, public sector, law and civil society communities regarding their experiences and views on transborder data

[18] House of Commons of Canada – BILL C-27 – 2nd Session, 40th Parliament – April 24, 2009 - http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3832885&file=4

flows, data protection and security, and alternate models of privacy protection (Safe Harbour etc.).

● Forward Looking Brainstorming Session at the end of the day addressed the issue of outreach. There was much discussion surrounding the perceptions and impacts felt by members of the business community regarding two major laws; PIPEDA and the US Patriot Act. Education and outreach by governments to North American businesses and State / Provincial legislators clarifying these laws may provide a better understanding of how they are realistically affected by these laws, and further potentially enable business efficiencies and expansions in North America.

● Closing statement from Industry Canada:

- Committee needs to ensure that we are *balancing* the core values within the Statement: Public Safety – Protection of Privacy/Civil Liberties – Economic Prosperity.
- Report on progress to date to the SPP Working group on Electronic Commerce and Information and Communication Technology, to the SPP Regulatory Cooperation Framework, and to their responsible Ministers.
- Outreach and communication activities will be at the centre of the work ahead.

IV: Action Items

● Report of the Trilateral Committee on Transborder Data Flows to be submitted to the E-Commerce and ICT Working Group – end of July 2009

● Two Page Executive Summary to be submitted to the E-Commerce and ICT Working Group for addition to their report to the Minister – end of July 2009

● Critical Path, Calendar and Next Steps for the Committee (Fall 2009) – end of July 2009

● Draft a comprehensive Outreach Strategy for next year.

● Deliver complete report on the "Questionnaire on the Costs of Impediments to TBDF".

● Update Industry Canada SPP website to reflect completion of the 3rd Stakeholder's Forum.

V: Country Specific Initiatives

i. Canada

- Coordinate and compile input from Mexico & the United States for the Report on the Trilateral Committee on Transborder Data Flows for submission to the Electronic Commerce and ICT Working Group.
- Produce a detailed report on the findings identified by the Questionnaire on the Cost of Impediments to Transborder Data Flows.
- Update Industry Canada's website dedicated to the work of the Trilateral Committee to reflect the outcomes of the Ottawa meeting, and the critical path for the next year.

ii. Mexico
- Produce a report which delivers a comprehensive overview of the progress made regarding the current Mexican Privacy Regime for contribution to the Report on the Trilateral Committee.
- Develop a strategy to increase awareness about privacy rights and Mexican privacy regulation among the private sector firms; presenting the value added of establishing a sound privacy regime for Mexico that would create the necessary trust and confidence to operate in the Global Internet Economy.
- In collaboration with the Canadian and U.S. embassies, develop an informational event in Mexico that would highlight and promote the SPP's work on transborder data flows as well as pending Mexican regulation regarding the same. The event would target private firms in Mexico and firms dealing in Mexico.

iii. United States
- Deliver FAQ's on the US privacy regulation framework to be posted on the SPP and Department of Commerce websites.
- Produce a legislative summary of the US privacy regime and any new developments for contribution to the Report on the Trilateral Committee.
- Explore options and develop a series of scenarios illustrating how the business community is managing transborder data in their operations.

iv. Trilateral committee
- Explore the possibility of engaging other interested domestic trade associations in North America for outreach activities in the coming year.

Upcoming events:

Leader's Meeting – August 2009 (to be confirmed)

Annex 7 - Systemscope Deck

Systemscope

Information Management and Transformation Partnerships

Economic Impact for Canada of Impediments to North American Data Flows

Presentation to Trilateral Committee on Transborder Data Flows
Annie Crombie

June 15, 2009

The views expressed in this paper are those of the author, and do not necessarily represent the views of Industry Canada or the Government of Canada.

Systemscope

Information Management and Transformation Partnerships

Outline

- Introduction
- Nature of TBDF
- Economic Benefits of TBDF
- Regulation of TBDF
  - How regulation impacts TBDF
  - Types of regulatory measures impacting TBDF
- Economic impact of TBDF
  - Root of economic impacts
  - Assessment of varying levels of impact
- Way forward
  - Further research
  - Resolving impediments

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Systemscope
Information Management and Transformation Partnerships

Introduction

- Industry Canada engaged Systemscope to assess the economic impact of impediments to TBDF on the Canadian economy
  - Researchers:
    - Annie Crombie – Consultant and Researcher
    - Dr. Carolan McLarney – Consultant and Professor of International Business at Dalhousie University
- The study involved:
  - Extensive literature review covering academic, government, news media and private sector sources
  - Targeted interviews with stakeholders and experts
  - Economic analysis
  - Reporting of the findings

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Nature of TBDF

- Definition (according to UN):
  - The movement across national boundaries of machine readable data for processing, storage or retrieval.
- TBDF can be classified in terms of :
  - Sender and Receiver
  - Type of Data
  - Activities
  - Sectors Involved

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Nature of TBDF (continued)

Types of Data

- Commercial market data
- Commercial non-marketable data
- Personal data
- Sensitive data

Activities Involved

- Data purchase
- Data storage
- Data processing
- Data sharing and collaboration
- Surveillance
- Travel and shipping
- Client sales and service

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Economic Benefits of TBDF

- Some of the advantages firms realize through their use of TBDF include:
  - Economies of scope
  - Increased trade in ICTs and services fuels market growth due to significant income and price elasticity
  - Leveraging global supply chains by outsourcing support functions allows for renewed focus on core business
  - Access to knowledge
  - Increased productivity
  - International growth opportunities
  - More responsive customer service
  - Access to new products and services
  - More effective targeting of customers

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How regulation impacts TBDF

- Governments around the world have regulations in place that restrict the free movement of data across borders
- Reasons for these types of regulations include:
  - socio-cultural e.g. privacy, identity theft, unwanted solicitation
  - national security, e.g. physical and cyber threats
  - Economic, e.g. protectionism, IP protection, fraud
- Domestic regulations often unintentionally impact TBDF
  - Domestic regulations usually not developed with the intent of being a barrier to trade in services, they often are.
  - Notably the case in areas where firms have to comply with different and un-coordinated policy frameworks from one jurisdictions to the next.

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Types of legislative/regulatory measures impacting TBDF

- The types of legislative and regulatory instruments that affect TBDF in North America include:
  - **Privacy Laws**
  - **Anti-Spam Legislation**
  - **Anti-Money Laundering and Terrorism Financing**
  - **Anti-Offshoring Legislation**
  - **National Security Laws**
- Some of these measures have a negative impact on the economy
  - This doesn't mean the regulatory instruments are not important or should be removed
  - However, policy makers and legislators should consider what changes could be made to reduce impediments while still achieving policy and legislative objectivity (e.g. increased harmonization)

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Assessing the economic impact of impediments to TBDF

- Great interest in understanding economic impact of globalization, outsourcing and regulatory impediments
  - However, they are extremely difficult to research quantitatively in particular as it relates to trade in services
  - Existing economic models and available quantitative data are insufficient
- With regards to TBDF:
  - There is insufficient data to support empirical economic modeling.
  - However, available qualitative and anecdotal evidence from a variety of sources has been used to develop a significant body of information to further discussions on this topic

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Roots of impediments to TBDF

- There are three primary ways in which regulation of TBDF creates a negative economic impact:
  - Restrictions on outsourcing or data mobility
  - Lack of harmonization
  - Concern about access of sensitive data by foreign governments
- Each of these are discussed in turn on the following slides.

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Restrictions on outsourcing or data mobility

- Businesses are restricted from outsourcing functions related to data management to other jurisdictions or when restrictions are placed on the location of that data
- Applicable regulatory instruments:
  - Some privacy laws (e.g. BC and NS public sector privacy laws, provincial credit bureau regulations, California restrictions regarding voter data)
  - Anti-offshoring legislation
- Economic impact/costs:
  - Higher labour costs
  - Higher data storage costs
  - Higher overhead costs

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Lack of harmonization

- Characterized by procedural or policy differences in domestic laws that businesses must take into account when doing business across jurisdictions.
- Applicable regulatory instruments:
  - Privacy Laws
  - Anti-Spam Laws
  - Anti-Money Laundering and Terrorism Financing Laws
- Economic impacts/costs:
  - Increased legal costs
  - Increased administrative costs
  - Decreased ability to reach qualified clients
  - Choice not to pursue certain opportunities
  - Risk of non-compliance

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Example: Lack Harmonization

Which laws apply when potential security breach occurs?

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Concern about access of sensitive data by foreign governments

- Do not create a restriction on the movement of data across the border, but do act as a de facto restriction due to public concern.
- May ultimately have the same economic impact as a legislated restriction on the movement of data.
- Applicable regulatory instruments:
  - Customs Laws
  - National Security Laws (e.g. USA Patriot Act)
- Economic impacts/costs:
  - Higher data security costs
  - Higher data storage costs
  - Choice not to pursue certain opportunities
  - Inability to provide certain services

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Economic Impacts Vary

- The economic impacts named vary based on:
  - How restrictive the impediments are
  - How many companies/what portion of the economy is affected
  - Whether primarily large business or small business is affected by the impediments
- Some sectors face significant impediments, but those sectors are relatively small and made up of large companies
- Other sectors face less significant impediments, but a much larger number of companies are affected, including a large number of SMEs
- The costs of regulatory compliance can be up to five times as high for small businesses than for large businesses.
  - Some of the impediments to TBDF would be costly enough to prevent small businesses from exporting their services.

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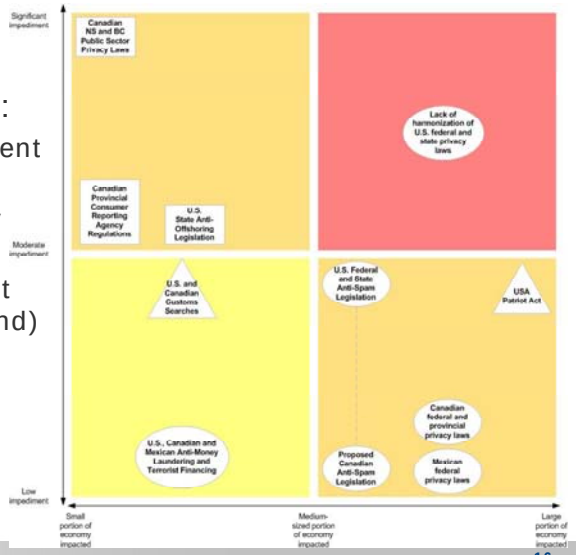
Degree of Economic Impact of Various Impediments

- Plotting of regulatory instruments based on:
  - Degree of impediment (Y-axis)
  - Portion of economy impacted (X-axis)
  - Type of impediment (shapes – see legend)



Legend	
▭	Regulatory measures involving restrictions on outsourcing or data mobility
⬭	Regulatory measures involving lack of harmonization
△	Regulatory measures involving concerns about access of sensitive data by foreign governments

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Industry Sectors Most Impacted

- All sectors face impediments to TBDF if they do business across borders
- However, some sectors are more impacted than others, including:
  - **Government outsourcing:** Outsourcing of government service delivery to the private sector.
  - **Financial services:** Banks, credit bureaus, insurance.
  - **Marketing sectors**: Telemarketing, e-mail marketing, behavioural marketing, market research and analytics
  - **Sectors selling to consumers**: Retail, travel and tourism, and other sectors selling directly to consumers.
  - **Semi-public sectors**: Health and education.
  - **Others:** Legal services, personnel and payroll.
- Spin-off effects (positive and negative) felt in some other industries.

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Way Forward

- Areas for further research:
  - To further quantify the economic impact of impediments to TBDF, a large scale survey would be required.
    - Qualitative survey: Rich, in-depth understanding of issues
    - Quantitative survey: Greater ability to quantify, but accuracy may be questionable
  - Should focus on the sectors that are most impacted
- Resolving impediments and decreasing economic impacts:
  - Need to address divergence in regulatoyr approaches
  - Understand where differences are based on policy versus procedure
  - Prioritize areas fore regulatory convergence
    - Are there quick wins that would make a significant impact?

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Annex 8 - IC/iapp deck

Industry Canada Industrie Canada

iapp
international association of privacy professionals

Cost of Impediments to Transborder Data Flows: Findings

TRILATERAL COMMITTEE
ON TRANSBORDER DATA FLOWS
June 15, 2009
Ottawa

Eric Futin (IC)
Kris Klein (IAPP)

Canada

Objectives of the Study

- Collecting information in order to provide background for the work of the Trilateral Committee.
- Documenting the tangible impacts that restrictions on transborder data flows will produce on North American businesses.
- Looking at the impact of rules and regulations affecting cross-border trade.

2

Context of the study

- Collaboration between Industry Canada and the International Association of Privacy Professionals (IAPP)
- Online survey to IAPP members.
- Survey conducted between April 21 – 28.
- Total of 128 respondents

3

Profile of Respondents

Who are the respondents?

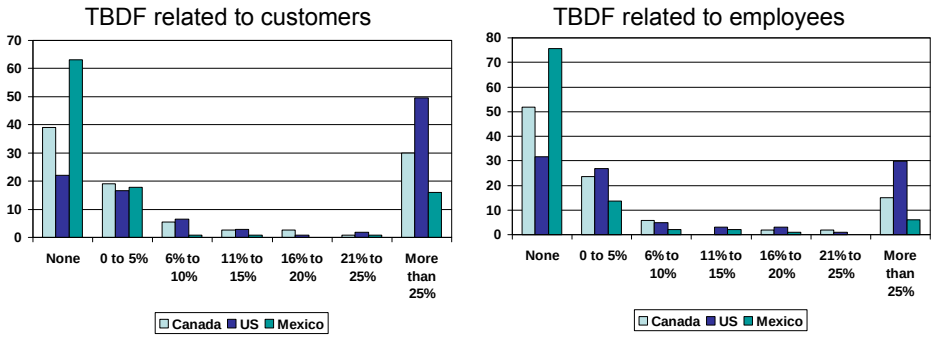
- More than three quarter of respondents come from the US (77.3%) while less than a quarter come from Canada (22.7%) and none from Mexico.
- Most of respondents were in the finance and insurance sector (38.9%) and in the professional, scientific and technical services sector (34.4%).
- Most of the respondents identified other ICT services (35.9%), operation (32.8%) and data processing (32.0%) as their principal activities followed by financial and management services (31.3%).

4

Profile of Respondents

Data transferred to or from Canada and Mexico are low as compared to the ones transferred to or from the United States.

Types of data transferred to or from Canada, the US and Mexico



5

Impediments to TBDF

Almost of half of respondents indicated being affected by some regulatory measures, such as …

- Respondents were asked to indicate if regulatory measures slowed down or caused problems for businesses operations in providing or purchasing business services on a temporary or ongoing basis in Canada, the United States and/or Mexico.
- 58 respondents indicated that they are affected by some regulatory measures that have an impact on TBDF.
  - 75.9% indicated that they are affected when doing business within Canada,
  - 81.0% indicated that they are affected when doing business within the United States, and
  - 7.8% indicated that they are affected when doing business within Mexico.

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Impediments to TBDF

… PIPEDA and BC FOIPA in Canada, and…

Ranking of regulatory measures by degree of restrictiveness in Canada

Regulatory Measures	Number of Respondents			Weighted Score[1]
	Rank 1	Rank 2	Rank 3	
PIPEDA	11	6	2	47
BC FOIPA	8	2	0	28
Provincial Privacy Laws	2	3	3	15
Various Privacy Laws	3	0	0	9
PHIPA	1	2	0	7
Nova Scotia FOIPOP	0	1	1	3

Note: 1. The number 1 measures were given a value of 3, the number 2 measures a value of 2 and the number 3 measures a value of 1.

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Impediments to TBDF

… HIPAA and Patriot Act in the United States.

Ranking of regulatory measures by degree of restrictiveness in the US

Regulatory Measures	Number of Respondents			Weighted Score[1]
	Rank 1	Rank 2	Rank 3	
Health Insurance Portability and Accountability Act (HIPAA)	6	5	2	30
Patriot Act	6	0	1	19
Gramm-Leach-Bliley Act (GLBA)	4	2	2	18
State Breach notification laws	3	1	1	12
FTC Red Flags Rules	0	3	2	8
Massachusetts data security regulations	1	2	0	7

Note: 1. The number 1 measures were given a value of 3, the number 2 measures a value of 2 and the number 3 measures a value of 1.

8

Economic Cost of Impediments to TBDF

Only few respondents indicated they are impacted by regulatory measures…

- A specific question were asked on the impact that regulatory measures have on respondents' organisation.
- Half of the respondents (64) answered that question.
- From them, only 9 respondents, or 14.1%, indicated that they had lost contracts or sales because of one or more regulatory measures.

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Economic Cost of Impediments to TBDF

… and if so, economic impacts on their organisations are small.

	Canada		United States		Mexico	
	#	%	#	%	#	%
None	2	22	2	33	3	75
Less the 5%	7	78	4	67	1	25
Between 6% to 10%	-	-	-	-	-	-
Between 11% to 15%	-	-	-	-	-	-
Between 16% to 20%	-	-	-	-	-	-
Between 21% to 25%	-	-	-	-	-	-
More than 25%	-	-	-	-	-	-
Total	9	100	7	100	4	100

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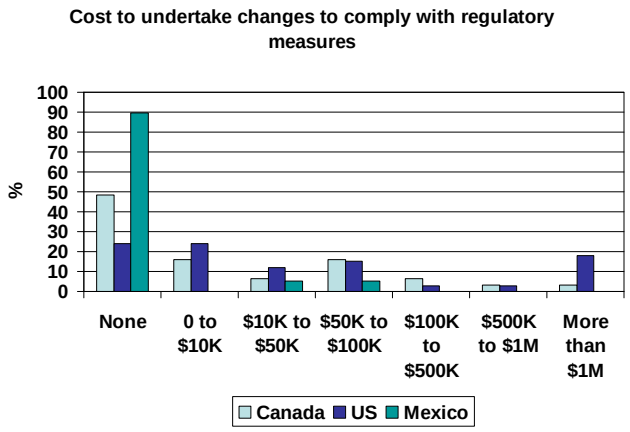
Economic Cost of Impediments to TBDF

Also, costs to undertake changes to comply with regulatory measures are minimal.[1]



1. Note: Based on the sample which contains a majority of large organisations with more than $100M in revenue.

11

Conclusion

Key Messages

From results of the survey	Canada	US	Mexico
Proportion of organisations affected by regulatory measures	76%	81%	8%
Major impediment	PIPEDA	HIPAA	None
Respondents impacted by regulatory measures	14%		
Economic impact on organization	Less than 5% of revenue	Less than 5% of revenue	None
Compliance costs to undertake changes	Low	Low	Low

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