



November 8, 2023

Global Data Alliance Comments re Jamaica's Draft Regulations Under the Data Protection Act (2020)

The Global Data Alliance (GDA)¹ welcomes the recent announcement by the Minister with Responsibility for Skills and Digital Transformation, the Honorable Senator Dr. Dana Morris Dixon, regarding forthcoming regulations on the implementation of Jamaica's Data Protection Act, 2020.² We appreciate the opportunity to share these preliminary comments with you.

The Global Data Alliance is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. The Global Data Alliance supports policies that help instill trust in the digital economy without imposing undue cross-border data restrictions or localization requirements that undermine data security, innovation, economic development, and international trade. Alliance member companies have significant investments and operations in Jamaica.

Our comments focus on two core issues:

1. Recognizing the benefits of international data transfers.
2. Promoting convergence and interoperability among contractual transfer mechanisms, including those authorized under the Eighth Pillar of the Data Protection Act at Art. 31(4)(h)-(i).

We outline those elements below.

1. Recognizing the Benefits of International Data Transfers

We welcome the Data Protection Act's recognition of the importance of cross-border data transfers in Article 31. This article is crafted in line with international best practices, inasmuch as it recognizes the importance of legal certainty relating to cross-border data and inasmuch as it provides for a range of potential data transfer mechanisms.

As reflected in the GDA's [Cross-Border Data Policy Index](#),³ the ability to access technology and transfer data securely across international digital networks is of central importance to both [economic](#) and other [governmental policy objectives](#): Not only do restrictive cross-border policies fail to protect [privacy](#),⁴ but they also hurt [developing countries](#)⁵ and [small businesses](#); ⁶ impede [financial inclusion](#); ⁷ undermine [cybersecurity](#); ⁸ slow [innovation](#); ⁹ and impair various [health and safety](#), ¹⁰ [environmental](#), ¹¹ and other [regulatory compliance](#) goals (including anti-corruption, anti-money laundering, fraud prevention, etc.).¹² Data transfers are critical to economies [across all sectors](#)¹³ and at [every stage of the value chain](#).¹⁴

The United Nations, World Trade Organization, as well as the World Bank and other development banks have warned against the risks of digital fragmentation, particularly in the form of data localization mandates, data transfer restrictions, or similar cross-border data restrictions. For example:

The World Bank's 2020 *World Development Report* found that, "restrictions on data flows have large negative consequences on the productivity of local companies using digital technologies... Countries would gain on average about 4.5 percent in productivity if they removed their restrictive data policies, whereas the benefits of reducing data restrictions on trade in services would on average be about 5 percent."¹⁵ Indeed, it has been estimated that 75% of the value of data transfers accrues to industries like services, agriculture, and manufacturing.¹⁶

The World Bank 2021 *World Development Report* has noted that measures that "restrict cross-border data flows ... [may] materially affect a country's competitive edge in the burgeoning trade of data-enabled services."¹⁷ A 2020 World Economic Forum study found that, "approximately half of cross-border [services] trade is enabled by digital connectivity[, which] ... has allowed developing countries and micro, small and medium-sized enterprises (MSMEs) to export through greater visibility, easier market access and less costly distribution. ... Developing countries ... accounted for 29.7% of services exports in 2019."¹⁸

The UN High-Level Advisory Board on Effective Multilateralism noted in 2023 that, "regulatory fragmentation in the digital landscape...is most likely to adversely impact low-income countries, less well-off individuals, and marginalized communities the world over, as well as worsen structural discrimination against women. A future of exclusionary digital development must be avoided at all costs."¹⁹

The United Nations Conference on Trade and Development has also explained that, "[d]ivergent data nationalism...reduces market opportunities for domestic MSMEs to reach worldwide markets, [and]...reduces opportunities for digital innovation, including various missed opportunities for inclusive development that can be facilitated by engaging in data-sharing through strong international cooperation....[M]ost small, developing economies will lose opportunities for raising their digital competitiveness."²⁰

We support Jamaica's safeguarding these priorities while advancing high standards of data protection by pursuing the so-called "accountability principle."

Article 31 of Jamaica's Data Protection Act is drafted and designed in a manner that reflects this principle. This Article permits data transfers with the understanding that transferring organizations shall implement procedures to ensure that data will continue to be protected, even if it is transferred to countries other than where it was first collected. The accountability principle was first developed by the OECD,²¹ and was subsequently endorsed and has been integrated in many legal systems including the EU,²² Japan,²³ New Zealand,²⁴ Singapore,²⁵ and Canada.²⁶ This principle is also a significant feature of the recently launched Global Cross-Border Privacy Rules Forum.²⁷

2. Promoting convergence and interoperability among contractual transfer mechanisms

To leverage the benefits that are brought about by responsible flow of data across borders, we recommend Jamaica promote convergence and interoperability of data transfer mechanisms that are developed in the draft regulations pursuant to Article 31(4)(h)-(i) of the Data Protection Act.

First, we respectfully recommend that Jamaica recognize and authorize of the widest possible array of such mechanisms, to include standard contractual clauses, binding corporate rules, certification mechanisms, and other international instruments and agreements. Different types of organizations and different business models require the use of different transfer mechanisms that are not interchangeable. In practice, companies of different sizes and in different sectors will often rely on one or more data transfer mechanisms, using the tool most tailored to their business needs and to the specific data transfer(s) at hand. Creating a range of flexible transfer mechanisms that can be used differently in these different situations will help companies transfer data responsibly, consistent with Jamaican law.

Data transfer mechanisms designed for use by companies operating in one country also cannot be viewed in isolation from mechanisms created and used in other countries. As countries worldwide develop and update their personal information protection laws and regulations it is critical that these legal frameworks are designed to effectively protect privacy in a manner that is internationally interoperable, flexible enough to account for rapid evolution in both technologies and business models, levels of risk, and that prioritizes high standards of data protection.²⁸

Second, we recommend that Jamaica favor transfer mechanisms that are sufficiently similar – in structure and substantive protections – with similar mechanisms in other jurisdictions. This approach will create a more efficient compliance process and drives investment in strong practices that companies can leverage in more than one jurisdiction. It is probable that many companies inside and outside of Jamaica have adopted contractual transfer mechanisms including the:

- European Union’s Standard Contractual Clauses (EU SCCs);
- United Kingdom’s International Data Transfer Agreements (UK IDTAs); and
- APEC Cross Border Privacy Rules System and the accompanying APEC Privacy Rules for Processors (APEC CBPRs and APEC PRPs)

One possible approach for Jamaica to consider would include a recognition that that these existing contractual transfer mechanisms offer contractual safeguards consistent with Jamaica’s legal requirements under Article 31(4)(h)-(i). Such an approach would allow for companies to quickly advance the highest possible standards of privacy protection without having to re-negotiate contracts to market-specific or market-unique pre-approved language or formats. This approach to contractual transfer safeguards would help drive harmonization by recognizing alignment between these existing mechanisms and Jamaican legal requirements – ensuring that companies can leverage existing compliance practices and mechanisms in support of products, services, and customers in Jamaica.²⁹ In addition, participation in international certification systems can also advance convergence and interoperability.

Third, we also recommend that Jamaica prioritize flexibility in the appropriate format for standard contractual arrangements, including for existing contractual arrangements that already meet substantive obligations of Jamaican law. For example, one interoperable approach that Jamaica could consider to leveraging existing contractual mechanisms is to create a model addendum that can be added onto other contractual mechanisms, such as an addendum to the EU SCCs. The UK Information Commissioner’s Office (UK ICO) recently adopted this approach in two new sets of model contractual clauses that came into force this year.³⁰ The creation of such addenda – which recognize the substantive protections in the underlying contractual transfer mechanism and adopt a set of additional protections designed to satisfy the requirements of a second jurisdiction – helps support interoperability of data transfer mechanisms across jurisdictions.³¹

Finally, if Jamaica adopts new model SCCs under Article 31(4)(h)-(i), we encourage Jamaica to account for the range of different entities that transfer data and the range of different transfers between these entities. Any new contractual mechanism should support transfers between two controllers, from a controller to a processor, from a processor to a controller, or between processors.³² Data transfers take many shapes and forms and it is important that contractual transfer mechanisms can be used in the full range of transfer scenarios. For example, the EU recently updated its SCCs to adopt a modular approach that organizations can use to support these different types of transfers. Whether Jamaica adopts a modular approach or not, any new SCCs in Jamaica should be flexible enough to be used in each of these scenarios.

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Thank you again for your focus on promoting interoperable mechanisms to support international data transfers. We welcome an opportunity to further engage with Jamaica on these important issues.

¹ The Global Data Alliance is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. Alliance members are headquartered across the globe and are active in the advanced manufacturing, aerospace, automotive, consumer goods, electronics, financial services, health, media and entertainment, natural resources, supply chain, and telecommunications sectors, among others. BSA | The Software Alliance administers the Global Data Alliance. For more information on the Global Data Alliance, please see: <https://www.globaldataalliance.org/>

² <https://japarliament.gov.jm/attachments/article/339/The%20Data%20Protection%20Act,%202020.pdf>

³ <https://globaldataalliance.org/resource/cross-border-data-policy-index/>

⁴ <https://globaldataalliance.org/issues/privacy/>

⁵ <https://globaldataalliance.org/issues/economic-development/>

⁶ <https://globaldataalliance.org/issues/small-businesses/>

⁷ <https://globaldataalliance.org/sectors/finance/>

⁸ <https://globaldataalliance.org/issues/cybersecurity/>

⁹ <https://globaldataalliance.org/issues/innovation/>

¹⁰ <https://globaldataalliance.org/sectors/biopharmaceutical-rd/>; <https://globaldataalliance.org/sectors/medical-technology/>; <https://globaldataalliance.org/sectors/healthcare/>

¹¹ <https://globaldataalliance.org/issues/environmental-sustainability/>

¹² <https://globaldataalliance.org/issues/regulatory-compliance/>

¹³ <https://globaldataalliance.org/wp-content/uploads/2021/07/GDAeverysector.pdf>

¹⁴ <https://globaldataalliance.org/wp-content/uploads/2021/07/infographicgda.pdf>

¹⁵ World Bank, *World Development Report* (2020), at: <https://www.worldbank.org/en/publication/wdr2020>

¹⁶ See Global Data Alliance, *The Cross-Border Movement of Data: Creating Jobs and Trust Across Borders in Every Sector* (2020), at [https://www.globaldataalliance.org/downloads/\[j\]everysector.pdf](https://www.globaldataalliance.org/downloads/[j]everysector.pdf) ; See Global Data Alliance, *Jobs in All Sectors Depend Upon Data Flows* (2020), at [https://www.globaldataalliance.org/downloads/infographic\[j\].pdf](https://www.globaldataalliance.org/downloads/infographic[j].pdf); Global Data Alliance, *Cross-Border Data Transfers Facts and Figures* (2020), at [https://www.globaldataalliance.org/downloads/\[j\]factsandfigures.pdf](https://www.globaldataalliance.org/downloads/[j]factsandfigures.pdf)

¹⁷ World Bank, *World Development Report – Data For Better Lives* (2021), at: <https://openknowledge.worldbank.org/bitstream/handle/10986/35218/9781464816000.pdf>

¹⁸ World Economic Forum, *Paths Towards Free and Trusted Data Flows* (2020).

¹⁹ UN High Level Advisory Board on Effective Multilateralism, *Effective and Inclusive Global Governance for Today and the Future* (April 2023), <https://highleveladvisoryboard.org/breakthrough/>

²⁰ UNCTAD, *Cross-border data flows and development: For whom the data flow*, Digital Economy Report 2021 (2021), at: https://unctad.org/system/files/official-document/der2021_en.pdf

²¹ OECD Privacy Framework 2013 (p15), http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf

²² Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

²³ Act on the Protection of Personal Information, <https://www.ppc.go.jp/en/legal/>

²⁴ Privacy Act 2020, <https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23223.html>

²⁵ Personal Data Protection Act 2012, <https://www.pdpc.gov.sg/Overview-of-PDPA/The-Legislation/Personal-Data-Protection-Act>

²⁶ Personal Information Protection and Electronic Documents Act fair information principles, https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/

²⁷ Global CBPR Forum Website (2023), at: <https://www.globalcbpr.org/>

²⁸ Of course, the context and perspective around privacy and personal data protection may appropriately vary among different countries based on cultural expectations, legal traditions, and other factors. At the same time, governments should support the common recognition of international norms and practices around core substantive protections that underpin interoperable privacy frameworks. If countries instead adopt fragmented policies on core issues it raises costs for companies, workers, and consumers, and it can undermine personal data protection and consumer privacy.

²⁹ A touchstone of future regulatory efforts should be to seek to ensure interoperability between Jamaican regulations and those of the EU, the USA and other jurisdictions. As Jamaica considers the possibility of new regulatory requirements, we encourage the establishment of reasonable grace periods and due respect for business predictability and legal certainty.

³⁰ See UK ICO, International Data Transfer Agreement and Guidance, <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-data-transfer-agreement-and-guidance/>. First, the UK ICO adopted a 36-page standalone set of contract terms that companies could adopt to support transfers of data from the UK. Second, the UK ICO adopted a separate nine-page addendum, which companies can add to existing contracts that incorporate the EU SCCs; this allows companies to adopt the additional language in the addendum to support transfers of data from the UK. Adopting both a standalone set of SCCs and an addendum creates flexible options for companies transferring data from the UK, including for smaller businesses (which may not have other contractual mechanisms in place and thus may not make use of the addendum) and larger ones (which may already have existing contractual mechanisms that are readily modified by the addendum).

³¹ We recommend ensuring that companies may seek to adhere by reference to a model addendum. Parties could provide that their contractual agreements incorporate the model addendum by reference, while noting that the agreement may provide for more specific terms on particular issues.

³² We also note that in complex intercompany relationships, a particular entity may have different roles in different contexts, with respect to different information sets, and at different times, including as a controller, processor, importer, and/or exporter.