

CORPORATE GOVERNANCE HOTLIST: 2011



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Two innovative subjects should stand out on the agenda of the Corporate Governance Committee for 2011: (i) Binding Corporate Rules for international transfers of personal data and (ii) the decision of President Santos' administration to include Good Governance principles to guide the proper conduct of public officials. Although both of these issues may seem distant and somehow disconnected, they are actually two sides of the same coin. The introduction of binding corporate rules provides for a responsible commitment of companies within their scope of business in view of their interaction with the public authorities. On the other hand, the adoption of good government practices shifts onto the public sector a reality that has been changing the way corporations do business and makes them accountable to their stakeholders.

I. GOOD GOVERNANCE PRINCIPLES IN THE PUBLIC ADMINISTRATION

Good Governance practices in the public administration were introduced by President Santos in a declaration made public before his inauguration. The declaration of principles was presented as a commitment of the utmost importance as it is intended to involve and guide all high level officials of the administration.

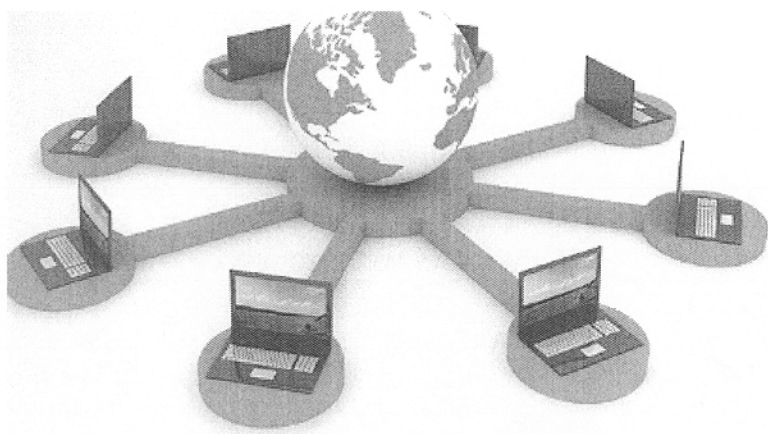
This declaration includes basic principles which must be observed by all during their work as administrators, and a series of results which should be obtained by their implementation, and ethical and behavioral principles.

The basic principles include transparency, zero tolerance with corruption, equality, pluralism, efficiency and austerity. All of them constitute a means to achieve a performance of the public administration which is effective, competitive, has measurable results, is proactive, based on merits, and committed to public service.

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The declaration of principles is particularly explicit. Public servants and officials at all levels must:

1. Deliver more than expected and strictly comply with the law in the exercise of their duties.
2. Avoid any situation in which personal interests conflict with the public interest or which interfere with the ethical and transparent performance of their duties.
3. Make decisions exclusively in the public interest, with zero tolerance for the abuse of power or the trafficking of influences.
4. Declare ownership of property before taking office, in order to guarantee transparency.
5. Denounce illegalities and irregularities.
6. Refrain from the use of privileged or confidential information.
7. Act with moderation in granting distinctions and awards.
8. Refrain from receiving donations which may generate a conflict of interests.

The incorporation of these principles, and the willingness to enforce them, should permeate all levels of the administration in order to reinstate trust and belief in the application of a system based exclusively on respect for the rule of law. Trust, boosted by the verification by citizens of the adherence of public servants to ethical guidelines in all of their actions, leads to the strengthening of democratic values and economic and social progress. Increased transparency in the performance of public

institutions creates trust and, consequently, promotes investment.

A good starting point for this subject is the extensive material produced by the OECD regarding both corporate governance practices for state-owned enterprises and the guidelines on transparency and ethical behavior in public administration, prevention of corruption, handling of conflicts of interest, and procurement in the public sector.

Now that this first step has been taken, a necessary second one is to evaluate the implementation of these principles to assess their impact.

2. BINDING CORPORATE RULES IN INTERNATIONAL DATA TRANSFERS

The final session of Congress last year brought good news to the team working on approval of a general Privacy and Data Protection statute.

This necessary law, still not in force due to the mandatory preliminary exam by the Constitutional Court, included an issue of tremendous importance (although its impact has not yet been analyzed): Binding Corporate Rules for international transfers of personal data. Article 28 of the Data Protection Statute establishes that the Government will regulate this mechanism for protection of personal data in order to obtain a certificate of good standing and enable companies to transfer data to third parties with less than adequate levels of protection without resorting to individual authorization schemes.

But what exactly are Binding Corporate Rules (BCRs) in the context of Data Protection?

BCRs are essentially a set of internal corporate regulations which are drafted by a specific multinational corporation, aimed at defining the way in which a member of that multinational group may send data to another member of the group that is



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located in an area that does not provide an adequate level of protection. As indicated by the European authorities, BCR's must include the following: (i) privacy principles (transparency, data quality, security, etc.), (ii) tools of effectiveness (i.e. audit, training, complaint system, etc.), and (iii) an element establishing that BCR's are binding.

BCRs originate from the provisions contemplated in article 26(2) of the Data Protection Directive of the EU, which provides for a method of transferring data overseas different from the individual authorizations in contractual clauses. It therefore allows for a Member State to authorize a transfer or a set of transfers of personal data to a third country without a recognized adequate level of protection "where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights (...)".

The adoption of these corporate codes of conduct is made through a procedure within the EU and may require significant dedication and effort from

the requesting company, since the Data Protection authorities of all Member States, which are part of Article 29 Working Party, have a say in the process.

Once adopted, these binding rules ensure that transfers made within a corporate multinational group are safeguarding the privacy and fundamental rights of the individuals involved. On the corporate side, the advantage of transiting the difficult road towards approval of the BCRs is to avoid the cumbersome individual approval regime which implies extensive paperwork for each personal data transfer.

The implications and extent of this type of binding corporate rules in Colombia is yet to be seen. The Data Protection Authority, which will be in charge of authorizing international data transfers (Superintendency of Industry and Commerce), will have to decide on transfers made to third countries with an inadequate level of protection according to Colombian standards. The adoption of BCRs, as implemented by the EU, will surely provide a rational model for the authorization of personal data transfers.

