

July 3, 2013

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Ministry of Science, ICT, and Future Planning (MSIP)

Via e-mail to: kchu@msip.go.kr

**RE: ITI's Comments on Korea's Revised "Proposed Bill for the Development of Cloud Computing and Protection of Users"**

Dear Director Kim:

The Information Technology Industry Council (ITI) appreciates the opportunity to comment on the Ministry of Science, ICT, and Future Planning's (MSIP) revised "Proposed Bill for the Development of Cloud Computing and Protection of Users." ITI is a leading U.S.-based high tech trade association. ITI's members<sup>1</sup> comprise leading information and communications technology (ICT) companies, many of which provide products and services that support cloud computing. Our companies also are global, earning a substantial portion of their revenues from foreign markets, conducting extensive cross-border business, and managing global supply chains. As a result, we understand the impact of international policies on ICT innovation, deployment, and use around the world.

We commend MSIP for seeking to promote the development and use of cloud computing. We also appreciate the Korean Government's transparency over the past year in drafting this bill and welcoming stakeholder input. ITI submitted its original comments for consideration in August 2012, and then sent additional comments in March 2013. We are grateful for MSIP's willingness to address in its revised bill some of the issues and concerns raised by the global ICT industry.

However, we continue to urge Korea not to move forward with regulating cloud computing. Korea would be the only country in the world to take this approach to cloud. Fundamentally, the growth of cloud computing, and the cloud's value to Korea and other countries' businesses, citizens, and economies, will continue only if its development is guided by the same open approach to an international policy framework that has long enabled the dynamic growth of the Internet and ICT generally. Adopting a similar approach in line with the Korean Government's focus on deregulating the economy in a way to promote further growth in the economy and in employment will allow cloud computing (and Internet-based computing generally) to grow the most rapidly and dynamically in Korea, particularly in response to user needs. Policies based on promotion—not regulation—in turn will support and facilitate the development of innovative and entrepreneurial companies in Korea, such as those focused on creative applications and content.<sup>2</sup> These policies also will support Korean small- and medium-sized enterprises in all

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<sup>1</sup> See attached ITI member list.

<sup>2</sup> In the United States, for example, some of today's most successful social media and content companies were founded by college students who did not face a myriad of Internet or cloud-related regulations. It is doubtful these students would have been as successful (or even tried to launch their companies) had they faced such regulations.

sectors that can choose from an array of computing options that meet their needs for efficiency and productivity.

With all the hype around cloud computing, it is understandable to wonder if it has reached maturity or even saturation. The truth is, cloud computing is just beginning to take hold. The worldwide market for public cloud services will reach \$131 billion (149 trillion KRW) in 2013.<sup>3</sup> By comparison, worldwide IT spending will reach \$3.7 trillion (4.2 quadrillion KRW).<sup>4</sup> Adoption has just begun.

What users need is an easy “on ramp” to the cloud coupled with the choice, control, and security they desire. This is especially true for small- and medium-sized enterprises that will benefit tremendously from the shared computing power, lower costs, and easier-to-manage technology. This “on-ramp” should enable enterprises of all sizes to build, access, and integrate cloud/Internet-based computing across public, private, and hybrid, fully realizing the scalability, security, and flexibility of a cloud infrastructure. This allows for the true reinvention and acceleration of business.

Accordingly, ITI recommends that policymakers in Korea as well as other countries around the world, instead of enacting cloud-specific regulations, embrace the following six recommendations to build the “on ramp” to the cloud and enable its full benefits for all:

- **Innovation Policy.** Consider policies that encourage innovation in ICT generally, rather than cloud-specific policies.
- **International Cooperation.** Promote interoperability and mutual recognition of adequacy in data privacy and security laws and policies.
- **Trade.** Avoid discriminatory market access trade practices and policies that restrict the transfer of information and data across borders.
- **Cybersecurity.** Improve cybersecurity holistically, rather than targeting cloud technologies and applications specifically.
- **Broadband.** Aggressively roll-out high speed broadband networks that are critical to connecting to, and expanding, the cloud. We note that Korea is a leader in this regard.
- **Standards.** Continue to rely on global ICT standards developed via standard-setting processes that are consensus-based, transparent, and industry-led, with participation open to interested parties.

Within this context, below we provide comments to support our position on the revised bill.

### General comments on Korea’s proposed bill

Our general concerns are as follows:

- It is extremely unclear to whom the bill applies. This introduces a significant amount of uncertainty to industry, which can cause unnecessary confusion in the marketplace.
- Many of the issues Korea attempts to address—such as security and data protection—are not confined strictly to cloud computing. The bill creates unnecessary distinctions that

<sup>3</sup> <http://www.gartner.com/newsroom/id/2352816>

<sup>4</sup> <http://www.gartner.com/newsroom/id/2292815>

would prevent the development of measures that should be adopted to protect data no matter where they are stored. Threats are global and the practices that respond to them must be global as well.

- The bill includes requirements that could be unnecessarily burdensome on ICT providers and therefore hamper the growth of technology and cloud computing in Korea—the opposite of the bill’s intentions. While we understand that Korea seeks to provide greater assurance to Korean citizens that cloud computing services provide adequate security, levels of service, and data privacy protections, many of these issues are already addressed in either government policies or vendor practices (such as contracts) and do not warrant new legislation.
- The proposal does not take into consideration the global, multi-national, and multi-jurisdictional nature of cloud computing. Many of the proposed country-specific requirements would be impossible for global cloud services providers to meet. This would inhibit future Korean cloud providers who want to provide global services as well as create de facto barriers against non-Korean cloud providers. Because many global companies partner with Korean companies to provide a suite of cloud-related services, negative impacts on non-Korean companies could have unintended consequences on Korean companies as well. Finally, market barriers might also in turn possibly create a precedent that could be exploited by other countries who may emulate Korea’s proposed requirements to prevent access to their own cloud computing market by Korean cloud providers.
- Overall, regulation will deter growth of the cloud industry in Korea. Global companies must act globally, and non-globally standard requirements or burdensome licensing may outweigh the benefits of serving the market. Further, the cost of compliance and penalties will ultimately likely be factored into cloud services, and ultimately passed onto Korean users—also impeding growth.

#### Specific comments on bill revisions

ITI commends the elimination of the following articles from the June 2012 draft:

- Article 14 - *Reporting of Cloud Computing Service Business*
- Article 15- *Transfer of Cloud Computing Service Businesses and Merger of Business Entities, etc.*
- Article 19 - *Cloud Computing Service Certification*
- Article 28 - *Measures for Information Preservation and Recovery*
- Article 31 - *Measures in Case of Suspension of Cloud Computing Service*

ITI also appreciates Korea’s willingness to remove the mandatory requirements from Article 26 and 27 of the 2012 bill (which are now combined into a new Article 24) and make these voluntary. However, we firmly believe that Korea should eliminate all portions of this bill that would impose regulations or other requirements (including “voluntary” ones) on cloud services providers in the commercial market, as these types of regulations could hamper the growth of cloud computing in Korea—the opposite of the bill’s intentions. Consequently, we provide comments on the new Article 24 below.

## Specific comments on the remaining text

### ***Article 2: Definitions***

The definitions are extremely broad and capture a wide range of ICT products and services, many of which may or may not actually support cloud computing at any given time. We believe it is difficult if not impossible to accurately define cloud computing, given its myriad technologies, services, and business models (which are ever-changing), without encompassing a broad range of web- and Internet-based technologies, services, and business models. Thus, companies will not know if they or their products / services fall under the legislation. Nor is it clear what a cloud computing “user” is—it could refer to the end customer (for example, software-as-a-service/SaaS user) and/or the enterprise customer that provides its own service using cloud computing service (for example platform-as-a-service/PaaS user), which creates additional uncertainty for businesses regarding their obligations. Further, attempting to define the cloud in legislative language would codify into law technologies and services that are rapidly changing. Similarly, it is unclear what constitutes “cloud user information” (per item 6).

### ***Article 8: Fact-Finding Survey***

We support the Korean Government’s desire to understand the cloud computing industry to better promote cloud usage. We appreciate that the revised bill eliminates the provision that would have mandated compliance with requests for information “in the absence of a justifiable reason for not doing so.” Any legislation, regulation, or policy should not require ICT companies to comply with government requests for materials, comments, statements, or statistics related to cloud computing. Such information often must remain confidential because it is intellectual property, trade secrets, customer-related data, business plans, technology architecture information, etc. Any provision of such information should be voluntary. Further, even voluntary requests should focus strictly on necessary information.

### ***Article 17: Use of Cloud Computing Services by Public Institutions***

We appreciate the encouragement of Korean public institutions to adopt cloud computing.

However, we seek clarity on the reference to Article 56(3) of the Electronic Government Act. Article 56(3) would allow the Director of the National Intelligence Service (NIS) to conduct inspections of security measures taken by administrative agencies “to prevent electronic documents from being forged, altered, mutilated, or leaked in the course of preservation and circulation of electronic documents through an information and communications network.”<sup>5</sup> We agree that such security measures are extremely important. Further, given that this Article refers to data of public institutions (e.g., the Korean Government), we agree that the Korean Government has the right and responsibility to ensure the systems and information being held in the public trust are adequately protected.

However, we are concerned with the provision that would allow the NIS to inspect the facilities of cloud computing service providers. We suggest that any inspection powers be amended as follows. First, private certification bodies, as opposed to NIS or another Korean Government

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<sup>5</sup> Taken from English translation of Electronic Government Act.

agency, should be responsible for inspections. Further, inspections should be based on global auditing/inspection standards, such as SSAE16.

***Article 20: Enhancing the Reliability of Cloud Computing Service***

This would allow MCIT to establish detailed criteria regarding quality, performance and their levels of adequacy and recommend these criteria to cloud computing service providers. We question how MCIT would determine those criteria, and believe such a choice would be quite arbitrary. “Appropriate” quality and performance levels would be different from service to service depending on what is be offered or delivered, and are best addressed in private contracts. The bill should not try to set any baselines in this area.

***Article 21: Standard Contracts***

We are concerned with the proposal that MCIT might enact a standard contract and recommend that cloud computing service providers implement it. First, it is important to consider that there exists a large, still developing variety of cloud computing services and business models. Standard contractual clauses would not be able to reflect this diversity. Instead, they would apply a constrictive one-size-fits-all framework that would inhibit the development of cloud computing (as just one of many examples, contracts for consumers using public clouds differ greatly from contracts for business using private clouds). Greater flexibility in contracting can particularly serve the diverse needs of small and medium sized enterprises.

Second, recommending particular contractual clauses should only occur if a public interest is not met. In the context of business-to-business contractual relations – where customers have an expert understanding of their needs—contractual clauses should be left to the parties in question.

***Article 22: Report of Infringement Accidents***

This would require a notification to users of every incidence of information being exposed. To be useful, notification should only be required if there is an actual risk of tangible harm to the individual.

Further, the time frame is characterized as “without delay.” There may be legitimate reasons, such as efforts to address an ongoing breach, which would warrant a delay prior to notification.

***Article 23: Prohibition on Provision of Information to Third Parties***

- (1) This Article does not allow for sharing unless “consent” has been obtained. It is unclear how “consent” must be obtained. Also, limiting the use or sharing of information to the “provision of services” may not be sufficiently broad to cover all the uses and sharing that may be necessary. For example, companies may use or share information in order to identify fraud or for the improvement or analysis services. Also, an exception is necessary for legitimate law enforcement requests.
- (2) and (3) The requirement of returning or destroying the User information does not specify whether data can be retained in an unidentified form.

***Article 24: Protection of Cloud Computing Service Users***

Although the general purpose of the bill is to promote the adoption of cloud computing and level the playing field among the many different forms of computing (including cloud computing), this requirement is biased against cloud services and puts cloud services at a disadvantage.

This bill would only require companies to disclose when cloud services are used, but would not require that other types of outsourced data storage and processing (such as data backup services) be disclosed. It is not clear why cloud computing services should be subject to greater disclosure requirements. This disclosure requirement is unnecessary for cloud services, as well as other forms of outsourced data storage and processing.

- (1) It is not clear when there would be a requirement to disclose the name of the country where user information is stored. “If necessary for the protection of the Users” does not provide sufficient guidance. [Also, if information is stored in the cloud, it may not be feasible to indicate where the information is being stored.]
- (2) Same concern as in (1). The standard “If necessary of the protection of the Users” does not provide sufficient guidance.

***Article 25: Return and Destruction of User Information***

As we commented on Article 23, it appears that this Article would not allow for information to be de-identified in lieu of it being destroyed.

***Article 26: Compensation for Damages***

The standard for liability is extremely broad, as it states “In the event the User sustains damages.” Greater specificity is necessary regarding the nature of the damages that would result in liability.

***Article 28: Corrective Order***

Generally, we have concerns about providing access to business premises.

- (2) This item does not include any notice provision or any limitations on the entering of premises. A company should receive sufficient notice before their premises are entered and there should be a limitation on how many times its premises are entered.
- (3) This item should include a process to enable a company to appeal from the issuance of a corrective order.

<b>Conclusion</b>
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Thank you again for your transparent process and engagement with stakeholders on this bill. ITI appreciates the opportunity to provide comments on the revised draft bill. Although we commend the Korean Government’s interest in promoting cloud computing, and we support a number of the recent revisions to the draft bill, we continue to urge the Korean Government not to pursue regulation of cloud computing for the many reasons we laid out above. Korea should remove all portions of this bill that would impose regulations or other requirements (including “voluntary” ones) on cloud services providers in the commercial market. These types of

regulations could hamper the growth of cloud computing in Korea—the opposite of the bill’s intentions.

ITI and its member companies appreciate your consideration of our comments and your committed openness to discussing the bill with stakeholders. Please contact us with any questions you may have at [dkriz@itic.org](mailto:dkriz@itic.org). We look forward to a continued dialogue with you on this very important topic.

Sincerely,



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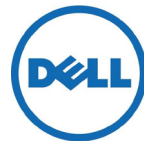


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