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INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

LETTER FROM THE PRESIDENT

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Coming amendments to federal privacy legislation: A new challenge for the Canadian investment industry

SUMMARY

Companies collecting personal data can send it outside Canada (under certain parametres) without additional consent – the government thinks this needs to change.

This past June, the Office of the Privacy Commissioner of Canada (OPC) released a discussion document on cross-border transfer of personal data for processing, under PIPEDA legislation. The document reversed OPC's long-standing position, which was that, the transfer of personal information for processing was a "use" of the personal information by the transferor rather than a "disclosure" to the processor. Simply put, if personal information was being processed (aka 'used') for the purpose for which it was originally collected, regardless if that use/processing was outside Canadian borders, further consent from the owner of the personal data was not required. Canadian entities could outsource data-processing activities and/or share personal data with affiliates without issue.

OPC's change of heart on the matter set off a firestorm of objections from stakeholders, with the IIAC weighing in with a robust submission.

The first issue is, quite simply, you can't put the toothpaste back in the tube; using third parties to process data outside Canada is a well-established practice. Firms have always retained the ultimate responsibility for the safety and integrity of client data. Second, this reversal could impose a sizeable and unnecessary cost burden on the industry, including dealers and other financial institutions, that routinely outsource to service providers inside and outside Canada (think payment service providers, cloud service providers, information vendors, and HR and marketing services providers). These institutions would have to upend their firm's information practices, privacy notices and consent documents to comply with the new requirements. Third, the proposed requirement for consent is unprecedented, even within the EU privacy rules which are amongst the most stringent in the world.

In response to this negative backlash, the OPC announced last month a return to their original position. It brought considerable relief to the dealer community, already besieged with substantial compliance burdens from securities regulation, tax-reporting and money laundering, but the positive outcome may end up a pyrrhic victory.

The OPC is still emphatic that existing protections for cross-border data transfers are "clearly insufficient" and will be making recommendations to strengthen the protections in a future law. In addition, the federal government has already joined the fray and called for submissions and input around their proposed amendments to PIPEDA legislation (in a May 21, 2019 discussion paper), including – you guessed it – regulations related to cross-border data flows.

The sweeping proposed legislative changes aim to provide Canadians with transparency on the management of their personal data, give them better control and access to their information, and facilitate the portability and transfer of personal data in response to client demand. The goal behind the proposed amendments is to:

- bring privacy laws into better alignment with the expanding and increasingly innovative world of data analytics and artificial intelligence;
- integrate the federal government's ten-point "Digital Charter" released in May 2019, which was intended to lay the foundation for increasing consumer trust in the digital economy and set the groundwork for reforming Canada's privacy law; and
- move the Canadian privacy rules much closer to the EU General Data Protection Rules (GDPR).

If the amendments are implemented, they will result in:

- more extensive rule framework, and a need for substantial investment in systems and technology, and reliance on third party vendors, to meet improved disclosure and transparency requirements;
- the enabling of client options for the portability and interoperability across institutions in the financial sector while maintaining high standards of data security; and
- new governance and compliance procedures having to be put in place.

**See end of Letter for overview of relevant proposed amendments*

All this will add significantly on operating and capital costs of dealers and increase potential liability. As the federal government seeks comment on the proposed amendments to PIPEDA legislation, the investment industry will have to respond vigorously over the coming year or so. While there is no doubt the regulatory framework will expand considerably, the industry must ensure proposed rules are practical, absolutely necessary, make common sense, and not duplicative with existing securities regulation.

Whether these changes are brought into law, remains to be seen.

The powers of the Privacy Commissioner of Canada will undoubtedly increase to ensure compliance with the rules, and uniform standards of service and protection of privacy and personal data across firms. As a first step, the Privacy Commissioner should work closely with the financial regulators of institutions subject to the legislation to coordinate rule-making and compliance oversight. The objective should be to embed new privacy rules, as necessary, within the existing regulator's rulebook to streamline rules and compliance oversight by delegating to the existing regulator. Moreover, the portability requirements for personal data will be only workable if institutions have compatible technology for the interface and transfer of personal data, and if firms have confidence that the firm receiving personal data can meet the required standards of data protection. It is clear the proposed privacy rules, once given final approval, will have to be phased in over an extended implementation schedule to achieve the policy objectives.

*AMENDMENTS TO THE PIPEDA LEGISLATION

The May 2019 "Strengthening Privacy for the Digital Age" discussion paper outlined some of the more significant amendments to the PIPEDA legislation including:

i. Requiring organizations to provide individuals specific, standardized and plain-language information on the intended use of the information, and the third parties with which information will be shared
ii. Prohibiting the bundling of client consent into a contract
iii. Requiring that clients be informed about the use of automated decision-making, the factors involved in the decision, and information about the logic upon which the decision is based
iv. Requiring enhanced transparency of practices by explicitly requiring organizations to demonstrate their accountability, including in the context of transborder data flows
v. Providing an explicit right for individuals to direct their personal information to be moved from one organization to another in a standardized digital format, where such format exists
vi. Enhancing the powers of the Privacy Commissioner for compliance with the PIPEDA
vii. Providing individuals with the explicit right to request deletion of their personal information, with some caveats
viii. Requiring organizations to communicate changes or deletion of personal information to any other organization to whom it has been disclosed

Yours sincerely,

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