August 6, 2019

To: Office of the Privacy Commissioner of Canada
Delivered by email: OPC-CPVPconsult2@priv.gc.ca

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Dear Sirs/Mesdames:

RE: Consultation on transfers for processing – Reframed discussion document

About Alternative Investment Management Association (AIMA)

AIMA was established in 1990 as a direct result of the growing importance of alternative investments in global investment management. AIMA is a not-for-profit international educational and research body that represents practitioners in alternative investment funds, futures funds and currency fund management – whether managing money or providing a service such as prime brokerage, administration, legal or accounting.

AIMA's global membership comprises almost 2000 corporate members in more than 60 countries, including many leading investment managers, professional advisers and institutional investors and representing over $2 trillion in assets under management. AIMA Canada, established in 2003, now has more than 130 corporate members.

The objectives of AIMA are to provide an interactive and professional forum for our membership and act as a catalyst for the industry's future development; to provide leadership to the industry and be its pre-eminent voice; and to develop sound practices, enhance industry transparency and education, and to liaise with the wider financial community, institutional investors, the media, regulators, governments and other policy makers.

The majority of AIMA Canada members are managers of alternative investment funds and fund of funds. Most are small businesses with fewer than 20 employees and $100 million or less in assets under management. The majority of assets under management are from high net worth investors and are typically invested in pooled funds managed by the member.

Investments in these pooled funds are sold under exemptions from the prospectus requirements, mainly the accredited investor and minimum amount investment exemptions. Manager members also have multiple registrations with the Canadian securities regulatory authorities: as Portfolio Managers, Investment Fund Managers, Commodity Trading Advisers and in many cases as Exempt Market Dealers. AIMA

Canada's membership also includes accountancy and law firms with practices focused on the alternative investments sector.

For more information about AIMA Canada and AIMA, please visit our websites at canada.aima.org and www.aima.org.

Comments

AIMA ("we") welcomes the opportunity to respond to the Privacy Commissioner of Canada's consultation on transfers for processing, including transborder transfers, as per the Reframed discussion document.

The European Union's ("EU") General Data Protection Regulation[1] ("GDPR") marks a worldwide trend toward strengthening individuals' data protection rights. Since implementation of the GDPR, a number of countries, from Brazil to Australia, have also been raising their legal standards and appear to be moving towards a European-style regulation, with a number of provision akin to the GDPR.

As you will be aware, the GDPR framework includes provisions on the cross-border transfer of data. The GDPR imposes a general prohibition on the transfer of personal data to a non-European Economic Area (EEA) country unless that country ensures an "adequate level of protection" to the fundamental rights of individuals to data protection. It provides for the European Commission to adopt an "adequacy decision" in order to certify that a third country can provide that standard of protection. In the absence of this, personal data can still be transferred if the organisation wishing to transfer data outside the EEA can either provide additional safeguards or rely on a derogation, such as explicit consent. The GDPR broadens the range of approaches available to entities seeking to transfer data on a cross-border basis through an extended catalogue of adequacy requirements; increased recognition of the Binding Corporate Rules safeguard and introduction of a new derogation based on "compelling legitimate interests".

In practice, the restrictive nature of this framework is leading to unwelcome outcomes for firms and we would caution the OPC against emulating the GDPR for this reason. For example, we have recently encountered a difficulty where several of our non-U.S. members have been unable to register with the U.S. Securities and Exchange Commission ("SEC") as Investment Advisers pursuant to the U.S. Investment Advisers Act of 1940, given concerns held by the Staff regarding the impact of GDPR.

Specifically, SEC Staff have made the following request of firms seeking registration:

> *"You certified in the Form ADV Non-Resident Execution Page that the adviser's books and records will be preserved and available for inspection by the U.S. Securities and Exchange*

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

> *Commission as required by the Investment Advisers Act. Please provide an opinion of counsel from a counsel licensed to practice in the U.S. that the applicant can, as a matter of law, provide the Commission with prompt direct access to its books and records and to submit to onsite inspection and examination by the Commission once registered. In addition to any other relevant laws, rules, regulations, or interpretations, the opinion should specifically address the entity's ability to provide prompt direct access to its books and records, including personal data, in light of the EU's General Data Protection Regulation (GDPR) that went into effect on May 25, 2018."*

In the absence of any cases concerning the effect of GDPR vis-à-vis an SEC examination, while law firms have expressed a willingness to issue a reasoned opinion, there is limited basis for them to issue a "clean" opinion. As a result, we understand that no new registrations have been processed since summer 2018.

While this specific example provided – disclosure of personal information to the SEC for registration purposes – would be considered a "disclosure" and not a transfer for processing, and therefore would not technically be impacted by the OPC proposed shift in position, it is nonetheless a helpful example of how an overly restrictive and prescriptive approach to data privacy leads to challenges for organizations without any meaningful benefit to privacy protections for individuals.

Some other impacts of the proposed shift in policy position are set out below:

- Create uncertainty and unpredictability for businesses: PIPEDA is a principles-based law, which makes it difficult for organizations to interpret. Organizations should be able to rely on guidance from the OPC to understand their obligations under PIPEDA. If the OPC can reverse its guidance at any time, without any change in the underlying legislation, this will introduce an additional level of uncertainty and unpredictability for businesses that are subject to PIPEDA. This uncertainty and unpredictability is costly to businesses and may result businesses not entering, or leaving, the Canadian market.

- Reduce interoperability with other jurisdictions: Requiring consent for the transfer of personal information to service providers for processing, will create additional interoperability challenges for organizations that are subject to both PIPEDA and the privacy laws of other jurisdictions, such as the GDPR. In particular, under the GDPR consent is relied upon only when there is no other lawful basis to process personal information. Further, consent under the GDPR is only valid if can be "freely given", meaning that the individual must have the opportunity to refuse to provide his or her consent. Consent cannot be relied upon under the GDPR in circumstances where the individual must provide his or her consent in order to obtain a product or service. However, the OPC's consultation document states

that with respect to transfers of personal information to service providers for processing, an individual may have no choice but to consent if they wish to receive products or service from a business. If the proposal set forth by the OPC is implemented, businesses will need to develop different onboarding flows for Canada as compared with other jurisdictions.

- Be costly for organizations: Organizations have already spent time and money reviewing and revising their consent processes and consent language in light of the Guidelines for Obtaining Meaningful Consent, which came into effect in January of this year. If the position put forward by the OPC is implemented, organizations will again need to review and revise their privacy consent language. This is a costly and time-consuming exercise for businesses, and it is unreasonable to impose these costs on businesses multiple times within such a short time period, particularly when the law itself has not changed. Further, if the proposals outlined in connection with Canada's Digital Charter are implemented, which include reduced reliance on consent for normal business activities and prescribed information to be provided at the time consent is requested, organizations will again need to revisit their privacy consent language and processes to ensure compliance.

- Consent puts too much responsibility on individual: Requiring consent for disclosure of personal information to service providers for processing will further increase the length of privacy consent notices thereby reducing the digestibility of this information and resulting in less information being read and understood by the individual. In connection with Canada's Digital Charter, the government recognized that consent puts too much responsibility on the individual to ensure that his or her personal information is handled appropriately and therefore recommended moving away from consent except in situations where consent can be meaningful (i.e. where there is a choice to consent or not). The OPC's proposal places increased responsibility on the individual to ensure appropriate handling of their personal information and is in direct conflict with the governments proposal under the Digital Charter.

- Have no meaningful impact on accountability: It is clear from the OPC's consultation document that they are looking to consent as a means of addressing perceived gaps in PIPEDA as it relates to accountability. However, accountability and consent are two distinct requirements under PIPEDA and requiring individual consent will have no meaningful impact on organizational accountability. If the OPC is concerned about how organizations are fulfilling their accountability obligations in connection with their relationships with third party service providers, it should issue guidance on this topic.

As such, AIMA recommends that the Privacy Commissioner of Canada ensures that while reflecting the importance of data protection, any future data privacy legislation is balanced proportionately with the specific rights and requirements of all industry bodies.

Please do not hesitate to contact the members of AIMA set out below with any comments or questions that you might have. We would be pleased to meet with you to discuss our comments and concerns further.

Yours truly,

ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION (CANADA)