



August 6, 2019

Delivered By Email: CPVPconsult2@priv.gc.ca

Office of the Privacy Commissioner of Canada

Dear Sirs and Mesdames:

RE: Consultation on transfers for processing – Reframed discussion document

The Investment Funds Institute of Canada (**IFIC**) appreciates the opportunity to comment on the Office of the Privacy Commissioner of Canada's (**OPC**) consultation on transfers for processing – reframed discussion document, which considers the application of the current law, and any future law, in regards to transfers for processing, including transborder transfers.

IFIC is the voice of Canada's investment funds industry. IFIC brings together 150 organizations, including fund managers, distributors and industry service organizations to foster a strong, stable investment sector where investors can realize their financial goals.

IFIC operates on a governance framework that gathers member input through working committees. The recommendations of the working committees are submitted to the IFIC Board or board level committee for direction and approval. This process results in a submission that reflects the input and direction of IFIC members.

Our efforts as industry leaders and advocates are aimed at preserving the integrity of the investment funds industry and fostering public confidence in investment funds. Protecting the personal information of the investing public is a key consideration to earning and maintaining public confidence.

OPC Consultation on transfers for processing

In 2009, under the [OPC's 2009 Guidelines for processing personal data across borders \(the 2009 Guidance\)](#), the OPC interpreted the *Personal Information Protection and Electronic Documents Act (PIPEDA)* to provide that transfers of personal information to a third party for processing are a "use" by the transferring organization, rather than a disclosure, which would require consent. The OPC's guidance stated that in this case, the processing organization that receives the personal information can only use it to assist the transferring organization for the purposes for which the information was originally collected.

Requiring consent for transfers of personal information is not necessary to protect individuals' privacy interests. Individuals are sufficiently protected by the Accountability principle¹ and the Openness principle². The OPC's 2009 Guidance noted that transfers of personal information for processing are a common and

¹ The Accountability principle requires organizations that transfer personal information for processing to ensure that the personal information is adequately protected while in the custody of the processor.

² The Openness principle requires organizations to inform individuals that their personal information will be transferred to another organization for processing and, if applicable, will be processed outside Canada and might be subject to access by foreign courts, law enforcement and national security authorities.

necessary business reality. Requiring consent to such transfers of personal information for processing raises many concerns, including:

- obtaining individuals' consent to transfers would be difficult, if not impossible, in many circumstances;
- obtaining individuals' consent would lead to information overload and consent fatigue, and would not provide individuals with meaningful choice or result in meaningful consent; and
- requiring consent in these circumstances implies that the consent can be withdrawn, which may lead individuals to erroneously believe they can refuse to consent, or withdraw consent, to necessary information transfers but still receive desired goods and services.

The change in interpretation is inconsistent with the OPC acknowledgement that the consent model does not work well in many circumstances³. Even the European Union General Data Protection Regulation permits transfers (including cross-border transfers) of personal information for processing based on a lawful basis other than consent.

Moreover, the long-standing view that transfers are not disclosures under PIPEDA has not been objected to. As a result, it is neither necessary nor appropriate for the OPC to change its interpretation of PIPEDA to consider transfers of personal information for processing to be disclosures that require the consent of affected individuals.

The proposed change of interpretation is also inconsistent with the federal government's proposals to modernize PIPEDA⁴, which suggests limiting consent to those uses that have the biggest impact on individuals with exceptions to requiring consent for common uses of personal information such as standard business activities. The transfer of personal information, whether domestic or across borders, is clearly a well-established standard business activity that should not require consent.

Operational Implications

The business considerations outlined in the 2009 Guidance have not changed. Using third party service providers continues to be a necessary part of efficient business practices and a way of obtaining specialized expertise outside of a firm. In the mutual fund industry, there is a constant and necessary exchange of information between fund managers, distributors and service providers.

The OPC's proposal that in order to obtain consent a list of third parties should be provided to affected persons is not a practical approach to enhancing privacy protection and may be an insurmountable task for industry participants.

Mutual fund managers and distributors need to have the ability to enter into, or change, third party service providers as their business operations evolve in response to an ever-changing business and regulatory environment. Additionally, multinational fund managers and distributors may transfer personal information between affiliates for processing. The operational impact of requiring consent for the transfer of personal information in these situations will be significant.

The consultation also fails to consider how firms should respond when consent is not received from existing clients, either by choice or lack of action. Absent consent, a firm may be constrained in servicing the investor. Alternatively, it is unclear whether the OPC would expect firms to close client accounts, which may have negative tax implications for investors.

While we agree that appropriate action should be taken to safeguard personal information, the primary focus should be on data protection and the ability to identify, respond to, and recover from any unauthorized

³ See, for example, the OPC's May 2016 [A discussion paper exploring potential enhancements to consent under the Personal Information Protection and Electronic Documents Act](#)

⁴ See [Proposals to modernize the Personal Information Protection and Electronic Documents Act](#)

access or use of personal information. Consent will not change the impact of any breach on affected persons.

Public Consultation Process

The OPC's public consultation process has been difficult to navigate. The initial consultation was published on April 9th with a comment deadline of June 4th. A supplementary discussion document was published on April 23rd. On May 15th the comment deadline was extended to June 28th. Following the publication of the Digital Charter on May 21st, the consultation was informally suspended by Daniel Therrien, Privacy Commissioner of Canada during a speech at the International Association of Privacy Professionals Canada Privacy Symposium. However, this information was not publicly disseminated until June 18th. Finally, the reframed document extending the purpose of the consultation was published on June 11th with only an 8 week deadline for comments.

Going forward, the OPC should create a more predictable structure around its public consultation process. For example, we note that in the securities regulatory context, the securities regulators generally issue rule proposals or discussion papers for comment with a 60 to 180 day comment period.

We would also suggest that the OPC issue consultations or proposals that include an assessment of the potential costs and benefits of the change, as outlined in our submission dated March 1, 2019 in response to OSC Staff Notice 11-784 *Burden Reduction*⁵. Further, the federal Red Tape Reduction Act (**Act**)⁶ requires that "if a regulation is made that imposes a new administrative burden on a business, one or more regulations must be amended or repealed to offset the cost of that new burden against the cost of an existing administrative burden on a business". While the Act only applies to regulations, we would encourage the OPC to apply the same rigor when proposing to amend guidance⁷.

Federal Proposal to modernize PIPEDA

IFIC acknowledges the publication of the federal government's Digital Charter and the related white paper entitled *Strengthening Privacy for the Digital Age*, which includes proposals to modernize PIPEDA. IFIC will be submitting a comment letter on behalf of its members in due course.

* * * * *

We would be pleased to provide further information or answer any questions you may have. Please feel free to contact me by email at mupadhyaya@ific.ca or, by phone 416-309-2314.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA



By: Minal Upadhyaya
Vice President, Policy & General Counsel

⁵ See [IFIC Submission - OSC - Staff Notice 11-784 Burden Reduction \(March 1, 2019\)](#) at page 2

⁶ See [Red Tape Reduction Act](#)

⁷ We also note that the 2018 Federal Budget [Investing in Middle Class Jobs](#) further states: "To ensure that federal regulators are able to keep pace with new requirements, the Government proposes to provide up to \$10 million, over three years, to assist federal departments and agencies in strengthening their capacity to incorporate economic and competitiveness considerations when designing and implementing regulations."