



Advancing Standards™

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Re: Discussion paper: "Strengthening Privacy for the Digital Age"

The Portfolio Management Association of Canada (**PMAC**) is pleased to have the opportunity to submit the following comments regarding the Government of Canada's proposals via the Ministry of Innovation, Science and Economic Development to amend the *Personal Information Protection and Electronic Documents Act* (**PIPEDA**) as set out in the discussion paper titled "Strengthening Privacy for the Digital Age" (referred to in this letter as the **Federal Proposal** or the **Consultation**).

As background, PMAC represents [over 270 investment management firms](#) – both Canadian and foreign - registered to do business in Canada as portfolio managers with the members of the Canadian Securities Administrators (**CSA**). In addition to this primary registration, most of our members are also registered as investment fund managers and/or exempt market dealers (we refer to these entities collectively herein as "**asset managers**"). PMAC's members encompass large and small firms, and "traditional" as well as on-line firms, managing total assets in excess of \$2.7 trillion for clients.

OVERVIEW

PMAC's mission statement is "advancing standards" and we are consistently supportive of measures that improve standards for the benefit of investors (the clients of asset managers). We applaud the Federal government's aim of ensuring that Canadians can trust that their privacy is protected, that their data will not be misused, and that companies communicate privacy matters in a simple and straightforward manner. We also support the 10 broad principles outlined in the Digital Charter. We believe the Federal Proposal is a timely and important initiative.

PMAC's member firms echo the feedback received by the Federal government that PIPEDA needs to be modernized and streamlined in a way that both supports innovation and protects Canadians.

KEY RECOMMENDATIONS

PMAC is providing this submission in response to the Federal Proposal. We look forward to providing more detailed stakeholder feedback on the text of any legislative amendments to PIPEDA. Our initial key recommendations are as follows:

- PMAC firmly believes the Federal Proposal should be fully considered and, if applicable, implemented prior to any change in practice being instituted by the OPC, as discussed further below. Requiring firms to alter their privacy practices to reflect the OPC Consultation (defined below) – even if for a short period of time – could significantly disrupt relationships between investors and their portfolio managers, as well as between portfolio managers and their third-party service providers, to the detriment of investors.
- PMAC supports the creation of specific alternatives or exemptions to the consent requirement under PIPEDA to facilitate the use of personal information by firms under certain circumstances, including for standard business practices. We believe this is beneficial for firms, as well as for investors. We further believe this would be beneficial to Canadian businesses from an international competitiveness and comparability perspective. It would also ensure that individual investors whose consent is sought for the collection, use and disclosure of their personal information are able to focus on what is truly important, without the distractions that lead to “consent fatigue”.
- PMAC believes that Canada's privacy legislation must be robust, transparent and aligned with other jurisdictions and trading partners such as the European Union and the United States. In our view, the Federal Proposal provides a balanced approach to updating Canada's privacy laws in a way that fosters innovation, competition and equivalency with other jurisdictions, while also implementing needed enhancements to privacy protection and clarity about compliance.

OPC CONSULTATION

PMAC recently made a [submission](#) to the Office of the Privacy Commissioner of Canada (**OPC**) with respect to the reframed discussion document titled “Consultation on transfers for processing” (the **OPC Consultation**). The submission is summarized below.

Although PMAC supports the OPC's general goals of enhancing transparency and protecting the personal information of investors, our members opposed the OPC's interpretation in its Report of Findings in the Equifax investigation as expressed in the OPC Consultation that would require firms to seek express consent in *all* circumstances.

PMAC's submission to the OPC outlined how onerous requirements, such as the need to obtain express consent and/or to source domestic alternatives for data processing, have

the potential to impede our members' ability to properly serve their clients. Importantly, it was not clear how the measures outlined in the OPC Consultation would improve the security of investors' personal information. The failure to strike the right balance between strong and reasonable privacy protection on the one hand and the ability of Canadian firms to provide services and select the best third-party data processors in a cost-efficient and competitive manner on the other, would be harmful to our economy and, ultimately, to Canadians.

PMAC urged the OPC to maintain the position that organizations are not expected to alter their practices with respect to transborder data flows until such time as the Federal Proposal has been fully considered and legislation has been amended. Requiring firms to alter their privacy practices, even if for a short period of time, could have serious negative impacts on investors and business relationships.

FEDERAL PROPOSAL

We have the following comments on certain aspects of Federal Proposal and the considerations and questions set out therein.

1. Consent and transparency

We support the Federal Proposal to provide more meaningful controls and increased transparency to individuals.

PMAC supports the aim of the Federal Proposal to reduce reliance on the consent requirement for common practices while enhancing consent requirements where the impact is greatest. We agree with the statement in the Federal Proposal that it is important to be wary of "consent fatigue" so that Canadians can focus on areas where their consent is more important. This is particularly relevant in the investment industry, where investors are already provided with extensive disclosure. We are also concerned that an express consent requirement could become a condition of service rather than "meaningful consent", as contemplated by the May 2018 guidelines published by the OPC.

We further agree with the Federal Proposal that exemptions from the consent requirement for standard business practices is appropriate and would provide greater certainty for companies and reduce the risk of objection by clients to these practices. This is particularly the case when the purpose for transferring personal information to a third party is a common business practice that the individual could reasonably expect to be required for the data controller to perform its obligations under the contract¹.

The OPC's approach to consent requirements could handcuff firms to their current third-party providers or risk business disruption and missed opportunities for their clients. In contrast, the Federal Proposal's approach to consent wisely appears to support such opportunities. The fact is that most individuals do not respond to requests for updated information or consent from businesses without repeated follow-up and extensive outreach.

¹ In the context of transborder data flows and transfers for processing, we note that an organization is responsible for personal information under its control, including personal information transferred to third parties, even after such a transfer occurs.

PMAC's member firms have reported that initial requests for information typically garner very low response rates from investors. This is particularly the case where the investor has hired a portfolio manager for discretionary asset management and there is no need to be in touch on a frequent basis. Delays in responding to requests for consent and/or the inability to obtain such consent in a timely fashion could negatively impact clients' investment portfolios and firms' ability to make necessary and desirable changes to their third-party service providers. The result of such delays stands to hurt the investors that both PMAC's members and the Government are trying to benefit and protect.

PMAC agrees that the term "standard business practices" can and should capture purposes such as "fulfilling a service; using information for authentication purposes; sharing information with third-party processors; risk management; or meeting regulatory requirements". PMAC believes this concept would be effective and would avoid undue regulatory burden on firms and their clients. Importantly, such an exemption may remove barriers to innovation and competition by giving businesses more freedom and flexibility in the selection of third-party service providers.

We also note that the continued applicability of the accountability and openness principles under PIPEDA ought to provide additional protection for personal information for whatever purpose it is used.

In the context of PMAC's membership, our firms owe their clients a fiduciary duty of care. This elevated duty of care is also bolstered by the contractual arrangements between asset managers and their clients and the third-party service provider oversight obligation in National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, the primary regulation that governs the conduct of our members.

PMAC is also pleased to see that the Federal Proposal on consent and transparency reflects much the same approach as those adopted under the General Data Protection Regulation (EU) (**GDPR**), as well as proposals currently under consideration regarding privacy law in the United States. Under the GDPR, data controllers do not need to obtain consent for the transfer of personal information to "processors" and, in Europe, seeking express consent is treated as a last resort, in recognition of the effort required for firms to obtain it and the difficulty of handling withdrawn consent. PMAC believes that a similar approach is warranted in Canada and that transparent disclosure to clients and a reliance on an exemption from consent requirements based on legitimate interest/standard business process is prudent. The Federal Proposal seems poised to create a more flexible and competitive marketplace for Canadian businesses while maintaining the same level of rigour in protecting privacy that is in place internationally for Canada to meet any equivalency standards.

PMAC sees the following benefits of removing the requirement to obtain express consent to process personal information for purposes that are considered to be "standard business practices":

- Increase in certainty for firms which permits them to contract with the most desirable third-party information processors to the benefit of investors. These benefits may accrue to investors in the form of better service, lower fees, more security in data processing, more useful information, etc.;

- Increase in the ability of firms to change service providers in a timely fashion to address technology, security, cost, innovation - or other concerns or opportunities - to the benefit of investors;
- Increase in cross-border competitiveness for Canadian firms and comparability between the Canadian privacy regime with those of major trading jurisdictions;
- Increase in competitiveness among third-party service providers, as opposed to the OPC position on consent which would, in effect, entrench incumbent service providers;
- Decrease in time and monetary costs to firms for compliance and record-keeping, which savings are passed on to clients;
- Decrease in the risk of client confusion and inconvenience, and improvement of service delivery timelines;
- Decrease in the risk of objection by clients to standard business practices, thereby reducing the risk of disruption to client portfolios which could have negative tax or other financial consequences to Canadian investors; and
- Decrease in the risk of investor “consent fatigue” to allow them to focus on other, important and meaningful disclosure and consent requirements material to their investment portfolios and relationship with their portfolio managers.

2. Enhancing Oversight and Enforcement

PMAC recognizes that the OPC plays a valuable role in protecting the privacy of Canadians. Regarding enhancements required to the OPC’s oversight role, PMAC looks forward to the opportunity to provide feedback on specific proposed amendments. PMAC agrees that there may be instances in which stronger financial consequences for organizations may incentivize compliance. However, we also agree with the comment in the Federal Proposal that, in other instances, non-compliance can be the result of a lack of clarity or certainty regarding obligations under PIPEDA and that increased clarity of those obligations may be necessary.

We are in favour of rules supported by clear guidance on implementation and applicability, including effective and appropriate enforcement measures. Furthermore, we agree that effective enforcement of PIPEDA necessitates ease of understanding and compliance and a commitment to due process so as not to add undue burden and cost to firms and investors.

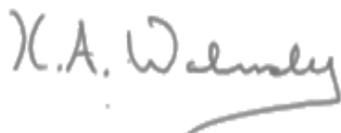
CONCLUSION

Thank you for the opportunity to respond to the Federal Proposal. We look forward to the opportunity to provide more detailed stakeholder feedback on proposed legislative amendments to PIPEDA.

If you have any questions regarding the comments set out above, please do not hesitate to contact Katie Walmsley at (416) 504-7018 or Melissa Ghislanzoni at (416) 504-1118.

Yours truly,

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