PMAC
PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA
Advancing Standards™

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Sent via email

Direction du Secrétariat des commissions
Assemblée nationale du Québec
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Re: Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information*

The Portfolio Management Association of Canada (**PMAC**) is pleased to have the opportunity to submit the following comments regarding Bill 64, *An Act to modernize legislative provisions as regards to the protection of personal information* (referred to in this letter as the **Proposed Amendments** or **Bill 64**), particularly as these relate to the *Act respecting the protection of personal information in the private sector.*

PMAC represents over 285 investment management firms – both Canadian and global - registered to do business in Canada as portfolio managers with the members of the Canadian Securities Administrators, including the Autorité des marchés financiers (**AMF**) in Quebec. Of our over 285 member firms, 157 of them are registered to do business in Quebec, including 35 that are principally regulated by the AMF. 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 $2.9 trillion for their clients.

OVERVIEW

PMAC's mission statement is "advancing standards"; we are consistently supportive of measures that improve standards for the benefit of investors (the clients of asset managers). PMAC's member firms believe that privacy legislation needs to be modernized and streamlined in a way that both supports innovation and protects all

Canadians. This should include maintaining equivalency with the *Personal Information Protection and Electronic Documents Act* (**PIPEDA**) and the amendments proposed in Bill C-11, the *Digital Charter Implementation Act* (**Bill C-11**). We applaud Quebec's goal of updating legislation to ensure that individuals' privacy is protected, that their data will not be misused, and that companies communicate privacy matters in a simple and straightforward manner.

KEY RECOMMENDATIONS

Our key recommendations are as follows:

- Ensure that the Quebec privacy framework is aligned with other Canadian and international privacy regulations. As such, we suggest that any changes to the Quebec privacy framework be delayed until Bill C-11 is enacted, to ensure that rules are harmonized across Canada. To do otherwise would impede businesses that operate within Quebec from conducting business in other jurisdictions, particularly as it relates to the ability to transfer data across Quebec's borders. We are concerned that fundamental aspects of Bill 64 are out of step with Bill C-11, and legislation in other Canadian jurisdictions. Given that many PMAC members conduct business in Quebec as well as in various Canadian and international jurisdictions, PMAC believes that privacy legislation must be robust, transparent and aligned across Canada and with other jurisdictions and trading partners, such as the European Union and the United States. This will result in better outcomes for Quebec businesses and consumers.

- Adopt a principles-based and industry-specific approach to privacy. The prescriptive requirements in Bill 64 impose excessive burden on asset management firms and threaten innovation and competition, without corresponding enhancements to privacy protection for consumers. Certain prescriptive features of Bill 64 do not account for the pace of technological change and the manner in which data is used in the investment industry, and could significantly disrupt relationships between asset managers and their clients, as well as between asset managers and their third-party service providers, to the detriment of investors.

- Create specific alternatives or exemptions to the consent requirements to facilitate the use of personal information by asset managers in certain circumstances, including for standard business practices. This is consistent with the approach introduced in Bill C-11 and 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".

Harmonize rules across Canada and internationally

We strongly urge Quebec to avoid adopting requirements that are not harmonized with privacy rules in other Canadian jurisdictions and internationally. We urge Quebec to work to ensure consistent rules are applicable across Canada. In our comments on the discussion paper "Strengthening Privacy for the Digital Age" (**ISED Proposals**), we supported the Canadian Ministry of Innovation, Science and Economic Development's (**ISED**) balanced approach to updating Canada's privacy laws in a way that fosters innovation and inter-connectedness while also implementing needed enhancements to privacy protection.

Given that many PMAC member firms operate throughout Canada and internationally, and are already subject to PIPEDA and the privacy legislation of other provinces, it is of paramount importance that requirements be harmonized. A failure to harmonize could result in overlapping or conflicting requirements in various provincial and international jurisdictions, resulting in additional legal and compliance costs to firms and the risk of firms inadvertently missing or infringing inconsistent requirements. Any deviation from Bill C-11 should be specifically considered, and rationalized or explained with a cost/benefit analysis being completed.

Adopt a principles-based, industry-specific approach

PMAC is consistently supportive of principles-based regulation that allows firms the flexibility to operationalize requirements as applicable to their individual business models to better serve their various clients. In the context of PMAC's membership, our member 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, as well as the third-party service provider oversight obligation in National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**the Asset Manager Requirements**), the primary regulation that governs the conduct of our members.

There are unique aspects of the portfolio manager-client relationship that determine how data is used, and how communication takes place and for this reason, we are not in favour of a one-size-fits all approach to privacy regulation with overly-prescriptive and burdensome requirements. Such requirements are costly, introduce unnecessary operational complexity, hinder competition and, especially in the context of asset managers, do not necessarily provide the intended consumer protection outcome. Certain of the Proposed Amendments will have a negative

impact on our members without corresponding benefit. We have outlined some examples below:

i) The requirement to publish policies and procedures on firm websites.

In the investment industry, firms have robust policies and procedures for handling client information and their policies and procedures are audited by the various members of the Canadian Securities Administrators, including the AMF. Mandatory publication of detailed internal policies has the potential to hamper competition, and policies may require frequent updating, which is costly and time-consuming. As such, many firms publish a summary of their policies and procedures online. Industry research has demonstrated that providing lengthy, complex information to investors is not beneficial and does not enhance the investment process.[1] We note that Bill C-11 does not require publication of policies. A summary of policies regarding how private personal information is collected and used, is a more useful and straightforward way of explaining the controls that firms have in place to protect and secure personal information.

Providing detailed information on internal policies and procedures related to data may also present a security risk, as it gives potential bad actors additional information on the firm's internal systems and processes. For example, internal policies may refer to specific technologies or identify providers used internally to monitor or protect client data. If these policies are required to be posted, as an alternative to having to provide the detailed information proposed, PMAC requests that firms be permitted to redact any confidential, sensitive and/or proprietary information in such policies.

ii) Notification requirements

The notification requirements with respect to the use of technology allowing an individual to be identified, located, or profiled (within the meaning of Bill 64) has important implications in the investment industry. The use of technology to perform analysis on investor characteristics and behaviours is common in the investment industry. This information allows firms to develop investment products and strategies that are beneficial to investors. We agree that clients should be informed of the use of such technology in certain circumstances. For example, clients may be informed if the firm uses third party software or systems to verify client identity for anti-money-laundering and anti-terrorist financing (**AML**) purposes, both during client onboarding and on an ongoing basis. However, it would not be possible to inform clients in all circumstances, or to deactivate the technology on request.

[1] Behavioural Insights Team and Ontario Securities Commission Investor Office, *Improving fee disclosure through behavioural insights*, August 19, 2019

The same is true for information being used to make a decision, based on an automated process. Investment decisions are frequently made based on automated processes, such as approved proprietary algorithms. Although a firm could inform the client that such a process is being used, the frequency and volume of decisions made on an automated basis would make it impossible to disclose to a client all of the reasons, factors and parameters that go into a particular investment decision.[2] This is particularly problematic in the case of investors who have hired a portfolio manager to manage their investments on a discretionary basis – these clients have placed their trust in the asset manager, knowing they are contractually bound to comply with an Investment Policy Statement and subject to a fiduciary standard. Moreover, disclosure of the details of such processes could involve sensitive commercial proprietary information and intellectual property. We urge Quebec to align any such requirements with those in Bill C-11.

This is also the case with respect to automated systems for AML and know-your-client verification. It is possible that an institution would not accept a new client if they are unable to verify their identity (particularly in the fintech space). Firms may use automated systems to conduct such verification.

iii) Requirement to delete certain data

With respect to the requirement to delete certain data, this will not be possible in all circumstances. Portfolio managers are subject to several legal and regulatory document retention requirements in various jurisdictions. Backup and archiving systems may be employed within the firm or with a third-party service provider. Such systems and requirements exist for the client's protection and it will not always be possible or practical to delete the information, and this may be contrary to existing regulations in other jurisdictions. The focus of the Proposed Amendment should be on information that is publicly available on the Internet that has the potential to impact a person's reputation, rather than applying to businesses and information that do not have such an impact. These requirements should also be aligned with those in Bill C-11.

However, we are supportive of improving public access to information regarding the disciplinary history of individuals and firms in the investment industry and oppose any requirement that would prevent the investing public from having access to such information.

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[2] For example, due to COVID-19, the federal government allowed RRIF investors to reduce their minimum withdrawal amounts by 25% this year. One of our members advised that they have interrogated their system and will be sending out an email reminder to those RRIF clients who have not yet made a change to inform them that the option exists. Another example would be RRSP contribution reminders – a provider may analyze which clients have not made an RRSP contribution before the deadline and generate a list of clients to contact. This type of information-gathering happens on a regular basis and is in the clients' best interests.

iv) Monetary Administrative Penalties

With respect to the monetary administrative penalties provided for in Bill 64, PMAC agrees that there may be instances in which greater financial consequences for organizations may incentivize compliance. We are in favour of rules supported by clear guidance on implementation and applicability, including effective and appropriate enforcement measures. We believe that the imposition of any penalties should be subject to similar procedures to those included in Bill C-11. For example, they should be subject to findings of misconduct and subject to a due diligence defence. They must also be aligned with other regulations so as not to add undue burden and cost to firms and investors, and to ensure due process. Increased fines and monetary administrative penalties, a new private right of action and minimum punitive damages awards may have the unintended consequence of stifling innovation and increasing legal and compliance costs to firms. These may be unnecessary as civil causes of action for negligence and privacy breaches already exist in the Quebec Civil Code and the common law.

Regulatory burden and corresponding benefit

Enhancing privacy protections for individuals is a laudable goal, which we support. However, we encourage a principles-based and industry-specific approach to privacy. This includes any codes, standards and certifications and data portability specifications required to be adopted. Legislative measures should not impose undue regulatory burden on firms without corresponding privacy protections for individuals. We believe that an accountability regime, similar to PIPEDA and codified in Bill C-11, would provide appropriate protections.

As noted above, we encourage Quebec to coordinate the implementation of any changes with Bill C-11 such that businesses will not be required to undertake multiple reviews of their policies. We also urge Quebec to give firms time to implement any changes. Making significant changes to policies, procedures, practices, contacting clients to re-paper agreements and obtain necessary consent, and re-negotiating agreements with service providers or finding new service providers will take significant time, effort and expense to implement. We suggest that a staged implementation over a 24 to 36-month period would be more appropriate.

Legislation and regulations should be flexible to allow for best practices to develop over time, specific to the way business is conducted and the particular privacy risks to individual consumers within the asset management industry. A risk-based approach should be adopted, rather than a one-size-fits-all prescriptive approach. In our view, the following aspects of Bill 64 will impose regulatory burden for investment firms without commensurate consumer protections:

- the assessment of privacy-related factors, which is required to be conducted for an "information system project or electronic service delivery project involving the collection, use, communication, keeping or destruction of personal information" – such assessments should be risk-based and subject to a high threshold. We note that Bill C-11 is silent with respect to the privacy impact assessment, and GDPR only requires such assessments where a high risk to individual freedom is identified.

- We are supportive of breach notification requirements, which are becoming the norm in other Canadian and international jurisdictions. We support Bill 64's notification threshold, which is in line with Bill C-11 and other jurisdictions. However, notification requirements should be harmonized with Bill C-11 and other Canadian requirements such that a single breach will not result in multiple overlapping notification requirements in various jurisdictions. For example, Bill 64 refers to unauthorized "use" of personal information, whereas other jurisdictions refer to access, disclosure or loss of personal information. It would be detrimental to businesses with operations or clients in Quebec if they were to be required to comply with additional notification requirements.

- Defaulting to the "highest level of confidentiality" for firms collecting information by electronic means would also impose a very high burden, without corresponding benefit. Bill C-11 does not have a similar requirement. Firms may use multiple software platforms, and these can change frequently – the costs of implementing a higher standard may be significant, and this may not be necessary in terms of the risk to consumers. The interpretation of "highest level" is subjective – a reasonableness standard that considers the type of system and its uses, the costs involved in implementing and the risk of harm to consumers would be more appropriate.

Trans-border data flows

Onerous requirements such as the need to source domestic providers for data processing have the potential to impede our members' ability to properly serve their clients. Most business is now cloud-based, and providers may be located in other jurisdictions with varying levels of privacy protections. PMAC made a submission to the Office of the Privacy Commissioner of Canada (**OPC**) with respect to the discussion document titled "Consultation on transfers for processing" (the **OPC Consultation**). Our members opposed onerous requirements, such as the need to obtain express consent and/or to source domestic alternatives for data processing, which have the potential to impede our members' ability to properly serve their clients. More importantly, it was not clear how the measures outlined in the OPC Consultation would improve the security of investors' personal information.

Ultimately, the OPC determined that specific consent is not required for transborder processing of data.

We have similar concerns with respect to Bill 64, particularly with respect to data transfers outside Quebec (both within Canada and internationally). We are of the view that Bill C-11 strikes the appropriate balance between the protection of investors' personal information and the ability of Canadian asset managers of all sizes to service investors efficiently and effectively. Bill C-11 does not include any restrictions on the transfer of personal information outside of Canada and does not require an equivalency analysis with respect to the privacy regimes of other jurisdictions. It is important that privacy regimes throughout Canada be compatible with one another and those of other jurisdictions, to capitalize and build upon existing best practices where proven beneficial, without imposing undue hardship on Canadian businesses.

The time and costs required to implement and comply with the requirements in Bill 64 regarding the communication of personal information outside Quebec would be prohibitive and could have a chilling effect on Canadian business. Importantly, it is not clear how such measures would improve the security of investors' personal information. PMAC believes the existing principles of accountability and openness under PIPEDA appropriately and effectively protect individuals' privacy.

We support the exemptions to the consent requirements in reasonable commercial contexts provided in Bill 64, as is permitted in other jurisdictions. Exemptions to consent requirements should be harmonized with Bill C-11 (in addition to exceptions for legitimate business activities and to provide information to service providers, for socially beneficial purposes and for research and statistical purposes, Bill C-11 provides that an organization may collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances). Under 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 throughout Canada and that transparent disclosure to clients and a reliance on an exemption from the consent requirements based on legitimate interest/standard business process, is prudent.

Additionally, in the context of PMAC's members, the Asset Manager Requirements require firms to provide proper oversight of all third-party service providers. Such oversight is tested through compliance reviews by the provincial securities commissions. Investment firms are heavily reliant on data and the transfer of data among institutions, often involving third-party service providers. Firms and service providers have implemented strong data protection systems to ensure the protection of investors' information.

Finally, prohibiting the transfer of information where the other jurisdiction lacks "the same degree of equivalency" will be harmful to businesses and to the competitiveness of the Canadian economy. Firms would have to engage legal and privacy experts to determine what constitutes an "equivalent" jurisdiction. At this time, no other Canadian province has adopted the same prescriptive standards proposed in Bill 64, nor are the Canadian federal requirements as elevated. It would therefore be impossible for Canadian firms operating in Quebec to transfer information throughout Canada, let alone internationally. This is especially relevant for the investment industry, where many firms and service providers have operations and/or clients in Quebec. As a result, services will become more expensive and fragmented, which will be detrimental to the Canadian investment industry and individual consumers.

Consent

We support the goals of enhancing transparency and protecting the sensitive personal information of investors; the circumstances in which consent is required should be narrow and very clear. We agree that consent should be obtained where data is to be used for purposes not related to the services for which the client has contracted. PMAC supports an exemption for "standard business practices", including for fulfilling a contracted service and transferring information for processing by third parties. We also support reducing reliance on consent in certain common business contexts. We believe that firms should be permitted to continue to rely on implied consent from clients for transfers for processing of their personal information in certain circumstances. Examples include permitting implied consent for transfers and uses that most individuals would consider reasonable. Such exemptions would give businesses more freedom and flexibility in the selection of third-party service providers and increase firms' ability to change service providers in a timely fashion to address technology, security, cost, innovation - or other concerns or opportunities – to the benefit of investors.

Obtaining express consent for each specific use of information presents a significant challenge and imposes a substantial burden for firms. It would require that firms individually contact each of their clients and await a response prior to any transfer of personal information to a third-party processor. The imposition of this obligation could cause inconvenience and confusion for the client. A failure to respond or a time lag by the client could result in significant business disruption, which would be detrimental to each of the business, the client, and the third-party service provider. In the specific context of investors who have contracted with a portfolio manager for asset management services, such a disruption could produce negative tax and financial consequences if the portfolio manager is not authorized to transfer personal information for various purposes required to effect trades. In fact, many investors choose to engage a discretionary portfolio manager because they do not have the

time, knowledge, or inclination to direct their own investment portfolio. An express consent requirement is simply not a practical or workable option, especially considering that consent is unlikely to improve the protection afforded to the information.

Further, operationalizing the requirement to request consent separately from any other information provided to a client would be very challenging. It would strip the meaning out of the consent process and force organizations to provide a number of notices to individuals, which can be cumbersome and overwhelming to the individual. In our view, clients would neither expect nor want this volume of notices.

Individual consumers' focus should be directed to areas where their consent is most important and "consent fatigue" should be avoided. This is a particular concern with respect to seniors and vulnerable clients. Express consent should not be relied upon for common practices, but instead should be employed only where the impact is greatest. 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.

CONCLUSION

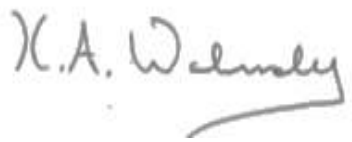
We are supportive of Quebec's leadership in updating privacy legislation to ensure the protection of individuals' privacy, to prevent data from misuse and so that privacy matters are communicated by companies in a clear fashion. However, as set out above, we have concerns about certain aspects of Bill 64 that go beyond Bill C-11. Privacy legislation across Canada should be robust, transparent and aligned from coast to coast to protect individuals, support businesses and ensure our competitiveness and attractiveness with trading partners.

For asset management firms, we strongly believe that exemptions to the consent requirements are required to facilitate the use of personal information in certain circumstances. We believe such exemptions will protect individuals' privacy rights while allowing asset managers to serve their clients effectively.

Thank you for the opportunity to respond to the Proposed Amendments. 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,

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA



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