

23 August 2019

Joint Secretary Gopalakrishnan S.
Ministry of Electronics and Information Technology (MeitY)
Room No. 4016, Electronics Niketan,
6 CGO Complex, CGO Complex,
Lodhi Road, New Delhi – 110 003

ASIFMA comments on Ministry of Electronics and Information Technology (MEITY) additional consultation on the Personal Data Protection Bill (PDPB), August 2019

Dear Shri Gopalakrishnan S.,

The Asia Securities Industry & Financial Markets Association (**ASIFMA**)¹ and its members take this opportunity to comment on the impact that the Personal Data Protection Bill (PDPB) currently being drafted by the Ministry of Electronics and Information Technology (MEITY) could have on India-based and India-facing financial institutions, in light of efforts by the Ministry to seek clarification from stakeholders and input on new components such as the introduction of provisions regarding non-personal data.

Our members are deeply concerned about MEITY's limited consultation with select stakeholders on the Personal Data Protection Bill (PDPB) in August 2019. We understand that a new notion of non-personal data has been introduced in additional consultations. This is a significant concern as such proposals have not been part of previous consultations and will likely create further problems for the financial sector, particularly if such proposals are not carefully defined or calibrated and if requirements overlap or conflict with other obligations under banking regulation and licensing requirements. ASIFMA strongly recommends public consultation as the only way to ensure the impact and effectiveness of the PDPB is fully considered.

ASIFMA and its members have much analysis to offer any future public consultation on the PDPB, and welcomes the opportunity for meaningful dialogue with MEITY to ensure the perspective of international financial institutions with India-based or and India-facing operations and business lines are adequately considered. We enclose our previous letter to MEITY on the PDPB (dated 28 September 2018), as well as a letter sent previously to the Department for Promotion of Industry and Internal Trade regarding its drafting of India's National e-Commerce Policy (dated 28 March 2019), of which the latter includes the Global Financial Market Association's recently 'International Principles to Improve Data Security and Mobility' which are also relevant.

¹ ASIFMA is an independent, regional trade association with over 100 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

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To summarize members' concerns with PDPB, ASIFMA offers the following comments:

- **Banking confidentiality principles:** ASIFMA is cognizant of the potential conflicts between the proposed provisions under the draft PDPB and the MOF's long-standing banking confidentiality principles under Sections 45C, 45D, 45E of the Reserve Bank of India (RBI) Act and Section 19, 20, 21, 22 and 23 of the Credit Information Companies (Regulation) Act, 2005. Financial institutions are already subject to regulatory obligations of confidentiality and security.² As entities that must process financial data daily, many of the proposed requirements from the PDPB would cut across existing financial sector rules and significantly undermine existing processes, with little additional benefit from a customer perspective.
- **Regulatory overlap:** The PDPB will result in the creation of a new Data Protection Authority (DPA) in India. The PDPB also grants the DPA with powers to be issue guidance on a broad range of matters, in addition, the PDPB itself also imposes blanket rules without full consideration of the needs of the different sectors. It is important to ensure that the operation of the PDPB does not cut across these sectoral rules which could cause conflicts or difficulties in established banking processes that meet the requirements of the financial regulators. ASIFMA and its members urge the MOF to establish a working group and a working relationship between itself, the RBI, Securities and Exchange Board of India (SEBI) and the new DPA (and MEITY if necessary). This is to ensure that the PDPB and related DPA guidance and secondary legislation will be harmonised with sectoral requirements thereby resulting in a single set of rules and enforcement processes that are appropriately applied to financial institutions and brokers.

In the United Kingdom, the Information Commissioner's Office (ICO) retains all relevant powers in relation to data protection, but a breach of data protection laws may also constitute a breach of Financial Conduct Authority (FCA) principles which may be actionable by the FCA. In practice, and as a result of the FCA's ability to work with the ICO, regulated entities continue to engage with their financial services regulator on data privacy and confidentiality issues rather than establishing extensive and duplicative dialogue with the Information Commissioner.

Such collaboration may conclude that various rules result in duplicative requirements and are not required. We highlight specific instances of overlap below.

- **Scope and applicability:** ASIFMA believes that the provisions of the PDPB should only be applicable to entities that collect and conduct processing activities within India in relation to personal data, sensitive personal data or critical personal data of persons resident in India. ASIFMA recommends that data from heavily regulated sectors (such as financial services) should be excluded from the extra-territorial applicability of the PDPB on the grounds that such data is already subject to confidentiality and other regulatory requirements. Data collected offshore pursuant to offshore data protection legislation should therefore be excluded from the PDPB regime. Applying the PDPB to data collected from a third country may make it difficult to return the data back to the country of origin, which would render outsourcing to India highly impractical.

² Examples include the *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information Rules, 2011)*, RBI Master Circular on Customer Services in Bank (2014), and the Master Circular on Mobile Banking Transactions in India (2014).

The Philippines, another outsourcing destination, has provided for such exclusions³. At a minimum, third country data should be exempt from the restrictions on outward transfer of data from India and related consent requirements.

- **Sensitive and critical personal data:** ASIFMA suggests that the definition of sensitive and personal data under the PDPB should retain the spirit of the previous definition under the 2011 Rules on *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information Rules, 2011)*. In particular, ASIFMA recommends that the narrower definitions in the 2011 rules be retained and that the broader (and unclear) financial data limb in the PDPB be removed, especially for financial institutions.

The PDPB definition of financial data could cover an extremely wide and indeterminate class of data that cannot easily be identified or audited. This would mean that the entirety of a bank's business could need to operate on continuous and ad-hoc explicit consents from customers, with little to no exceptions provided for legal or regulatory obligations, outsourcing models or the existing body of common law which already establishes the nature and extent of bank confidentiality. Such an approach could result in "consent fatigue" on the part of customers and is not a practicable outcome.

While the industry welcomes data protection measures, ASIFMA would like to emphasize the need to distinguish between unregulated entities and financial sector entities which are already subject to regulatory requirements and the oversight of the financial sector regulators. ASIFMA also encourages further dialogue between all relevant stakeholders to ensure financial data can be processed in a manner that meets policy objectives but also results in a practicable solution for the industry.

- **Data protection impact assessment:** ASIFMA is concerned with the requirement for every data protection impact assessment to be submitted to the DPA under Section 33. It is unnecessary for a sector-agnostic data protection regulator to oversee this, and market participants strongly prefer co-ordinating with existing supervisors on this matter. Such impact assessments should generally only be required where needed.
- **Data protection officer (DPO):** Under Section 36 of the PDPB, data fiduciaries are mandated to appoint a DPO that is physically located in India. ASIFMA believes that this is not always feasible and that the PDPB should instead require that the DPO be accessible or available for the purposes of the PDPB (regardless of their location).
- **Data fiduciaries:** ASIFMA strongly believes that the PDPB should align with other global jurisdictions and all references to *data fiduciaries* should be changed to align with the global standard of *data controllers*. The departure from standard nomenclature implies undefined fiduciary obligations and liabilities on the data controllers and may be subject to differing interpretation.
- **Data localisation and cross-border data transfers:** Sections 40 and 41 of the PDPB outline restrictions and requirements around the location and transfer of personal and sensitive personal data. In addition, the PDPB includes a requirement that copies or originals of certain categories

³ See section 4(g) of the Philippines Data Privacy Act of 2012 available [here](#).

of data be maintained on servers physically located in India. According to the *Asia-Pacific Economic Cooperation (APEC) Roadmap for a New Financial Services Data Ecosystem*⁴, there is a substantial negative impact in jurisdictions (such as Indonesia, South Korea, and China) that have enacted or proposed data localisation of an average of -0.7 percent of GDP.

ASIFMA therefore recommends that the PDPB considers adopting a differentiated approach whereby all data stored in approved locations (e.g. United States, European Union, United Kingdom, Singapore) is exempted from these provisions as compared to high-risk locations (to be specified) where it would not be permitted. As a net importer of data, India is uniquely positioned to be a global leader in setting data protection rules and fostering an open and cooperative data environment.

ASIFMA would like to highlight the importance of cross border data flows to modern finance. The solution to regulatory access to data held elsewhere is to ensure such data is accessible, wherever located, to the appropriate regulators rather than requiring data replication or localisation. Such rules can be costly to implement, offer little practical benefit, create additional security concerns where cloud models are unnecessarily fragmented as rapid development of technology renders the concept of data being “located” anywhere less and less meaningful, and often create retaliatory regulations in other jurisdictions. As a major player in outsourcing, cross border data flows and burgeoning financial service technology centre, and with a stated commitment to free and open trade, we encourage the MEITY and MOF to avoid localisation requirements and focus instead on ensuring access to any data required by regulators.

ASIFMA appreciates MEITY’s continued efforts and strongly encourages further public consultation with the industry to ensure the impact and effectiveness of PDPB is fully considered. We look forward to continued dialogue and opportunities to extensively engage with MEITY on the PDPB, particularly in light of new components now under consideration, and its potential impact on the financial services industry in India. If you have any further questions or would otherwise like to follow up, please contact me at mausten@asifma.org or +852 2531 6510, or Matthew Chan, ASIFMA Executive Director and Head of Policy and Regulatory Affairs, at mchan@asifma.org or +852 2531 6560.

Sincerely,



Mark Austen
Chief Executive Officer
Asia Securities Industry & Financial Markets Association

⁴ Asia-Pacific Economic Cooperation (APEC) and APEC Business Advisory Council. “Financing Asia-Pacific Integration in the Digital Age: An APEC Roadmap for a New Financial Services Data Ecosystem (2018 Progress Report).” Page 19.
https://www2.abaconline.org/assets/2018/AGFSCB_Key_Documents/Attachment_A_An_APEC_Roadmap_for_a_New_Financial_Services_Data_Ecosystem.pdf