

Morrison & Foerster Client Alert.

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India Issues Clarification to Privacy Rules

By Miriam H. Wugmeister and Cynthia J. Rich

In response to industry pressure, on Wednesday, August 24, 2011, the Indian Ministry of Communication & Technology issued a clarification of the Privacy Rules (“Clarification”). Of significance is that the Clarification appears to: 1) exempt service providers from the main substantive obligations of the Privacy Rules other than the cross-border limitations and the security obligations; 2) clarifies that a “provider of information” is a “natural person”; and 3) clarifies that consent is valid if it is in any mode of electronic communication (as opposed to just letter, fax or email).

In April 2011, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (“Privacy Rules”), was issued under the Information Technology (Amendment) Act, 2008. (See [our alert dated May 4, 2011](#).) The Privacy Rules raised significant issues and caused concern among organizations that outsource business functions to Indian service providers. As a result, industry both within and outside India expressed concern that the Privacy Rules would decimate the outsourcing industry.

Exemption for Service Providers: As drafted, the Privacy Rules applied to all organizations that collect and use personal data and information in India regardless of where the individuals resided or what role the company that was collecting the information played in the process of handling the information.¹ The Clarification provides:

These rules are regarding sensitive personal data or information and are applicable to the body corporate or any person located within India. Any such body corporate providing services relating to collection, storage, dealing or handling of sensitive personal data or information under contractual obligation with any legal entity located within or outside India is not subject to the requirement of Rules 5 & 6. Body corporate, providing services to the provider of information under a contractual obligation directly with them, as the case may be, however, is subject to Rules 5 & 6.

¹ The provisions apply to a “body corporate,” which is defined as “any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities,” as well as, in many instances, “any person on its behalf.”

Beijing

Jingxiao Fang 86 10 5909 3382
Paul D. McKenzie 86 10 5909 3366

Brussels

Joanna Łopatowska 32 2 340 7365
Karin Retzer 32 2 340 7364

Hong Kong

Gordon A. Milner 852 2585 0808

London

Ann Bevitt 44 20 7920 4041
Deirdre Moynihan 44 20 7920 4164
Anthony Nagle 44 20 7920 4029

Los Angeles

Michael C. Cohen (213) 892-5404
David F. McDowell (213) 892-5383
Purvi G. Patel (213) 892-5296
Russell G. Weiss (213) 892-5640

New York

Madhavi T. Batliboi (212) 336-5181
John F. Delaney (212) 468-8040
Sherman W. Kahn (212) 468-8023
Mark P. Ladner (212) 468-8035
Michael B. Miller (212) 468-8009
Suhna N. Pierce (212) 336-4150
Marian A. Waldmann (212) 336-4230
Miriam H. Wugmeister (212) 506-7213

Northern Virginia

Daniel P. Westman (703) 760-7795

Palo Alto

Anna Ferrari (650) 813-5681
Christine E. Lyon (650) 813-5770
Bryan Wilson (650) 813-5603

San Francisco

Roland E. Brandel (415) 268-7093
Jim McCabe (415) 268-7011
James R. McGuire (415) 268-7013
William L. Stern (415) 268-7637

Tokyo

Daniel P. Levison 81 3 3214 6717
Gabriel E. Meister 81 3 3214 6748
Jay Ponazacki 81 3 3214 6562
Toshihiro So 81 3 3214 6568
Yukihiro Terazawa 81 3 3214 6585

Washington, D.C.

Nicholas A. Datlowe (202) 887-1590
Richard Fischer (202) 887-1566
D. Reed Freeman, Jr. (202) 887-6948
Julie O'Neill (202) 887-8764
Obrea O. Poindexter (202) 887-8741
Cynthia J. Rich (202) 778-1652
Kimberly Strawbridge Robinson (202) 887-1508
Robert A. Salerno (202) 887-6930
Andrew M. Smith (202) 887-1558
Nathan David Taylor (202) 778-1644

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A welcome clarification is that the Privacy Rules apply only to organizations in India. This is a welcome change from the original draft which purported to apply to all organizations, globally. What that appears to mean is that if an organization in India receives information as a result of a direct contractual relationship with an individual, all of the obligations under the Privacy Rules continue to apply. However, if an organization in India receives information as a result of a contractual obligation with a legal entity (either inside or outside India), the substantive obligations of notice, choice, data retention, purpose limitation, access and correction do not apply. Thus, an organization to which services are outsourced under a contract is exempt from most of the substantive obligations.²

It is important to note that an organization in India that has a contractual obligation to a legal entity is not exempt from all of the obligations under the Privacy Rules. The organization must still comply with the security obligations and with the obligations relating to the transfer of information.

The Transfer of Information section provides:

An organization or any person on its behalf may transfer sensitive personal data to any other organization or person in India or to another country that ensures the same level of data protection as provided by these Privacy Rules. The transfer may only be allowed if it is necessary for the performance of the contract between the organization or any person on its behalf and the provider of the information *or* where the person has consented to the transfer.³

The Clarification did not modify the language in the Transfer of Information section and thus the language can be interpreted to limit transfers of sensitive data only to countries that provide the same level of data protection, with consent of the individual or when there is a contract between the individual and the organization in India. The ambiguity in the language, which could be interpreted to preclude a transfer of information based on a contract with a legal entity, has not been modified or clarified.

Provider of Information is an Individual: The Privacy Rules use the term “Provider of Information,” and it was unclear whether the Provider of Information could be a legal entity providing information or an individual person. The Clarification states that: “Providers of information, as referred to in these Rules, are those natural persons who provide sensitive personal data or information to a body corporate.”

Mode of Consent: The Privacy Rules stated that consent needed to be obtained in writing through letter, fax or email. The Clarification states that consent “includes consent given by any mode of electronic communication.”

Implications for Businesses: While the Clarification does limit the scope of the Privacy Rules somewhat, particularly for organizations that outsource to India, there are still many open questions. For example, do the Privacy Rules apply to employers in India? Do service providers in India need to obtain consent in order to transfer information to their corporate customers? Is a password by itself sensitive information subject to all of the Privacy Rules?

² It is also possible to interpret the language to suggest that even if the organization in India is not a service provider, but is using the data jointly with another legal entity, it would also be exempt from the obligations.

³ The use of the term “person” is undefined in the Privacy Rules. In certain places the Privacy Rules refer to a “Provider of Information” and in other places the term “person” is used.

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