

October 14, 2020

VIA E-MAIL

Manager of Access and Privacy Strategy and Policy Unit
Ministry of Government and Consumer Services
Enterprise Recordkeeping, Access and Privacy Branch
134 Ian Macdonald Blvd.
Toronto, Ontario M7A 2C5

Re: Public Consultation - Reforming Privacy in Ontario's Private Sector

The Electronic Transactions Association (“**ETA**”) submits these comments in response to the Ministry of Government and Consumer Services’ consultation on Reforming Privacy in Ontario's Private Sector. We hope that these comments will assist the Government in understanding the key considerations of the payments industry with respect to privacy, data security, and innovation.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA’s members include financial institutions, mobile payment service providers, mobile wallet providers and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient and rewarding payment solutions and lending alternatives.

ETA and its members support privacy protections designed to safeguard the personally identifiable information of Canadian individuals, and value the privacy protections that Canadian laws provide to protect the personal information of Canadian end users. Canada enjoys a robust, national framework under the *Personal Information Protection and Electronic Documents Act* (PIPEDA). This national approach already provides a consistent and predictable framework that business must adhere to and is favourable to a patchwork of sub-national privacy regimes which create cumbersome compliance challenges for global payments technology providers.

PIPEDA is currently undergoing a review and modernization process, with legislative and regulatory changes expected in the near future. We also note that each of the “Key Areas for Reform” identified in the discussion paper were addressed in the federal PIPEDA review, and therefore may be unwarranted or mute pending the outcome of PIPEDA’s modernization. ETA therefore encourages the Ontario government to commit to working at the Federal level to ensure that PIPEDA is modernized in a way that meets its privacy reform goals and invites the Ministry to use this consultation process to assess whether a made-in-Ontario privacy law is actually needed in view of the modernization of PIPEDA.

With this in mind, should Ontario proceed with its own legislative framework, ETA encourages an approach to data rights that is consistent not only with PIPEDA and other Canadian privacy regimes, but also the EU’s General Data Protection Regulation (GDPR), to best enable organizational compliance and predictability, and avoid creating new layers of friction that will stifle financial services innovation and dampen economic growth in Ontario. Additionally, we would encourage the Ontario government to consider enacting new privacy rules only as necessary to fill in gaps in the regulatory framework provided by PIPEDA. ETA is pleased to see

that the Ministry's consultation document indicates that Ontario's regime will interact, but not overlap, with the federal privacy regime. In this regard, we urge government to create an approach to data regulation that does not create asymmetric privacy and data rules for organizations.

In accordance with this principal, ETA submits that the Ministry must consider the importance of a maintaining a single lead for enforcement actions in Canada, with power vested in the Office of the Privacy Commissioner of Canada, to prevent conflicting jurisdiction among the Federal government and provincial privacy authorities. Overlapping enforcement may increase compliance costs for companies that operate across the country, while also creating the risk of uneven levels of privacy enforcement for citizens. The "one-stop-shop" compliance and enforcement approach adopted under the GDPR may be a useful reference point for the Ministry as it considers how its approach will align with the benefits of maintaining national approach to compliance enforcement.

Individual Rights

Safeguarding individual rights are a critical aspect of the Ministry's considerations. ETA believes that conformity across not only data protection principles but also established data protection regimes will be the most successful in achieving organizational compliance. Based on members' experience working with established privacy frameworks in other jurisdictions, ETA has several recommendations with respect to individual rights.

With respect to the right to be forgotten, ETA encourages government to adopt an approach consistent with GDPR, that includes the same or similar instances in which an individual may make the request to be forgotten, in addition to the exceptions in which an organization would not erase the individual's personal information.

For data portability as well, ETA encourages government to adopt an approach consistent with GDPR. Namely, to provide individuals with their data "in a structured, commonly-used and machine-readable format." ETA believes that this language, in addition to providing this important individual right, also avoids being overly prescriptive in a manner that would be out-of-date with industry options, data storage and transmission.

ETA also support the government's initiative to clarify exceptions to consent. In particular, ETA encourages the Ministry to consider introducing alternative legal authorities to consent such as those found under GDPR. ETA agrees that consent is not always the most appropriate ground on which to rely, but this is not limited to cases involving deidentified or derived data. In many cases, obtaining valid consent may prove impossible (e.g., where there is an imbalance of powers between the parties) or simply unfeasible (e.g., where there is no opportunity for collecting valid consent). Furthermore, it is now recognized that over-reliance on consent may in fact undermine the rights of individuals. In such cases, ETA submits that organizations should still be able to collect, use, or disclose personal information based on other legal grounds which provide for equally robust privacy protections.

Requirements for Deidentified Data

ETA encourages government to distinguish between "deidentified" data and "pseudonymized" data in a manner consistent with the GDPR. Further, ETA encourages government to encourage organizations to deidentify data, which is in the interest of both the organizations (by reducing the risk of processing data) as well as the data subjects or individual (by protecting the individuals'

rights and freedoms). Consistent with other data protection regimes, ETA encourages government to state that once data is deidentified it is no longer considered personal information subject to data protection laws. ETA encourages government to adopt measures consistent with this approach to best enable innovation, research and learnings that are essential for organizations, including financial technology companies, for use in detecting fraud and improving compliance, while simultaneously avoiding security risks to individuals and protecting individual interests.

A Principles-Based Approach

ETA is dedicated to continuously driving innovation in the payment space and values the importance of a Canadian financial ecosystem whose participants ensure that individuals and businesses are provided with financial products and services that are convenient, secure and reliable. Access to financial data and information is an important issue that involves individuals, traditional financial institutions, financial technology companies (FinTechs) and other financial service providers, including data aggregators and third-party application providers. The Canadian ecosystem also consists of multiple stakeholders, each with differing roles within data aggregation.

ETA and its members recognize the increased convergence between these groups and the need to preserve consumer access, choice, and control. To preserve market dynamism, ETA strongly encourages government to be sensitive to the risk of applying a prescriptive regulatory framework. In particular, ETA and its members support an industry-led and principles-based framework for open data access that promotes innovation and competition among all industry participants in the financial data marketplace, that permits consent-based sharing and use of financial data, and that is protective of consumer interests.

Among the principles that should guide the government's direction, includes avoiding duplication and overlap with existing government or industry requirements. Rather than issue prescriptive requirements, the Ministry should encourage industry to take the lead in developing solutions that preserve industry flexibility to continue to develop new and innovative products and services that benefits individuals while providing appropriate consumer protections. In this regard, the financial services industry, including ETA member FinTech companies, have demonstrated a robust and sustained commitment to ensuring consumer access to information, the protection of customer information, and the integrity of financial systems and networks.

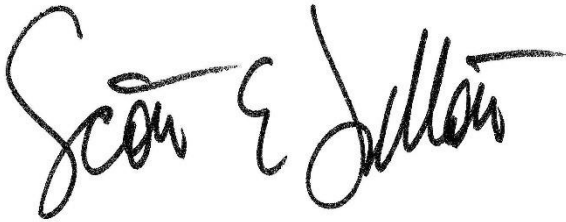
Specifically, ETA believes that industry solutions that take into account the unique circumstances of the parties and the functionalities being contemplated will be more effective in addressing the risks and opportunities being presented. It is important to recognize that this is a highly dynamic space where players, technologies, and services offered may differ widely and present different or evolving risks. A one-size fits-all regulatory approach or solution will not keep pace with the dynamic nature of this space and will stifle innovation.

Conclusion

In sum, as technology and innovation are constantly evolving and continue to shape how information is created, accessed, stored, and disposed of, regulations that are consistent with established data protection frameworks, such as the GDPR, and have a principles-based approach best enable innovation and compliance, while protecting individuals' rights to privacy. ETA would be pleased to discuss the comments herein with the Government of Ontario to ensure the perspective of the payments industry is well understood.

ETA thanks you for the opportunity to submit these comments.

Yours respectfully,



Scott Talbot
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Electronic Transactions Association