



Draft Notification of the Personal Data Protection Committee on Rules and Principles of Appropriate Personal Data Protection for International Transfer under the Personal Data Protection Act 2019

Comments from BSA | The Software Alliance

October 21, 2022

Introduction

BSA | The Software Alliance (**BSA**)¹ welcomes this opportunity to provide our comments to the Ministry of Digital Economy and Society (**MDES**) and Office of the Personal Data Protection Committee (**PDPC Office**) regarding the draft Notification on Rules and Principles of Appropriate Personal Data Protection for International Transfer under the Personal Data Protection Act (**PDPA**). BSA is the leading advocate for the global software industry before governments and in the international marketplace. We have extensive experience engaging with governments around the world to promote effective, internationally interoperable legal systems that protect personal information and provide strong consumer rights while supporting responsible uses of data-driven technologies.

BSA members are among the world's most innovative companies, creating software solutions that help businesses of all sizes in every part of the economy to modernize and grow. Our members offer tools including cloud storage services, customer relationship management software, human resources management programs, identity management services, security solutions, and collaboration software.

BSA members are enterprise software companies that are in the business of providing privacy protective technology products and services and their business models do not depend on monetizing users' data. Companies entrust some of their most sensitive information to BSA members. Our members recognize that companies need to earn consumers' trust and act responsibly with their personal data, and BSA members work hard to keep that trust. As enterprise software companies, BSA members generally act as data processors under the PDPA

¹ BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, CrowdStrike, Dassault, Databricks, DocuSign, Dropbox, Graphisoft, IBM, Informatica, Intel, Kyndryl, MathWorks, Microsoft, Nikon, Okta, Oracle, Prokon, PTC, Rockwell, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

because they handle data on behalf of their business customers, which act as data controllers.

In the past few years, BSA has followed with great interest developments related to the PDPA. We provided recommendations on the PDPA and its draft subordinate regulations and implementing rules, with a listing of the submissions and the respective online links below:

- BSA Comments on Thailand's Personal Data Protection Act 2019 Draft Implementing Rules²
- Third Group of Draft Subordinate Regulations under the Personal Data Protection Act 2019³
- Second Group of Draft Subordinate Regulations under the Personal Data Protection Act 2019⁴
- BSA's Comments on the Draft Subordinate Regulations under the Personal Data Protection Act 2019⁵
- BSA Comments on Dec 2018 Version of Thailand's Personal Data Protection and Cybersecurity Bill⁶
- Comments on Jan 2018 Version of Draft Personal Data Protection Act⁷
- BSA Comments to July 2017 Revisions of the Personal Data Protection Bill⁸
- Comments on Draft Personal Data Protection Act (2015)⁹

BSA supports an internationally interoperable approach to data protection that enables companies to deliver global services that benefit the individuals and businesses they serve, creating local jobs and adding value to the Thai economy. The comments and recommendations that follow are intended to improve interoperability and consistency while maintaining the high-level of data protection required by the Personal Data Protection Act.

BSA Welcomes Additional Mechanisms for International Data Transfers

BSA appreciates the provision of further details on binding corporate rules and the provision of additional mechanisms to allow international transfers of personal data, specifically contractual clauses, codes of conduct and certification. These are welcome additions to support international data transfers, and we look forward to hearing more details on the internationally recognized certifications and codes of conduct that would be recognized by the PDPC.

² <https://www.bsa.org/policy-filings/thailand-bsa-comments-on-thailands-personal-data-protection-act-2019-draft-implementing-rules>

³ <https://www.bsa.org/policy-filings/thailand-third-group-of-draft-subordinate-regulations-under-the-personal-data-protection-act-2019>

⁴ <https://www.bsa.org/policy-filings/thailand-second-group-of-draft-subordinate-regulations-under-the-personal-data-protection-act-2019>

⁵ <https://www.bsa.org/policy-filings/thailand-bsas-comments-on-the-draft-subordinate-regulations-under-the-personal-data-protection-act-2019>

⁶ <https://www.bsa.org/policy-filings/thailand-bsa-comments-on-dec-2018-version-of-thailands-personal-data-protection-and-cybersecurity-bill>

⁷ <https://www.bsa.org/policy-filings/thailand-comments-on-jan-2018-version-of-draft-personal-data-protection-act>

⁸ <https://www.bsa.org/policy-filings/thailand-bsa-comments-to-july-2017-revisions-of-the-personal-data-protection-bill>

⁹ <https://www.bsa.org/policy-filings/thailand-comments-on-draft-personal-data-protection-act>

Recommendations to Align Definitions with International Norms

With respect to the concepts of binding corporate rules and contractual clauses in the present draft Notification, BSA encourages the PDPC Office to adjust the definitions and relevant provisions for these concepts to ensure more consistent and data-protective transfers of personal data across borders. BSA recommends clarifying the definitions of the following terms to be in line with international norms:

1. Binding Corporate Rules

The definition of “Binding Corporate Rules” in the draft Notification currently refers to “an agreement or policy for personal data protection that is mutually agreed between the Transferor and Transferee”. However, internationally, this term typically refers to rules that are approved by a data protection authority, and not rules that are agreed between Transferor and Transferee.

If the PDPC Office intends to approve these rules as reflected in clauses 5 and 6, **we recommend revising the definition of “Binding Corporate Rules” to refer to “rules establishing the appropriate safeguards for personal data among a group of undertakings or a group of enterprises, as approved by the PDPC Office in accordance with Clause 6”.**

2. Standard Contractual Clauses

The definition of “Standard Contractual Clause” in the draft Notification presently refers to “a contractual clause for personal data protection that is mutually agreed by the Transferor and Transferee of the personal data...”. However, “standard contractual clauses” are typically known internationally as those that have been prescribed by a data protection authority, and organizations are unable to negotiate or change them.

Based on the drafting of the Notification, it appears that what the PDPC Office has in mind is a set of clauses that can be negotiated among the relevant parties, rather than a set of fixed clauses to be prescribed by the PDPC Office. We appreciate that the PDPC Office has recognized that organizations do not need to adopt specific prescribed language for their cross-border data transfer arrangements as long as they reflect the minimum requirements set out in the Appendices. **We accordingly recommend that, for clarity, the term “Standard Contractual Clause” be revised to “Contractual Clause”.**

3. Definition of “Transferor” and “Recipient”

The definition of “transferor” covers both the data controller and data processor. Similarly, the definition of “recipient” covers both the data controller and data processor. **BSA recommends that the definitions of “transferor” and “recipient” should be clear in each case whether the reference is to the data controller or data processor.**

Recommendations on International Interoperability and Alignment of BCRs

Laws and regulations that promote convergence around internationally recognized approaches to data transfers can ensure high levels of data protection and improve services by maximizing efficiency. The transfer mechanisms adopted by any given jurisdiction should be sufficiently similar to mechanisms adopted by other countries — in structure and substantive protections —

so that data transfer and protection obligations under one jurisdiction's laws can be easily mapped onto the obligations of other jurisdictions. This ensures that organizations can understand how their obligations change across jurisdictions, thus facilitating compliance and driving investment in strong data protection practices.

Additionally, to promote interoperability with prevailing international data protection norms around which many enterprises have designed their data protection controls, **we also recommend that the PDPC adhere to those international norms in its treatment of different cross-border data transfer scenarios and contractual relationships.** For example, these scenarios and relationships are reflected in the OECD Privacy Framework,¹⁰ the APEC Privacy Framework,¹¹ the APEC Privacy Recognition for Processors (PRP) system, the APEC Cross Border Privacy Rules (CBPR) system,¹² the Global Cross-Border Privacy Rules Forum,¹³ and the ASEAN Model Contractual Clauses.¹⁴ They are also integrated into national laws including those of the EU,¹⁵ Japan,¹⁶ New Zealand,¹⁷ and Singapore.¹⁸ **Similarly, we recommend that Binding Corporate Rules that have been approved by data protection authorities in other jurisdictions are explicitly recognized in Thailand so that companies do not have to undergo any further approvals to use the same Binding Corporate Rules under the PDPA.**

BSA also recommends that, to encourage the use of Binding Corporate Rules in particular, the PDPC either (1) not require approval, similar to jurisdictions like Singapore, or (2) establish a trusted mechanism for review and approval that protects proprietary information.

Recommendations on Appropriate Safeguards

On the requirement for the data controller and data processor to submit appropriate safeguards to the PDPC Office, we wish to confirm that approval from the PDPC is not required prior to the international transfer of personal data. **BSA recommends that as long as the appropriate safeguards are submitted to the PDPC Office, organizations may proceed with the international transfer of personal data.** We caution against requiring prior approval as this would be unnecessarily burdensome on both the PDPC Office and on organizations for compliance, resulting in a chilling effect on international transfers.

¹⁰ OECD Privacy Framework (2013), http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf

¹¹ APEC Privacy Framework (2015), [https://www.apec.org/Publications/2017/08/APEC-Privacy-Framework-\(2015\)](https://www.apec.org/Publications/2017/08/APEC-Privacy-Framework-(2015))

¹² APEC Cross Border Privacy Rules system, <https://www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System>

¹³ Global Cross-Border Privacy Rules Forum (2022), <https://www.commerce.gov/global-cross-border-privacy-rules-declaration>

¹⁴ ASEAN Model Contractual Clauses (2021), at: https://asean.org/wp-content/uploads/3-ASEAN-Model-Contractual-Clauses-for-Cross-Border-Data-Flows_Final.pdf; See also, Singapore Personal Data Protection Commission, Guidance for Use of ASEAN Model Contractual Clauses for Cross-Border Data Flows in Singapore (2022), at: <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Other-Guides/Singapore-Guidance-for-Use-of-ASEAN-MCCs.pdf?la=en#:~:text=The%20ASEAN%20Model%20Contractual%20Clauses%20%28ASEAN%20MCCs%29%20are,parties%20that%20protects%20the%20data%20of%20data%20subjects>.

¹⁵ Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

¹⁶ Act on the Protection of Personal Information, <https://www.ppc.go.jp/en/legal/>

¹⁷ Privacy Act 2020, <https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23223.html>

¹⁸ Personal Data Protection Act 2012, <https://www.pdpc.gov.sg/Overview-of-PDPA/The-Legislation/Personal-Data-Protection-Act>

Recommendations on the Responsibilities of Data Processors

BSA welcomes the minimum requirements in Appendices A and B for controller-to-controller and controller-to-processor international transfers. For these transfers, we recommend **that only the data controller, and not the data processor, be the party held accountable to the PDPC Office and to data subjects on appropriate safeguards for international transfers of personal data.** The data controller is the party that both determines how and why to collect a consumer's data and is responsible for the transfer of data overseas. Therefore, only the data controller should be required to submit appropriate safeguards to the PDPC Office and not the data processor. BSA has raised similar points in a past submission¹⁹ cautioning against the conflation of the roles of data controller and data processor.

BSA is concerned about the following provisions in Appendix B for controller-to-processor transfers:

1. The Requirement for a Data Subject to be able to Enforce His or Her Rights Against the Data Processor Under Sections 1 and 4 of Appendix B

As mentioned above, the data controller is the party that both determines how and why to collect a consumer's data and is responsible for the transfer of data overseas. **BSA recommends that the data controller, and not the data processor, be the party held accountable to the data subject, including any dispute with the data subject.** The data controller should be held responsible to carry out dispute resolution with the data subject and the data processor should remain accountable to the data controller according to their contractual agreement.

2. The Requirement for a Data Processor to Provide Details of Devices or Tools Used to Process Personal Data Upon Request by the Data Controller in Section 3(f) of Appendix B

This requirement is overly prescriptive. It is also extremely difficult, if not impossible, for cloud service providers who act as data processors to comply with this requirement, as they process information across multiple IT equipment and software comprising their cloud architecture. **BSA recommends removing this requirement as there are already sufficient safeguards to ensure the protection and due processing of personal data by data processors in the other minimum requirements of Appendix B.**

3. The Requirement for a Data Processor to Submit a Summary of Personal Data Protection Measures and a Copy of the Service [...] in Case the Data Subject is not Able to Obtain such Details from the Transferor of Personal Data in Section 3(g) of Appendix B

It is unclear to whom the Data Processor is to submit the information required by this section. To the extent that information is to be submitted to the data subject, this requirement is difficult to justify and implement as the data processor has no contractual commitments with the data subject. To the extent that the information is to be submitted to the Data Controller, the requirement is too prescriptive as there are already sufficient

¹⁹ See footnote 5: BSA's Comments on the Draft Subordinate Regulations under the Personal Data Protection Act 2019.

safeguards to ensure the protection and due processing of personal data by data processors in the other minimum requirements of Appendix B. **BSA thus recommends removing this requirement.**

Conclusion

BSA appreciates the opportunity to provide our comments and recommendations on the draft Implementing Rules of the PDPA. We support the Government of Thailand's efforts in implementing the PDPA successfully and look forward to continuing working with the MDES and the PDPC Office on privacy and personal data protection policies. Please do not hesitate to contact the undersigned at waisanw@bsa.org if you have any questions or comments regarding our suggestions.

Yours faithfully,

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