

## Somebody’s Watching Me (and You)

We’re not sure if it’s cool or creepy, but when we searched for a privacy-related playlist to listen to when we wrote this month’s bulletin, our #1 [search result](#) came from the Office of the Privacy Commissioner (OPC) itself. Why do we feel like the OPC was watching over our shoulder, or reading our minds? And why didn’t Rockwell make it onto the OPC’s playlist?



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### 1. Changes to PIPEDA in the Pipeline

On May 22, the Government of Canada announced a 10-principle [Digital Charter](#) and released a [Discussion Paper](#) outlining proposals to modernize the Personal Information Protection and Electronic Documents Act (PIPEDA). These potential reforms are in an early stage of development but since they may have a significant impact on aspects of how firms do business with their customers, we want to give you heads-up about the direction of change. Of particular interest to our clients, we noted the following.

**Potential changes to knowledge and consent system:** According to the Discussion Paper, complex data flows, lengthy privacy policies, the multiplicity of online interactions, and the rise of machine learning make it challenging for people to understand and control how their personal data is used. Therefore, the Government wants to:

- Prohibit the bundling of consent into contracts;
- Require organizations to give people specific, standardized and plain-language information on the intended use of personal information and any third parties with whom information will be shared (see our [article](#) below on cross-border data flows);



## In Brief

### Get Ready for SEDAR Security Enhancements

The Canadian Securities Administrators (CSA) are planning to implement security enhancements to SEDAR on June 15. The change involves a new process to record the authorization that issuers have granted to filing agents and to confirm the identity of self-filing issuers. The authorization process will have to be completed if a self-filing issuer is filing for the first time or hasn't made a SEDAR filing since December 14, 2017. Likewise, an issuer will have to validate its filing agent for a first-time filing on SEDAR or if the agent hasn't made a filing for the issuer in the past eighteen months.

For issuers, it's very important to ensure that the contacts in your SEDAR profile are up-to-date now, so that the CSA can reach you promptly to obtain authorization on the implementation date. Please [contact us](#) if you need any assistance in preparing for this security enhancement.

### Canada Amended Its Sanctions Regime - We Say Carry on as Usual

Recently, the Canadian government amended some of the federal regulations that require securities dealers and advisers to file monthly reports with their principal securities regulator about whether or not they are in

- Require organizations to inform individuals about the use of automated decision-making, the factors involved in these decisions, and the logic upon which these decisions are made;
- Make it easier for businesses to use personal information in some situations by creating limited exceptions to the consent requirement, e.g. for common uses of personal information for standard business activities, with consent still required for uses that have the biggest impact on individuals; and
- Create an exception for the use and disclosure of "de-identified information" in some circumstances, together with penalties for re-identification.

**Data mobility:** Individuals would have the statutory right to direct that their personal information be moved from one organization to another in a standardized, digital format.

**Self-regulation:** The Government wants to incentivize the development of codes of practice, accreditation/certification schemes and standards, e.g., by:

- Formally recognizing them in PIPEDA as a means for organizations to demonstrate compliance with certain provisions in the legislation; and/or
- Enabling the Office of the Privacy Commissioner (OPC) to recognize them as a mitigating factor in investigations or enforcement matters.

**Enforcement and Oversight:** The Government wants to strengthen PIPEDA's enforcement mechanisms, e.g., by:

- Giving the Privacy Commissioner cessation and records preservation powers for compliance audits and investigations;
- Substantially increasing the range of fines for offences and providing for a scheme that identifies mitigating and aggravating factors;
- Extending the existing regime for fines to other key provisions in PIPEDA (such as the consent and data safeguard requirements); and
- Empowering the Court to order statutory damages for certain breaches of the law.

The Government is open to receiving feedback on the proposals but hasn't set a deadline. Please [contact us](#) if you have questions or want to make a submission. We will monitor the progress of this initiative and keep you informed.

## 2. Don't Stop Believin' (in the Importance of Filing OBAs on Time)

On May 15, we heard rejoicing in the streets when the Ontario Securities Commission (OSC) [confirmed](#) a two-year moratorium on late fees payable when registrants disclose new, or changes to, outside employment or other business activities (OBAs) past the ten business-day filing deadline. Until the moratorium was announced, registered firms were subject to a late fee of \$100 per business day (up to a maximum of \$5,000 per year) for late filings with respect to OBAs.

### ***In brief cont'd***

possession or control of property owned or controlled by or on behalf of certain individuals or entities (Designated Persons) listed in various regulations that form part of Canada's anti-money laundering, anti-terrorist financing and economic sanctions regime (Federal Provisions). The bottom line is that although the monthly reporting obligation has been streamlined (a bit), firms still need to continuously check all of the lists to ensure they are not dealing with any Designated Persons.

AUM Law can help you comply with the Federal Provisions, for example, by screening client names against the Designated Persons lists, preparing and/or filing monthly reports on your behalf, drafting or reviewing your compliance policies, and/or advising you on specific situations where you believe you might have an immediate reporting or other obligations. Please [contact us](#) if you have any questions or for a quote on our services.

### **IOSCO Consults on Crypto-Asset Trading Platforms**

In [March](#), we reported that the Canadian Securities Administrators (CSA) and Investment Industry Organization of Canada (IIROC) were seeking feedback on the appropriate regulatory framework for crypto-asset trading platforms. That [consultation](#) closed earlier this month, and now the International

The moratorium is backdated to January 1, 2019 and will end no later than December 31, 2021. During this period, the OSC will work on clarifying the disclosure requirement.

The late fees moratorium applies only in respect of OBAs. Late fees still attach to, among other things, delinquent filings to amend other information on Form 33-109F4 about registered individuals or on Form 33-109F6 about a registered firm.

Although the fee moratorium may offer some immediate financial relief, we encourage firms to remain focused on ensuring that new and changed OBAs are disclosed promptly to the firm and that updated OBA disclosures are consistently filed on time, for the following reasons.

- The late fee moratorium doesn't change the underlying requirement. Failure to disclose new or changed OBAs by the filing deadline is a breach of securities legislation.
- Non-disclosure or late disclosure of OBAs by an individual to their firm could make it harder for the firm to address potential conflicts of interest before they become a problem. As a good practice, we recommend that firm policies require such disclosure before the individual becomes involved in, or effects changes to, an OBA.
- Patterns of late and/or inadequate disclosure of OBAs are a risk factor that could lead to more intrusive, frequent or extensive regulatory audits.

The OSC's announcement signals the potential for changes to the existing OBA regime. [AUM Law](#) will monitor developments and keep you informed. We can also conduct a targeted compliance review in this area and then work with you to strengthen your policies and internal controls.

### **3. NextBlock Settlement Reminds Us That OMs Come in Various Shapes and Sizes**

Many of our readers likely have read or heard about the recent [settlement](#) between the Ontario Securities Commission (OSC), NextBlock Global Limited (NextBlock) and Alex Tapscott (Tapscott) regarding misleading statements in slide decks (Investor Decks) given to prospective investors in a private placement. The Investor Decks, which were the only materials describing the company's business and affairs that the prospective investors received, asserted that various, prominent blockchain figures were NextBlock's advisers. In fact, these individuals had not agreed to act as advisers or have their names included in the materials.

The settlement itself cost NextBlock \$800,000 and Tapscott \$300,000 in administrative penalties and contributions to the OSC's investigation costs. These amounts were in addition to payouts already made to investors (representing a 140% return on their original investment).

This case acts as an important reminder that an OM is defined by its content and purpose, not its format or a label. That means a term sheet, investor

### **In brief cont'd**

Organization of Securities Commissions (IOSCO) just published a consultation paper ([Consultation Paper](#)) on the same subject. It's a useful reference document to help you stay informed on global regulatory trends globally in this area. Among other things, the Consultation Paper outlines recent studies and regulatory initiatives in major financial markets, discusses key considerations for capital markets regulators, and summarizes the results of its survey of IOSCO member regulators in more than forty jurisdictions (including Canada). The consultation closes on July 29.

summary, slide deck or cocktail napkin that purports to describe an issuer's business and affairs and is prepared primarily for delivery to and review by a purchaser to assist with an investment decision about a prospectus-exempt distribution can be an OM, and therefore carry with it potential liability for misrepresentations. (There is a carve-out that may apply in some circumstances if the document is provided to an investor who is already familiar with the issuer.)

AUM Law has substantial experience advising market participants in connection with exempt distributions. Among other things, we can draft or review documents to be provided to investors, advise you on how securities laws apply to those materials and the proposed transaction, draft or review transaction documents and assist with securities regulatory filings. Please do not hesitate to [contact us](#) to ask how we can help.

#### **4. Privacy Commissioner Consults on Cross-Border Data Flows**

In April, the Office of the Privacy Commissioner of Canada (OPC) published a [consultation paper](#) and supplementary [discussion document](#) (collectively, the Consultation) regarding cross-border data transfers and other disclosures of personal information between organizations.

**Background:** In its 2009 *Guidelines for Processing Personal Data across Borders* (2009 Guidelines), the OPC expressed the opinions that:

1. Organizations that transfer personal information to a third party (including a third party in another jurisdiction) are accountable for protecting that personal information and must use contractual or other means to provide a comparable level of protection while that information is being processed by the third party.
2. The "transfer" of information is a use by the organization and not to be confused with a disclosure within the meaning of the Personal Information Protection and Electronic Documents Act (PIPEDA). Assuming that the information is being used for the purpose for which it was originally collected, additional consent for such a transfer is not required.
3. Organizations should be transparent about their personal information handling practices. Among other things, organizations that might send a customer's personal information to another jurisdiction for processing should advise customers of this practice, ideally when the information is collected.

**The OPC Has Changed Its Mind:** During its investigation into the Equifax data breach, the OPC revisited the position set out in (2) above. It has now concluded that a transfer of personal information by one organization to another for processing of that information **likely is a "disclosure"** within the meaning of PIPEDA. Consequently, the OPC now believes that an organization that wants to transfer information to a third party for processing (including a cross-border transfer) requires consent.

**What Does the OPC's Revised Position Mean for Organizations?** Although the OPC is consulting the public on this shift in its guidance and could conceivably change its mind again, we think organizations should treat this new interpretation as being in effect now. After all, this is a change in interpretation, not a change in the underlying law itself.

- **Obtain Informed Consent:** According to the OPC, an organization that discloses information across a border, including for processing, must obtain consent unless an exemption from PIPEDA

applies. The form of content depends on the sensitivity of the information and the risk of harm to the individual.

- If there a meaningful risk of significant harm to the individual from inappropriate use or disclosure of their personal information, the consent should be express, not implied.
- Individuals would reasonably expect to be notified that their information was to be disclosed outside Canada and be subject to another country's legal regime.
- Individuals should be informed of their options if they do not want their personal information disclosed across borders. If the cross-border transfer of information for processing is integral to the organization's delivery of a service, the organization will not be expected to provide an alternative. But it will be expected to provide clear and adequate information about the consequences of disclosure of the personal information across the border, so that the individual can make an informed decision whether or not to do business with the organization.
- **Accountability:** An organization should assess its policies, procedures and contracts, as well as the commercial environment and regulatory framework at home and in the other jurisdiction, to determine whether it has adequate controls in place to mitigate the risks of inappropriate use or disclosure of a customer's personal information.
- **Assess Your Domestic Transfers of Information, Too:** Although the Consultation focuses on cross-border data flows, the OPC's change in policy position is relevant for domestic transfers of information as well, such as transfers to the firm's service providers. We recommend that organizations consider whether, in light of the sensitivity of the information and potential risks associated with the transfer of information, they have given enough information to their customers to enable them to meaningfully consent to the transfer and disclosure of information to another organization. They also should assess their outsourcing arrangements to confirm that third parties have adequate controls in place to protect the personal information of the firm's customers.

The deadline for commenting on the Consultation is June 28. If you want to know more about the Consultation or want our help in preparing a submission, please do not hesitate to contact us. [AUM Law](#) also can help you assess the adequacy of your privacy and cyber-security policies, the disclosures in your client-facing documents, and your outsourcing arrangements.

## 5. CSA Plans to Integrate and Update Its Regulatory Filing Systems

On May 2, the Canadian Securities Administrators (CSA) announced their [plans](#) to develop an integrated, national information and filing system (Renewed System). It will replace the National Registration Database (NRD), System for Electronic Document Analysis and Retrieval (SEDAR), System for Electronic Disclosure by Insiders (SEDI) and various, local records filing systems. The CSA intends that the Renewed System will be simplified, more user-friendly and cost-effective, include improved features such as better search capabilities and a browser-based interface, and be more cyber-resilient.

**Requests for Comment:** The CSA wants feedback on [proposed changes](#) to Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* (MI 13-102) to introduce a flat-fee model. It would replace the existing model, where system fees are based on the number of jurisdictions where documents are filed. It also is seeking comments on a [new rule](#), National Instrument 13-103 *System Replacement Rule* (NI 13-103), which will require filers to transmit documents electronically to securities regulators through the Revised System. There will be exceptions for, among other things, documents delivered in connection with compliance reviews, investors and hearings.

**Phases:** The CSA plans to roll out the Renewed System in phases:

- **Early 2021:** Issuer-related systems and filings (e.g. SEDAR, National Cease Trade Order Database (CTO), Disciplined List (DL), and certain filings currently made in paper or in local, electronic filing systems.
- **Later phases:** NRD, the National Registration Search (NRS), SEDI, and remaining filings in local systems. No target date is specified for rolling NRD and NRS into the Renewed System.

**Comment Deadline:** Comments are due on both proposals by July 31, 2019. [AUM Law](#) will monitor developments with this proposal and keep you informed.

## 6. IIROC Issues Guidance on Soliciting Dealer Arrangements

After concluding their [consultation](#) on potential conflicts of interest arising from soliciting dealer arrangements, the Canadian Securities Administrators (CSA) and the Investment Industry Organization of Canada (IIROC) have decided that their regulatory concerns are best addressed through IIROC guidance. [IIROC Notice 19-0092 Managing Conflicts of Interest Arising from Soliciting Dealer Arrangements](#) (the Notice) discusses the kinds of soliciting dealer arrangements (Arrangements) that raise the greatest regulatory concerns. Among other things, IIROC believes that member firms should avoid Arrangements that contemplate one-sided or success-based fees in contested director elections because IIROC thinks that such conflicts cannot be adequately managed through policies and disclosure.

Although the Notice is relevant primarily to IIROC members, the guidance is founded upon general principles and rules dealing with conflicts of interest. As such, it serves as a refresher for all registrants on the importance of assessing business arrangements (including, in particular, arrangements that provide for contingent compensation) to identify potential conflicts and determine whether they can be effectively managed or should be avoided altogether. Please [contact us](#) if have any questions or would like our assistance in evaluating specific arrangements.

### Practical Advice. Efficient Service. Fixed-Fee Plans.

AUM Law focuses on serving the asset management sector in the areas of regulatory compliance and investment funds. We also support clients in this sector by providing legal advice and services for structuring entities, raising capital, business combinations, and compliance with reporting issuers' and investors' disclosure obligations. Our clients include investment fund managers, portfolio managers, dealers, public and private investment vehicles including real estate funds, alternative funds and private equity funds, investors, and private and public companies.

This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.

