

August 6, 2019

Mr. Daniel Therrien
Privacy Commissioner of Canada
Office of the Privacy Commissioner of Canada
30 Victoria Street – 1st Floor
Gatineau, QC K1A 1H3

Sent via email to: OPC-CPVPconsult2@priv.gc.ca

Re: Consultation on transfers for processing

Dear Commissioner Therrien,

Payments Canada welcomes the opportunity to comment on the Office of the Privacy Commissioner of Canada's (OPC) consultation on transfers for processing.

About Payments Canada

Payments Canada is a public purpose entity underpinning the Canadian financial system through operation of Canada's payment clearing and settlement infrastructure, including associated systems, by-laws, rules and standards. The value of payments cleared and settled by Payments Canada in 2018 was more than \$53 trillion or \$209 billion each business day. In fulfilling our legislative mandate, as set out in the *Canadian Payments Act*, Payments Canada strives to meet the needs of the broader Canadian public interest and our regulated member financial institutions.

Payments modernization

The payments industry both in Canada and globally is rapidly evolving. Payments Canada is currently undertaking an ambitious and complex multi-year initiative to modernize Canada's payment systems (the "Modernization initiative"). The Modernization initiative, which aims to ensure Canada has modern payments systems that are fast, flexible and secure -- and that promote innovation and strengthen Canada's competitive position -- will have far reaching impacts across the financial services industry. As Canadians continue to demonstrate a growing appetite and readiness for payments innovation, choosing digital payments and adopting new payment channels,¹ the Modernization initiative will foster a payments ecosystem where modern systems optimize the way Canadians make payments.

¹ *Canadian Payment Methods and Trends: 2018*, Payments Canada Discussion Paper No. 8, December 2018.

Transfers under PIPEDA and impacts on the payments industry

The OPC's proposed policy position, that a transfer of personal information (as defined under the *Personal Information Protection and Electronic Documents Act* (PIPEDA)) be considered a disclosure requiring consent, would have significant impacts on the payments industry. In Payments Canada's view, a transfer of personal information for processing should be considered a *use* not a *disclosure* under PIPEDA. When the information being transferred is used to perform services directly related to the purpose for which the individual consented to providing their personal information, additional consent should not be required. PIPEDA's accountability principle already sets a robust framework for organizations to comply with to protect personal information. The OPC's proposed position is also inconsistent with other privacy regimes, including the European Union's General Data Protection Regulation (GDPR). The GDPR contains a number of mechanisms to support cross-border transfers, including where processing is necessary for the purposes of the legitimate interests pursued by the controller or a third party.²

Requiring consent for all transfers would add significant and unnecessary complications to organizations and end users, without yielding equivalent benefits with respect to privacy protection. While the OPC consultation emphasizes cross-border transfers, given that the PIPEDA principle regarding disclosure applies to either domestic or cross-border transfers, the OPC's proposed position would have far reaching consequences. In the payments industry in particular, predictable outsourcing arrangements with reliable service providers are important to securely and efficiently process payments and to drive business and economic efficiencies, which flow down to users. Such outsourcing arrangements are pursued for specific and unique expertise that cannot be found elsewhere, and for resource scale. In the rapidly evolving payments industry, where Canadians want payments innovation, organizations must be able to innovate to compete. Requiring consent for third party service providers that organizations use from time to time to process payments would be unduly burdensome and stifle competition that is in the best interests of end users. In these outsourcing relationships, the activity being performed by the external service provider is often the very activity for which consent was obtained. Currently, contracts with third party service providers are carefully reviewed and overseen to demonstrate that these vendors meet stringent obligations with respect to protection of confidential information. Security mechanisms such as encryption and tokenization are also used to prevent access to this information during transfers for processing.

Other regulatory mechanisms exist in the heavily regulated payments system industry to safeguard confidential information. For example, the Bank of Canada oversees designated financial market infrastructures (including Payments Canada's systems); and the Office of

² See General Data Protection Regulation 2016/679, article 6(1).

the Superintendent of Financial Institutions (OSFI)'s *B-10 Guideline - Outsourcing of Business Activities, Functions and Processes* places stringent obligations on federally regulated financial institutions with respect to their outsourcing arrangements, requiring that these institutions retain ultimate accountability for all outsourced activities.

Requiring consent for transfers would complicate organizations' existing privacy practices and necessitate organizations adopting lengthy disclosure documentation. This would likely be confusing and frustrating to end users and would have the unintended consequence of hindering rather than fostering meaningful consent. Given the nature of outsourcing relationships in the payments system industry, transfers are often necessary for the very activity being performed. For this reason, the OPC proposal that end users be offered the option to either forego entering into the business relationship or choose not to receive the service, may be more illusory than real. This is particularly the case if an organization can refuse to provide a service where an individual does not consent to the transfer for processing – and with the unintended consequence of disruption to ordinary course payment flows.

Maintaining trust and confidence in Canadian payment systems is of paramount importance to Payments Canada and its member financial institutions. Payments Canada supports a strong privacy regime in Canada and we believe this can be accomplished through robust transparency and accountability practices, rather than a reversal of the OPC's long-standing policy position with respect to transfers for processing. As we continue to progress with our Modernization initiative, we support further dialogue about maintaining trust and confidence in Canada's payments systems while also promoting innovation and competition.

Sincerely,



Anne Butler
Chief Legal Officer and Head of Policy and Research