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May 16, 2016

The Honourable Aloysio Nunes Ferreira
Senado Federal
Anexo I, 9o. Andar Salas 1 A 6
Praça dos Três Poderes
Brasília DF
70165-900

RE: Revised Senate Bill 330

Dear Senator Nunes,

This letter follows on our October 8, 2015 meeting with your parliamentary advisor Fabricio da Mota Alves in Brasilia to discuss data protection law developments in Brazil and the then latest draft of Senate Bill No. 330 (Senate Bill). We very much appreciated the opportunity to discuss these important issues with Mr. da Mota.

Since then, we have followed with interest the various subsequent developments in creating a comprehensive privacy law for Brazil, including on the draft bill by the Ministry of Justice (Ministry Bill) as well as your Senate Bill No. 330 and the latest revised draft you released at the end of October 2015. As you may recall, in spring of 2015, we had filed formal comments on the initial draft of the Ministry Bill on behalf of the Centre for Information Policy Leadership (CIPL)[1] and many of our comments on that bill were also relevant to the earlier draft of Senate Bill 330, which we shared with Mr. da Mota.[2] Since then, we have prepared another set of formal comments on the subsequent version of the Ministry Bill.

Today, we would like to offer you a few additional comments on behalf of the Centre for Information Policy Leadership (CIPL) on the revised Senate Bill. As an initial matter, we commend you and your staff for the progress reflected in the revised bill. We believe that the revised bill has made significant strides towards the creation of a modern and effective data protection law for Brazil that reflects the dual goal of protecting privacy of the individual while also enabling technological innovation and the associated societal benefits of the modern digital

[1] CIPL is a global information privacy and security policy think tank that works with business leaders, regulatory authorities and policymakers to develop global solutions for privacy and the responsible use in the modern information age. Founded in 2001 by leading companies and Hunton & Williams LLP, CIPL is supported by approximately 42 member companies. For more information, please see our website at www.informationpolicycentre.com.

[2] CIPL's formal comments on the first draft of the Ministry Bill are available in Portuguese at https://www.informationpolicycentre.com/files/Uploads/Documents/Centre/Comentarios_do_Centre_for_Information_Policy_Leadership_Anteprojeto_de_lei_do_Brasil.pdf, and in English at https://www.informationpolicycentre.com/files/Uploads/Documents/Centre/Comments_Centre_for_Information_Policy_Leadership_Brazil_draft_law.pdf.

economy. By way of examples, we very much welcomed the inclusion of the concept of "legitimate interest" processing in Article 12; the inclusion of the concept of organizational accountability in Article 29 regarding implementing organizational privacy governance programs; and the recognition also expressed in that article of the need to consider risk of harm (both the likelihood and severity) in connection with any organizational accountability and compliance measures.

With your permission, we would like to suggest the following additional clarifications and amendments as this draft bill moves forward. Note that we have not prepared a comprehensive set of formal comments specifically addressing the draft Senate Bill. Instead, because some of the key issue we are focused on were also raised by the revised draft Ministry Bill, we merely flag our issues in this letter and refer you to the more detailed discussions that we prepared for the Ministry Bill and that we excerpted for you in the attached compendium. We have chosen this method in the interest of time, hoping that our points will remain sufficiently clear even when presented in relation to a different draft law. Please note also that our comments are based on an English translation of the original text so that it is possible that some of the nuance has escaped us.

Comments

- **Scope of Jurisdiction.** Generally, it appears that this law applies mainly to information controllers ("party in charge") as opposed to information processors ("operators"). The exceptions appear to be the provisions on Information Processing Security in Section III, which apply to the "party in charge, the contractor and any party that has access to personal information . . .," and, possibly, Article 4 X ("assumption of liability and accountability by agents that process personal information . . ."). We recommend that the respective application of this law to controllers and processors by clarified. Further, if Article 2 also intends to cover information processors ("operators"), we believe that the language in that article may be too broad in that it may cover processing activities undertaken by Brazilian information processors on behalf of foreign information controllers on personal information collected in foreign jurisdictions that is subject to legal requirements that may be different from Brazilian requirements. *See Compendium at No 1.*

- **Anonymous Data.** Article 2, Paragraph 4 appears to provide that de-anonymized data (data that was anonymized but has been de-anonymized or re-identified) is covered by this law, and Article 3 XIV provides that anonymous data is data that "cannot" be identified with "reasonable" technical means. It would be good to clarify the standard for "cannot" and "reasonable" technical means, because that impacts which "anonymous" data is not covered by this law. We also suggest additional measures other than technical measures that would ensure that information can be considered "anonymous" for purposes of this law. *See Compendium at No. 2.*

- **Consent.** Articles 4, 12 and 15 indicate that only the processing of "sensitive data" requires "express" consent, which we support. This seems to suggest that in certain contexts not involving sensitive data opt-out consent and implied consent are permissible, which we believe is essential. However, Article 13 states that consent (not express

consent) "must be granted separately from the other statements . . ." We suggest clarifying this language to ensure that it does not appear to conflict with consent scenarios that do not involve a "statement," such as opt-out or implied consent. *See Compendium at No. 3.*

- **International Transfers.** Article 28 sets forth means for transferring personal information to countries that do not offer the same degree of protection as Brazil. We offer two suggestions: (1) that the transfer options be supplemented to include a mechanism that is similar to, and able to interact with, the APEC Cross-Border Privacy Rules (CBPR) (as they are not the same as "global corporate rules," which, under the draft are limited to processing by companies that are "part of the same business group"); and (2) that there not be a requirement that global corporate rules (or CBPR) be approved only by the competent administrative authority but that a more efficient, but equally rigorous, process for approving such rules be permitted. *See Compendium at No. 4.*

- **Effective Date.** The draft provides that the law will take effect one hundred and twenty days after the date of its official publication. We believe that this short time frame leaves insufficient time for covered entities to implement the new requirements. Note that even the recently enacted EU General Data Protection Regulation provides for a two-year implementation period for countries that have had comprehensive privacy laws and privacy infrastructures for a long time. Thus, we recommend a longer implementation period.

- **Prospective Application.** We also recommend that it be made explicit that the law will have prospective application.

We hope that these suggestions are useful. Again, please note that they are based on our reading of an English translation. Should you have any questions, please do not hesitate to contact me.

Kind regards,

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