



## Comments on Draft Guideline Amendment on Data Transfers under the Act on the Protection of Personal Information

October 13 2023

BSA | The Software Alliance<sup>1</sup> and the Global Data Alliance<sup>2</sup> appreciate the opportunity to submit the following comments to Japan's Personal Information Protection Committee (**PPC**) regarding the draft Guideline Amendments on Data Transfers (**Guideline Amendment**) under the Amended Act on the Protection of Personal Information (**APPI**).<sup>3</sup>

The recent amendments highlight the role that the OECD Declaration on Government Access to Personal Data Held by the Private Sector<sup>4</sup> ("OECD TGA Declaration") can play in promoting greater transparency and accountability by governments when accessing personal data, including data transferred from another jurisdiction. As strong supporters of the OECD TGA Declaration, we generally support the Guideline Amendment.

### Introduction

BSA and GDA members share a deep and long-standing commitment to protecting data across technologies and business models, as they recognize that today's cross-border economy depends on the trust of customers and the public. We strongly support Japan's efforts to enhance personal data protection and standards of data governance while also promoting cross-border data transfers.

As reflected in the GDA's Cross-Border Data Policy Index,<sup>5</sup> the ability to access technology and transfer data securely across international digital networks is of central importance to both economic and other governmental policy objectives: Not only do restrictive cross-border policies fail to protect privacy,<sup>6</sup> but they also hurt developing countries<sup>7</sup> and small businesses; <sup>8</sup> impede financial inclusion; <sup>9</sup> undermine cybersecurity; <sup>10</sup> slow innovation; <sup>11</sup> and impair various health and safety, <sup>12</sup> environmental, <sup>13</sup> and other regulatory compliance goals (including anti-corruption, anti-money laundering, fraud prevention, etc.).<sup>14</sup> Data transfers are critical to economies across all sectors<sup>15</sup> and at every stage of the value chain.<sup>16</sup> The United Nations, World Trade Organization, World Bank, and other development banks have warned that data localization mandates and data transfer restrictions are particularly harmful to developing economies. The Global Data Alliance supports Japan's commitment to supporting economic opportunity, personal data protection, and the other policy objectives outlined above through cross-border data transfers.

### Recommendations

Our comments build on prior comments on the APPI Commission Rules<sup>17</sup> and the associated Guidelines.<sup>18</sup> The 2023 Draft Guideline Amendments recommend that the principles in the OECD TGA Declaration also be considered when transferring data to another country. We have translated the relevant amendment below:

In relation to legal systems in which it is possible for the government to collect information on personal information held by business operators, and for purposes of assessing whether such systems may have significant impacts on the rights and interests of the identifiable person, reference may be made to the OECD Declaration on Government Access to Personal Information Held by the Private Sector (2022).<sup>19</sup>

The Draft Guidelines contain examples of relevant information regarding the "systems that may have significant impacts on the rights and interests of the identifiable person." The reference to the OECD TGA

Declaration above is a new (third) example that may be taken into account. We respectfully offer the following observations.

**First**, we welcome the Guideline Amendment's proposed new reference to the OECD TGA Declaration, which recognize important common values around safeguards limiting government access to personal data for national security and law enforcement purposes. The BSA and GDA have strongly supported the OECD's work to develop these shared principles, which we believe are helpful in creating a more stable environment for the international data transfers that power today's digital economy. We support the PPC's efforts to incorporate the OECD TGA Declaration into guidelines that promote the ability of companies to transfer data under APPI.

**Second**, as part of a longer-term approach to effectuating the Guideline Amendment, we have recommended that the G7 Parties and other participating economies in the Institutional Arrangement for Partnership on Data Free Flow with Trust publish documentation showing how their respective legal systems correspond to each of the principles or elements of the OECD TGA Declaration.<sup>20</sup> If those economies agree to undertake such a "mapping" exercise with the results published on a publicly accessible website, this information could also (in the future) be cross-referenced on the PPC website.

**Third**, because the OECD TGA Declaration has been adopted by OECD members but is not yet adopted by other countries, it is important to avoid any unfounded presumption that non-OECD members do not meet the standards of the OECD TGA Declaration, or that data should not be transferred to non-OECD members. Indeed, these transfers are already permitted under the APPI, subject to other safeguards. It may be helpful to add explanatory language on the PPC website to this effect.

**Finally**, we reiterate our suggestion from our June 2021 submission that information on the personal information protection system in foreign countries be based on information that PPC provides on the PPC website.

## Conclusion

BSA | The Software Alliance and the Global Data Alliance appreciate the opportunity to comment on the Guideline Amendment. We hope that our recommendation will be useful as you continue to refine the Guidelines. We appreciate PPC taking steps to update and involve a wide range of stakeholders. Please let us know if you have any questions or would like to discuss our comments in more detail.

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<sup>1</sup> See [www.bsa.org](http://www.bsa.org).

<sup>2</sup> See [www.globaldataalliance.org](http://www.globaldataalliance.org).

<sup>3</sup> See <https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000259478>

<sup>4</sup> OECD, *Declaration on Government Access to Personal Information Held by the Private Sector* (2022) (*hereinafter* "OECD TGA Declaration"), at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0487#:~:text=WE%20ACKNOWLEDGE%20that%20government%20access%20to%20personal%20data,vested%20with%20powers%20to%20lawfully%20access%20such%20data>.

<sup>5</sup> <https://globaldataalliance.org/resource/cross-border-data-policy-index/>

<sup>6</sup> <https://globaldataalliance.org/issues/privacy/>

<sup>7</sup> <https://globaldataalliance.org/issues/economic-development/>

<sup>8</sup> <https://globaldataalliance.org/issues/small-businesses/>

<sup>9</sup> <https://globaldataalliance.org/sectors/finance/>

<sup>10</sup> <https://globaldataalliance.org/issues/cybersecurity/>

<sup>11</sup> <https://globaldataalliance.org/issues/innovation/>

<sup>12</sup> <https://globaldataalliance.org/sectors/biopharmaceutical-rd/>; <https://globaldataalliance.org/sectors/medical-technology/>; <https://globaldataalliance.org/sectors/healthcare/>

<sup>13</sup> <https://globaldataalliance.org/issues/environmental-sustainability/>

<sup>14</sup> <https://globaldataalliance.org/issues/regulatory-compliance/>

<sup>15</sup> <https://globaldataalliance.org/wp-content/uploads/2021/07/GDAeverysector.pdf>

<sup>16</sup> <https://globaldataalliance.org/wp-content/uploads/2021/07/infographicgda.pdf>

<sup>17</sup> See e.g., <https://www.globaldataalliance.org/downloads/en01252021gdacmtsappirules.pdf>

<sup>18</sup> See e.g., <https://globaldataalliance.org/wp-content/uploads/2021/07/en06182021gdaamendappi.pdf>

<sup>19</sup> See Provision to a Third Party in a Foreign Country Volume of the Draft Guidelines / 5-2 Information to be Provided / (2) Information on the System Relating to the Protection of Personal Information in the Said Foreign Country – Example 3, at: <https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000259478>

<sup>20</sup> Global Data Alliance, *Comments on An International Arrangement for Partnership on Data Free Flow with Trust* (2023), at <https://globaldataalliance.org/wp-content/uploads/2023/04/04212023gdacmts7dfft.pdf>; See also, *Global Industry Statement on An Institutional Arrangement for Partnership on Data Free Flow with Trust* (2023), at: <https://globaldataalliance.org/wp-content/uploads/2023/04/04182023g7dfftglindustry.pdf>