Navigating Data Privacy and Compliance in India

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Overview of Data Privacy Laws

- The Digital Personal Data Protection Act, 2023 (**DPDP Act**) was enacted in 2023 to overhaul the data privacy regime in India. Underlying rules to implement the DPDP Act yet to be notified.

- A technical, non-binding business requirement document (**BRD**) has been released to guide implementation.

- The DPDP Act applies to digital personal data processed in India, and also to data processed outside India if it's linked to any activity related to offering of goods/ services to people in India.

- The DPDP Act allows personal data to be processed only with the data subject's consent or for certain clearly defined legitimate uses. If consent is withdrawn or the purpose is fulfilled, whichever happens first, the data must be deleted, unless the law requires otherwise.

- Data of a child or person with disability has to be processed after obtaining the verifiable consent of the parent or lawful guardian, as applicable.

- Cross-border data transfer is subject to the requirements to be put in place by the Central Government.

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Key Stakeholders

- <u>Data Principal</u>: Individual whose personal data is collected (includes parents/ guardians for children and persons with disabilities).

- <u>Data Fiduciary</u>: Entity determining the purpose and means of processing personal data.

- <u>Consent Manager</u>: Individual or entity facilitating consent management between data principal and fiduciary via a consent management system.

- <u>Data Processor</u>: Entity processing personal data on behalf of the data fiduciary.

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Consent Life Cycle Management

- Consent collection

  - Triggered when a data principal initiates a service request.

  - Requires granular, purpose-specific consent via clear affirmative action (e.g., "I Agree" or checkbox). Default settings to not pre-check consent options.

  - Request for consent and notice to be in English and all twenty-two (22) languages listed in the Eighth Schedule of the Indian Constitution.

- Consent validation

  - Real-time validation required before data processing or upon system/ API request.

  - Must confirm consent aligns with purpose and is active.

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Consent Updates, Renewal, and Withdrawal

- <u>Consent updation</u>

  - New or modified processing purposes require updated, granular consent.

  - Process must be as simple as initial consent.

- <u>Consent renewal</u>

  - Expired or nearing expiration consent requires notification for consent renewal.

  - Process must be as simple as initial consent.

- <u>Consent withdrawal</u>

  - Data principal must be able to withdraw consent easily via user dashboard.

  - Withdrawal process must be as simple as giving consent.

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Data Retention and Deletion

- <u>Data retention</u>

  - Expired records must be purged using secure deletion protocols (e.g., cryptographic erasure).

  - Administrators to be notified before critical data deletion.

  - Audit logs of all retention and deletion activities to be maintained.

- <u>Cookie consent management</u>

  - Granular consent options, multi-language notices and real-time updates required to manage cookie consent.

  - Only essential cookies can be enabled by default; explicit consent needed for others.

  - Cookie policy must be published, detailing usage, purposes, and data sharing practices.

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Key Takeaways

- The BRD provides much-needed clarity on consent management under the DPDP Act.

- Legal status is unclear; released without public consultation, raising transparency concerns.

- Allocation of legal responsibility between consent managers and data fiduciaries is unclear.

- One-size-fits-all approach, unlike global best practices that favor risk-based implementation.

- Requirement for 22-language consent notices is onerous and challenging to implement.

- Organizations will have to develop policies and technical solutions for issues like age verification and legal exceptions.

- More government guidance needed on BRD's status and practical compliance.

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