



U.S. Chamber of Commerce Comments on Amendments to the Promotion of Access to Information Act (POPIA)

November 15, 2021

The U.S. Chamber of Commerce welcomes the opportunity to provide the South African government with comments on the amendment of regulations to the Promotion of Access to Information Act (POPIA) regarding the protection of South African citizens' personal data.

The U.S. Chamber of Commerce is the largest business advocacy organization in the world, operating in all 50 states and in over 50 countries to promote free enterprise and advance American trade and investment globally, representing companies of every size and from every sector, working with state and local Chambers and over 100 AmChams around the world. The Chamber is also home to the U.S.-South Africa Business Council ("US-SABC"), which represents America's leading companies doing business with South Africa and is the preeminent Washington-based business organization dedicated to the bilateral economic relationship and enhancing the competitiveness of our economies through commercial engagement.

Although the Chamber applauds the South African government's efforts to promote the shared values of consumer protection and data privacy in South Africa, the Chamber has concerns regarding businesses' ability to continue their operations in South Africa with the adoption of the proposed POPIA amendments. In contrast to these amendments, the Chamber supports broadening the legal bases on which companies can collect and process personal data. In doing so, we support moving away from a "consent-heavy" or "consent-only" paradigm, which is often restrictive for B2B companies and does not align with the realities of the digital economy. Many international benchmark regimes recognize a variety of lawful bases as legally equivalent to consent, including, legitimate interest, fulfilment of contractual or legal obligations, vital interests of the data subject, public interest, and business improvement, enhancement, and innovations. In addition to these high-level recommendations, please find our recommendations for the specific amendments to POPIA for your consideration below.

- **Clarify on What Basis A Data Subject Can Object To The Processing of Their Personal Information**

Section 2, which concerns data subjects' ability to file objections to the processing of their personal information lacks clarity regarding what basis an individual can file such a complaint. Based on review of sections 11 3a and 11 3b of POPIA, greater transparency as to what may constitute as an objection to the usage of one's personal data is needed for businesses to soundly operate in South Africa.

Recommendation: We encourage the South African government to clarify when data subjects can file objections and to keep acceptable objections narrow in scope. Otherwise, if data subjects can file objections to all forms of data processing, businesses will face uncertainty as to whether they can manage such a burden in order to continue their business operations in the South African market.

- **Avoid Terms That Lead to Interpretation When Describing When Data Subjects May Request Data Changes**

Section 3.2, which states that data subjects have the right to request for correction or deletion of information if the personal information is, "inaccurate, irrelevant, excessive, out of date, incomplete, misleading, or obtained unlawfully," does not provide a basis for submitting an objection. Namely, whether information is "relevant" or "misleading" is highly subjective and is open to individual interpretation. Furthermore, although the term, "out of date," provides less room for interpretation than the two previously mentioned terms, "out of date" does require context to appropriately assess the validity of each individual data request.

Recommendation: We recommend the South African government delete the terms, "irrelevant" and "misleading" to avoid the use of highly subjective language. The existing language provides too much room for individual interpretation and therefore, prohibits the businesses from operating in a stable environment in South Africa.

- **Expand Mediums for Companies to Receive Requests for the Deletion/Destruction of Personal Information**

According to Section 3.4, when a data subject requests companies to delete or destruct their personal information, such request must be submitted to companies on a form which is substantially similar to Form 2. The use of such forms will have an administrative burden for companies.

Recommendation: We suggest to the South African government that the amendment should be as follows: "on a form which is substantially similar to Form 2 *or in any manner that may be expedient*". This will allow companies to have links that lead to automated forms/deactivation requests for these requests.

- **Expand the Response Time Requirements for Correction and Deletion Requests**

Section 3.5 requires the responsible party to notify a data subject of the result of the data subject's request for correction or deletion of their personal information within 14 days. While companies strive to respond as quickly as possible to correction and deletion requests, some requests involve complex review that may make it impracticable to respond within 14 days. This time period is inconsistent with other established global frameworks and will be particularly onerous for small businesses.

Recommendation: We urge the South African Government to modify section 3.5 to require that responsible parties respond without undue delay and at the latest within one month of receiving the request. This time frame gives businesses more flexibility to appropriately respond to requests, while still ensuring that data subjects receive timely responses.

- **Expand the Mediums in which Responsible Parties Can Obtain Consent to Process Data Subjects' Personal Information**

Section 6.1, provides that where companies wish to process a data subject's personal information companies must obtain written consent from the data subject on a form substantially similar to Form 4 or in any manner that may be expedient, free of charge and reasonably accessible to the data subject including electronic mail, telephonically, SMS, Facsimile.

Recommendation: We urge the South African government to modify this regulation so that companies are not limited to only the above underlined mediums. This will allow companies to have links that lead to automated forms/explicit consent requests.

- **Limit the Consent Requirement for Data Processing for Direct Marketing & Clarify Consent Regarding Opting Out**

Section 6, which requires that direct marketing firms obtain written consent from data centers to use personal data for the purpose of direct marketing, will substantially hinder the direct marketing practices of companies. Enterprises of all sizes will be negatively affected due to their reduced ability to engage in direct marketing in the South African market. Furthermore, Section 6.4 as written does not clearly explain if opting out of electronic communications does or does not provide a data subject's consent as to whether their data can be processed by the entity.

Recommendation: We urge the South African government to amend the consent requirement for data processing for direct marketing purposes by reducing the types of data considered "personal data." The draft amendment imposes onerous requirements for the processing of "personal data" for direct marketing purposes, as "personal data" is currently defined under POPIA. Such requirements are unlikely to have any meaningful benefit in terms of additional data protection for consumers. Since personal data is usually processed for multiple purposes, requiring consents for each purpose will likely result in a flood of consent notices that create "consent fatigue" among users and overburden companies with bureaucratic requirements that will disrupt the smooth functioning of South Africa's digital economy. Furthermore, we urge the



Government of South Africa to more clearly clarify if opting out of electronic communications provides a data subject's consent as to whether their data can be processed.

Conclusion

The Chamber thanks the South African government for the opportunity to provide these comments and voice our concerns about the proposed POPIA amendments. The U.S. business community is engaged in significant trade and investment in South Africa and is proud of its continued contributions to our bilateral economic relationship. Robust and sustained engagement with the business community is essential to better public policy outcomes. We therefore look forward to continued dialogue on the future of data governance in South Africa, as well as other foundational digital policy issues.

Contact

Abel Torres

Senior Director, Global Regulatory Cooperation
US Chamber of Commerce
atorres@uschamber.com

Kendra L. Gaither

Executive Dir, U.S.-South Africa Business Council
U.S. Chamber of Commerce
kgaither@uschamber.com