

Recommendation on Intermediary Guidelines (Amendment) Rules, 2018
Ref.: Public Consultation on Draft Intermediary Guidelines 2018 published on MeitY website

With reference to the draft Intermediary Guidelines (Amendment) Rules, 2018 published for public consultation some of the proposed provisions may need to be reassessed given the nature of intermediaries being of various types and therefore and a one size -fits all approach may not necessarily be appropriate in bundling all types of intermediaries in the same category. Under the current information technology regulations, an “intermediary” would be a platform that facilitates movement of content/ information or provision of a service. It has been observed that the definition of an intermediary is quite broad and includes most technology platforms available in India.

The Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018 (“Amendment”) aim to amend the current regulations to place certain additional compliances and liabilities on intermediaries. We have elaborated on the changes with regards to traceability and the requirement of a permanent establishment, and the significance of them on high growth internet companies and in lieu of the same recommendations that we propose to make:

No.	Current Position of Law	Proposed Amendment	Recommendations
1.	<p>Proposed Rule 3 (5): Take-down Compliance & Cooperation with the Government</p> <p>Under the current position of law, an intermediary must, within 36 hours of a complaint, take down the offending content/ information and preserve the same for 90 days. This provision was read down in a 2015 Supreme Court decision – only a court order or a government authority can issue a takedown notice for an intermediary to act on.</p> <p>If served with an order, the intermediary must provide information/ assistance to the</p>	<p>The Amendment incorporates the requirement of a court or government order for taking down content/ information. The government order can be based on a set of broad purposes, including “security of the state” and “public order”.</p> <p>The offending content/information must be removed within 24 hours.</p> <p>The intermediary must maintain a record of the unlawful activity in question for 180 days.</p> <p>Other significant changes to this rule are as follows:</p> <ul style="list-style-type: none"> - the intermediary should respond within 72 hours; 	<p>There should be an exception w.r.t the time frame of reverting on case to case basis depending upon the age of the data asked for. For data that is up to 180 days old, depending on the size and complexity of data demanded, it may be prudent to keep the time frame of 72 hours to one week from date of receipt of the notice, However, for data that is more than 180 days old, the time frame should be at least 15 days, extendable by another 15 days in certain circumstances be allowed.</p> <p>The ability to trace the “originator” of information must aim to place responsibility on social media,</p>

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	<p>government or its agencies that are authorized investigate.</p> <p>The purpose of seeking the information must be provided and the order must be in writing.</p>	<ul style="list-style-type: none"> - purpose for seeking information has been broadened to include anything incidental to or connected with the purposes under the existing law, including “security of the state”; - intermediary should be able to trace the originator of the information/ content, if requested by the government. 	<p>messaging and content hosting platforms.</p> <p>For intermediaries other than in the nature of social media, messaging and content hosting, we recommend that the regulations clarify the applicability of this only for intermediaries who create and host their own content, and not apply to intermediaries that host third-party created/owned content. Furthermore, while the intermediary can provide information relating to the originator of the information/ content, it should not be allowed to access the intermediary’s systems.</p>
2.	<p>Proposed Rule 3 (7): Registration and Permanent Establishment of Intermediaries and Appointment of Nodal Officer:</p> <p>No provision currently exists for this.</p>	<p>Under the Amendment, an intermediary that (i) has more than 50 lakh users, or (ii) is notified as an intermediary by the government, must:</p> <ul style="list-style-type: none"> - <u>be a registered company under the companies’ laws;</u> - have a permanent registered and physical address in India; and - have a nodal officer and alternative senior for coordination with law enforcement 	<p>Protection of user data from a personal and national security standpoint is of utmost importance. Accordingly, while these changes are welcome and will have a positive impact, it may be more beneficial to make the proposed changes more stringent and ensure that any sizeable or relevant intermediary entity (Indian and foreign) providing goods/services through a digital platform in India is made subject to this provision and is required to have a permanent establishment in India.</p> <p>To re-iterate, from a security standpoint it is also very important</p>

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			<p>that the users of the goods/services being offered by the intermediary entity (Indian and foreign) can easily identify the entity to initiate action against in case of a breach and/or non-compliance. This requirement would help address the current enforcement issues and ensure that all intermediaries do not evade other regulations that would be applicable; for instance, taxes paid on goods and services, foreign direct investment, companies laws' compliances, labour rules, consumer regulations, and personal data protection laws.</p> <p>It is recommended that the below-mentioned clarifications/amendments to the rules should be considered:</p> <ul style="list-style-type: none"> - that the intermediary entity registered in India should provide the services directly to its users, to ensure that the entity in India can be approached for any breaches and non-compliances; - that the user base threshold for an intermediary that falls under this provision be reduced to 10 lakhs; and - the term "users" should include any and all persons from whom data is collected and/or are registered on

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			the platform (either as a service provider or a service recipient).