

**14 February 2019**

**To**  
**Shri Ajay Prakash Sawhney**  
**Secretary**  
**Ministry of Electronics and Information Technology (MeitY)**  
**Government of India**  
**Electronics Niketan, 6, CGO Complex, Lodhi Road, New Delhi - 110003, India**

**Subject:** Counter Comments on the Published Comments on IT [Intermediary Guidelines (Amendment)] Rules 2018

Dear Sir,

The Asia Internet Coalition (AIC) and its members express our sincere gratitude to the Ministry of Electronics and Information Technology (MeitY), Government of India, for the opportunity to submit counter comments on Draft of "The Information Technology [Intermediary Guidelines (Amendment)] Rules 2018 (**Draft Rules**)". AIC is an industry association comprised of leading internet and technology companies and is committed to safe and open Internet. AIC seeks to promote the understanding and resolution of Internet and ICT policy issues in the Asia Pacific region. Our current members are AirBnB, Amazon, Apple, Expedia Group, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter, Booking.com, Yahoo (Oath).

As indicated by MeitY earlier and based on the all the published comments, wherein AIC also participated, we are submitting counter comments. We commend that the Government of India is reviewing its Intermediary Guidelines to align it with judicial precedents and global practices. As responsible stakeholders in this process, we appreciate the ability to participate in the consultation process and submit our views.

Accordingly, please find enclosed the detailed counter comments, which we would like the ministry to consider while reviewing the regulatory framework for intermediaries in India. We are grateful to MeitY for holding a multi-stakeholder public consultation in relation to the Draft Rules. Importantly, we look forward to offer our inputs and insights directly through meetings and discussions with the relevant authorities.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact us at [Secretariat@aicasia.org](mailto:Secretariat@aicasia.org) or at +65 8739 1490. Thank you for your time and consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Paine".

**Jeff Paine**  
**Managing Director**  
**Asia Internet Coalition (AIC)**

**Counter Comments**

S No	MEITY Ref. No.	Draft Intermediaries Guidelines (Amendment) Rules, 2018	
		Rule	Counter Comments
1.	MIT/79/034	Rule 3(2)	<p>The Election Commission of India seeks the inclusion of content in “<i>violation of any of the provisions of election law or/ and directions of the [ECI] during the period of any election</i>” under this rule.</p> <p><b><u>Counter Comments:</u></b></p> <ul style="list-style-type: none"> <li>● The comment of the Election Commission is not responsive to the Proposed Amendments and goes over and beyond the proposed amendments.</li> <li>● The terms “any provision of election law” and “directions of the ECI” are not precise phrases and are vague in nature. Using vague phrases for restricting free speech is not constitutionally permissible. Any restrictions on speech must be articulated in a precise and narrow manner.</li> </ul>
2.	MIT/79/029 and MIT/79/073	Rule 3(4)	<p>In these comments, stakeholders have indicated that the user notification obligation is not relevant in a B2B scenario or in case of cloud service providers.</p> <p><b><u>Counter Comments:</u></b></p> <ul style="list-style-type: none"> <li>● The requirement to notify users on a monthly basis is unduly burdensome on all types of intermediaries, not just in B2B scenarios or for cloud service providers.</li> <li>● The monthly notifications may not achieve the desired purpose of the proposed Rule and result in “warning fatigue” for users, with users ignoring the repeated notifications. We are not aware of such notification requirements existing in any other jurisdictions.</li> </ul>
3.	MIT/79/027	Deleted Rule 3(4)	<p>In this comment, the stakeholder has recommended the restoration of the deleted rule 3(4) of the Intermediaries Guidelines, 2011.</p> <p><b><u>Counter Comment:</u></b></p> <ul style="list-style-type: none"> <li>● Current Rule 3(4) has been declared unconstitutional by the Supreme Court in its <i>Shreya Singhal</i> ruling wherein the Court held that intermediaries were liable to takedown content only upon receipt of</li> </ul>

			<p>“actual notice” by way of a Court order or notification from government agencies. Hence, the current Rule 3(4) has been deleted from the Proposed Amendments.</p> <ul style="list-style-type: none"> <li>• Current Rule 3(4) also places undue burdens on intermediaries for content takedowns beyond the scope of the parent provision i.e. Section 79.</li> </ul>
4.	MIT/79/072, MIT/77/083, MIT/79/088, MIT/79/029, MIT/79/073, MIT/ 79/086, MIT/79/023, MIT/79/044, MIT/70/059	Rule 3(5)	<p>In these and other comments, stakeholders have recommended that tracing should only apply to content sharing platforms, with specific intermediaries such as cloud service providers being exempt from the proposed Rule.</p> <p><b>Counter Comments:</b></p> <ul style="list-style-type: none"> <li>• The requirements prescribed under the proposed Rule are beyond the scope of MEITY’s rule making powers under Section 79.</li> <li>• The Proposed Rule is vague and does not have any procedural safeguards. The term “assistance” has not been defined, which may require intermediaries to provide assistance for non-specified purposes.</li> <li>• The proposed obligation to trace originator information undermines the right of anonymous communication and would lead to targeted surveillance.</li> <li>• The Proposed Rule violates the internationally accepted principle of data minimisation and undermines end-to-end encryption as it requires intermediaries to store every message on their platforms in order to fulfil tracing obligations. Further, The Proposed Rule should exempt all categories of intermediaries which do not have the technological capacity to trace originators of information.</li> </ul>
5.	MIT/79/073, MIT/79/023, MIT/79/072, MIT/77/083, MIT/79/088.	Rule 3(7)	<p>In these and other comments, stakeholders have supported the proposed Rule and have sought a reduction in the currently specified user cap of 50 lakh, an amendment to the effect that the intermediary entity in India should provide the services directly to the users and applicability in respect of Content Sharing Platforms.</p> <p><b>Counter Comments:</b></p> <ul style="list-style-type: none"> <li>• The Proposed Rule is <i>ultra vires</i> Section 79, which is an exemption provision. The limited scope of due diligence obligations under Section 79 do not enable the Government to introduce new legal obligations such as creating a 24X7 law enforcement contact mechanism and incorporating an entity in India.</li> </ul>

			<ul style="list-style-type: none"> <li>● The requirement to incorporate the intermediary in India has no nexus with the exemption for liability under S.79.</li> <li>● The Proposed Rule may also have anticompetitive effects as it limits intermediaries ability to do business and it will also increase the cost of offering service.</li> </ul>
6.	MIT/79/029 MIT/79/023 MIT/79/088 MIT/77/083 and MIT/ 79/ 086.	Rule 3(8)	<p>In these and other comments, stakeholders have recommended the inclusion of certain safeguards requiring judicial scrutiny of takedowns and issues faced by B2B or reseller platforms in the context of content takedown.</p> <p><b>Counter Comments:</b></p> <ul style="list-style-type: none"> <li>● The Proposed Rule attempts to circumvent the existing process and checks and balances for blocking content under Section 69A of the IT Act and related rules.</li> <li>● The requirement to take down content in 24 hours is unduly burdensome.</li> <li>● The Proposed Rule should include “stop the clock” provisions allowing intermediaries to seek clarifications in relation to takedown requests. The time sought for seeking clarifications sought to be excluded.</li> <li>● The Proposed Rule increases the period of retention of information without formulating sufficient safeguards.</li> </ul>
7.	MIT/79/029, MIT/79/073, MIT/79/023, MIT/79/027, MIT/79/072,	Rule 3(9)	<p>In these and other comments, stakeholders have recommended that the Proposed Rule should only apply to content sharing platforms and other categories of intermediaries must be exempted.</p> <p><b>Counter Comments:</b></p> <ul style="list-style-type: none"> <li>● The Proposed Rule requires intermediaries to act as adjudicators of content, which is contrary to their role as neutral facilitators recognised in Indian and international jurisprudence.</li> <li>● The Proposed Rule requires intermediaries to conduct surveillance of private communication which is violative of the fundamental right to privacy of their users and does not fulfill the test laid down by the Supreme Court in <i>KS Puttaswamy v. Union of India</i>, (2017) 10 SCC 1 on legality, necessity and proportionality.</li> <li>● The Proposed Rule does not carve out appropriate exceptions for encrypted content</li> </ul>