

10 COMPLIANCE QUESTIONS TO CONSIDER ON THE NEW INTERMEDIARY SAFE HARBOUR RULES

On May 25, 2021, India's new IT (Intermediary Guidelines and Digital Media Ethics) Rules, 2021 ("New Safe Harbour Rules") will come fully into force. More particularly, on and from that date 'significant social media intermediaries' operating in India will need to follow additional due diligence measures and compliances to remain eligible to claim intermediary 'safe harbour' protections.

These additional due diligence compliances, grouped under Rule 4 of the New Safe Harbour Rules, create a series of (mostly) novel compliances that have to be in place on a platform if safe harbour protection is to be claimed.

Interpreting and complying with these requirements is an ongoing task for social media intermediaries. Here are 10 common questions and issues that you may face and need to address.

Please do contact us at practicemanager@btg-legal.com if you have any specific questions that we can help you with. The text of the New Safe Harbour can be found [here](#).

Frequently Asked Questions

1. Who is a 'significant social media intermediary'?

A 'social media intermediary' is an intermediary who enables online interaction between two or more users, and allows them to create, upload, share, disseminate, modify or access information using its services. This definition is quite extensive, and may even cover business collaboration tools that enable online meetings, work sharing, etc.

If your platform has only a 'ancillary' social media element (e.g., a delivery app that lets you share reviews), you may not be the primary target of enforcement. You should examine any such collaborative 'social' element to arrive at a reasoned view on applicability.

2. Is there a threshold over which a social media company becomes 'significant'?

Yes. Significant social media intermediaries should have at least 5 million users in India. See the relevant notification [here](#).

The rules do not clarify how these 5 million users are to be calculated, or what constitutes a 'user'. It may be worth examining if a distinction can be made regarding active users (and dormant users), or registered users (or 'guests'), or whether the intention is to cover entities with high 'monthly average' users. It is likely that Indian enforcement authorities will take an aggressive view, and require a social media company that crosses this threshold by any reckoning to be compliant.

3. The New Safe Harbour Rules require social media companies to appoint 3 new officers situated in India – a Chief Compliance Officer, a Nodal Contact Person, and a Grievance Officer? Can these be the same person?

The Chief Compliance Officer and the Nodal Contact Person cannot be the same person.

Other combinations may be possible – for example, Chief Compliance Officer and Grievance Officer, or a Nodal Contact Person and Grievance Officer. But you should consider the regulatory intention behind these positions, while filling them.

4. Are there a set of qualifications prescribed for these officers, and how long/often does he/she have to be physically present in India?

No qualifications are prescribed. You should consider if the proposed officers have prior experience in compliance matters and (perhaps more importantly) dealing with Indian regulators and law enforcement bodies.

The Chief Compliance Officer, in particular, is liable to ensure the significant social media intermediary complies with the New Safe Harbour Rules. This translates into personal liability for him/her; if called upon to defend against personal liability, he/she should be able to show that 'reasonable efforts' were made and steps taken by him/her to ensure compliance.

On the questions of physical presence in India, again, there is no specific guidance. Other Indian laws specify certain time periods, and it may be useful to look to these laws for some guidance.

5. Can we specify that a committee or working group will play these 3 roles?

Likely not. The idea behind each of these roles seems to be to fix personal liability, and to have a single officer who is the sole point of contact for local law enforcement.

A committee playing this role may present additional complications, that you should consider before taking a view on this.

6. Is there a problem if our Compliance Officer/Nodal Contact Person/Grievance Officer is also employed with our Indian subsidiary?

Do consider if this structure affects your 'entity separation' and tax arguments.

If your Indian entity employs people in common with your overseas operational entity, there may be issues if you want to limit liability to one of these jurisdictions. There may be pushback that both entities, in effect, have the same role and direction and either can be approached (for instance) for a law enforcement request.

Tax issues may also arise, if an Indian entity has common employees with its foreign parent, and this may queer the pitch for your arguments about permanent establishment presence in India, etc.

7. We are required to periodically 'publish' compliance reports. How do we do this – and is there a format specified?

No format is specified, and there is no direction on how this information is to be published. The way you 'publish', and what report content you do publish, will vary with your platform offering and the complaints you handle.

You should consider a reporting format that will help you duly comply with the new law, but at the same time be careful of 'dumping' a lot of your data in the public domain.

8. We are required to "deploy technology-based measures, including automated toolsto proactively identify information depicting rape, child sexual abuse..." etc. Is there a 'service level' or standard specified?

No service level in terms of success rate, uptime/downtime, etc., is specified.

The test may be practical, depending on how many instances of illegal content were found present/pointed out in the last month, etc. There may be some 'basic' service levels that may apply, varying with your service offering

9. Are we required to provide prior notice to content creators, before removing content?

Yes, under Rule 4(8), if you voluntarily remove content that violates Rule 3(1)(b) (which is a laundry list of prohibited content, including defamatory or obscene content, IP violations, etc.), prior notice and an appeals process are required under the New Safe Harbour Rules.

No minimum notice period is prescribed. You may get away with notice that is very short, but 'reasonable' in the circumstances and having regard to the nature of the illegal content. You may also be able to expeditiously remove specific content that is already declared illegal by a court, or content that (you can prove) will cause harm if not removed immediately (e.g. doxing).

10. Are we required to respond to every take-down request?

You will be required to remove or disable access to content: (i) within 36 hours, when you receive a court order or upon being notified by the designated government authority; and (ii) within 24 hours, upon receiving a complaint made by an individual or any person on their behalf in relation to content which shows nudity, private parts, or impersonates such person.

In addition, do note that in case of copyright infringements, the position is different due to Indian copyright laws, and your takedown protocols must account for this.

This is not intended to be legal advice. Your obligations may vary depending on your status and business set up. Consult your lawyers before taking any actions.

BTG maintains a rolling database of materials on the New Safe Harbour Rules. Please click [here](#) to access.



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