

Privacy & Cybersecurity Update

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

Historic New 'Privacy Shield' Agreement to Replace EU-US Safe Harbor

Two days after the original January 31 deadline, the European Union and United States have announced a replacement for the Safe Harbor agreement — the EU-U.S. Privacy Shield — which, if approved, will provide a new framework under which U.S. companies can transfer personal data from the EU to the U.S. under the EU Data Directive. The specific text of the Privacy Shield has not yet been released, and the agreement must still be approved on both sides of the Atlantic, which could take a few months, but some details of the historic arrangement have begun to emerge. Overall, the agreement seeks to balance the fundamental right of privacy of EU residents with the needs of the U.S. intelligence committee while also creating a workable system for U.S. companies.

Background

As we reported in the October 2015 edition of our *Privacy and Cybersecurity Update*, the Court of Justice of the European Union invalidated the then-current Safe Harbor framework agreement between the EU and U.S. The framework had allowed companies to transmit personal information from the EU to the U.S., despite the European Union's assessment that the United States does not have "adequate" data protection laws in place. In its *Schrems* decision, the court declared found that the existing framework did not adequately protect the interests of data subjects. Following the decision, the Article 29 Working Party, which is comprised primarily of representatives from the data protection authorities of each EU member state, and which generally seeks to coordinate data protection efforts in the EU, set a deadline of January 31, 2016, for agreement on a new Safe Harbor framework. According to the statement, if the deadline were missed, and if EU regulators determined that the other mechanisms do not afford adequate data protections, national authorities would take "all necessary and appropriate actions" to protect personal data.

The Privacy Shield

The U.S. Department of Commerce has indicated that the Privacy Shield was crafted very much with the *Schrems* decision in mind, and sought to address the court's concerns that led to invalidating the Safe Harbor. The central focus of the *Schrems* decision was not so much the use of personal data by companies, but rather the ability of

Privacy & Cybersecurity Update

the U.S. government to access such data and the lack of recourse available to EU residents. The Privacy Shield creates greater U.S. oversight, including a larger role for the FTC and the creation of a State Department “ombudsman” to oversee access to personal data by the U.S. intelligence community for surveillance purposes and review complaints by EU residents. The U.S. Office of the Director of National Intelligence also will provide written assurances that access to personal data for surveillance purposes will be limited and proportionate.

EU residents will have a variety of means to file complaints about access to and use of their data. For example, companies will now have to offer access to free alternative dispute resolution mechanisms to address issues that arise. European Data Protection Authorities could also refer complaints directly to the Department of Commerce or the Federal Trade Commission.

In addition, the European Commission and U.S. Department of Commerce will revisit the Privacy Shield each year to confirm it continues to address EU privacy concerns.

Next Steps

We expect that, in the coming days, the text of the Privacy Shield will be released, and the somewhat extended process will commence of approving the agreement in the EU. While approval is likely, privacy advocates have already begun to attack the deal for being too weak. No guidance has yet been provided as to whether companies that certified to the Safe Harbor in the past will be able to easily transition to the Privacy Shield or, rather, will need to start a whole new process. Companies should also keep in mind that the Privacy Shield will not be the only means to send personal data from the EU to the U.S., as the “model contract” regime remains in place.

The Skadden Privacy and Cybersecurity Group will continue to provide updates as new developments emerge.

(Attorney contacts appear on the next page.)

Privacy & Cybersecurity Update

If you have any questions regarding the matters discussed in this newsletter, please contact the following attorneys or call your regular Skadden contact.

Stuart D. Levi

Partner / New York
212.735.2750
stuart.levi@skadden.com

James R. Carroll

Partner / Boston
617.573.4801
james.carroll@skadden.com

Brian Duwe

Partner / Chicago
312.407.0816
brian.duwe@skadden.com

David Eisman

Partner / Los Angeles
213.687.5381
david.eisman@skadden.com

Patrick Fitzgerald

Partner / Chicago
312.407.0508
patrick.fitzgerald@skadden.com

Todd E. Freed

Partner / New York
212.735.3714
todd.freed@skadden.com

Marc S. Gerber

Partner / Washington, D.C.
202.371.7233
marc.gerber@skadden.com

Lisa Gilford

Partner / Los Angeles
213.687.5130
lisa.gilford@skadden.com

Rich Grossman

Partner / New York
212.735.2116
richard.grossman@skadden.com

Timothy G. Reynolds

Partner / New York
212.735.2316
timothy.reynolds@skadden.com

Ivan A. Schlager

Partner / Washington, D.C.
202.371.7810
ivan.schlager@skadden.com

David E. Schwartz

Partner / New York
212.735.2473
david.schwartz@skadden.com

Michael Y. Scudder

Partner / Chicago
312.407.0877
michael.scudder@skadden.com

Jennifer L. Spaziano

Partner / Washington, D.C.
202.371.7872
jen.spaziano@skadden.com

Helena J. Derbyshire

Of Counsel / London
44.20.7519.7086
helena.derbyshire@skadden.com

Gregoire Bertrou

Counsel / Paris
33.1.55.27.11.33
gregoire.bertrou@skadden.com

Jessica N. Cohen

Counsel / New York
212.735.2793
jessica.cohen@skadden.com

Peter Luneau

Counsel / New York
212.735.2917
peter.luneau@skadden.com

James S. Talbot

Counsel / New York
212.735.4133
james.talbot@skadden.com

Joshua F. Gruenspecht

Associate / Washington, D.C.
202.371.7316
joshua.gruenspecht@skadden.com