

Legal Update

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BREAKING NEWS: EU-US Privacy Shield Agreement Announced – But Not Yet Approved

By Peter T. Berk

As reported in our [November 2015 Newsletter](#), in October 2015, the Court of Justice of the European Union (“CJEU”) invalidated the “Safe Harbor” for legal transfers of data from the EU to the United States. Data privacy regulators also subsequently questioned the validity of other, previously approved methods to ensure legally compliant transfers, including Binding Corporate Resolutions (BCR’s) and Model Contract Clauses, causing significant uncertainty for U.S. companies that deal with citizens or entities companies in the EU or obtain data regarding EU citizens.

Although the relevant EU data privacy authorities, known as the Article 29 Working Party, stated that they would not initiate enforcement actions until the end of January, 2016, it was only on February 2, 2016 that EU and U.S. negotiators announced agreement on a new framework, dubbed “**EU-US Privacy Shield**”. According to the negotiators, the agreement contains new assurances and procedures, including:

- U.S. assurances regarding limits on public authorities’ access to data;
- A State Department ombudsman to handle complaints and questions from EU citizens and the Article 29 Working Party regarding U.S. surveillance, and the creation of other avenues of redress for disputes brought by EU citizens;
- “Robust obligations” on a company’s collection and processing of data;
- Publication of a company’s commitments to protection of individual data to be monitored by the Department of Commerce and enforced by the FTC; and
- Companies that handle human resources data from the EU must agree to comply with all decisions by the Article 29 Working Party.

The Privacy Shield documentation needs to be fully drafted, but, on February 3, 2016, the Article 29 Working Party issued a [press release](#) asking for all Privacy Shield documentation by the end of February, so that it can discuss the framework in a meeting at the end of March. It may also consider whether BCR’s and Model Clauses remain valid. In the meantime, however, regulators agreed that **they would not commence enforcement actions based on the use of BCR’s and Model Clauses until after the March meeting**. The enforcement moratorium should last until mid-April but EU regulators warned that reliance on the old Safe Harbor framework is insufficient.

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As details about Privacy Shield become available, companies should consider whether and how they can comply and prepare for its possible implementation. Companies concerned about potential individual complaints or enforcement in the interim should (a) maintain and, if necessary, improve existing safeguards for personal data, including that from the EU, such as server security, data encryption, access limits, policies, *etc.*, (b) consider whether they have, or can implement, BCR's or Model Clauses, and (c) consider whether they have, or can obtain, consent of the EU citizens for data transfers to the U.S. We encourage every business to consult with technical and legal advisors regarding appropriate actions to take at this time.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Peter T. Berk 312.701.6870; pberk@fvldlaw.com or your regular FVLD contact.

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