



PRIVACY AND DATA PROTECTION ALERT

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Timothy J. Toohey  
213.929.2637  
ttoohey@swlaw.com  
vCard

## The White House and European Union Privacy Proposals

by Timothy Toohey

**Second in a Two-Part Series**  
(Part One can be found [here](#).)

### European Data Protection Regulation

In contrast to the White House's proposal, which is limited to consumer transactions online and seeks adoption of a voluntary code of conduct in the first instance, the Data Protection Regulation ([EU Regulation](#)) proposed by the European Commission is detailed, comprehensive and, if passed by the European Parliament and Council, binding on all EU member states. Indeed, the proposed regulation,<sup>[1]</sup> which replaces the current EU data protection directives, would likely have a much greater effect on companies operating outside the EU than is currently the case with the existing EU laws.

The proposed EU Regulation, which is 82 pages in length and contains 139 recitals, is a complex and multi-faceted proposal. Given the complexity of the proposed regulation and the divergent viewpoints in



Rebecca A. Winterscheidt  
602.382.6343  
bwinterscheidt@swlaw.com  
vCard



Marc R. Currie  
602.382.6532  
mcurrie@swlaw.com  
vCard



Jennifer Hadley Dioguardi  
602.382.6371  
jdioguardi@swlaw.com  
vCard

the EU member states, it is likely that the regulation will be modified in the coming months. Moreover, the regulation will only come into force two years after it is adopted by the European Parliament and Council. It is nonetheless important for companies to consider the salient features of the proposed law well before it is enacted and goes into effect because the proposed law will affect not only the collection and processing of data in the EU, but also the transfer of such data outside the EU. The law may also affect the internal structure of many companies' data protection efforts.

**Scope of the Law:** In contrast to the White House proposal, which affects only consumers online, the EU Regulation applies to almost all data collection and processing activities, which is consistent with the fact that data protection is a fundamental right embodied in the Charter of Fundamental Rights of the European Union. *Communication*, p. 2. Indeed, the proposed regulation applies to the collection and processing of data regarding data subjects in the EU by controllers and processors located in the EU as well as those **outside the EU** if they offer goods or services to data subjects in the EU or monitor their behavior. *EU Regulation*, Article 3. In addition, the regulation applies to collection of all data wholly or partly by automated means with very limited exceptions, including data related to the prevention, investigation, detection or prosecution of criminal offenses. *EU Regulation*, Article 2.

**Increased Consumer Control of Data:** The regulation is also much more specific regarding consumer control of data than is the White House proposal. For example, processing of personal data is only lawful if certain specific conditions are met, including informed consent by the data subject. *EU Regulation*, Article 5. Consent generally must be opt-in, i.e., given freely and explicitly through a "clear affirmative action by the person concerned." *Communication*, p. 6. A data subject may withdraw consent at any time and consent is not a legal basis for processing where there is a "significant imbalance between the position of the data subject and the controller." *EU Regulation*, Article 7. The proposed

regulation specifies that this is “particularly the case . . . where personal data are processed by the employer of employees’ personal data in the employment context.” *Id.*, Recital 34.

**The Right to be Forgotten:** In a provision that has already prompted much commentary and controversy, the proposed EU Regulation would give Internet users a “right to be forgotten,” i.e., a right for a data subject to have his or her personal data erased, even if the data has been made public. Once a data subject has withdrawn consent for data processing, a data controller must take “all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data.” *EU Regulation*, Article 17.

**Data Transfer Protections:** The proposed regulation seeks to improve current mechanisms for transferring data outside the EU by providing general principles that have to be fulfilled for transfers of data outside the EU. These mechanisms include “adequacy” decisions and the use of “appropriate safeguards,” such as binding corporate rules. *EU Regulation*, Articles 41-43. For example, the regulation allows companies to adopt binding corporate rules if the rules fulfill certain requirements relating to collection and processing of data, are enforceable by data subjects and are legally binding. If adopted by a company, binding corporate rules will be applicable to all of the company’s affiliates and can be relied upon by the company in each EU member state. *EU Regulation*, Article 43. Decisions by the European Commission under the prior directive, including adequacy mechanisms such as the U.S. Safe Harbor system and standard contractual clauses approved by data protection authorities, will continue in force. *EU Regulation*, Article 41(8). Although the mechanisms for transfer have been liberalized somewhat, all data must meet the more exacting conditions for collecting and

processing set forth in the regulation. *EU Regulation*, Article 40.

**Consistent Enforcement of Data Protection Rules in the EU:** A major aim of the proposed EU Regulation is consistency of data protection rules and enforcement of those rules in the 27 EU member states. The regulation thus allows companies to deal with a single data protection authority where the company's designated "main establishment is located," rather than with multiple data protection authorities applying inconsistent legal provisions, as is currently the case. *Communication*, p. 8. *See also EU Regulation*, Articles 51, 55-56. The practices of data protection authorities will also be harmonized. *Id.*, Articles 52-53. Although compliance burdens will be reduced in this respect, companies with more than 250 permanent employees will be required to appoint a data protection officer and will be required to provide notice regarding data breaches "where feasible" within 24 hours. *EU Regulation*, Articles 31, 35-37.

**Greater Enforcement Authority to Data Protection Authorities:** Under the proposed regulation, data protection authorities would be given additional powers, including authority to consider complaints and carry out investigations. Data protection authorities would also be given greater enforcement authority, including the ability to impose very significant penalties and fines on those who do not comply with the regulation. Depending upon the nature of the violation, data protection authorities are given the power to impose fines from **.5 percent to 2 percent of a company's annual worldwide turnover** for certain negligent or intentional acts. *EU Regulation*, Article 79. Such fines, which could extend to tens or even hundreds of millions of dollars, depending upon the size of the company, are far beyond those imposed in the past and have the potential of significantly impacting a company's bottom line.

### **Conclusion**

The White House and EU proposals serve as

barometers of the degree to which privacy continues to play a central role in our increasingly connected global economy. Although both proposals seek to ensure economic growth and innovation, they reveal a great divide between the European approach, which applies to an enormous range of data collecting and processing activities and places emphasis on an individual's control of data, compared to that suggested by the White House, which relates only to Internet transactions and balances control and consumer responsibility. Although both proposals face an uncertain future, companies should carefully consider the impact of the potential changes in privacy policies on their operations.

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#### Notes:

[<sup>1</sup>] A "regulation" in the EU is a law directly applicable to all EU member states, whereas a "directive" sets forth guidelines for member states' laws. [[back](#)]

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