

Data Protection Update

Joint Webinar with Travers Smith

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Pepper Hamilton LLP
Attorneys at Law

Webinar | March 9, 2016

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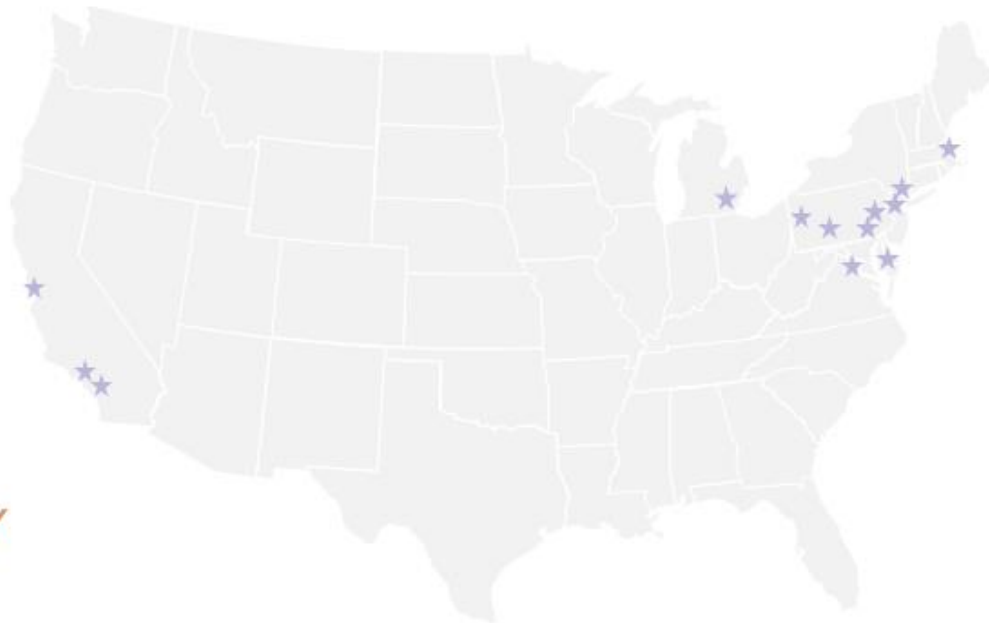
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Travers Smith capabilities



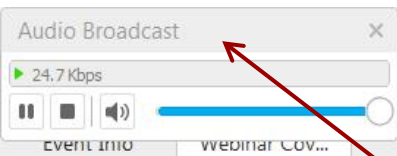
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Pepper Hamilton Webinar



Participants

Speaking:

- Panelists: 1
 - Brian Dolan (Host)
- Attendees:
 - Webinar Guest (me)

Q&A

All (0)

Ask: All Panelists

Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.

Send

Audio

The screenshot shows the Cisco WebEx Event Center interface. At the top, there is a menu bar with 'File', 'Edit', 'View', 'Communicate', 'Participant', 'Event', and 'Help'. Below the menu bar, there are tabs for 'Event Info' and 'Webinar Cov...'. The main content area is divided into two sections. The top section contains a video player with a volume control bar and a play button. A red text overlay reads: 'If you cannot stream audio, click phone icon and a phone number will be sent to you'. A red arrow points from this text to a phone icon in the bottom right corner of the video player. The bottom section contains a large graphic for 'Pepper Hamilton Web' celebrating 125 years (1890-2015) as 'Attorneys at Law'. On the right side of the interface, there is a 'Participants' panel showing a list of participants: 'Brian Dolan (Host)' and 'Webinar Guest (me)'. Below the participants list, there is a 'Q&A' section with a dropdown menu set to 'All (0)'. At the bottom of the Q&A section, there is a text input field with a 'Send' button.

01

If you cannot stream audio, click phone icon and a phone number will be sent to you

Audio Connection

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Pepper Hamilton Web

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Years
Pepper Hamilton LLP
Attorneys at Law

Q&A

Cisco WebEx Event Center

File Edit View Communicate Participant Event Help

Event Info Webinar Cov... x

01

Participants Chat Q&A

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Connected

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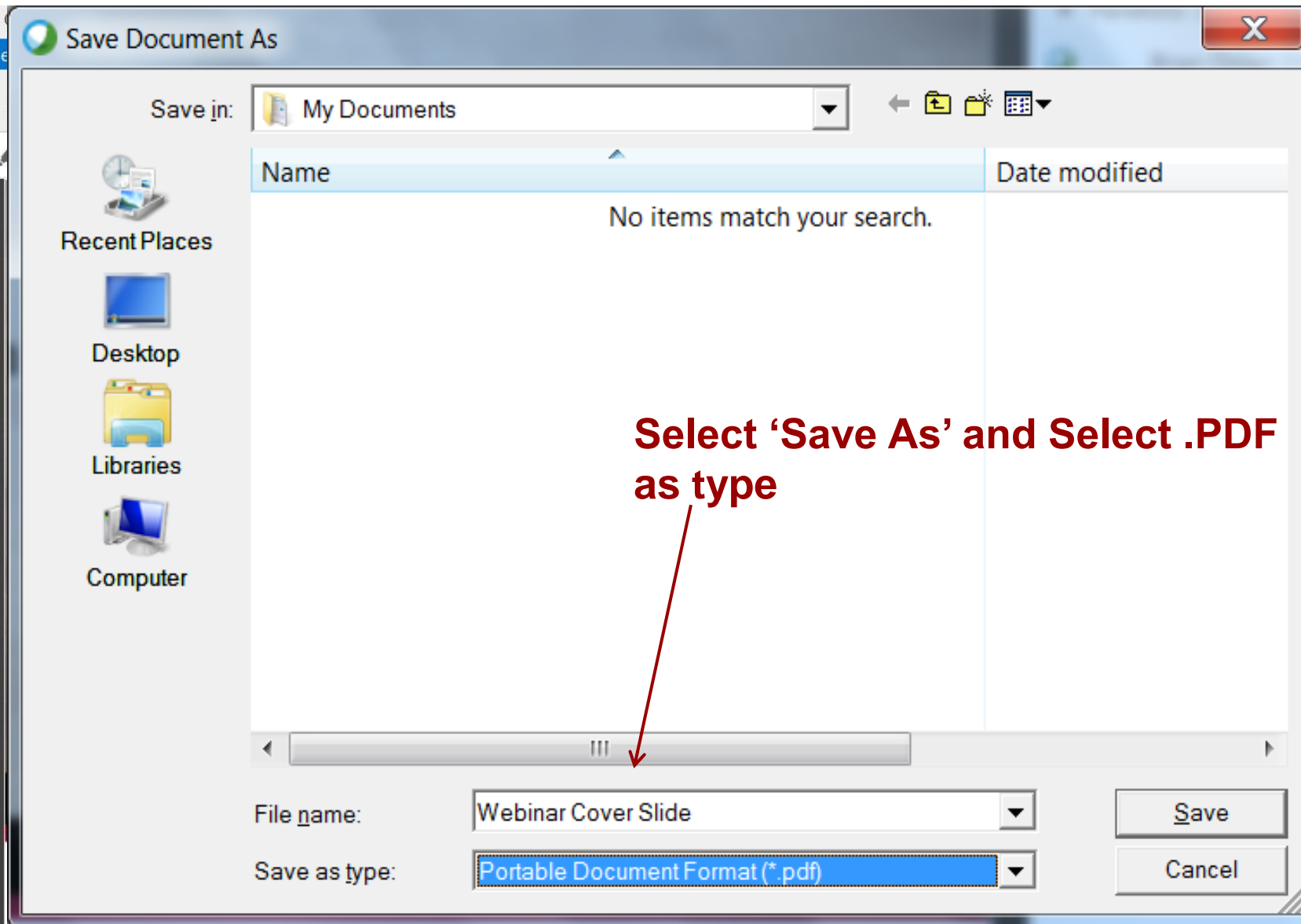
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The main content area shows a slide titled "Pepper Hamilton Webinar". The slide features the text "CELEBRATING 125 Years" with "1890" on the left and "2015" on the right. Below this, the logo for "Pepper Hamilton LLP Attorneys at Law" is displayed.

On the right side of the interface, there is a "Participants" panel showing "Speaking:" with "Panelists: 1" and "Attendees:" with "Webinar Guest (me)". Below this is a "Q&A" panel with a dropdown menu set to "All (0)" and a "Send" button. At the bottom right, there is a "Connected" status indicator.

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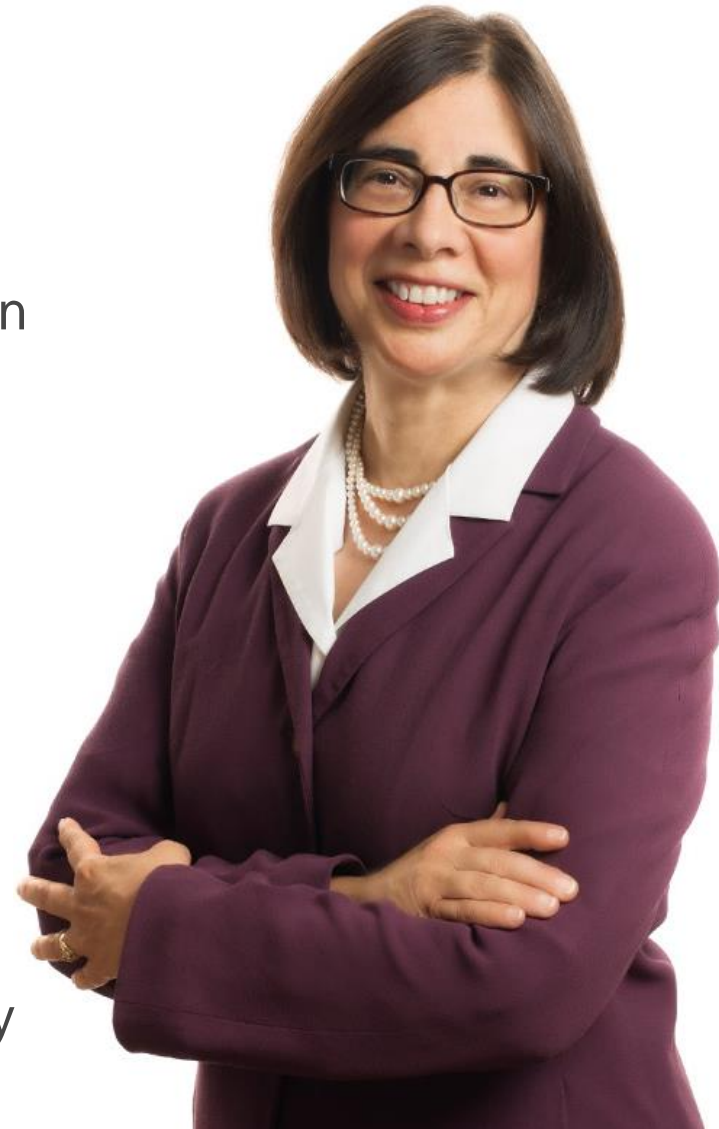
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- ▶ Represents health care industry clients in the licensing of information technology and medical devices
- ▶ Certified as an information privacy professional by the International Association of Privacy Professionals (IAPP).
- ▶ Frequent writer and presenter on privacy, security and data protection matters.



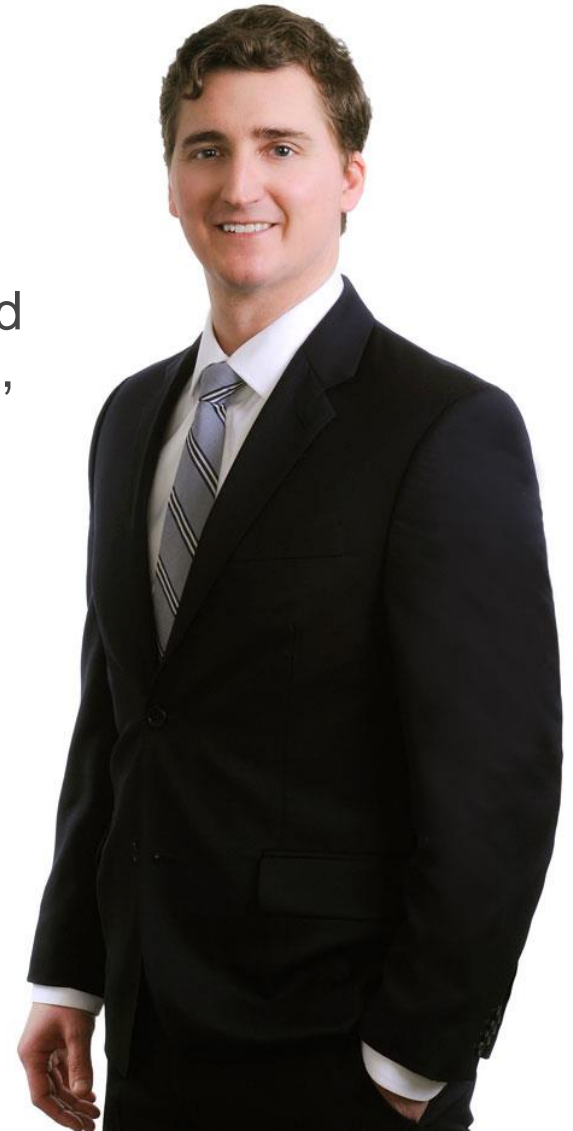
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- ▶ Practice is focused on technology and intellectual property transactional matters, including drafting and negotiating agreements involving software licensing, software as a service (SaaS), software and mobile application development, information technology and business process outsourcing, telecommunications, data licensing, copyright and trademark licensing, and professional services.
- ▶ Also advises clients on intellectual property compliance and enforcement matters and data privacy and information security laws and regulations, including Gramm-Leach-Bliley, HIPAA, US/EU Safe Harbor, and state data protection and breach notification requirements.



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- ▶ Leads the firm's intellectual property and technology practice
- ▶ Significant experience in the exploitation and protection of all types of IP, in particular matters relating to databases, software and the internet.
- ▶ Leads substantial projects relating to technology implementations, outsourcing and software development.
- ▶ Advises clients on complex data protection and confidentiality issues.
- ▶ Clients include many household names such as The Bank of England, Shazam, The London Stock Exchange, Micro Focus, HostelWorld.com and Pret a Manger.



Overview

- ▶ Safe Harbor, Privacy Shield and Alternatives
 - The old Safe Harbor
 - The new Privacy Shield
 - Alternatives to Safe Harbor/Privacy Shield
 - The UK perspective

Overview

- ▶ New General Data Protection Regulation
 - When does it take effect?
 - Brexit
 - Headline points
 - Territoriality
 - Appointing a processor
 - What will change
 - The US perspective

- ▶ Where do businesses go from here?

Where we've been – Safe Harbor

- ▶ EU's 1995 Data Protection Directive only allows transfer of personal data to third countries providing "adequate" level of protection – U.S. not deemed adequate.
- ▶ Safe Harbor developed by U.S. Department of Commerce in consultation with European Commission.
- ▶ Received an adequacy finding from the Commission in 2000

Safe Harbor – what was it?

- ▶ Companies would self-certify compliance with Safe Harbor principles of Notice, Choice, Onward Transfer, Access, Security, Data Integrity, and Enforcement.
- ▶ Publish a privacy statement that company adheres to Safe Harbor.
- ▶ Enforced by FTC

Safe Harbor – what happened?

- ▶ Snowden revelations of mass surveillance by U.S. government.
- ▶ Court of Justice of the European Union invalidated Safe Harbor October 6, 2015.
- ▶ EU Data Protection Authorities (Article 29 Working Party) gave deadline of January 31 for U.S. and EU to come up with solution. Deadline also a grace period for compliance.
- ▶ Note: Data transferred under Model Clauses and Binding Corporate Rules subject to same U.S. government access issues – will these mechanisms continue to be valid?

Privacy Shield

- ▶ Privacy Shield announced February 2, 2016; Text / Adequacy Decision released February 29, 2016.
- ▶ Article 29 Working Party will give opinion on Commission's Adequacy Decision; Opinion to be finalized during April 12-13 meeting
- ▶ Member state representatives must also adopt the Adequacy Decision before Privacy Shield becomes effective
- ▶ Chances of success – unclear
- ▶ In the mean time, Safe Harbor remains invalid transfer mechanism

Participating in the Privacy Shield

- ▶ Annually self-certify compliance with Privacy Shield Principles of Notice, Choice, Accountability for Onward Transfer, Security, Data Integrity and Purpose Limitation, Access, and Recourse, Enforcement and Liability.
- ▶ Publicly declare commitment to comply with Principles
- ▶ Privacy Shield Privacy Policy
- ▶ Be subject to FTC or U.S. Department of Transportation regulation (Other regulatory bodies may be included in the future)

Privacy Shield – what's changed

- ▶ **Addressing deficiencies cited by EU**
 - U.S. Government Access
 - Judicial Redress Act/Ombudsman
 - Annual Joint Review
 - Enforcement – Department of Commerce will:
 - Verify self-certification requirements
 - Expand efforts to follow up with organizations that have been removed from the Privacy Shield list
 - Search for and address false claims of participation
 - Increase cooperation with DPAs

Privacy Shield – what's changed

▶ Operational Impacts for Participants

- Additional information required to be provided for Notice principle (Privacy Shield privacy policy)
- Tightened conditions for onward transfer to third parties (contractual requirements for third party controllers)
- 45 days to respond to individual complaints
- Additional avenues to address individual complaints (take complaint to home DPA which can refer to FTC; Privacy Shield Panel)
- Organizations processing HR data must cooperate with and respond directly to DPAs regarding processing of such data
- Liability for third party agent violation of Principles
- Participants that drop out must continue to comply with respect to personal data collected under Privacy Shield

Alternatives to Safe Harbor

- ▶ **Model Clauses** – standardized data protection contracts approved by EU and DPAs

PROS	CONS
<ul style="list-style-type: none">• Cheaper and faster than binding corporate rules• No annual recertification• High level of certainty for compliance• Easy to monitor when relatively few contractual relationships are implicated	<ul style="list-style-type: none">• Non-negotiable• No limitation of liability• Strict subcontracting requirements• May require filing or approval depending on EU member state• Directly enforceable by data subjects• Must be changed over time to account for new data and entities

Alternatives to Safe Harbor

- ▶ **Binding Corporate Rules** – legally enforceable privacy rules for the transfer of personal information between entities in the same corporate group

PROS	CONS
<ul style="list-style-type: none">• Provides enterprise-wide approach for cross border data transfers• Can be tailored to a companies culture and processes• Encourage implementation of privacy program within corporate group	<ul style="list-style-type: none">• Takes time and money to implement• Only valid for transfers between entities in the corporate group• Revisions to BCRs would require approval by DPAs, making change difficult

Alternatives to Safe Harbor

- ▶ **Consent** – agreement of data subject to transfer of their data.

PROS	CONS
<ul style="list-style-type: none">• Less burdensome than execution of multiple model clauses or implementation of BCRs• May be effective solution for B2C websites requiring consent for specific transactions	<ul style="list-style-type: none">• Interpreted restrictively• Precise requirements to obtain voluntary, informed, unambiguous consent must be met (including affirmative action under new GDPR)• Consent can be withdrawn at any time• Need to keep good records of consent• Data subjects may not consent• Freely given consent difficult to establish in employment context

Alternatives to Safe Harbor

▶ Other Alternatives

- Derogations (other than consent)
 - Transfer necessary for performance of a contract
 - Transfer necessary or legally required on important public interest grounds or for the establishment, exercise or defense of legal claims
 - Transfer necessary to protect vital interests of data subject
- Direct approval by a national DPA (if available)

Personal data transfers to the US: the UK perspective

- ▶ Invalidation of Safe Harbor – a wake-up call for many
- ▶ Corporate deals – the problem with online data rooms
- ▶ Privacy Shield – sales badge for US businesses?
- ▶ GDPR – will it change anything?

General Data Protection Regulation (GDPR)

- ▶ Why do we need new laws?
- ▶ When will the new laws (finally) take effect?

GDPR and Brexit

- ▶ Would Brexit make the GDPR irrelevant to UK businesses?
- ▶ Probably not, because:
 - 2018 implementation – will exit be accomplished by then?
 - if UK joins EEA, we'll probably end up with GDPR anyway
 - the UK will want an “adequacy” rating in any event

GDPR: some headline points

- ▶ “Privacy by design and default”
- ▶ Record keeping requirements
- ▶ Impact assessments
- ▶ Data protection officers
- ▶ Breach notification
- ▶ Fines and penalties

Territoriality: non-EU and multi-nationals

- ▶ Widening the net – offering goods/services to Europeans
- ▶ The “one stop shop” and the controller’s “main establishment”

Appointing a processor

- ▶ Processor = anyone who processes personal data on behalf of the Controller
- ▶ Can your processor guarantee data security?
- ▶ Processors are now directly responsible for compliance
- ▶ Enforcement and penalties

GDPR – what will change (1)

Now	2018
Notification	No longer needed
What is “personal data” / “sensitive personal data”?	Some changes – needs client review to assess impact on them (particularly direct marketing)
Consent to processing	Expanded requirement requires greater clarity, but in many cases consent not an issue as some other “gateway” permits processing. Demise of the “soft opt in”? All a big issue for direct marketing and analytics , but also requires changes to mechanisms/wording used to get consent to the collection of data generally (including “opt in” and “soft opt in” and cookies. Note that PEC Directive is to be made consistent with GDPR)
Subject information	Broad requirements to tell data subject what is going on – one to watch out for, since it is currently ignored
Data accuracy	No change – keep it accurate

GDPR – what will change (2)

Now	2018
Data security	No change – keep it safe. Standards evolve over time
Data retention	No change – keep it only for so long as possible. NB enhanced rights of data subject to enforce this, and also the “right to be forgotten”
Transfer to third parties and intra–group transfer within EU	Make sure you fall within one of the “gateways” permitting this (no substantial change – but check the wording for your circumstances)
Export outside EEA	No substantial change – though NB impact of Schrems and “Safe Harbor 2.0”
Use of third party “processors” (payroll etc)	More of the same. This <u>will</u> need contracts to be updated
Subject Access Requests	Clients need to become familiar with the new text – potentially broader requirements and shorter time to respond
Data portability right	New

GDPR: the US perspective

- ▶ Lead regulator
- ▶ Breach notification
- ▶ Contracts with processors

Where do businesses go from here?

- ▶ Transfers of personal data to the United States
- ▶ GDPR implementation

Questions & Answers

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