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Between The Lines

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If you are Doing Business in Europe are you Complying with the General Data Protection Regulation?

**By: Jennifer Mullins, CIPP/E, Esq., Associate General Counsel, DigitalGlobe
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Any Colorado or other US company that has a presence in the European Union (“EU”) should be aware of big changes that came May 25, 2018 with respect to cross-border transfers of personal data from EU individuals. This includes any US business that targets EU individuals in connection with the offering of goods or services. US companies that have subsidiaries and employees in the EU should especially be aware of these changes as such businesses usually will collect and/or transfer personal data of their EU employees to the US. This article is a brief overview of the General Data Protection Regulation (“GDPR”), which became effective May 25, 2018, and associated requirements.

EU v. US Privacy

Privacy and protection of personal data is viewed very differently in the EU than in the US. While privacy is generally viewed as a consumer protection issue in the US, it is viewed as a basic human right by the European Commission (“EC”). In the US, laws protecting personal data usually extend no further than requiring a business to inform its customers when a disclosure in violation of its confidentiality obligation has occurred, or is otherwise industry specific (such as for health information, or consumer financial information). The EU, however, takes a comprehensive proactive view with respect to the collection and processing of all personal data of its individuals. For that reason, the EU has for the past two decades used a comprehensive EU Data Protection Directive (“Directive”) which is a comprehensive privacy framework and requested its member states to give effect to the Directive through local legislation.

The Reach of the GDPR

The GDPR harmonizes the Directive for collecting and processing personal data (as further described below), implements additional accountability and other conditions, and turns the Directive into a formal regulation across all EU member states and, in the process, will affect numerous businesses overseas. US companies with EU subsidiaries and/or EU employees or contractors generally will need to comply. The GDPR will apply in all instances where a company processes personal data in the EU. This includes having a physical facility in the EU, servers doing processing in the EU (except if the data merely “passes through” the EU), or collecting data for providing goods and services to EU data subjects (in which case the collection must be done in accordance with GDPR).

The GDPR is truly a global law because it even applies to businesses established outside the EU if the businesses process personal data of EU individuals (regardless if the processing takes place in the EU or not) in connection with the offering of goods or services to individuals in the EU, or engage in business activities that monitor the EU individuals’ behavior. In the context of goods or services, the GDPR will apply if it is apparent that the US company envisages offering such goods or services to EU individuals, such as when a commercial website uses a language or a currency generally used in one or more member states of the EU; or the website mentions customers or users who are EU individuals, etc. Although this will be determined on a case-by-case basis, merely having a website which can be accessed by anyone in the world, including someone in the EU, is not sufficient.

If a business falls within the purview of the GDPR, that business must then follow one of the permitted methods for cross-border transfer of personal data of EU

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We are pleased to announce that G. Brent Coan, managing member, John W. Madden, III, of counsel, and Paul T. Maricle, Esq. were included in the 2019 Edition of The Best Lawyers in America.

This is Mr. Coan's sixth year in a row having been selected by his peers for inclusion for corporate and real estate law, Mr. Madden's fourth year having been selected for his work in construction law, and Mr. Maricle's first year having been selected by his peers for business organizations (including LLCs and Partnerships)



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individuals as set forth in the GDPR and as described below.

Personal Data

The definition of personal data in the EU includes not only typical personally identifiable information such as name, address, social security number, but also items like criminal record, genetic information, health information, or religious beliefs. Generally, anyone collecting personal data from an individual in the EU (whether customer, employee or otherwise) needs a lawful purpose to do so. A lawful purpose may entail collection by obtaining the consent from the data subject, where the data is necessary to perform a contract, where necessary to comply with a legal obligation, or the collection is in the legitimate interest of the data controller. For example, the collection of employee data may be lawful because the data is necessary to fulfill the employment agreement between employer and employee as well as necessary to comply with a legal obligation (i.e. submission of tax information to tax authorities).

In addition, the GDPR imposes data minimization obligations which mean that the business collecting personal data should only collect no more than necessary in relation to the purpose of such collection. You must notify the data subject of the purpose of collection. Should a business seek to use the information for a different purpose from the original, the business generally must identify the lawful purpose for the secondary use as well. The GDPR also imposes requirements as to retention,

accuracy, integrity and accountability with respect to personal data. Under the GDPR, the data subject will gain more expansive rights to access data as well as rights regarding data portability and erasure.

Transferring Data

In order for personal data to be transferred from the EU to an outside jurisdiction, such as to the US, the US business must first comply with the conditions set forth in the GDPR. The GDPR specifies certain transfer vehicles to ensure that personal data is protected while allowing for movement across the EU border. These obligations flow downstream, meaning that not only must the US business collecting personal data comply, it must also ensure that any processors and sub-processors of such personal data comply with GDPR. There are various methods to achieve compliance under the GDPR. In the US, the most efficient method for achieving adequacy with respect to recurring cross-border transfers of personal data is the certification process pursuant to the US-EU privacy shield. The EU-U.S. Privacy Shield Framework was designed by the U.S. Department of Commerce and EC to provide businesses on both sides of the Atlantic with an efficient mechanism to comply with the GDPR when transferring personal data from the EU to the United States. (Because Switzerland is outside of the EU, the US has separately negotiated a similar privacy shield with Switzerland.) For example, a US company who establishes a European subsidiary with European employees and maintains HR information of all of its employees at its US headquarters likely will find the certification process under the privacy shield the best method to comply with GDPR. This certification will usually ensure that all such cross-border transfers of personal data are compliant with GDPR. Aside from the certification process, the US company can use standard contractual clauses (containing specific requirements promulgated by the EC), enact binding corporate rules or obtain express consent from the EU individual on a case-by-case basis. The specific method to comply with GDPR will depend on the nature of the US company's business operations in the EU. Sometimes, it may make sense for a US business to undertake more than one method for GDPR compliance as a matter of caution.

Consequences for Noncompliance

Noncompliance with the GDPR will be taken seriously by the EC and will be subject to legal sanctions, including criminal penalties and monetary fines (up to 4% of worldwide revenue). While there are jurisdictional considerations, US companies may thus be subject to legal sanctions for violating the GDPR even without a traditional establishment in the EU such as a subsidiary or branch office. The GDPR requirements also apply to any company, large or small. Therefore, any US company, however small, who is offering goods or services to individuals in the EU or engages in activities which monitor the individuals' behavior, should be aware of the basic framework of the GDPR and how to comply with it. We recommend that any business that will be affected by GDPR consult an advisor for further information and obtain advice tailored to its specific situation. •

Protecting Your Business Assets

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Most business owners understand the necessity of forming a business entity, generally as a corporation or limited liability company, to protect their personal assets from the risks and liabilities associated with their businesses. While there are some nuanced differences in the liability protection provided by the two primary forms of business entities, each does provide limited liability protection to their ownership. Generally, absent certain instances where an entity is

being used inappropriately, the owners' liability is limited to losing their investment.

Of course, this is a great start to managing business risk, as the owner needs to limit personal exposure. The sophisticated business owner, however, goes a step further by asking the question, "How do I protect the business' assets from the business' risks?" Obviously, insurance comes to mind as one answer, and is an absolute must, but there are still more options with respect to business structure that should be considered.

One common structural option is to implement operating and holding companies. With this structure, substantial assets, such as real estate or equipment, are "held" in one entity, whose sole business purpose is owning and leasing such assets. This holding company entity then leases the assets to the operating company entity. The operating company entity is then the entity that conducts the principal business operations.

Provided the entities are properly established and the agreements between them are properly drafted, respected and otherwise defensible, this separates substantial assets from the risks of the operating company, or the principal business in which the assets are used. As such the business assets are protected in a manner that is similar to the manner in which the corporation or limited liability

company entity structure protects the owner's personal assets – there is legal distinction that cuts off responsibility. The protection, however, may in fact be even greater as the investment in the assets is likely protected as well.

If you haven't considered business structures beyond a single entity to protect your personal assets, you should consult with both your legal and tax advisors. You may be exposing your business to more risk than is necessary, and perhaps missing out on some tax advantages as well. •

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