



# Post-Schrems II Checklist for EU-US Data Transfers

Odia Kagan, Partner

The Court of Justice of the European Union recently invalidated the EU-U.S. Privacy Shield, the framework that facilitated transfers of personal data from the European Union to the United States for thousands of companies. It also imposed qualifications on the use of Standard Contractual Clauses, the most popular cross-border transfer mechanism.

Here are 10 things U.S.-based companies should do or think about now:

- 1. Assess Your Data Transfers (Including Subprocessor)** to determine which rely on Privacy Shield as the sole method of transfer. Review and revise your Article 30 record of processing.
- 2. (If using Privacy Shield) Find an Alternative Method of Transfer**, such as, Standard Contractual Clauses or, for groups, Binding Corporate Rules (BCRs).
- 3. Maintain and Abide by Your Privacy Shield Certification Obligations** or risk Federal Trade Commission (FTC) enforcement.
- 4. Amend Your Privacy Notice** to address not using Privacy Shield as your sole transfer mechanism.
- 5. Assess (With Counsel) and Document Whether or Not You Are Subject to the Broad Scope of Section 702 of FISA.**
- 6. Assess Whether the Nature of Your Transfer Makes it Less Likely to Be Subject to Foreign Intelligence Investigations.** Consider, with legal counsel:
  - The nature of the data
  - The type of recipient
  - The purpose for which it was transferred
  - Have you (or your subcontractors) ever been subject to or contacted in relation to a FISA investigation? With respect to what information?
- 7. Examine Technical/Organizational Solutions That Would Help Mitigate Risk.** Consider:
  - Data minimization
  - Encryption
  - Storage in the EU
  - Containerized storage solutions (trustee arrangements)
  - Expanded recourse mechanisms for EU individuals.
- 8. Track Data Protection Authorities' Statements** to see their concerns; look out for European Data Protection Board (EDBP) guidance.
- 9. Stay in Close Contact With Your Subprocessors** — Ask them about their approach, and watch for technical or other solutions they may have.
- 10. Consider Using GDPR Data Transfer 'Derogations' as a Fall-back Mechanism** — Consent or necessity for performance of contract may be a legal basis but consider the EDPB guidance limiting their use and consider a “consent wall”/consent management tool.

*For assistance with your cross-border transfer issues, please contact Odia Kagan, Partner and Chair of the GDPR Compliance & International Privacy Practice. She can be reached at [okagan@foxrothschild.com](mailto:okagan@foxrothschild.com) or 215.444.7313.*

*None of the information presented in this article constitutes legal advice nor is it intended to be fact-specific. Readers should consult with knowledgeable legal counsel to determine how applicable laws pertain to specific facts and situations.*

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