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# Preparing for the EU General Data Protection Regulation

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## May 25, 2018

Effective date of the EU General Data Protection Regulation

- Significant new regulation affecting the use and transfer of "personal data" in the European Union
- Backed by significant new penalties for non-compliance including the greater of €20 million or "4% of annual worldwide turnover"

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# Develop a Timeline

**Timeline and Project Plan**

Alston & Bird recommends following the guidance provided by the French Data Protection Authority, Commission nationale de l'informatique et des libertés (CNIL) on March 15, 2017, regarding best practices to demonstrate GDPR compliance by May 2017. CNIL is the first data protection authority to recommend guidance for GDPR compliance. You can read more about the CNIL's guidance on Alston & Bird's Privacy Blog in post titled: French CNIL Releases GDPR Compliance Toolkit. The tasks and proposed dates are set forth below. For team and budgeted hours, please refer to the budget detail uploaded in Microsoft Excel.

| No. | Date | Activity | Description |
|---|---|---|---|
| | | | **Phase I**<br>**Appoint Data Protection Officer**<br>**February 2018** |
| **1.** | February 2018 | Decide Whether to Appoint a Data Protection Officer | Consider whether necessary to appoint a data protection officer (DPO), even in the absence of a legal requirement. French Data Protection Authority Recommends this be done even in the absence of a legal requirement to do so.[1] If so, work with client to identify appropriate person for this role in accordance with recent EC DPO |




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## Applies Broadly to "Processing" of "Personal Data" of EU Residents

- ***"Personal data"*** means any information relating to an identified or identifiable natural person ("data subject"). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.
- ***"Processing"*** means any operation or set of operations performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

*Applies to businesses that offer goods or services to EU residents or monitor the behavior of EU residents.*

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## EU Regulators Eager to Start Enforcing the GDPR





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## Selected Key Requirements

- Update privacy notices to identify (a) legal bases for processing; (b) legitimate interests pursued; (c) retention periods; and (d) transfer recipients (Art. 13-14)
- Maintain detailed written records of all processing activity, and the legal basis for that processing (Article 30)
- Privacy by Design and Privacy by Default
- PIAs and DPOs
- Expanded Individual Rights

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"Privacy by Design" and "Privacy by Default" Required

- Limit retention
- Minimize use of personal information




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# PIAs

- Data Protection Impact Assessments are required if
  - (i) "high risk" to rights and freedoms,
  - (ii) profiling/automated decision-making that legally or significantly affects individuals, or
  - (iii) "large scale" sensitive data processing.

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- Data Protection Officer must be designated if "the controller's or processor's 'core activities' require 'regular and systematic monitoring of data subjects on a large scale' or consist of 'processing on a large scale of special categories of data.'"

  - *"core activities" and "large scale" not defined*

- "Special categories of data" –
  - Race
  - Politics
  - Religion or "philosophical beliefs"
  - Trade union membership
  - Genetic, biometric, health data or data regarding sex life or sexual orientation


- **Think: HR? marketing, mass communications, or "Big Data" analytics of individuals? Other activities?**




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Data Protection Officers:

- required to have "expert knowledge of data protection law and practices;"
- must report to the "highest management level" of the organization; and
- can't be fired or "receive any instructions" regarding the exercise of tasks.

***Also required for processors – significant for companies who don't have EU locations but who have EU clients or customers***

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## Expanded Individual Rights

- Data Access
  - Right to know purpose of processing, categories of data concerned, the "existence of automated decision-making," and "meaningful information about the logic involved."
- Data Portability
  - Right to usable (machine-readable) copy of information concerning the data subject
- Right to Object
- Right to Rectification
- Right to Erasure




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## Other Requirements

- Must notify supervisory authority within **72 hours** of "becoming aware" of a data breach
- Recordkeeping (individual rights requests, consents, refusal of access, refusal to stop processing, record processing activities)
- Subcontracting (mandatory outsourcing / subcontracting requirements, including contractual flow-downs)
- New children's privacy provisions

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# Penalties

- For controllers and processors
- Greater of €10M or "up to 2% of the total worldwide annual turnover of the preceding financial year" for (e.g.):
  - Failure to obtain proper parental consent for processing children's data
  - Failure to adhere to principles of data protection by design and by default
  - Failure of your DPO to perform tasks properly




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- Greater of €20M or "up to 4% of the total worldwide annual turnover of the preceding financial year" for:
  - Failure to adhere to "principles of processing" to collect data for "specified, explicit and legitimate purposes" and not process otherwise;
  - Failure to adhere to data minimization or data retention requirements;
  - Failure to maintain "appropriate" security;
  - Failure to process data based on one of 6 specific identified bases for process; or
  - Failure to give effect to the data subjects' expanded rights

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## Other Enforcement/Penalties

- Also empowers individual data subjects by authorizing actions against DPAs, against controllers or processors, by authorizing non-profits to represent individuals, by authorizing compensation for data subject damaged by violation
- And also……

member states may impose "other penalties"




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## What We're Doing to Help

- Roadmap to GDPR Series
- Blog Posts
- Major Engagements


  - World's largest logistics company, largest fast-casual dining company, major global data security and hospitality firms, etc.
  - Data mapping, review of organizational controls, vendor contracting, updating notices, gap analysis, review of key systems (CRM, HR, systems where data subject may exercise rights)

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# Recognizing and Responding to GDPR Issues

- How to identify whether your client has an issue?
  - First step is easy: customers or employees in the E.U? any processing of EU "personal data"?
- Next Steps:
  - These can be significant projects for large organizations
  - Should be working on this NOW / yesterday.




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# Global Compliance Checklist

- Identify the Countries that are critical for your business
- Understand whether you have cloud vendors or other vendors that might trigger compliance obligations
- Conduct privacy/security due diligence
- Be Aware of key developments in the EU, China, and US
- Train and Engage Your Employees

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# Cross-Border Transfer Laws

European Union

Russia

Switzerland

China

South Korea





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# Synthesizing Analysis on Data Transfers in APEC (Examples)

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DATA LOCALIZATION REQUIREMENTS IN SELECTED APEC COUNTRIES

| No. | Localization Criteria | Vietnam | Malaysia | Philippines | Thailand | China | Hong Kong | Taiwan | India | Singapore | South Korea |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Country has data localization laws | Yes[1] | Yes[2] | Yes[3] | No[4], [5] | Yes[6] | Yes[7] | Yes[8] | Yes[9] | Yes[10] | Yes[11] |
| 2 | Law(s) apply to ALL PII in country | No | Yes[12] | Yes[13] | | No | Yes[14] | No | No | Yes[15] | Yes[16] |
| 3 | Law(s) apply to only certain types of PII in country | Yes[17] | No | No | | Yes[18] | No | Yes[19] | Yes[20] | No | Yes/No[21] |
| | (a) PHI | No | | Yes[22] | | Yes[23] | | No | Yes | | Yes[24] |
| | (b) Sensitive Data | No | | Yes[25] | | Yes[26] | | No | Yes[27] | | Yes[28] |
| | (c) Posts to Social Media/Gaming/Web Forums | Yes[29] | | | | No | | No | No | | |

| No. | Notice Requirement Description | Source of Notice Requirement | | | | | |
|---|---|---|---|---|---|---|---|
| | | Privacy Shield | GDPR | WP29 GUIDANCE | APEC | ePrivacy | ePrivacy Proposal |
| 1. | **Personal Data Collection** | | | | | | |
| a. | Categories/ Sources of Categories of Personal Data | | X | X | X | | |
| b. | Types of Personal Data collected | X | X | X | X | X | X |
| 2. | **How Personal Data is Collected** | | | | | | |
| a. | Personal data collection practices and policies | | | X | X | | |

# Global Laws Requiring Vendor Management

- **GDPR** (effective 5/25/18)
  - Article 44- processor

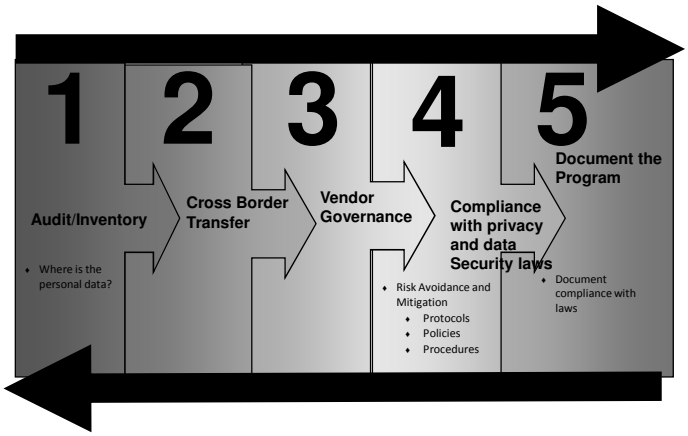
  Obligations for onward transfer
- **Privacy Shield**
  - Contractual requirements for vendors to comply with the (1) Security and (2) Accountability for Onward Transfer Principle
- **Chinese Network Security Law** (effective 6/1/17)








# Vendor Management Practical Guidance



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# Questions

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