

NEWSLETTER

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Transfer of Personal Data to the USA – The Swiss-US Privacy Shield

On 11 January 2017, the Swiss Federal Data Protection and Information Commissioner announced that a new agreement on the transfer of personal data from Switzerland to the USA had been reached. The Swiss-US Privacy Shield Framework replaces the former US-Swiss Safe Harbor Framework. US companies may self-certify under the Swiss-US Privacy Shield as from 12 April 2017.

I. INTRODUCTION

According to Article 6 para. 1 of the Federal Act on Data Protection (“FADP”), personal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, in particular due to the absence of local legislation that guarantees adequate protection of personal data. As the US from a Swiss perspective do not guarantee such adequate protection of personal data, in 2008 the **US-Swiss Safe Harbor Framework** (“US-Swiss Safe Harbor”) was established, which should guarantee adequate protection of personal data transferred to US companies registered under the US-Swiss Safe Harbor.

In the absence of such registration, personal data may be transferred to the US inter alia (see Article 6 para. 2 FADP):

- if **the Swiss data exporter has entered into a written agreement with the US data importer**; the Swiss Federal Data Protection and Information Commissioner („FDPIC”) provides a template Swiss Transborder Data Flow Agreement and the EU provides standard contractual clauses for this purpose; or

- in case of **consent** of the data subject **in a specific case**; a general consent is not sufficient and may be withdrawn at any time; or
- if personal data are transferred within groups of companies, provided the companies involved are subject to data protection rules that ensure an adequate level of protection (**Binding Corporate Rules**).

On 6 October 2015, the EU Court of Justice declared the decision of the European Commission invalid, which found that the US guarantee an adequate level of protection when personal data is transferred under the analogous US-EU Safe Harbor Framework. As a consequence, the US-Swiss Safe Harbor was also formally terminated by the Swiss Federal Council. Since then, Swiss companies which formerly relied on the US-Swiss Safe Harbor were recommended to transfer personal data to the USA only if they either implemented written agreements or Binding Corporate Rules.

Following the approval of the EU-US Privacy Shield Framework (“EU-US Privacy Shield”) on 12 July 2016, the FDPIC announced on 11 January 2017 that the Federal Council approved the **Swiss-US Privacy Shield Framework** (“Swiss-US Privacy

Shield”), replacing the aforementioned US-Swiss Safe Harbor (for FDPIC’s documentation click [here](#)).

II. SWISS-US PRIVACY SHIELD

1. CONTENT

Under the Swiss-US Privacy Shield, the following improvements have been introduced in comparison with the US-Swiss Safe Harbor:

- **Cooperation** between the US Department of Commerce and the FDPIC will be **intensified**;
- **Stricter application of data protection principles** by participant companies;
- **Improved management and supervision** of the framework **by the US authorities**;
- Investigation of the processing of personal data of Swiss data subjects by US security services by an **ombudsperson**;
- **Binding arbitration** if a complaint of a data subject may not be resolved through other available remedies.

2. REGISTRATION

With the introduction of the Swiss-US Privacy Shield, the same standards apply as for data exports under the EU-US Privacy Shield. However, the participant companies need to register separately under the Swiss-US Privacy Shield.

For the Swiss-US Privacy Shield, self-certifications will be accepted as from **12 April 2017**. An annual re-certification is needed.

3. WHAT TO DO

Swiss companies need to evaluate whether they transfer personal data to the US and whether any transfer is compliant with Swiss law (Article 6 FDAP). If not, one possibility is to make the US data importer self-certify under the Swiss-US Privacy Shield.

US companies interested in a certification under the Swiss-US Privacy Shield should prepare for their self-certification, especially:

- The company’s **privacy policy should be revised** in order to be compliant with the Privacy Shield Principles and any references to the US-Swiss Safe Harbor Framework must be removed from the privacy policy;

- **Information and documentation** needed for the self-certification should be collected (an overview of needed information may be found under: [Self-Certification Information | Privacy Shield](#)).

III. OUTLOOK

On 16 September 2016, Digital Rights Ireland has lodged an action for annulment of the European Commission’s Adequacy Decision, which approved and adopted the EU-US Privacy Shield, before Europe’s second highest court (General Court; case number: T-670/16). Furthermore, according to a press release of 23 March 2017, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs voted in favour of a resolution declaring the EU-US Privacy Shield inadequate. The resolution is now expected to be voted on by the European Parliament as a whole in April 2017. The future of the EU-US Privacy Shield is therefore uncertain.

The FDPIC has reserved the right to re-evaluate the adequacy of protection provided by the Swiss-US Privacy Shield on an annual basis and will thereby also take into account any EU court judgements or developments. Therefore, the future of the Swiss-US Privacy Shield remains uncertain and Swiss companies should evaluate whether a written agreement with the US data importer or (in case of intragroup transfer of personal data) Binding Corporate Rules may be implemented.

In addition, the following developments regarding data protection have to be taken into account by Swiss companies in the nearer future:

- The **EU General Data Protection Regulation** replacing the current Directive will apply as from 25 May 2018. For Swiss companies, this Regulation may be applicable if goods or services are offered or the behaviour of data subjects is monitored within the EU.
- The Federal Council has submitted for consultation a preliminary draft of a **revised FADP** (the preliminary draft in German may be found [here](#)) with the aim to strengthen the protection of personal data and to accommodate the developments within the EU and on the level of the Council of Europe. The consultation period has expired on 4 April 2017. The synthesis report and the Federal Council’s dispatch are expected by the summer 2017.

The content of this Newsletter does not represent legal advice and may not be used as such. For a personal consultation, please get in touch with your contact at Suter Howald Attorneys at Law or with one of the following persons:



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