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PRIVACY AND CYBERSECURITY ISSUES IN M&A TRANSACTIONS

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Overview

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- Why should I care?
- Five Key Legal Requirements
 - Sector-Specific laws
 - Privacy Policies
 - Data Security Requirements
 - Breach Notification Laws
 - Cross-Border Restrictions
- Implementing Privacy and Security in Deals
 - Diligence
 - Reps and Warranties
 - TSAs

Why should I care?

- If a target company cannot collect and deploy data consistent with data privacy laws, the business model on which the company is premised may be flawed
- Failure of target company to meet its data privacy and security obligations can be a major risk for acquiring company
- Transfer and sharing of data in connection with diligence and after the transaction may in itself violate data privacy laws

Good News / Bad News

- **Good News** – there is no all-encompassing data privacy or cybersecurity statute in the U.S.
- **Bad News** – there is no all encompassing data privacy cybersecurity statute in the U.S.:

Attorney General Enforcement

FTC Act

FCRA

CAN-SPAM

COPPA

Breach Notification Laws

Data Disposal Laws

FERPA

Gramm-Leach-Bliley

MA Data Security Laws

Red Flags Rule

FACTA

EU “safe harbor” rules

Consumer Class Actions

PCI and DSS Credit Card Rules

Document Retention

Requirements

HIPAA

CA Online Privacy Act

Stored Communications Act / ECPA

Do Not Call Lists

Telephone Consumer Protection Act

Video Privacy Protection Act

Wire Tapping liability

Invasion of Privacy Torts

Data Encryption Laws

E-Sign

Computer Fraud and Abuse Act

Communications Decency Act

Spyware Laws

RFID Statutes

FDCPA

Driver’s Privacy Act

Social Security Number Laws

Regulation Z

Others State Laws

1. Sector Specific Privacy Laws

Money	Health	Kids
<ul style="list-style-type: none">• Gramm-Leach-Bliley Act• Fair Credit Reporting Act (FCRA)• State Laws	<ul style="list-style-type: none">• Health Insurance Portability & Accountability Act (HIPAA)	<ul style="list-style-type: none">• Family Educational Rights & Privacy Act (FERPA)• Children's Online Privacy Protection Act (COPPA)• State Laws

- Consumer Marketing! Telephone Consumer Protection Act (TCPA), CAN-SPAM, and Do Not Call regulations

2. Privacy Policies

- FTC and CA Online Privacy Act
- Self-imposed regulation
- Basic principles
 - Notice
 - Access and Control
- Must notify regarding material, retroactive changes
- Language to look for:
 - “Transfer of assets” language
 - Restrictions on sharing
 - Promises about security
- Look at the language for all entities involved; website and mobile
- Other public statements about privacy and security?

3. Data Security Requirements

- Sector-specific laws may apply
- Contracts may require certain security standards
- MA Security Regulations
 - Have a written information security plan
 - Additional administrative discipline
 - Social security numbers
 - Encryption
 - Training

4. Breach Notification Laws

- 48 States and D.C.
- Based on the individual's residence
- Triggering elements vary
- Encryption / lack of use exception – sometimes
- Issue of “who's obligation”?
- Timing of notice– “as soon as practicable,” but need information to notify
- Vendor management

5. Cross Border Data Transfers

- **Transfers out of EU**

- Privacy Shield
 - New regime for transfer from EU, after European Court of Justice recently held that the safe harbor regime is invalid
 - Tougher new requirements; questions remain
- Model clause agreements: good, but must have right language and foreign counterparty who retains liability.
- Binding Corporate Rules: hard to implement at multi-national level; can be good for isolated transfers. One European entity retains liability.
- Consent of Data Subjects: really only works at an individual level; can be revoked at will; not good for database or large-scale transfers. Can be good if just a few European employees or customers.
- Necessary for Contract Performance: very limited to “necessary”; e.g. address for shipping.

- **Transfers from APEC Countries; Russia**

M&A - Reps and Warranties

- Privacy and Security related reps and warranties are most often included in the “Intellectual Property” section.
- Three common Privacy related reps:
 - Compliance. Seller is in material compliance with all applicable Laws, as well as its own rules, policies and procedures, relating to privacy, data protection, and the collection, use, storage and disposal of personal information collected, used, or held for use by Sellers in the conduct of the Business.
 - Claims. No claim, action or proceeding has been asserted in writing or, to the Knowledge of Seller, threatened in connection with the operation of the Business alleging a violation of any Person’s rights of publicity or privacy or personal information or data rights.
 - Security. Seller has taken reasonable measures, including, any measures required by any applicable Laws, to ensure that personal information used in the conduct of the Business is protected against unauthorized access, use, modification, or other misuse.

M&A - Privacy related Diligence

- Privacy related diligence typically involves:
 - *Buy Side:* Reviewing applicable privacy policies to ensure data transfer is permitted. Most should expressly permit transfers in a M&A context.
 - *Buy Side:* Ensuring industry specific rules permit the transfer (kids, money, health, EU, etc.) For these industries, it may make sense to have a conference with the Privacy Officer.
 - *Sell Side:* We always recommend hitting privacy head on, especially in the regulated industries or retail, uploading privacy policies to the data room and describe data collection and transfer issues.
 - *Sell Side:* Keep logs of any data security breaches, remediation efforts, and steps to prevent access in the future. These are more common than one would expect.

M&A - TSAs

- Transition Services Agreements; common in M&A transactions.
 - Often involve some of the most sensitive data that the company (employee data, customer data).
 - Involve a member of the privacy team early when discussing the TSA.
 - Could require an information security audit from Buyer (which is somewhat counter intuitive)
 - Think of them as an outsourcing or hosting deal...the issues are the same!

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QUESTIONS?

Biography



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Doneld G. Shelkey represents clients in global outsourcing, commercial contracts, and licensing matters, with a particular focus on the e-commerce and electronics entertainment industries. Doneld assists in the negotiation of commercial transactions for domestic and international manufacturers, technology innovators, and retailers, and counsels clients in the e-commerce and electronics entertainment industries on consumer licensing and virtual property matters.



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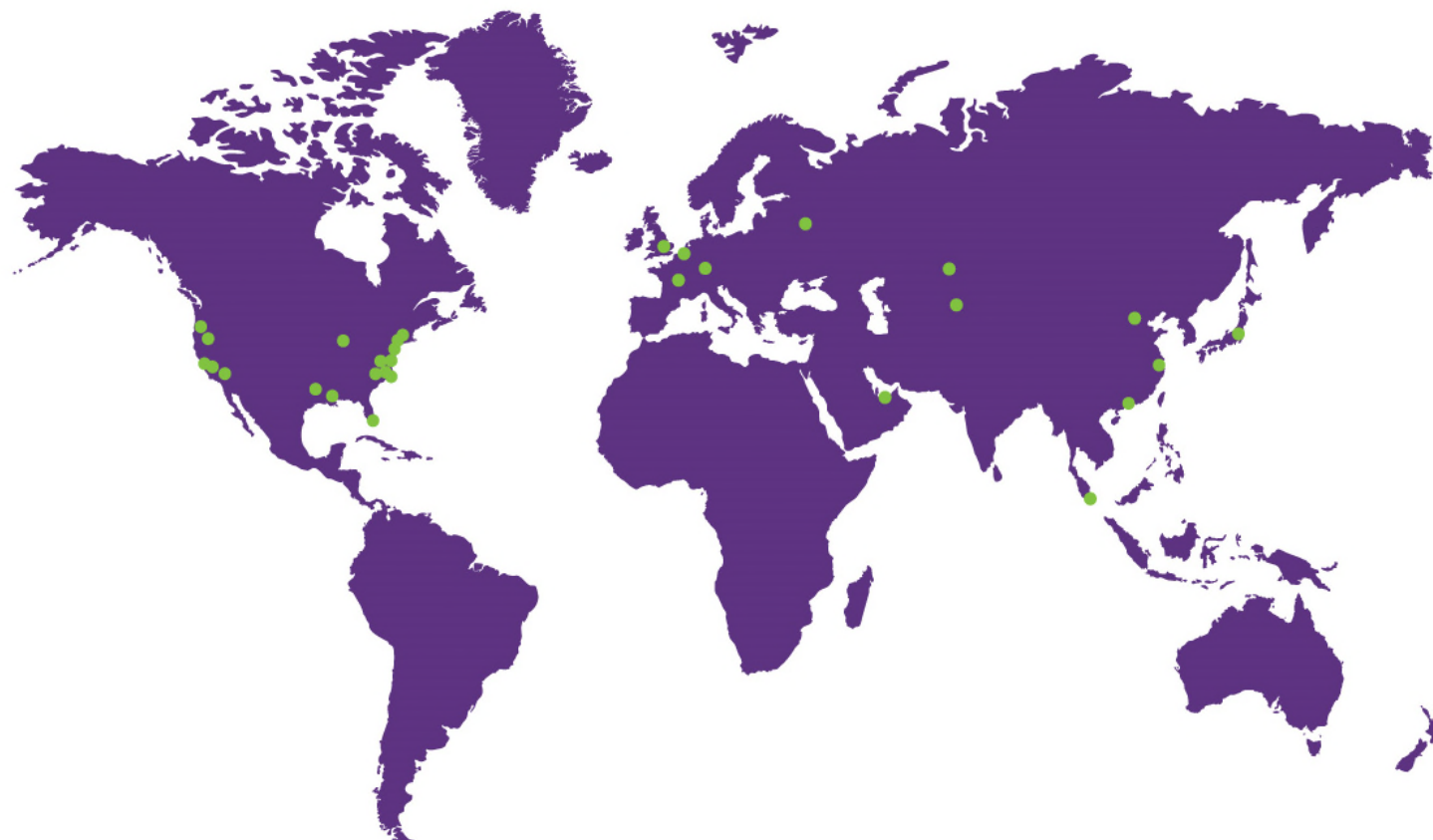
Ezra D. Church regularly represents and counsels clients in privacy and cybersecurity matters. His work in this area includes representation of companies faced with class action litigation, government investigations, and he has advised hundreds of companies in connection with data breaches and privacy and data security compliance issues. He has earned designation as a Certified Information Privacy Professional (CIPP/US) with the International Association of Privacy Professionals and regularly speaks and writes on these topics.

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Asia Pacific
Europe
Latin America
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North America

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