

A photograph of a chessboard with a vertical split down the center. The left side is dark and the right side is light. Chess pieces are visible on the board, including a king, queen, and knight on the right side, and a king and queen on the left side. The background is a solid light blue.

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# PRIVACY AND CYBERSECURITY ISSUES IN M&A TRANSACTIONS

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# Overview

- Introduction
- Why should I care?
- Five Key Legal Requirements
  - Sector-Specific laws
  - Privacy Policies
  - Data Security Requirements
  - Breach Notification Laws
  - International Privacy Rules / Cross-Border Restrictions
- Implementing Privacy and Security in Deals
  - Diligence
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# Why should I care?

- If a target company cannot collect and deploy data consistent with data privacy laws, there may be flaws in the premise for the deal or the business model itself
- 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"><li>• Gramm-Leach-Bliley Act</li><li>• Fair Credit Reporting Act (FCRA)</li><li>• State Laws</li></ul>	<ul style="list-style-type: none"><li>• Health Insurance Portability &amp; Accountability Act (HIPAA)</li></ul>	<ul style="list-style-type: none"><li>• Family Educational Rights &amp; Privacy Act (FERPA)</li><li>• Children's Online Privacy Protection Act (COPPA)</li><li>• State Laws</li></ul>

- 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

- 50 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. International Privacy Rules / Cross Border Data Transfers

- **EU General Data Protection Regulation**

- Comprehensive privacy regime that applies to any collection of personal data relating to an identified or identifiable natural person.
- Apply extraterritorially to any processing of EU resident data by company offering goods or services in the EU or monitoring individuals in the EU.
- Fines as high as 4% of global revenue or 20 million Euros.

- **Transfers out of EU**

- Privacy Shield
- 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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Don 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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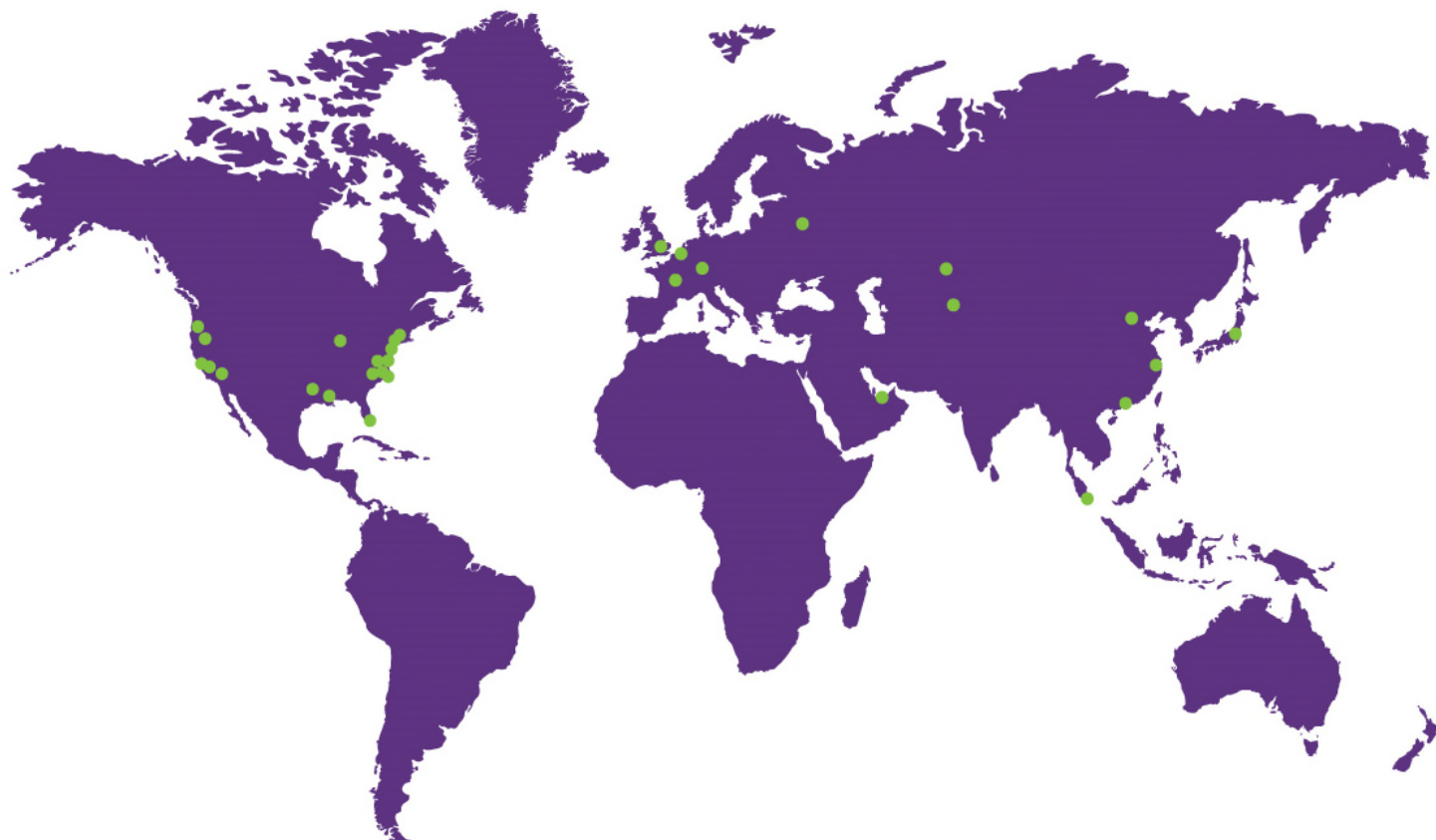
Ezra regularly represents and counsels clients in privacy and cybersecurity matters. His work in this area includes representation of companies faced with class action litigation, government investigations, and he has advised hundreds of companies in connection with data breaches and privacy and data 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.

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Almaty	Dallas	London	Paris	Shanghai*
Astana	Dubai	Los Angeles	Philadelphia	Silicon Valley
Beijing*	Frankfurt	Miami	Pittsburgh	Singapore
Boston	Hartford	Moscow	Princeton	Tokyo
Brussels	Hong Kong*	New York	San Francisco	Washington, DC
Chicago	Houston	Orange County	Santa Monica	Wilmington



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