

Data transfer to the US: What's hot?

The Swiss – US Privacy Shield will be effective in less than a month

The Swiss–US Privacy Shield. In January 2017, the US and Switzerland agreed to a new legal framework to transfer personal data from Switzerland to companies based in the US. Switzerland will apply roughly the same conditions as the European Union, which set up a comparable system with the US in 2016 (the *EU–US Privacy Shield*).

Is it better than the previous agreement? Yes. The new framework replaces the previous Safe Harbor arrangement and improves the protection of personal data for Swiss data subjects. Most new requirements of the Swiss-US Privacy Shield will affect US based companies that wish to self-certify to the agreement, in order to be able to receive data from Switzerland. However, the agreement also contains other improvements, like for instance additional limits to government access to personal data. Further, Swiss residents will have access to an Ombudsman at the US Department of State, in order to file complaints in case of alleged improper government access. Time will tell whether this will be an efficient mechanism or whether it was the result of a political compromise, without much practical impact.

To whom is this good news? The announcement of this new Privacy Shield is good news to you if you are (i) a Swiss company that has to share personal data with a US entity (an external service provider for instance), (ii) a US based company that works with entities or individuals based in Switzerland, (iii) a multinational company that collects data in Switzerland and sends them to the US; in brief, this is an improvement to all Swiss-US trade relationships. For the actors in this industry, the Privacy Shield will help ensuring that personal data flow is protected internationally and allow for transfers to take place easily.

How does it work? Starting **April 12, 2017**, US based companies will be able to self-certify to the CH–US Privacy Shield and the agreement will be fully applicable as of that moment. The US Department of Commerce will publish a list of all entities that are certified, and (only) these will be the companies with which Swiss entities will be able to lawfully share personal data, without it being necessary to have additional contractual guarantees (e.g. *Binding Corporate Rule*, **BCR** or *Standard Contractual Clauses*, **SCC**).

The special case of transfer of human resources data. The Swiss-US Privacy Shield carves out specific obligations for the transfer of Swiss employee data to the US. Organizations intending to receive human resources (**HR**) data from Switzerland must notably implement an HR privacy policy, provide a copy of the latter to the US Department of Commerce and ensure that it is made available to affected employees.

What the future holds. Simultaneously to the Swiss-US Privacy Shield being implemented, the EU-US Privacy Shield is already facing an uncertain future. Two separate challenges against this agreement have been lodged with the European Court of Justice in late 2016. In addition, SCC's – one of the

contractual alternatives to the Privacy Shield - are being challenged in front of Irish courts and are likely to also be referred to the European Court of Justice.

Thus, for the foreseeable future, this will remain an area to watch closely as it may be subject to changes if so decided by the Courts.

But for the time being, any Swiss entity doing business with the US (and vice versa) would be well advised to ensure its data flow is consistent with the upcoming Swiss-US Privacy Shield.

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This briefing does not constitute legal advice. Please contact us should you have any question in relation thereto.

