

2018 GLOBAL TECHNOLOGY SUMMIT
AT THE INTERSECTION OF
BUSINESS, LAW AND TECHNOLOGY

TECHNOLOGY, LAW AND PUBLIC POLICY

TechLaw

Agenda

- Introduction
- Public policy v. innovation
- GDPR/CCPA
- CFIUS/China
- Trade regulation

Panelists

- Ambassador Nicholas Burns, Senior Counselor, Cohen Group
- Eleanor Lacey, Senior VP and GC, Sophos
- Eve Saltman, VP, Corporate Business Development, GC and Secretary, GoPro
- Sally Shin, CNBC

California Consumer Privacy Act

- Landmark US data protection law
- First state law to create significant privacy rights for individuals across sectors
- Complex, demanding operational requirements
- Definition of “personal information” is broader than GDPR
- Heavy nudge to encourage residents to opt-out of sale of their data
- High potential fines for privacy violations, but enforced by the AG only
- Potentially massive class action liability for data breaches

CCPA (cont.)

- Transparency/Website privacy notice
- Right to know
- Right to say “no” - opt-out of sale of personal information
- Right to opt-in to sale of personal information for minors under 16
- Right to obtain deletion
- Right to access
- Right to portability
- Right against discrimination
- Right to sue for statutory damages for data breaches

Comparison of CCPA to GDPR

CCPA

- Any personal information that relates to or is capable of being associated with an individual, device or household
- Shorter notice obligations but specific places where notices must be placed and ways to receive requests
- Right to opt out of sale only, but third parties may opt people out and there are much narrower legitimate interest exceptions
- Rights to access, deletion and portability with narrower exceptions and broader range of personal data
- Right against discrimination for exercising rights
- Data breach class action for statutory damages
- Potentially high AG enforcement for intentional violations

GDPR

- Any information related to an identified or identifiable individual
- Longer notices required but flexible as to how present as long as just-in time and prominent
- No right to opt out of sale per se, although consent (opt in) to collection, use and disclosure of data may be required depending on circumstances
- Similar rights for narrower range of personal data and with broader exceptions
- No such right, but discrimination may render processing unlawful
- No class actions for statutory damages
- Potentially enormous regulator fines

CFIUS

- On August 13, 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)
- FIRRMA was enacted to modernize and strengthen analysis and process of Committee on Foreign Investment in the United States (CFIUS)
- CFIUS reviews investments, mergers, acquisitions and takeovers in which any foreign person may obtain **foreign control** of any person/entity or asset in the US (referred to as “covered transactions”) to determine the effects of such transactions on the **national security** of the US
 - CFIUS can recommend that the President of the United States suspend, prohibit, divest or unwind a “covered transaction” if:
 - a foreign person
 - will assume control
 - over a US business
 - and might take action that threatens to impair US national security.

CFIUS (cont.)

- Investment/acquisition transactions triggering a CFIUS review include the following industries:
 - Technology
 - Communications
 - Defense/aerospace
 - Transportation
 - Infrastructure
 - Energy assets (incl. wind farms)
 - Biotechnology/health
 - Real estate

How can you address CFIUS concerns?

- Assess whether a particular investment, acquisition, or other transaction could be a **covered transaction** subject to the jurisdiction of CFIUS
- Conduct **CFIUS-specific due diligence**
- Depending on diligence results, the parties should submit:
 - a **joint voluntary notice** to CFIUS seeking its approval or
 - a **voluntary declaration** (a lighter notice) to CFIUS pursuant to FIRRMA or
 - a **mandatory declaration** to CFIUS pursuant to FIRRMA
 - CFIUS has yet to issue regulations that implement **voluntary or mandatory declarations**
 - CFIUS may devise a pilot program on declarations in the interim

What makes the CFIUS process challenging?

- CFIUS's jurisdiction over foreign investments in the United States is quite broad and in most cases hinges on whether a foreign person will have “control” over a US business
- CFIUS accounts for a variety of factors when determining the national security implications of a “covered transaction”
 - CFIUS does not disclose the specific factors that influence its analyses
 - CFIUS members have access to non-public information which they will not share with the transaction parties
- In practice, CFIUS reviews can take **longer than the periods specified under applicable law/regulations**

Trade tariffs

- 10% or 25% tariffs on three different lists of thousands of imports from China
 - October 9 deadline for request for exclusion from List 1
 - December 18 deadline for request for exclusion from List 2
 - No exclusion process for List 3
 - List of products:
<https://ustr.gov/sites/default/files/files/Press/Releases/301FRN.pdf>

Trade Tariffs (cont.)

- Possible options to mitigate impact of additional duties
 - Consider possible changes in tariff classification
 - Determine availability of exemption
 - Review processing operations for country of origin
 - Consider alternatives to current purchase arrangements
 - Consider alternative methods for importation to US, such as bonded warehouse, Foreign Trade Zone and Temporary Importation Bonds
 - Review applicability of US drawback statute
- <https://www.dlapiper.com/en/us/insights/publications/2018/10/section-301-additional-tariffs-on-imports-of-chinese-products/>