DATA PROTECTION LAWS OF THE WORLD

United Kingdom vs United States

DLA PIPER

UNITED KINGDOM

Last modified 22 January 2024

LAW

Following the UK’s exit from the European Union, the UK Government has transposed the General Data Protection Regulation (Regulation (EU) 2016/679) into UK national law (thereby creating the **“UK GDPR”**). In so doing, the UK has made a number of technical changes to the GDPR in order account for its status as a national law of the United Kingdom (e.g. to change references to **“Member State”** to **“the United Kingdom”**). These changes were made under the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. *At this time, all material obligations on controller and processors essentially remain the same under the UK GDPR as under the ‘EU GDPR’.*

The Data Protection Act 2018 (**“DPA”**) remains in place as a national data protection law, and supplements the UK GDPR regime. It deals with matters that were previously permitted derogations and exemptions from the EU GDPR (for example, substantial public interest bases for the processing of special category data, and context-specific exemptions from parts of the GDPR such as data subject rights).

In addition,

- Part 3 of the DPA transposes the Law Enforcement Directive ((EU) 2016/680) into UK law, creating a data protection regime specifically for law enforcement personal data processing;
- Part 4 of the DPA updates the data protection regime for national security processing; and
- Parts 5 and 6 set out the scope of the Information Commissioner's mandate and her enforcement powers, and creates a number of criminal offences relating to personal data processing.

On 8 March 2023, the new ‘Data Protection and Digital Information (No. 2) Bill’ (“the Bill”) was introduced to Parliament following on from the consultation by the Department for Culture, Media and Sport on data protection reforms. The

UNITED STATES

Last modified 29 January 2023

LAW

United States privacy law is a complex patchwork of national, state and local privacy laws and regulations. There is no comprehensive national privacy law in the United States. However, the US does have a number of largely sector-specific privacy and data security laws at the federal level, as well as many more privacy laws at the state (and local) level. In recent years, beginning with California, states have begun to introduce their own comprehensive privacy laws, and other states are expected to follow and enact their own comprehensive state privacy laws. Although a bipartisan draft bill (the ‘American Data Privacy and Protection Act’) was introduced in 2022, several senators were in opposition of the bill, and comprehensive privacy law on the federal level is not expected to pass any time soon.

Federal and State Privacy Laws and Regulations

Federal laws and regulations include those that apply to financial institutions, telecommunications companies, credit reporting agencies and healthcare providers, as well as driving records, children’s privacy, telemarketing, email marketing and communications privacy laws.

There are also a number of state privacy and data security laws that overlap with federal law—some of these state laws are preempted in part by federal laws, but others are not. US states have also passed privacy and data security laws and regulations that apply across sectors and go beyond federal law—such as data security laws, secure destruction, Social Security number privacy, online privacy, biometric information privacy, and data breach notification laws. Generally, each state’s laws apply to personal information about residents of that state or activities that occur within that state. Thus, many businesses operating in the United

anticipated reforms aim to reduce the compliance burden on organisations. A few of the proposed changes in the Bill include:

- Amendments to certain definitions, such as “identifiable living individual” (impacting the definition of “personal data”) and the meaning of research and statistical purposes;
- Amendments to data protection principles, including the addition of recognised ‘legitimate interests’ to assist with determining an applicable legal basis;
- Amendments to the conduct of data subject rights, by recognising requests that may be “vexatious or excessive”; and
- Amendments to the obligations of controllers and processors which generally provide more flexibility than the current position, for example with regard to complying with accountability obligations.

It is expected that the Bill will be debated and amended further as it passes through the House of Lords in the first months of 2024, and will likely be enacted through the course of the year.

Territorial Scope

The application of the UK GDPR turns principally on whether an organization is established in the United Kingdom. As under the EU GDPR, an 'establishment' may take a wide variety of forms, and is not limited to a company registered in the United Kingdom.

The UK GDPR also has extra-territorial effect, following the same principles as set out in the EU GDPR. As a result, an organisation that it is not established within the United Kingdom will be subject to the UK GDPR if it processes personal data of data subjects who are in the United Kingdom where the processing activities are related "*to the offering of goods or services*" (Article 3(2)(a)) to such data subjects in the United Kingdom or "*the monitoring of their behaviour*" (Article 3(2)(b)) as far as their behaviour takes place within the United Kingdom.

States must comply not only with applicable federal law, but also with numerous state privacy and security laws and regulations.

For example, California alone has more than 25 state privacy and data security laws, including the California Consumer Privacy Act (CCPA) and its regulations as recently amended by the California Privacy Rights Act (CPRA), collectively referred to as the CCPA. The CCPA, as amended, introduced additional definitions and individual rights, and imposed additional requirements and restrictions on the collection, use and disclosure of personal information. The CCPA is also unique among state comprehensive privacy laws in that, as of January 1, 2023, it applies to HR and B2B personal information. Enforcement of the CPRA amendments to the CCPA commenced on July 1, 2023 for violations of the new provisions that occur on or after that date.

Notably, updated CCPA regulations based on the CPRA amendments were finalized on March 29, 2023, with enforcement by the California Attorney General and the newly established California Privacy Protection Agency (‘CPPA’ or ’Agency’) expected to begin on July 1, 2023. However, following a suit filed by the California Chamber of Commerce, the Sacramento district court ruled that the Agency was required to give businesses 12-months between finalizing a CCPA regulation and commencing enforcement, effectively delaying enforcement of the amended regulations to March 29, 2024. This delay does not affect the Agency or the California Attorney General’s ability to enforce the version of the CCPA amended by the CPRA (effective July 1, 2023) or the existing (i.e., pre-2023-amendment) CCPA regulations (effective August 14, 2020).

In late 2022, the California legislature also passed the California Age-Appropriate Design Code, which was slated to take effect July 1, 2024 and would apply to companies that meet the definition of “business” under the CCPA and that provide online services that are likely to be accessed by individuals under 18 years of age. However, on September 18, 2023, a California District Court issued an injunction blocking the law from coming into effect on First Amendment grounds. Following an appeal to the Ninth Circuit by the California Attorney General's office, the fate of the law is currently uncertain. More information on the California Age-Appropriate Design Code can is available at https://www.dlapiper.com/en-us/insights/publications/2023/05

Beyond California, Colorado's Attorney General finalized the Colorado Privacy Act (CPA) Rules on March 15, 2023, which add significantly to the CPA’s obligations on businesses. Both the CPA and the CPA Rules went into effect July 1, 2023. Connecticut, Utah, and Virginia’s privacy laws also took effect in 2023.

While not identical, the Colorado, Connecticut, Utah, and Virginia state privacy laws are substantially similar to each other in most key aspects. Further, unlike the CCPA, all are also generally inapplicable to personal information collected about, and processed in the context of, employee and business relationships. On the other hand, while the CCPA has some practical similarities with these state laws, it adopts more granular definitions, requirements, and restrictions that vary considerably from these laws, and, notably, applies to personal information collected from California residents in employment and B2B contexts.

2023 brought a significant development in the health data space, with Washington passing the My Health My Data Act (MHMD). The law ostensibly applies only to consumer health data, but its exceptionally broad definitions and scope combined with its private right of action may mean its enforcement touches on data many companies may not typically consider “health” data. More information on the MHMD Act is available at https://www.dlapiper.com/en/insights/publications/2023/04/w

Finally, the pace of state privacy legislation accelerated in 2023 overall, with the following states passing their own comprehensive privacy laws or variations thereof:

- Florida (effective July 1, 2024)
- Oregon (effective July 1, 2024)
- Texas (effective July 1, 2024)
- Montana (effective Oct. 1, 2024)
- Delaware (effective Jan. 1, 2025)
- Iowa (effective Jan. 1, 2025)
- Tennessee (effective Jan. 1, 2025)
- New Jersey (effective Jan. 15, 2025)
- Indiana (effective Jan. 1, 2026)

More information on the US state privacy laws is available at https://privacymatters.dlapiper.com/state-privacy-laws/

Enforcement of Unfair and Deceptive Trade Practices

In the United States, consumer protection laws, which prohibit unfair and deceptive business practices, provide another avenue for enforcement against businesses for

their privacy and security practices.

At the federal level, the US Federal Trade Commission (FTC) uses its authority to protect consumers against unfair or deceptive trade practices, to take enforcement actions against businesses for materially unfair privacy and data security practices. The FTC uses this authority to, among other things, take enforcement actions and investigate companies for:

- Failing to implement reasonable data security measures
- Making materially inaccurate or misleading privacy and security statements, including in privacy policies
- Failing to abide by applicable industry self-regulatory principles
- Transferring or attempting to transfer personal information to an acquiring entity in a bankruptcy or M&A transaction, in a manner not expressly disclosed on the applicable consumer privacy policy
- Violating consumer privacy rights by collecting, using, sharing or failing to adequately protect consumer information, in violation of standards established in their prior enforcement precedents

Many state attorneys general have similar enforcement authority over unfair and deceptive business practices, including failure to implement reasonable security measures and violations of consumer privacy rights that harm consumers in their states. State attorneys general also sometimes work together on enforcement actions against companies for actions that broadly affect the consumers of multiple states (such as data breaches).

Privacy class actions also continue to be a key risk area in the United States, including in the context of biometric privacy (under the Illinois Biometric Privacy Act), text messaging (under the federal Telephone Consumer Privacy Act) and call recording, wiretapping and related claims under the California Invasion of Privacy Act and other state laws. Online monitoring and targeting activities—including via cookies, pixels, chat bots, and so-called “session replay” tools—are an area of particular focus in the United States from a regulator and enforcement perspective and are also a developing litigation risk area.

DEFINITIONS

"Personal data" is defined as "any information relating to

DEFINITIONS

Definition of personal data

an identified or identifiable natural person" (Article 4). A low bar is set for "identifiable" – if the natural person can be identified using “all means reasonably likely to be used” (Recital 26) the information is personal data. A name is not necessary either – any identifier will do, such as an identification number, phone number, location data or other factors which may identify that natural person.

Online identifiers are expressly called out in Recital 30, with IP addresses, cookies and RFID tags all listed as examples.

The UK GDPR creates more restrictive rules for the processing of "special categories" (Article 9) of personal data (including data relating to race, religion, sexual life, data pertaining to health, genetics and biometrics) and personal data relating to criminal convictions and offences (Article 10).

The UK GDPR is concerned with the "processing" of personal data. Processing has an extremely wide meaning, and includes any set of operations performed on data, including the mere storage, hosting, consultation or deletion of the data.

Personal data may be processed by either a "controller" or a "processor". The controller is the decision maker, the person who "alone or jointly with others, determines the purposes and means of the processing of personal data" (Article 4). The processor "processes personal data on behalf of the controller", acting on the instructions of the controller. In contrast to the previous law, the GDPR imposes direct obligations on both the controller and the processor, although fewer obligations are imposed on the processor.

The "data subject" is a living, natural person whose personal data are processed by either a controller or a processor.

"Public authority" and "public body" are expressions used in the UK GDPR. The DPA defines them by reference to the definition of "public authority" used in the Freedom of Information Act 2000.

The DPA also clarifies that, where the purpose and means of processing are determined by an enactment of law, then the person on whom the obligation to process the data is imposed by the enactment is the controller.

Varies widely by law and regulation. The definition of personal information varies under US law. Some laws—such as data breach and security laws—apply more narrowly, to sensitive personal information, such as government identifiers, financial account information, password, biometrics, health insurance or medical information, and other information that can lead to identity fraud and theft or financial harm. On the other hand, under a number of state and federal laws, personal information broadly includes any information that identifies or is linked or reasonably linkable to an individual.

California

Under the CCPA, personal information includes information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The definition specifically includes name, alias, contact information, government IDs, biometrics, genetic data, location data, account numbers, education history, purchase history, online and device IDs, and search and browsing history and other online activities, if such information is linked or linkable with a particular consumer or household. Excluded from the definition are deidentified information and information lawfully made publicly available through various means, such as through government records or by the consumer.

Under the law, 'consumer' is broadly defined as any resident of California.

Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, New Jersey, Oregon, Tennessee, Texas, Utah, Virginia

Under the other thirteen comprehensive state privacy laws, personal data includes information that is linked or reasonably linkable to an identified or identifiable individual, who is a resident of the particular state acting an individual or household capacity. Deidentified data, personal data made publicly available, and personal data about individuals acting in an employment or B2B context are generally not in scope.

Definition of sensitive personal data

Varies widely by sector and by type of statute.

Generally, includes personal health data, financial data, credit worthiness data, student data, biometric data, personal information collected online from children under

13, and information that can be used to carry out identity theft or fraud are considered sensitive, and subject to additional restrictions and regulations.

For example, state breach notification laws and data security laws generally apply to more sensitive categories of information, such as Social security numbers and other government identifiers, credit card and financial account numbers, passwords and user credentials, health or medical information, insurance ID, digital signatures, and/or biometrics.

California

The CCPA defines *sensitive personal information* as personal information that reveals about a consumer one or more of the following types of information, including:

- Social Security, driver’s license, state identification card or passport number
- account log-in, financial account, debit card or credit card number in combination with any required security or access code, password or credentials allowing access to an account
- precise geolocation
- racial or origin, citizenship or immigration status, religious or philosophical beliefs, or union membership
- contents of a consumer’s mail, email, and text messages unless the business is the intended recipient of the communication
- genetic data
- biometric information
- health information
- information about sex life or sexual orientation

Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, New Jersey, Oregon, Tennessee, Texas, Utah, Virginia

Under the other thirteen comprehensive state privacy laws, the definition of *sensitive data* is a sub-cateogry of peronsal data and largely the same with various states adding or subtracting certain data elements from the above list.

Washington

Washington’s MHMD Act introduced a very broad definition of *consumer health data*, which includes: “personal information that is linked or reasonably linkable to a consumer and that identifies the consumer's past, present, or future physical or mental health status."

For the purposes of this definition, physical or mental

health status includes, but is not limited to:

- Individual health conditions, treatment, diseases, or diagnosis
- Social, psychological, behavioral, and medical interventions
- Health-related surgeries or procedures
- Use or purchase of prescribed medication
- Bodily functions, vital signs, symptoms, or measurements of the information described in subsection (8)(b)
- Diagnoses or diagnostic testing, treatment, or medication
- Gender-affirming care information
- Reproductive or sexual health information
- Biometric data
- Genetic data
- Precise location information that could reasonably indicate a consumer's attempt to acquire or receive health services or supplies
- Data that identifies a consumer seeking health care services
- Any information that a regulated entity or a small business, or their respective processor, processes to associate or identify a consumer with the data described in (b)(i) through (xii) of this subsection that is derived or extrapolated from nonhealth information (such as proxy, derivative, inferred, or emergent data by any means, including algorithms or machine learning)

This definition could arguably include any category of personal data (e.g., the inclusion of inference data makes it difficult to exclude any data whatsoever in the health, wellness, and fitness space). In addition, “health care services” includes any service provided to a person to assess, measure, improve, or learn about a person's health.

NATIONAL DATA PROTECTION AUTHORITY

The Information Commissioner (whose functions are discharged through the Information Commissioner's Office **("ICO")**) is the supervisory authority for the UK for the purposes of Article 51 of the UK GDPR. Following Brexit, the ICO no longer has influence or membership in the European Data Protection Board and can no longer be nominated as a lead supervisory authority under the EU GDPR regime. This is reflected in the UK GDPR which omits Chapter 7 (Cooperation and Consistency) of the EU

NATIONAL DATA PROTECTION AUTHORITY

There is no single national authority.

With some exceptions (such as for banks, credit unions and insurance companies), the FTC has jurisdiction over most commercial entities and has authority to issue and enforce federal privacy regulations (including telemarketing, email marketing, and children's privacy) and

GDPR, on the basis that the UK will not be part of the EU’s cooperation and consistency mechanisms.

The ICO's contact details are:

Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

T +0303 123 1113 (or +44 1625 545745 if calling from overseas)

F 01625 524510

www.ico.org.uk

REGISTRATION

The UK operates a fee-paying scheme for controllers under the Data Protection (Charges and Information) Regulations 2018, known as the ‘Data Protection

to take enforcement action to protect consumers against unfair or deceptive trade practices, including materially unfair privacy and data security practices.

Many state attorneys general have similar enforcement authority over unfair and deceptive business practices, including failure to implement reasonable security measures and violations of consumer privacy rights that harm consumers in their states.

California

The California Attorney General and the California Privacy Protection Agency (the Agency) share authority to enforce the CCPA.

California consumers also have a private right of action under the CCPA for certain data breaches, and the CCPA provides for statutory damages.

Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, New Jersey, Oregon, Tennessee, Texas, Utah, Virginia

State Attorneys General in all the other thirteen states have authority to enforce their state comprehensive privacy laws. Additionally, in some states such as Colorado, district attorneys can enforce the law.

None of these states currently provide for a private right of action.

Washington

The Washington Attorney General has the authority to enforce the MHMD Act.

Washington residents also have a private right of action under the Act, but unlike the CCPA the MHMD Act does not provide for statutory damages, meaning plaintiffs must prove actual damages to succeed.

Sector-Specific Enforcement

In addition, a wide range of sector-specific regulators, particularly those in the healthcare, financial services, telecommunications and insurance sectors, have authority to issue and enforce privacy and security regulations, with respect to entities under their jurisdiction.

REGISTRATION

There is no requirement to register databases or personal information processing activities. However, four states currently impose certain registration requirements on data

Fee’. All controllers have to pay the data protection fee to the ICO annually, unless they are exempt from doing so.

The UK Government has set the fee tiers based on its perception of the risks posed by controllers processing personal data. The amount payable depends upon staff numbers and annual turnover or whether the controller is a public authority, a charity or a small occupational pension scheme. Not every controller must pay a fee – there are exemptions. The maximum fee, for large organisations, is GBP 2,900.

The maximum penalty for a controller who breaks the law by not paying a fee (or not paying the correct fee) is a fine of GBP 4,350 (150% of the top tier fee).

brokers:

California

The CCPA (as amended in 2019) requires (subject to some exceptions) that data brokers register with the California Attorney General (however, following amendments to the data broker registration law in late 2023, the data broker registration process and list is being transferred to the Agency). Under the law, a "data broker" is defined as a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship. The terms "sell" and "personal information" are defined as set forth in the CCPA.

Oregon

In 2023, Oregon passed a law requiring data brokers register on an annual basis with the Department of Consumer and Business Services before collecting personal data in Oregon. Companies must register if they maintain data that is “categorized or organized for sale or licensing to another person.” The law took effect on January 1, 2024.

Texas

In 2023, Texas passed a law requiring data brokers register with the Secretary of State. The law has a narrower scope than most of the other state data broker registration laws in that it only applies to businesses that (1) in a 12-month period, derive more than 50% of their revenue from the processing or transfer of personal data that the business did not collect directly from individuals, or (2) derive revenue from the processing or transfer of personal data of more than 50,000 individuals whose data the business did not directly collect. The law took effect on September 1, 2023, with first registrations due March 1, 2024.

Vermont

In 2018, Vermont passed a law requiring data brokers to register with the Secretary of State and adhere to minimum data security standards. Under the law a “data broker” is defined as a company that collects computerized, personal information of Vermont residents with whom the company has no direct relationship, and either sell or licenses that information.

In addition, several state laws require entities that engage in certain types of telemarketing activities to register with the state attorney general or other consumer protection agency.

DATA PROTECTION OFFICERS

Under the UK GDPR, each controller or processor is required to appoint a data protection officer if it satisfies one or more of the following tests:

- it is a public authority;
- its core activities consist of processing operations which, by virtue of their nature, scope or purposes, require regular and systemic monitoring of data subjects on a large scale; or
- its core activities consist of processing sensitive personal data on a large scale.

Groups of undertakings are permitted to appoint a single data protection officer with responsibility for multiple legal entities (Article 37(2)), provided that the data protection officer is easily accessible from each establishment (meaning that larger corporate groups may find it difficult in practice to operate with a single data protection officer).

DPOs must have "expert knowledge" (Article 37(5)) of data protection law and practices, though it is possible to outsource the DPO role to a service provider (Article 37(6)).

Controllers and processors are required to ensure that the DPO is involved "properly and in a timely manner in all issues which relate to the protection of personal data" (Article 38(1)), and the DPO must directly report to the highest management level, must not be told what to do in the exercise of his or her tasks and must not be dismissed or penalised for performing those tasks (Article 38(3)).

The specific tasks of the DPO, set out in the UK GDPR, include (Article 39):

- to inform and advise on compliance with the UK GDPR and other UK data protection laws;
- to monitor compliance with the law and with the internal policies of the organization including assigning responsibilities, awareness raising and training staff;
- to advise and monitor data protection impact assessments where requested; and
- to cooperate and act as point of contact with the supervisory authority.

COLLECTION & PROCESSING

Data Protection Principles

DATA PROTECTION OFFICERS

With the exception of entities regulated by HIPAA, there is no general requirement to appoint a formal data security officer or data privacy officer.

Massachusetts and some other state laws and federal regulations, including the recently updated FTC Safeguards Rule (applicable to non-banking financial institutions), require organizations to appoint one or more employees to maintain their information security program.

COLLECTION & PROCESSING

US privacy laws and self-regulatory principles vary widely, but generally require that a notice be provided or made

Controllers are responsible for compliance with a set of core principles which apply to all processing of personal data. Under these principles, personal data must be (Article 5):

- processed lawfully, fairly and in a transparent manner (the "lawfulness, fairness and transparency principle");
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes (the "purpose limitation principle");
- adequate, relevant and limited to what is necessary in relation to the purpose(s) (the "data minimization principle");
- accurate and where necessary kept up to date (the "accuracy principle");
- kept in a form which permits identification of data subjects for no longer than is necessary for the purpose(s) for which the data are processed (the "storage limitation principle"); and
- processed in a manner that ensures appropriate security of the personal data, using appropriate technical and organizational measures (the "integrity and confidentiality principle").

The controller is responsible for and must be able to demonstrate compliance with the above principles (the "accountability principle"). Accountability is a core theme of the UK GDPR. Organisations must not only comply with the UK GDPR but also be able to demonstrate compliance perhaps years after a particular decision relating to processing personal data was taken. Record keeping, audit and appropriate governance will all form a key role in achieving accountability.

Legal Basis under Article 6

In order to satisfy the lawfulness principle, each use of personal data must be justified by reference to an appropriate basis for processing. The legal bases (also known lawful bases or lawful grounds) under which personal data may be processed are (Article 6(1)):

- with the consent of the data subject (where consent must be "freely given, specific, informed and unambiguous", and must be capable of being withdrawn at any time);
- where necessary for the performance of a contract to which the data subject is party, or to take steps at the request of the data subject prior to entering into a contract;
- where necessary to comply with a legal obligation (under UK law) to which the controller is subject;

available pre-collection *(eg,* in a privacy policy) that discloses a company's collection, use and disclosure

- where necessary to protect the vital interests of the data subject or another person (generally recognised as being limited to 'life or death' scenarios, such as medical emergencies);
- where necessary for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller; or
- where necessary for the purposes of the legitimate interests of the controller or a third party (which is subject to a balancing test, in which the interests of the controller must not override the interests or fundamental rights and freedoms of the data subject. Note also that this basis cannot be relied upon by a public authority in the performance of its tasks).

Special Categories of Personal Data

Processing of special categories of personal data is prohibited (Article 9), except where one of the following exemptions applies (which, in effect, operate as secondary bases which must be established for the lawful processing of special category data, in addition to an Article 6 basis):

- with the explicit consent of the data subject;
- where necessary for the purposes of carrying out obligations and exercising rights under employment, social security and social protection law or a collective agreement;
- where necessary to protect the vital interests of the data subject or another natural person who is physically or legally incapable of giving consent;
- in limited circumstances by certain not-for-profit bodies;
- where processing relates to the personal data which are manifestly made public by the data subject;
- where processing is necessary for the establishment, exercise or defence of legal claims or where courts are acting in their legal capacity;
- where necessary for reasons of substantial public interest on the basis of United Kingdom law, proportionate to the aim pursued and with appropriate safeguards;
- where necessary for preventative or occupational medicine, for assessing the working capacity of the employee, medical diagnosis, provision of health or social care or treatment of the management of health or social care systems and services;
- where necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or

practices, the related choices individuals have regarding their personal information, and the company's contact information.

Opt-in consent is required under certain circumstance to collect, use and disclose certain sensitive data, such as health information, credit reports, financial information, children’s personal information, biometric data, video viewing choices, geolocation data and telecommunication usage information.

All states with comprehensive privacy laws, other than California, Florida, Iowa, and Utah require a business obtain consent from consumers to collect their sensitive data. California requires businesses to provide individuals a right to limit use of their sensitive data, and Iowa and Utah require individuals be provided a notice and right to opt-out of the collection of sensitive data.

The (federal) Children’s Online Privacy Protection Act (COPPA) requires verifiable parental consent prior to the collection of any personal information from children under 13. In addition, the CCPA requires that a business obtain explicit consent prior to the sale of any personal information about a consumer that the business has "actual knowledge" is less than 16 years old, and where the consumer is less than 13 years old, express parental authorization is required. (As discussed further below, the definition of "sale" under the CCPA is very broad and may include online advertising and retargeting activities, for example.). Amendments to the CCPA expanded this concept to include “sharing” of a minor’s personal information (meaning the disclosing of personal information for purposes of cross-contextual behavioral advertising).

Further, companies generally need to obtain opt-in consent prior to using, disclosing or otherwise processing personal information in a manner that is materially different than what was disclosed in the privacy policy applicable when the personal information was initially collected. The FTC deems such changes ̰retroactive material changes’ and considers it unfair and deceptive to implement a retroactive material change without obtaining prior, affirmative consent. Under the CCPA, which applies to individual and household data about California residents, businesses must, among other things:

- At or before collection, provide a notice to consumers disclosing the categories of personal information to be collected. the purposes for collecting such information, whether such

ensuring high standards of health care and of medical products and devices; or
- where necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with restrictions set out in Article 89(1).

Schedule 1 to the DPA supplements the requirements for processing special categories of personal data, and also provides for a number of ‘substantial public interest’ grounds that can be relied upon to process special categories of personal data in specific contexts which are deemed to be in the public interest. Many of these grounds are familiar from the previous UK law, whilst other are new. Important examples include:

- processing required for employment law;
- heath and social care;
- equal opportunity monitoring;
- public interest journalism;
- fraud prevention;
- preventing / detecting unlawful acts (eg money laundering / terrorist financing);
- insurance; and
- occupational pensions.

Criminal convictions and offences data (Article 10)

The processing of criminal conviction or offences data is prohibited by Article 10 of the UK GDPR, except where specifically authorised under relevant member state law. Part 3 of Schedule 1 of the DPA authorises a controller to process criminal conviction or offences data where the processing is necessary for a purpose which meets one of the conditions in Parts 2 of Schedule 1 (this covers the conditions noted above other than processing for employment law, health and social care), as well as number of other specific conditions:

- consent;
- the protection of a data subject's vital interests; and
- the establishment, exercising or defence of legal rights, the obtaining of legal advice and the conduct of legal proceedings

Appropriate policy and additional safeguards

In any case where a controller wishes to rely on one of the DPA conditions to lawfully process special category, criminal conviction or offences data, the DPA imposes a separate requirement to have an appropriate policy

information will be sold or shared, and how long such information will be retained or the criteria to determine such period.
- Post a privacy policy that discloses
    - the categories of personal information collected, categories of personal information disclosed for a business purpose, and categories of personal information "sold" and "shared" by the business in the prior 12 months
    - the purposes for which the business collects, uses, sells, and shares personal information
    - the categories of sources from which the business collects personal information
    - the categories of third parties to whom the business discloses personal information and
    - the rights consumers have regarding their personal information and how to exercise those rights
- Include a “do-not-sell-or-share my information” link on the business's website and page where consumers can opt-out of the sale and sharing of their personal information (if applicable)
- Generally, provide at least two methods for consumers to submit CCPA requests to the business, including an online method (e.g., submission of an online form) and a toll-free number

Other California privacy laws (*eg*, the California “Shine the Light Law” and the California Online Privacy Protection Act) currently in force impose additional notice obligations, including:

- Where any personal information is disclosed to a third party for their own marketing use, a specific notice about such disclosure (*eg*, in a company’s privacy policy) must be provided and accessible through a special link on their homepage. Further, the law gives California residents to request a list of the personal information and third parties to whom such information was disclosed for marketing purposes in the prior 12 months
- Whether the company honors any do-not-track mechanisms

Under the comprehensive US state privacy laws , individuals have various qualified rights to request access to, correction, and deletion of their personal information

document in place and apply additional safeguards to justify the processing activity. The purpose of the policy document is to set out how the controller intends to comply with each of the data protection principles in Article 5 of the UK GDPR in relation to this more sensitive processing data activity.

Processing for a Secondary Purpose

Increasingly, organisations wish to 're-purpose' personal data - i.e. use data collected for one purpose for a new purpose which was not disclosed to the data subject at the time the data were first collected. This is potentially in conflict with the core principle of purpose limitation; to ensure that the rights of data subjects are protected. The UK GDPR sets out a series of factors that the controller must consider to ascertain whether the new process is compatible with the purposes for which the personal data were initially collected (Article 6(4)). These include:

- any link between the original purpose and the new purpose
- the context in which the data have been collected
- the nature of the personal data, in particular whether special categories of data or data relating to criminal convictions are processed (with the inference being that if they are it will be much harder to form the view that a new purpose is compatible)
- the possible consequences of the new processing for the data subjects
- the existence of appropriate safeguards, which may include encryption or pseudonymisation.

If the controller concludes that the new purpose is incompatible with the original purpose, then the only bases to justify the new purpose are consent or a legal obligation.

Transparency (Privacy Notices)

The UK GDPR places considerable emphasis on transparency, i.e. the right for a data subject to understand how and why his or her data are used, and what other rights are available to data subjects to control processing. The presentation of granular, yet easily accessible, privacy notices should, therefore, be seen as a cornerstone of UK GDPR compliance.

Various information must be provided by controllers to data subjects in a concise, transparent and easily accessible form, using clear and plain language (Article 12(1)).

The following information must be provided (Article 13) at

and to “opt out” of sales, sharing, and the use of their personal information for targeted advertising purposes. Further, these laws require businesses to

the time the data are obtained:

- the identity and contact details of the controller;
- the data protection officer's contact details (if there is one);
- both the purpose for which data will be processed and the legal basis for processing, including, if relevant, the legitimate interests for processing;
- the recipients or categories of recipients of the personal data;
- details of international transfers;
- the period for which personal data will be stored or, if that is not possible, the criteria used to determine this;
- the existence of rights of the data subject including the right to access, rectify, require erasure, restrict processing, object to processing and data portability;
- where applicable, the right to withdraw consent, and the right to complain to supervisory authorities;
- the consequences of failing to provide data necessary to enter into a contract;
- the existence of any automated decision making and profiling and the consequences for the data subject; and
- in addition, where a controller wishes to process existing data for a new purpose, they must inform data subjects of that further processing, providing the above information.

Different requirements apply (Article 14) where information has not been obtained from the data subject.

Rights of the Data Subject

Data subjects enjoy a range of rights to control the processing of their personal data replicating those in the EU GDPR. Controllers must provide information on action taken in response to requests within one calendar month as a default, with a limited right for the controller to extend this period thereby a further two months where the request is onerous.

Right of access (Article 15)

A data subject is entitled to request access to and obtain a copy of his or her personal data, together with prescribed information about the how the data have been used by the controller.

Right to rectify (Article 16)

Data subjects may require inaccurate or incomplete

conduct data protection or risk assessments before engaging in certain higher-risk processing activities, such as processing that relates to:

- Certain unfair or intrusive profiling or targeted advertising purposes
- Selling of personal data
- Processing sensitive data

All states other than California and Utah require businesses to establish an internal process whereby consumers may appeal a controller’s refusal to take action on a privacy request and, where the appeal is denied, a method by which the consumer can submit a complaint to the state’s Attorney General.

Other states impose a wide range of specific requirements, particularly in the student and employee privacy areas. For example, a significant number of states have enacted employee social media privacy laws, and, in 2014 and 2015, a disparate array of education privacy laws. In addition, there are several sector-specific privacy laws that impose notice obligations, significantly limit permitted disclosures of personal information, and grant individuals the right to access or review records about the individual that are held by the regulated entity.

The US also regulates marketing communications extensively, including telemarketing, text message marketing, fax marketing and email marketing (which is discussed below).

personal data to be corrected or completed without undue delay.

Right to erasure ('right to be forgotten') (Article 17)

Data subjects may request erasure of their personal data. The right is not absolute; it only arises in quite a narrow set of circumstances, notably where the controller no longer needs the data for the purposes for which they were collected or otherwise lawfully processed, or as a corollary of the successful exercise of the objection right, or of the withdrawal of consent.

Right to restriction of processing (Article 18)

Data subjects enjoy a right to restrict processing of their personal data in defined circumstances. These include where the accuracy of the data is contested; where the processing is unlawful; where the data are no longer needed save for legal claims of the data subject, or where the legitimate grounds for processing by the controller are contested.

Right to data portability (Article 20)

Where the processing of personal data is justified either on the basis that the data subject has given his or her consent to processing or where processing is necessary for the performance of a contract, then the data subject has the right to receive or have transmitted to another controller all personal data concerning him or her in a structured, commonly used and machine-readable format (e.g. commonly used file formats recognised by mainstream software applications, such as .xsl).

Right to object (Article 21)

Data subjects have the right to object to processing on the legal basis of the legitimate interests of the data controller or where processing is in the public interest. Controllers will then have to suspend processing of the data until such time as they demonstrate “compelling legitimate grounds” for processing which override the rights of the data subject.

In addition, data subjects enjoy an unconditional right to object to the processing of personal data for direct marketing purposes at any time.

The right not to be subject to automated decision making, including profiling (Article 22)

Automated decision making (including profiling) "which produces legal effects concerning [the data subject]

… or similarly significantly affects him or her" is only permitted where:

- necessary for entering into or performing a contract;
- authorised by UK law; or
- the data subject has given their explicit (i.e. opt-in) consent.

Further, where significant automated decisions are taken on the basis of grounds (a) or (c), the data subject has the right to obtain human intervention, to contest the decision, and to express his or her point of view. Further safeguards for automated decisions that are necessary for entering into or performing a contract or which are authorised by UK law are set out in section 14 of the DPA.

Child's consent to information society services (Article 8)

Article 8(1) of the UK GDPR stipulates that a child may only provide their own consent to processing in respect of information society (primarily, online) services, where that child is over 16 years of age, unless UK law applies a lower age. The DPA reduces the age of consent for these purposes to 13 years for the UK.

TRANSFER

Transfers from the UK

Transfers of personal data by a controller or a processor to third countries outside of the United Kingdom are only permitted where the conditions laid down in the UK GDPR are met (Article 44).

The United Kingdom Government has the power to make an adequacy decision in respect of a third country under the UK GDPR (Article 45). This power is equivalent to the similar authorities granted to the EC has under the EU GDPR and involves the Secretary of State making a positive determination that the third country provides for adequate level of data protection, following which personal data may be freely transferred to that third country (Article 45(1)). On 21 September 2023, the United Kingdom Government adopted its adequacy decision for the UK Extension for the EU-US Data Privacy Framework, in which an adequate level of protection for personal data transferred the UK to US companies that have joined the framework is ensured in accordance with UK GDPR Art. 45. Currently, the following countries or territories enjoy UK adequacy decisions (these have all

TRANSFER

There are generally no geographic transfer restrictions that apply in the US, except regarding the storing of some governmental records and information. However, the HIPAA Privacy Rule requires that covered entities not disclose protected health information outside the US without appropriate safeguards.

essentially been 'rolled over', on a temporary basis, from the EU GDPR): Andorra, Argentina, Canada (with some exceptions), Switzerland, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, Eastern Republic of Uruguay, United States (if certified under the UK Extension to the EU-US Data Privacy Framework) and New Zealand. The UK is also treating all EU and EEA Member States as adequate jurisdictions, again on a temporary basis. The United Kingdom intends to reassess all these adequacy decisions before the end of 2024. It also has the power to make its own adequacy decisions, and likely time consider new candidates for UK adequacy.

Transfers to third countries are also permitted where **appropriate safeguards** have been provided by the controller or processor and on condition that enforceable data subject rights and effective legal remedies for the data subject are available (Article 46). The list of appropriate safeguards includes, amongst others, binding corporate rules and standard contractual clauses with additional safeguards to guarantee an essentially equivalent level of protection to data subject’s and their personal data[1].

Schedule 21 to the DPA provides that the EU Commission approved standard contractual clauses may continue to be used for transfers under the UK GDPR, until such time as they replaced by clauses issued by the UK Government. Note that the standard contractual clauses carried into UK law are those which were in use as at the end of 2020. It is expected these will be updated during the course of 2021.

Article 49 of the UK GDPR also includes a list of context specific **derogations**, permitting transfers to third countries where:

- explicit informed consent has been obtained;
- the transfer is necessary for the performance of a contract or the implementation of pre-contractual measures;
- the transfer is necessary for the conclusion or performance of a contract concluded in the interests of the data subject between the controller and another natural or legal person;
- the transfer is necessary for important reasons of public interest;
- the transfer is necessary for the establishment, exercise or defence of legal claims;
- the transfer is necessary in order to protect the vital interests of the data subject where consent cannot be obtained; or
- the transfer is made from a register which

according to domestic law is intended to provide information to the public, subject to certain conditions.

There is also a very limited derogation to transfer where no other mechanism is available and the transfer is necessary for the purposes of compelling legitimate interests of the controller which are not overridden by the interests and rights of the data subject; notification to the supervisory authority and the data subject is required if relying on this derogation.

Transfers demanded by courts, tribunals or administrative authorities of countries outside the United Kingdom (Article 48) are only recognised or enforceable (within the United Kingdom) where they are based on an international agreement such as a mutual legal assistance treaty in force between the requesting third country and the United Kingdom; a transfer in response to such requests where there is no other legal basis for transfer will infringe the UK GDPR.

Transfers from the EU to the UK

The UK is now a third country for the purposes of Chapter V of the EU GDPR. .

On 28 June 2021, the EU adopted adequacy decisions in relation to the UK, recognising that the UK offers an equivalent level of protection of personal data as compared to the EU. This therefore enables personal data to flow freely from the EU to the UK.

For more information, please visit our Transfer - global data transfer methodology website.

1. Following the decision of the Court of Justice of the European Union in the *Data Protection Commissioner v. Facebook and Max Schrems* case (the ‘Schrems II’ case)

SECURITY

The UK GDPR is not prescriptive about specific technical standards or measures. Rather, the UK GDPR adopts a proportionate, context-specific approach to security. Article 32 states that controllers and processors shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the

SECURITY

Most US businesses are required to take reasonable technical, physical and organizational measures to protect the security of sensitive personal information (*eg*, health or financial information, telecommunications usage information, biometric data, or information that would require security breach notification). A few states have

risk of the processing. In so doing, they must take account of the state of the art, the costs of implementation, and the nature, scope, context and purposes of processing. A 'one size fits all' approach is therefore the antithesis of this requirement.

However the UK GDPR does require controllers and processors to consider the following when assessing what might constitute adequate security:

- the pseudonymisation and encryption of personal data;
- the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
- the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; and
- a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

enacted laws imposing more specific security requirements for such data.

For example, Massachusetts has enacted regulations that apply to any company that collects or maintains sensitive personal information (eg, name in combination with Social Security number, driver's license, passport number, or credit card or financial account number) on Massachusetts residents. Among other things, the Massachusetts regulations require regulated entities to have a comprehensive, written information security program and set forth the minimum components of such program, including binding all service providers who touch this sensitive personal information to protect it in accordance with the regulations. Massachusetts law includes encryption requirements on the transmission of sensitive personal information across wireless networks or beyond the logical or physical controls of an organization, as well as on sensitive personal data stored on laptops and portable storage devices.

Some states impose further security requirements on payment card data and other sensitive personal information. In 2019, New York passed a new law (the New York “SHIELD Act”) setting forth minimum security obligations for safeguarding private information. The SHIELD Act does not mandate specific safeguards but rather provides that a business will "be deemed to be in compliance" with the law if it implements a security program that includes elements set forth in the SHIELD Act.

The CCPA and Washington’s MHMD Act provide a private right of action to individuals for certain breaches of unencrypted personal information or consumer health data, respectively, which increases class action risks posed by data breaches.

There are also several other sectoral data security laws and regulations that impose specific security requirements on regulated entities – such as in the financial, insurance and health sectors. Federal financial regulators impose extensive security requirements on the financial services sector, including requirements for security audits of all service providers who receive data from financial institutions. For example, the New York Department of Financial Services (NYDFS) regulations impose extensive cybersecurity and data security requirements on licensees of the NYDFS, which includes financial services and insurance companies. The federal Gramm-Leach-Bliley Act and implementing rules and regulations require financial institutions to implement reasonable security measures.

HIPAA regulated entities are subject to much more

BREACH NOTIFICATION

The UK GDPR contains a general requirement for a personal data breach to be notified by the controller to the ICO, and for more serious breaches to also be notified to affected data subjects. A "personal data breach" is a wide concept, defined as any "*breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*" (Article 4).

The controller must notify a breach to the ICO without undue delay, and where feasible, not later than 72 hours after having become aware of it, unless the controller determines that the breach is unlikely to result in a risk to the rights and freedoms of natural persons. When the personal data breach is likely to result in a high risk to natural persons, the controller is also required to notify the affected data subjects without undue delay (Article 34).

Where the breach occurs at the level of the processor, it

extensive data security requirements. HIPAA security regulations apply to so-called ‘covered entities’ such as doctors, hospitals, insurers, pharmacies and other healthcare providers, as well as their ‘business associates’ which include service providers who have access to, process, store or maintain any protected health information on behalf of a covered entity. ‘Protected health information’ under HIPAA generally includes any personally identifiable information collected by or on behalf of the covered entity during the course of providing its services to individuals.

Internet of Things

California enacted the first US Internet of Things (IoT) legislation, effective January 1, 2020. Under SB 327, manufacturers of most IoT and Bluetooth connected devices will be required to implement reasonable security features ‘appropriate to the nature and the function of the device and the information the device may collect, contain or transmit’ and ‘designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure.’ To the extent a device is equipped with a means for authentication outside a local area network, it shall be deemed a reasonable security feature if (i) the preprogrammed is unique to each device manufactured, or (ii) the device forces the user to set a unique password upon first use.

BREACH NOTIFICATION

All 50 US states, Washington, DC, and most US territories (including, Puerto Rico, Guam and the Virgin Islands) have passed breach notification laws that require notifying state residents of a security breach involving more sensitive categories of information, such as Social Security numbers and other government identifiers, credit card and financial account numbers, health or medical information, insurance ID, tax ID, birthdate, as well as online account credentials, digital signatures and/or biometrics.

Under many state laws, where more than 500 individuals are impacted, notice must also be provided to credit bureaus. Nearly half of states also require notice to state Attorneys General and / or other state officials of certain data breaches. Further, certain states require impacted individuals to be provided with credit monitoring services for specified lengths of time if the breach involved Social Security numbers. Finally, some state data breach laws impose certain (varying) notice content and timing

is required to notify the controller without undue delay upon becoming aware of the breach (Article 33(2)).

The notification to the ICO must include where possible the categories and approximate numbers of individuals and records concerned, the name of the organisation’s data protection officer or other contact, the likely consequences of the breach and the measures taken to mitigate harm (Article 33(3)).

Controllers are also required to keep a record of all data breaches (Article 33(5)) (whether or not notified to the supervisory authority) and permit audits of the record by the ICO.

Breaches in the United Kingdom can be reported to the ICO's dedicated breach helpline during office hours (+44 303 123 1113). Outside of these hours (or where a written notification is preferred) a pro forma may be downloaded and emailed to the ICO.

ENFORCEMENT

Fines

The UK GDPR empowers supervisory authorities to impose fines of up to 4% of annual worldwide turnover, or GBP 17.5 million (whichever is higher).

It is the intention that fines should, where appropriate, be imposed by reference to the revenue of an economic undertaking rather than the revenues of the relevant controller or processor. Recital 150 of the UK GDPR states that 'undertaking' should be understood in accordance with Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit anti-competitive agreements between undertakings and abuse of a dominant position.

Fines are split into two broad categories.

The highest fines (Article 83(5)) of up to GBP 17.5 million or, in the case of an undertaking, up to 4% of total worldwide turnover of the preceding year, whichever is higher, apply to infringement of:

- the basic principles for processing including conditions for consent;
- data subjects’ rights;
- international transfer restrictions;
- any obligations imposed by domestic law for special cases such as processing employee data; and
- certain orders of a supervisory authority.

requirements with respect to notice to individuals and to state Attorneys General and/or other state officials.

Federal laws require notification in the case of breaches of healthcare information, breaches of information from financial institutions, breaches of telecom usage information held by telecommunication providers, and breaches of government agency information.

ENFORCEMENT

Various entities enforce US national and state privacy laws. Violations of privacy laws and rules are generally enforced by the FTC, state Attorneys General, or the regulator for the industry sector in question. Civil penalties can be significant, particularly for uncooperative or repeat offenders.

In addition, individuals may bring private rights of action (and class actions) for certain privacy or security violations.

Some privacy laws (for example, credit reporting, marketing and electronic communications, video viewing history, call recording and cable communications privacy laws) may be enforced through private rights of action, which give rise to class action lawsuits for significant statutory damages and attorney’s fees, and individuals may bring actions for actual damages from data breaches.

The CCPA provides individuals with a private right of action and statutory damages, in the event of certain breaches of unencrypted personal information, where a business has failed to implement reasonable data security procedures (this applies to most categories of personal information under California’s breach notification law) – this raises significant class action risks. Currently, no other comprehensive state privacy laws contain a private right of action.

In June 2018, Ohio became the first US state to pass

The lower category of fines (Article 83(4)) of up to GBP 8.7 million or, in the case of an undertaking, up to 2% of total worldwide turnover of the preceding year, whichever is the higher, apply to infringement of:

- obligations of controllers and processors, including security and data breach notification obligations;
- obligations of certification bodies; and
- obligations of a monitoring body.

The ICO is not required to impose fines but must ensure in each case that the sanctions imposed are effective, proportionate and dissuasive (Article 83(1)).

Fines can be imposed in combination with other sanctions. To date, the ICO has issued several fines under GDPR, ranging from GBP 275,000 to GBP 20 million.

Investigative and corrective powers

The ICO also enjoys wide investigative and corrective powers (Article 58) including the power to undertake on-site data protection audits and the power to issue public warnings, reprimands and orders to carry out specific remediation activities.

Right to claim compensation

The UK GDPR makes specific provision for individuals to bring private claims against controllers and processors:

- any person who has suffered "material or non-material damage" as a result of a breach of the UK GDPR has the right to receive compensation (Article 82(1)) from the controller or processor. The inclusion of “non-material” damage means that individuals will be able to claim compensation for distress even where they are not able to prove financial loss.
- data subjects have the right to mandate a consumer protection body to exercise rights and bring claims on their behalf (Article 80).

Individuals also enjoy the right to lodge a complaint with the ICO (Article 77).

All natural and legal persons, including individuals, controllers and processors, have the right to an effective judicial remedy against a decision of the ICO concerning them or for failing to make a decision (Article 78).

Data subjects enjoy the right to an effective legal remedy against a controller or processor (Article 79).

cybersecurity safe harbor legislation. Under SB 220, a company that has suffered a data breach of personal information has an affirmative defense if it has ‘created, maintained, and complied with a written cybersecurity program that contains administrative, technical, and physical safeguards to protect personal information that reasonably conforms to an industry recognized cybersecurity framework’ (*e.g.*, PCI-DSS standards, NIST Framework, NIST special publications 800-171, 800-53, and 800-53a, FedRAMP security assessment framework, HIPAA, GLBA).

The DPA sets out the specific enforcement powers provided to the ICO pursuant to Article 58 of the UK GDPR, including:

- information notices – requiring the controller or processor to provide the ICO with information;
- assessment notices – permitting the ICO to carry out an assessment of compliance;
- enforcement notices – requiring the controller or processor to take, or refrain from taking, certain steps; and
- penalty notices – administrative fines.

The ICO has the power to conduct a consensual audit of a controller or a processor, to assess whether that organisation is complying with good practice in respect of its processing of personal data.

Under Schedule 15 of the DPA, the ICO also has powers of entry and inspection. These will be exercised pursuant to judicial warrant and will allow the ICO to enter premises and seize materials.

The DPA creates two new criminal offences in UK law: the re-identification of de-identified personal data without the consent of the controller and the alteration of personal data to prevent disclosure following a subject access request under Article 15 of the GDPR. The DPA retains existing UK criminal law offences, eg offence of unlawfully obtaining personal data.

The DPA requires the ICO to issue guidance on its approach to enforcement, including guidance about the circumstances in which it would consider it appropriate to issue a penalty notice, i.e. administrative fine.

The DPA also requires the ICO to publish statutory codes of practice on direct marketing and data sharing (preserving the position under the previous law).

ELECTRONIC MARKETING

The UK GDPR will apply to most electronic marketing activities, as these will involve some use of personal data (e.g. an email address which includes the recipient's name). The most plausible legal bases for electronic marketing will be consent, or the legitimate interests of the controller (which is expressly referenced as an appropriate basis by Recital 47). Where consent is relied upon, the strict standards for consent under the UK GDPR are to be noted, and marketing consent forms will invariably need to incorporate clearly worded opt-in mechanisms (such as

ELECTRONIC MARKETING

The US regulates marketing communications extensively, including email and text message marketing, as well as telemarketing and fax marketing.

Email

The CAN-SPAM Act is a federal law that applies labeling and opt-out requirements to all commercial email messages. CAN-SPAM generally allows a company to send commercial emails to any recipient, provided the recipient has not opted out of receiving such emails from the

the ticking of an unticked consent box, or the signing of a statement, and not merely the acceptance of terms and conditions, or consent implied from conduct, such as visiting a website).

Data subjects have an unconditional right to object to (and therefore prevent) any form of direct marketing (including electronic marketing) at any time (Article 21(3)).

Specific rules on electronic marketing (including circumstances in which consent must be obtained) are found in the Privacy and Electronic Communications Regulations 2003 (as amended) (**“PEC Regulations”**). The PEC Regulations are derived from European Union Directive 2002/58/EC (ePrivacy Directive), which have been retained in UK law post-Brexit.

The PEC Regulations prohibit the use of automated calling systems without the consent of the recipient. The PEC Regulations also prohibit unsolicited electronic communications (ie by email or SMS text) for direct marketing purposes without prior consent from the consumer unless:

- the consumer has provided their relevant contact details in the course of purchasing a product or service from the person proposing to undertake the marketing
- the marketing relates to offering a similar product or service, and
- the consumer was given a means to readily 'opt out' of use for direct marketing purposes both at the original point where their details were collected and in each subsequent marketing communication.

Each direct marketing communication must not disguise or conceal the identity of the sender and include the 'unsubscribe' feature referred to above.

The restrictions on marketing by email / SMS only applies in relation to individuals and not where marketing to corporate subscribers.

Enforcement of a breach of the PEC Regulations is dealt with by the ICO. The maximum fine for a breach of the PEC Regulations is GBP 500,000, which can be issued against a company or its directors. The ICO regularly issues fines for direct marketing violations, and it is not uncommon for these to be in the hundreds of thousands of pounds range.

sender, the email identifies the sender and the sender’s contact information, and the email contains instructions on how the recipient can easily and without cost opt out of future commercial emails from the sender. The FTC and state Attorneys General, as well as ISPs and corporate email systems can sue violators. Knowingly falsifying the origin or routing of a commercial email message is a federal crime.

Text Messages

Federal and state regulations apply to the sending of marketing text messages to individuals. Express consent is required to send text messages to individuals, and, for marketing text messages, express written consent is required (electronic written consent is sufficient, but verbal consent is not). The applicable regulations also specify the form of consent. This is a significant class action risk area, and any text messaging (marketing or informational) program needs to be carefully reviewed for strict compliance with legal requirements.

Calls to Wireless Phone Numbers

Similar to text messages, federal and state regulations apply to marketing calls to wireless phone numbers. Prior express consent is required to place phone calls to wireless numbers using any autodialing equipment, and, for marketing calls, express written consent is required (electronic written consent is sufficient, but verbal consent is not). The applicable regulations also specify the form of consent. This is a significant class action risk area, and any campaign or program that involves calls (marketing or informational) to phone numbers that may be wireless phone numbers needs to be carefully reviewed for strict compliance with legal requirements. The definition of autodialing equipment is generally considered to, broadly, include any telephone system that is capable of (whether or not used or configured storing or producing telephone numbers to be called, using a random or sequential number generator.

Telemarketing

Beyond the rules applicable to text messaging and calling to wireless phone numbers, there are federal and state telemarketing laws as well. Federal telemarketing laws apply to most telemarketing calls and programs, and state telemarketing law will apply to telemarketing calls placed to or from within that particular state. As a result, most telemarketing calls are governed by federal law, as well as the law of one or more states. Telemarketing rules vary by state, and address many different aspects of

telemarketing, such as calling time restrictions, do-not-call registries, opt-out requests, mandatory disclosures, requirements for completing a sale, executing a contract or collecting payment during the call, further restrictions on the use of auto-dialers and pre-recorded messages, and record-keeping requirements. Many states also require telemarketers to register or obtain a license to place telemarketing calls.

Fax Marketing

Federal law and regulations generally prohibit the sending of unsolicited advertising by fax without prior, express consent. Violations of the law are subject to civil actions and have been the subject of numerous class action lawsuits. The law exempts faxes to recipients that have an established business relationship with the company on whose behalf the fax is sent, as long as the recipient has not opted out of receiving fax advertisements and has provided their fax number ‘voluntarily,’ a concept which the law specifically defines.

The law also requires that each fax advertisement contain specific information, including:

- A ‘clear and conspicuous’ opt-out method on the first page of the fax
- A statement that the recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful, and
- A telephone number, fax number, and cost-free mechanism to opt-out of faxes, which permit consumers to make opt-out requests 24 hours a day, seven days a week
- Violations are subject to a private right of action and statutory damages, and thus pose a risk of class action lawsuits

ONLINE PRIVACY

The PEC Regulations (as amended) deal with the collection of location and traffic data by public electronic communications services providers (**"CSPs"**) and use of cookies (and similar technologies).

Traffic Data

Traffic Data held by a CSP must be erased or anonymised when it is no longer necessary for the purpose of the transmission of a communication.

However, Traffic Data can be retained if:

ONLINE PRIVACY

There is no specific federal law that *per se* regulates the use of cookies, web beacons and other similar tracking mechanisms. However, the state online privacy laws require notice of online tracking and of how to opt out of it.

Under California law, any company that tracks any personally identifiable information about consumers over time and across multiple websites must disclose in its privacy policy whether the company honors any ‘Do-Not-Track’ method or provides users a way to opt out of such tracking. The same law also

- it is being used to provide a value added service, and
- consent has been given for the retention of the Traffic Data.

Traffic Data can also be processed by a CSP to the extent necessary for:

- the management of billing or traffic
- dealing with customer enquiries
- the prevention of fraud, or
- the provision of a value added service.

Cookie Compliance

The use and storage of cookies and similar technologies requires:

- clear and comprehensive information, and
- consent of the website user.

The ICO released comprehensive guidance on the use of cookies and similar technologies in 2019. In line with the standard for ‘GDPR like’ consent under the PEC Regulations, this guidance significantly raised the bar in terms of the ICO’s expectations for cookie consent collection. It is now clear that the ICO expects consent to be collected on a clear opt-in basis – implied consent (such as the continued browsing of a website after being shown a cookie banner) is no longer sufficient. Instead, cookie consent modules that given users granular choices about cookie selection (typically on a ‘by purpose’ basis) are becoming the norm in order to align with the guidance.

Consent is not required for cookies that are:

- used for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or
- strictly necessary for the provision of a service requested by the user.

Enforcement of a breach of the PEC Regulations is dealt with by the ICO. The maximum fine for a breach of the PEC Regulations is GBP 500,000, which can be issued against a company or its directors.

requires website operators to disclose in their privacy policy whether any third parties may collect any personally identifiable information about consumers on their website and across other third party websites, and prohibits the advertising of certain products, services and materials (including alcohol, tobacco, firearms, certain dietary supplements, ultraviolet tanning, tattoos, obscene matters, etc.). Further, under most of the comprehensive state laws, information collected via cookies, online, mobile and targeted ads, and other online tracking are subject to the requirements of the law.

Further, given the broad definition of personal information under the comprehensive state privacy laws, information collected via cookies and similar technologies is generally subject to the requirements of the law (e.g., notice and consumer rights). For example, under the CCPA a 'sale' includes selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating a consumer’s personal information by one business to another business or a third party for monetary or other valuable consideration. ‘Sharing’ under the CCPA is defined as sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business to a third party for cross-context behavioral advertising, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged. These broad definitions sweep in certain online advertising activities -- for example, where a business permits the collection and use of information through certain third party cookies and tags on their website, in order to better target the business' ad campaigns on third party websites or in exchange for compensation from a third party ad network.

Universal Opt-Out Signals / Global Privacy Control (GPC)

Amendments to the CCPA, and recent enforcement actions by the California Attorney General, have highlighted the requirement that businesses that process personal information for targeted advertising purposes allow consumers to opt-out of sales and sharing, using an opt-out preferences signal sent by the consumer’s browser or a browser plugin, aso referred to as Global Privacy Control (GPC). Colorado’s comprehensive privacy law introduces the same requirement, with an effective date of July 1, 2024.

Minors

The Children’s Online Privacy Protection Act and regulations (COPPA) applies to information collected automatically (*eg*, via cookies) from child-directed websites and online services and other websites, online services and third party ad networks or plug-ins that knowingly collect personal information online from children under 13. COPPA also regulates behavioral advertising to children under 13 as well as the collection of geolocation information, requiring prior verifiable parental consent to engage in such advertising or collection.

California law requires that operators of websites or online services that are directed to minors or that knowingly collect personally identifiable information from minors permit minors that are registered users of their sites to remove any content the minor has posted from the site or online service. The law does not give minors the right to remove information posted by third parties. Minors must be given clear notice on how to exercise their right to removal. Certain state privacy laws (such as the CCPA, CPA or VCDPA) also require that a business obtain explicit consent prior to selling any personal information about an individual the business has actual knowledge is under 16 years old.

Location Data

Generally, specific notice and consent in needed to collect precise *(e.g.,* mobile device) location information. The CCPA defines precise geolocation information as “any data derived from a device and that is used or intended to be used to locate a consumer within a geographic area that is equal to or less than the area of a circle with a radius of one thousand, eight hundred and fifty (1,850) feet.” Connecticut and Utah law carry similar definitions, albeit with a radius of 1,750 feet.

KEY CONTACTS

Andrew Dyson
Partner, Global Co-Chair Data Protection, Privacy and Security Group
T +44 (0)113 369 2403
andrew.dyson@dlapiper.com

Ross McKean
Partner
T +44 (0) 20 7796 6077
ross.mckean@dlapiper.com

James Clark
Partner
T +44 113 369 2461
james.clark@dlapiper.com

DATA PRIVACY TOOL

You may also be interested in our Data Privacy Scorebox to assess your organization's level of data protection maturity.

KEY CONTACTS

Kate Lucente
Partner and Co-Editor, Data Protection Laws of the World
T +1 813 222 5927
kate.lucente@dlapiper.com

Andrew Serwin
Partner, Global Co-Chair Data Protection, Privacy and Security Group
T +1 858 677 1418
andrew.serwin@dlapiper.com

Jennifer Kashatus
Partner
T +1 202 799 4448
jennifer.kashatus@dlapiper.com

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