

# The EU Privacy Directive and US Financial Services



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# Privacy: Two Different Approaches



- **US**
  - **Sector-specific legislation**
  - **Industry self-regulation**
  - **Privacy statements**
- **EU**
  - **Comprehensive regulation**



# EU Privacy Directive



- **Adopted on October 24, 1995**
  - **Effective on October 25, 1998**
- **Comprehensive approach to all data protection issues; conceived before emergence of Internet**



# Basic Requirements



- **Criteria for data processing:**
  - **“Unambiguous consent”**
  - **“Necessary for performance of contract”**
  - **“Compliance with legal obligation”**
- **All personal data must be:**
  - **“Processed fairly and lawfully”**
  - **No incompatible secondary uses**
  - **Accurate, not excessive, and not held for longer than necessary**

# Extraterritorial Impacts



- **EU asserts that Directive applies to most, if not all, transactions having a connection to a Member State**
- **Article 25: No exports of personal data to countries that lack “adequate” data protection safeguards**



# Proposed “Safe Harbor” Principles



- **Notice**
- **Choice**
- **Onward Transfer**
- **Security**
- **Data Integrity**
- **Access**
- **Enforcement**



# Methods of Complying



- **Demonstrate that you are already covered by relevant US privacy laws**
- **Join self-regulatory mechanism such as BBBOnline**
- **Self-regulation (Privacy Policy)**
- **Model Contracts - to be approved.**
- **Enforcement:**
  - **FTC, under Section 5 of FTCA**
  - **Commit to cooperate with panel of EU data protection authorities**



# Treatment of Financial Services



- **Major outstanding issue is whether privacy provisions of G-L-B FSMA will automatically confer safe harbor status on covered entities (banks, etc.)**
- **Issue still unresolved**
  - **New Law; Regulations not final**
  - **EU has not yet found that FSMA provides “adequate” safeguards**



# Benefits of Safe Harbor



- **Presumption of “adequate” data protection standards; no automatic disruption of data flows from EU**
- **Enforcement by relevant US authorities (FTC or agency with regulatory authority over entity)**



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