Schnader
ATTORNEYS AT LAW
Schnader Harrison Segal & Lewis LLP
NEW YORK PENNSYLVANIA CALIFORNIA WASHINGTON, DC NEW JERSEY

INTERNATIONAL ALERT

MAY 2005

DATA PROTECTION ALERT

BY: SCOTT WENNER

Recent announcements from within the European Commission strongly suggest that U.S. companies employing European Union residents in Europe and/or marketing to persons in the E.U. over the Internet, by direct mail or in person should reexamine their compliance status with the European Union Data Protective Directive and audit their compliance programs at the earliest possible time.

Nearly 10 years ago, the European Union promulgated a directive on data privacy. To all but a few on this side of the Atlantic, this was and remains largely a non-event. However, the Data Protection Directive could actually have an enormous impact on the way every American company with employees or customers in Europe transmits, stores, massages, crunches or otherwise uses "personal data." As defined under the EU directive, "personal data" is any form of information, including a photograph, that can be tied to a specific person.

Under the directive, individual E.U. member states are required to enact their own national laws providing – at a minimum – a specific basic standard of protection. Already, 15 of the E.U. member states have achieved this. In addition, the 10 nations that joined the E.U. last year all have enacted legislation that is being reviewed for adequacy by the European Commission. Thus, there are currently national laws on the books in countries across the E.U. that regulate all processing of personal data – from collection to destruction – by any entity that possesses and/or controls it ("Data Controller") or that processes it at the behest of a data controller ("Data Processor"). The standards are stated as "Principles" and fall into two broad categories: (1) requirements for processing personal data within the European Economic Area;[1] and (2) preconditions for transferring personal data beyond the EEA to, among others, the United States.

Thus far – due in part to budget constraints and in part to a desire to avoid disrupting commerce with Europe's biggest trade partner – enforcement of the Directive has not been vigorous. Recently, however, greater and more stringent enforcement has been promised. In a recent Declaration, one E.U. body announced its commitment "to developing proactive enforcement strategies, increasing enforcement actions and intensifying its cooperation efforts by enhancing arrangements for mutual assistance."[2] The agency proposed broad and concrete strategies to accomplish this goal. Ominously, in a separate report issued almost simultaneously, the same body singled out U.S.-

1 This refers to the EU and certain other European nations that share common traditions and interests).

2 Declaration of the Article 29 Working Party on Enforcement, Report No.12067/04/EN WP 101 (11/24/04).

based companies that had declared their compliance with the so-called Safe Harbor agreement – a data privacy compliance mechanism specially negotiated by U.S. and E.U. officials – for widespread and serious non-compliance with their commitments.

American companies must view these recent developments as warning shots signaling a new level of enforcement. Once the stiffening enforcement regime promised in the Working Party's Declaration is actualized, U.S. companies should expect increased attention from European regulators. U.S. companies that market and sell to individuals in the European Union and/or who employ EU residents would be wise to re-examine their compliance status and audit their compliance measures immediately. Safe Harbor is but one of the methods open to U.S. data controllers and/or processors for compliance[3] and serious thought should be given to the means of compliance to use in these some what uncertain times.

3. Companies in financial services, communications and other sectors not subject to FTC jurisdiction may not utilize Safe Harbor because the FTC cannot exercise its enforcement authority against them.

International Law Practice Group

Schnader's practice reaches a broad and multidisciplinary spectrum of international, multinational and cross-border work, including transactions, counseling, litigation and dispute resolution. The practice approaches international matters by bringing together experienced legal practitioners, an active network of trusted legal contacts throughout the world and a common sense understanding of legal, business and social cultures and communities outside of the United States.

Our lawyers have a sophisticated understanding of international legal concepts and the requirements of the international legal and business communities. We have the know-how and the resources to provide solutions to often complex cross-border issues that global businesses increasingly face. Some of our lawyers received legal training and experience in foreign countries and have lived and worked abroad. Some of us are published in foreign and international books and periodicals and have addressed multinational groups on a variety of subjects. Among the languages Schnader lawyers speak and write are French, Spanish, German, Italian, Cantonese, Japanese and Russian.

For more informtation on our International Practice Group, please contact the International Practice Group chair:
Scott J. Wenner . . . . .212.973.8115 . . . . .swenner@schnader.com

Schnader International Alert is published periodically by Schnader Harrison Segal & Lewis LLP to provide current information to clients and friends. *Schnader International Alert* is intended only to inform, not to provide legal advice, and readers should seek professional advice for specific applications of the information.

©2005 Schnader Harrison Segal & Lewis LLP

Schnader Harrison Segal & Lewis LLP
1600 Market Street Suite 3600 Philadelphia, PA 19103-7286
215.751.2000 FAX 215.751.2205

schnader.com