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| **TO** | IAB | **DATE** | November 4, 2015 |
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| **RE** | House Subcommittee Hearings on U.S.-EU Safe Harbor and International Data Flows | | |

On November 3, 2015, two subcommittee hearings on the U.S.-EU Safe Harbor and cross-border data flows were held in the U.S. House of Representatives. We have provided below a summary of the House Energy and Commerce Joint Subcommittee hearing, followed by a summary of the House Judiciary Subcommittee hearing.

**House Energy and Commerce Joint Subcommittee Hearing**

The U.S. House Committee on Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade (“Trade Subcommittee”) and Subcommittee on Communications and Technology (“Technology Subcommittee”) held a joint hearing entitled “Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows.” Members of the Subcommittees and panelists discussed the economic impact of cross border data flows; the trade relationship between the United States and the EU; the legal challenges of renegotiating the U.S.-EU Safe Harbor Agreement (“Safe Harbor”) following the Snowden disclosures; and the *Maximillian Schrems v. Data Protection Commissioner* (“*Schrems*”) ruling that invalidated the Safe Harbor.

The hearing featured the following witnesses: (1) Victoria Espinel, President and CEO, BSA | The Software Alliance; (2) Joshua Meltzer, Senior Fellow Global Economy and Development, The Brookings Institute; (3) John Murphy, Senior Vice President for International Policy, U.S. Chamber of Commerce; (4) Marc Rotenberg, President, Electronic Privacy Information Center.

1. **Opening Statements of Subcommittee Members**

***Committee Chairman Fred Upton (R-MI)*** discussed the mutually beneficial nature of U.S.-EU trade and urged members of Congress to refrain from leveraging the *Schrems* ruling as a political tool to address controversial privacy and data protection matters. He advocated for the speedy adoption of a Safe Harbor 2.0 agreement.

***Committee Ranking Member Frank Pallone (D-NJ)*** asserted that the movement of data affects all global consumers and businesses and is essential to the American economy. He advocated for updating baseline privacy standards in the United States to address new technological developments and to build trust with consumers.

***Trade Subcommittee Chairman Michael Burgess (R-TX)*** emphasized that the United States and the EU have a mutual agreement on privacy and data security principles. He thanked the Department of Commerce (“DOC”) for its continued effort to negotiate a Safe Harbor 2.0 agreement and praised the enforcement work of the Federal Trade Commission (“FTC”). Trade Subcommittee Chairman Burgess encouraged the DOC to make every effort to secure an agreement in advance of the January 31, 2016 deadline when EU agencies will begin enforcing the *Schrems* decision.

***Trade Subcommittee Ranking Member Jan Schakowsky (D-IL)*** asserted that the value of a U.S.-EU Safe Harbor Agreement cannot be overstated. Trade Subcommittee Ranking Member Schakowsky stated that she plans to introduce legislation regulating security standards for personal data including geolocation, health, and biometric data, as well as email and social media account information. She stated that the legislation would also require breached entities to report data breaches to consumers within thirty days.

***Technology Subcommittee Chairman Greg Walden (R-OR)*** highlighted the benefits of cross border data flows for small and medium sized companies, suggesting that the free flow of data allows companies to reach new markets. He stated that without a valid Safe Harbor Agreement, small and medium sized companies will face higher costs associated with privacy and data security compliance efforts.

***Technology Subcommittee Vice Chairman Bob Latta (R-OH)*** stated that a Safe Harbor Agreement between the United States and the EU provides enhanced marketplace stability and greater protections for consumer data.

***Technology Subcommittee Ranking Member Anna Eshoo (D-CA)*** asserted that companies need guidance on regulatory and enforcement practices following the *Schrems* ruling. She stated that the magnitude of the *Schrems* decision reaches beyond U.S.-EU relations and implicates both trade and privacy policy on a global scale. Technology Subcommittee Ranking Member Eshoo urged the Obama Administration to reach a Safe Harbor 2.0 agreement as swiftly as possible.

***Rep. Marsha Blackburn (R-TN)*** noted that data flows between the United Stated and the EU are significantly higher than the data flows between the U.S. and Asia. She praised the legislative progress made in recent months related to privacy, data security, and enforcement, including progress with respect to the Judicial Redress Act (“H.R. 1428”).

1. **Opening Statements of Witnesses**

***Victoria Espinel, President and CEO, The Software Alliance,*** asserted that many businesses are struggling with legal uncertainty left in the wake of the *Schrems* ruling. She suggested that Congress should build consensus to help reach a Safe Harbor 2.0 Agreement; ensure that companies will have adequate time to comply with new requirements; and explore regulatory options that advance the interests of all parties involved in a sustainable and long-term manner.

***Joshua Meltzer, Senior Fellow Global Economy and Development, The Brookings Institute,*** discussed the implications of the *Schrems* ruling as it relates to investment between the United States and the EU. He stated that data flows enable the strong economic relationship between the United States and the EU, but that the different approaches to privacy and data security regulation and enforcement increase legal uncertainty, risk, and economic challenges for transatlantic companies.

***Marc Rotenberg, President, Electronic Privacy Information Center,*** proposed establishing a consumer privacy bill of rights; updating the Privacy Act of 1974; establishing an independent agency focused on privacy and data security; and developing an international framework to address data flows between global trade partners.

***John Murphy, Senior Vice President for International Policy, U.S. Chamber of Commerce,*** asserted that it would be a heavy burden for companies to comply with twenty-eight conflicting regulatory and enforcement obligations without a Safe Harbor agreement. He voiced his support for a Safe Harbor 2.0, and praised the House of Representatives for passing H.R. 1428 and the Cybersecurity Information Sharing Act.

1. **Questioning**

***U.S.-EU Safe Harbor*.** Trade Subcommittee Ranking Member Schakowskyinquired about the provisions that should be included in the Safe Harbor 2.0 Framework. Rotenberg stated that it will be critical to address the DOC’s and the FTC’s lack of authority over the surveillance activities called into question in the *Schrems* case. He added that FTC enforcement authority is not strong enough, and suggested that Congress should consider the creation of an independent agency to regulate privacy and data security. Trade Subcommittee ChairmanBurgess inquired about the importance of reaching a Safe Harbor 2.0 Agreement. Murphy answered that reaching agreement over a Safe Harbor 2.0 is indispensable because of the unparalleled investment relationship between the United States and the EU and the tremendous cost to businesses if an agreement is not reached. Rep. Yvette Clarke (D-NY) asked the panel if there are available options for small and medium sized businesses to address global data flow without a Safe Harbor agreement. Espinel noted that some companies can build local data centers, but she stated that this is not an option for smaller companies. Murphy added that there are no viable alternatives for small businesses if a Safe Harbor 2.0 agreement fails, noting that binding corporate rules are prohibitively expensive and time consuming to implement.

***DOC Negotiations.*** Technology Subcommittee Chairman Walden and Rep. Susan Brooks (R-IN) asked the panelists about the DOC efforts to negotiate Safe Harbor 2.0. Murphy praised the DOC for reaching out to the business sector. Espinel urged Congress to support the DOC. She also emphasized that additional measures will need to be taken to establish a long term solution to address global data flows.

***Schrems v. Data Protection Commissioner.*** Technology Subcommittee Chairman Walden inquired about the impact of the *Schrems* ruling on foreign direct investment. He stated that after the *Schrems* decision companies at all levels of foreign investment will need to review their processes as they pertain to data transfers, and that investments will face higher levels of risk and uncertainty. Trade Subcommittee ChairmanBurgess inquired about the effect of the *Schrems* ruling on small and medium sized businesses. Espinel stated that limiting data flows reduces efficiency and innovation in every economic sector.

***Government Surveillance.*** Rep. Jerry McNerney (D-CA) inquired about the practice of exceptional access, whereby authorized enforcement agencies use an encryption key to access data once they receive the appropriate warrant. Rotenberg stated that encrypted data is still vulnerable to attacks by cyber criminals. Technology Subcommittee Ranking Member Eshoo asked if there should be any adjustment to the current government surveillance practices employed by the NSA. Rotenberg stated that while the USA Freedom Act is a step toward addressing concerns about government surveillance, the law fails to address the collection of data about non-U.S. personnel.

***U.S.-EU Privacy and Data Security Law.*** Rep. Brett Guthrie (R-KY) inquired about differences in privacy and data security regulation in the United States and the EU. Rotenberg stated that there are more similarities than differences between United States and EU privacy and data security regulation. He suggested that the Fair Credit Reporting Act and other laws provide a strong base for privacy and data security protections in the United States. He stressed that privacy regulation in the United States must be updated to account for developing technology. Rep. Peter Welch (D-VT) and Rep. John Shimkus (R-IL) asked panelists about government surveillance in the EU. Meltzner asserted that EU government surveillance agencies engage in many of the same data collection practices as the NSA.

***Additional Global Action.*** Technology Subcommittee Chairman Walden and Technology Subcommittee Vice Chairman Lattaasked if other countries are considering action on privacy and data collection similar to the *Schrems* case in the EU. Rotenberg stressed that the establishment of fundamental privacy rights in different countries will impact every level of trade and global business. Meltzer suggested leveraging Asia-Pacific Economic Cooperation principles to preempt similar action from other countries.

**House Judiciary Subcommittee Hearing**

The House Judiciary Committee’s (“Committee”) Subcommittee on Courts, Intellectual Property, and the Internet (“Subcommittee”) convened a hearing entitled “International Data Flows: Promoting Digital Trade In the 21st Century.” The hearing focused on potential legislative and policy solutions to the invalidation of the U.S.-EU Safe Harbor Framework (“Safe Harbor”) on October 6th. Among the legislative proposals discussed include the “Judicial Redress Act” (“H.R. 1428”) and the “Law Enforcement Access to Data Stored Abroad Act” or the “LEADS Act” (“H.R. 1174”). Subcommittee members and witnesses also discussed certain proposals under the Trans-Pacific Partnership (“TPP”), including provisions that would prevent certain countries from requiring companies to localize data centers and share source code.

The panel featured the following witnesses: (1) Ambassador Peter Allgeier, President, Coalition of Service Industries (“CSI”); (2) Dr. Robert D. Atkinson, President, Information Technology and Innovation Foundation (“ITIF”); (3) Victoria Espinel, President and CEO, BSA | The Software Alliance; (4) Ed Black, President and CEO, Computer and Communications Industry Association (“CCIA”); and (5) Mark MacCarthy, Senior Vice President, Public Policy, Software and Information Industry Association (“SIIA”).

1. **Opening Statements of Committee Members**

***Subcommittee Chairman Darrell Issa (R-CA)*** highlighted his concern regarding the invalidation of the Safe Harbor agreement, noting that a failure to reach another agreement could have negative consequences on American businesses. He also discussed TPP and cautioned against regulations that would require data localization or the sharing of source code.

***Subcommittee Ranking Member Jerrold Nadler (D-NY)*** expressed concern regarding any proposed restrictions on cross border data transfers that could block social media, noting that blocking social media may stifle freedom of speech and negatively impact companies. He applauded Reps. Sensenbrenner (R-WI) and Conyers (D-MI) for their efforts on H.R. 1428.

***Committee Chairman John Conyers (D-MI)*** cited benefits of digital trade to the expansion of the U.S. economy. He noted that the passage of H.R. 1428 by the House of Representatives was an important step for the United States in addressing Europeans’ concerns pertaining to U.S. government surveillance. He stated that certain trade barriers such as bans on child pornography and digital piracy are necessary, whereas restrictions on data localization is harmful to digital trade.

1. **Opening Statements of Witnesses: Government Panel**

***Ambassador Peter Allgeier, President, CSI,*** expressed his concern that international rules have not been updated to protect the transfer of data across borders. He stated that the TPP should prevent localization requirements that would impact cloud computing services.

***Dr. Robert D. Atkinson, President, ITIF,*** stated that certain countries are increasingly adopting an approach to digital trade that reflects “protectionism.” He proposed that a narrow national security exemption should be included in the TPP.

***Victoria Espinel, President and CEO, BSA,*** highlighted the following areas to focus on with respect to data flows: prohibition of custom duties on digital products, prevention of requirements for companies to disclose source codes, and enactment of H.R. 1428. She listed countries that have implemented restrictions on data flows, including China, Russia, and Brazil.

***Ed Black, President and CEO, CCIA,*** focused on certain rules that impact data flows, including the EU “Right to Be Forgotten” and current trade and copyright rules. He called for enactment of H.R. 1428.

***Mark MacCarthy, Senior Vice President, Public Policy, SIIA,*** discussed his concern regarding the financial services provision in the TPP, stating that it is too broad. He stated that enactment of H.R. 1428 would facilitate reaching a Safe Harbor 2.0 agreement.

1. **Questioning**

***U.S.-EU Safe Harbor.*** Rep. Steve Chabot (R-OH) expressed concern regarding the potential impact that barriers to digital trade would have on small businesses. Atkinson stressed that without a Safe Harbor agreement, companies could adopt binding corporate rules, but stated that these rules would be costly for small companies to adopt. Espinel underscored that companies must be provided with sufficient time to comply with any Safe Harbor agreement resulting from negotiations.

***Judicial Redress Act (H.R. 1428).*** Committee Ranking Member Conyers promoted H.R. 1428, and each panelist announced their support for the legislation. MacCarthy stressed that H.R. 1428 has important implications for the Safe Harbor negotiations and the U.S.-EU Umbrella Agreement.

***LEADS Act (H.R. 1174).***  Rep. Suzan DelBene (D-WA) asked the panel to elaborate on the EU’s concern regarding U.S. law enforcement access to data and their positions on H.R. 1174. Espinel, MacCarthy, and Atkinson announced their support for H.R. 1174. Atkinson noted that the Mutual Legal Assistance Treaty could be improved.

***Law Enforcement and Government Surveillance.*** Subcommittee Ranking Member Nadler asked Atkinson to weigh in on Federal Bureau of Investigation (“FBI”) Director James Comey’s proposal for “backdoor” access to encrypted data. Atkinson opposed the proposal, noting that the FBI cannot account for the future of encryption technology. Rep. Ted Poe (R-TX) highlighted as areas for reform, Foreign Intelligence Surveillance Act (“FISA”) Courts, surveillance warrants under Section 702 of the FISA Amendments Act, Electronic Communications Privacy Act (“ECPA”), and backdoor access to encrypted data. Espinel noted her concern regarding encryption. The panel announced their support for ECPA reform.

***TPP.*** Subcommittee Chairman Issa suggested that a carveout for banks in the TPP that would require presenting data at the request of a government agency may not be burdensome. He pointed out that banks are required to present the International Revenue Service with certain documents upon request. Ambassador Allgeier responded that it may take banks a significant length of time to obtain data from servers across the globe. Black recommended that the World Trade Organization be further involved in setting rules for digital trade. Subcommittee Vice Chairman Doug Collins (R-GA) asked the panel for their views on TPP provisions that address computing localization and disclosure of source code. Espinel responded that these provisions are strong and enforceable. Rep. Collins stressed that the United States should not settle for copyright frameworks of other countries. Rep. Zoe Lofgren (D-CA) suggested that countries that have data localization, such as Russia, China, and Turkey, do not promote significant free speech and have other motivations for imposing this requirement.

***Website Blocking.*** Rep. Nadler asked Atkinson to discuss his view on addressing child pornography and digital piracy with respect to digital trade. Atkinson stressed that countries are not likely reach a consensus on these issues. He stated that the United States should focus on protecting certain Internet websites from being blocked, including social media websites.

***Other Potential Legislative and Policy Solutions.*** Chairman Issa recommended that an approach similar to the multilateral agreement that Antarctica is a “non-country” and free trade zones be considered in the development of a framework for international data flow governance. In offering a long term solution for international data flows, Espinel called for an international data flows framework that would be drafted in coordination with various countries.

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Please contact us with any questions.