

## SWISS-U.S. DATA PRIVACY FRAMEWORK PRINCIPLES ISSUED BY THE U.S. DEPARTMENT OF COMMERCE

### I. OVERVIEW

1. While the United States and Switzerland share a commitment to enhancing privacy protection, the rule of law, and a recognition of the importance of transatlantic data flows to our respective citizens, economies, and societies, the United States takes a different approach to privacy protection from that taken by Switzerland. The United States uses a sectoral approach that relies on a mix of legislation, regulation, and self-regulation. The U.S. Department of Commerce (“the Department”) is issuing the Swiss-U.S. Data Privacy Framework Principles, including the Supplemental Principles (collectively “the Principles”) and Annex I of the Principles (“Annex I”), under its statutory authority to foster, promote, and develop international commerce (15 U.S.C. § 1512). The Principles were developed in consultation with the Swiss Federal Administration, industry, and other stakeholders to facilitate trade and commerce between the United States and Switzerland<sup>1</sup>. The Principles, a key component of the Swiss-U.S. Data Privacy Framework (“Swiss-U.S. DPF”), provide organizations in the United States with a reliable mechanism for personal data transfers to the United States from Switzerland while ensuring that Swiss data subjects continue to benefit from effective safeguards and protection as required by Swiss legislation with respect to the processing of their personal data when they have been transferred to other countries. The Principles are intended for use solely by eligible organizations in the United States receiving personal data from Switzerland for the purpose of qualifying for the Swiss-U.S. DPF and thus benefitting from Switzerland’s recognition of adequacy. The Principles do not affect the application of the Swiss law on data protection in particular the Federal Act on Data Protection (“FADP”)<sup>2</sup> and its ordinances<sup>3</sup> that apply to the processing of personal data in Switzerland. Nor do the Principles limit privacy obligations that otherwise apply under U.S. law.
2. In order to rely on the Swiss-U.S. DPF to effectuate transfers of personal data from Switzerland, an organization must self-certify its adherence to the Principles to the Department (or its designee). While decisions by organizations to thus enter the Swiss-U.S. DPF are entirely voluntary, effective compliance is compulsory: organizations that self-certify to the Department and publicly declare their commitment to adhere to the Principles must comply fully with the Principles. In order to enter the Swiss-U.S. DPF, an organization must (a) be subject to the investigatory and enforcement powers of the Federal Trade Commission (the “FTC”), the U.S. Department of Transportation (the “DOT”) or another statutory body that will effectively ensure compliance with the Principles (*other U.S. statutory bodies recognized by Switzerland may be*

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<sup>1</sup> Due to the similarities between Swiss and EU law on data protection, the Principles and Annex I of the Principles are modeled on those developed for the EU-U.S. Data Privacy Framework (“EU-U.S. DPF”).

<sup>2</sup> Federal Act on Data Protection (FADP) of 25 September 2020.

<sup>3</sup> Ordinance on Data Protection of 31 August 2022, as well as Ordinance on Data Protection Certification of 31 August 2022.

*included as an annex in the future*); (b) publicly declare its commitment to comply with the Principles; (c) publicly disclose its privacy policies in line with these Principles; and (d) fully implement them<sup>4</sup>. An organization's failure to comply is enforceable by the FTC under Section 5 of the Federal Trade Commission (FTC) Act prohibiting unfair or deceptive acts in or affecting commerce (15 U.S.C. § 45); by the DOT under 49 U.S.C. § 41712 prohibiting a carrier or ticket agent from engaging in an unfair or deceptive practice in air transportation or the sale of air transportation; or under other laws or regulations prohibiting such acts.

3. The Department will maintain and make available to the public an authoritative list of U.S. organizations that have self-certified to the Department and declared their commitment to adhere to the Principles ("the Data Privacy Framework List"). Swiss-U.S. DPF benefits are assured from the date that the Department places the organization on the Data Privacy Framework List. The Department will remove from the Data Privacy Framework List those organizations that voluntarily withdraw from the Swiss-U.S. DPF or fail to complete their annual re-certification to the Department; these organizations must either continue to apply the Principles to the personal information they received under the Swiss-U.S. DPF and affirm to the Department on an annual basis their commitment to do so (*i.e.*, for as long as they retain such information), provide "adequate" protection for the information by another authorized means (for example, using a contract that fully reflects the requirements of the relevant standard contractual clauses approved, established or recognized by the Federal Data Protection and Information Commissioner ("the FDPIC")), or return or delete the information. The Department will also remove from the Data Privacy Framework List those organizations that have persistently failed to comply with the Principles; these organizations must return or delete the personal information they received under the Swiss-U.S. DPF. An organization's removal from the Data Privacy Framework List means it is no longer entitled to benefit from Switzerland's recognition of adequacy to receive personal information from Switzerland.
4. The Department will also maintain and make available to the public an authoritative record of U.S. organizations that had previously self-certified to the Department, but that have been removed from the Data Privacy Framework List. The Department will provide a clear warning that these organizations are not participants in the Swiss-U.S. DPF; that removal from the Data Privacy Framework List means that such organizations cannot claim to be Swiss-U.S. DPF compliant and must avoid any statements or misleading practices implying that they participate in the Swiss-U.S. DPF; and that such organizations are no longer entitled to benefit from Switzerland's recognition of adequacy to receive personal information from Switzerland. An organization that continues to claim participation in the Swiss-U.S. DPF or makes other Swiss-U.S. DPF-related misrepresentations after it has been removed from the Data Privacy Framework List may be subject to enforcement action by the FTC, the DOT, or other enforcement authorities.
5. Adherence to these Principles may be limited: (a) to the extent necessary to

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<sup>4</sup> The Swiss-U.S. Privacy Shield Framework Principles have been amended as the "Swiss-U.S. Data Privacy Framework Principles". (See Supplemental Principle on Self-Certification).

comply with a court order or meet public interest, law enforcement, or national security requirements, including where statute or government regulation create conflicting obligations; (b) by statute, court order, or government regulation that creates explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization; or (c) if the effect of Swiss law on data protection is to allow exceptions or derogations, under the conditions set out therein, provided such exceptions or derogations are applied in comparable contexts. In this context, safeguards in U.S. law to protect privacy and civil liberties include those required by Executive Order 14086<sup>5</sup> under the conditions set out therein (including its requirements on necessity and proportionality). Consistent with the goal of enhancing privacy protection, organizations should strive to implement these Principles fully and transparently, including by endeavouring to indicate in their privacy policies where exceptions to the Principles permitted by (b) above will apply. For the same reason, where the option is allowable under the Principles and/or U.S. law, organizations are expected to opt for the higher protection where possible.

6. Organizations are obligated to apply the Principles to all personal data transferred in reliance on the Swiss-U.S. DPF after they enter the Swiss-U.S. DPF. An organization that chooses to extend Swiss-U.S. DPF benefits to human resources personal information transferred from Switzerland for use in the context of an employment relationship must indicate this when it self-certifies to the Department and conform to the requirements set forth in the Supplemental Principle on Self-Certification.
7. U.S. law will apply to questions of interpretation and compliance with the Principles and relevant privacy policies by organizations participating in the Swiss-U.S. DPF, except where such organizations have committed to cooperate with the FDPIC. Unless otherwise stated, all provisions of the Principles apply where they are relevant.
8. Definitions:
  - a. “Personal data” and “personal information” are data about an identified or identifiable individual that are within the scope of the FADP and its ordinances, received by an organization in the United States from Switzerland, and recorded in any form.
  - b. “Processing” of personal data means any operation or set of operations which is performed upon personal data, whether or not by automated means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure or dissemination, and erasure or destruction.
  - c. “Controller” means a person or organization which, alone or jointly with others, determines the purposes and means of the processing of personal

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<sup>5</sup> Executive Order of October 7, 2022, "Enhancing Safeguards for United States Signals Intelligence Activities."

data.

9. The effective date of the Principles and Annex I of the Principles is July 17, 2023; however, personal data cannot be received from Switzerland in reliance on the Swiss-U.S. DPF until the date of entry into force of Switzerland's recognition of adequacy.<sup>6</sup>

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<sup>6</sup> The effective date of the Principles and Annex I of the Principles is July 17, 2023; however, personal data cannot be received from Switzerland in reliance on the Swiss-U.S. DPF until the date of entry into force of Switzerland's recognition of adequacy. The Principles and Annex I of the Principles apply immediately upon self-certification and participating organizations that previously self-certified to the Swiss-U.S. Privacy Shield Framework Principles will need to update their privacy policies to instead refer to the "Swiss-U.S. Data Privacy Framework Principles" (*See* section (e) of the Supplemental Principle on Self-Certification); however, personal data cannot be received from Switzerland in reliance on the Swiss-U.S. DPF until the date of entry into force of Switzerland's recognition of adequacy.

## II. PRINCIPLES

### 1. NOTICE

- a. An organization must inform individuals about:
  - i. its participation in the Swiss-U.S. DPF and provide a link to, or the web address for, the Data Privacy Framework List,
  - ii. the types of personal data collected and, where applicable, the U.S. entities or U.S. subsidiaries of the organization also adhering to the Principles,
  - iii. its commitment to subject to the Principles all personal data received from Switzerland in reliance on the Swiss-U.S. DPF,
  - iv. the purposes for which it collects and uses personal information about them,
  - v. how to contact the organization with any inquiries or complaints, including any relevant establishment in Switzerland that can respond to such inquiries or complaints,
  - vi. the type or identity of third parties to which it discloses personal information, and the purposes for which it does so,
  - vii. the right of individuals to access their personal data,
  - viii. the choices and means the organization offers individuals for limiting the use and disclosure of their personal data,
  - ix. the independent dispute resolution body designated to address complaints and provide appropriate recourse free of charge to the individual, and whether it is: (1) the FDPIC, (2) an alternative dispute resolution provider based in Switzerland, or (3) an alternative dispute resolution provider based in the United States,
  - x. being subject to the investigatory and enforcement powers of the FTC, the DOT or any other U.S. authorized statutory body,
  - xi. the possibility, under certain conditions, for the individual to invoke binding arbitration,<sup>7</sup>
  - xii. the requirement to disclose personal information in response to lawful requests by public authorities,

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<sup>7</sup> See, e.g., section (c) of the Recourse, Enforcement and Liability Principle.

including to meet national security or law enforcement requirements, and

- xiii. its liability in cases of onward transfers to third parties.
- b. This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization or discloses it for the first time to a third party.

## 2. CHOICE

- a. An organization must offer individuals the opportunity to choose (*i.e.*, opt out) whether their personal information is (i) to be disclosed to a third party or (ii) to be used for a purpose that is materially different from the purpose(s) for which it was originally collected or subsequently authorized by the individuals. Individuals must be provided with clear, conspicuous, and readily available mechanisms to exercise choice.
- b. By derogation to the previous paragraph, it is not necessary to provide choice when disclosure is made to a third party that is acting as an agent to perform task(s) on behalf of and under the instructions of the organization. However, an organization shall always enter into a contract with the agent.
- c. For sensitive information (*i.e.*, personal information specifying medical or health conditions, racial or ethnic origin, data relating to the intimate sphere (*e.g.*, personal sexuality), data relating to political, religious, philosophical or trade union-related views or activities, or information on social assistance measures or administrative and criminal proceedings or sanctions), organizations must obtain affirmative express consent (*i.e.*, opt in) from individuals if such information is to be (i) disclosed to a third party or (ii) used for a purpose other than those for which it was originally collected or subsequently authorized by the individuals through the exercise of opt-in choice. In addition, an organization should treat as sensitive any personal information received from a third party where the third party identifies and treats it as sensitive.

### **3. ACCOUNTABILITY FOR ONWARD TRANSFER**

- a. To transfer personal information to a third party acting as a controller, organizations must comply with the Notice and Choice Principles. Organizations must also enter into a contract with the third-party controller that provides that such data may only be processed for limited and specified purposes consistent with the consent provided by the individual and that the recipient will provide the same level of protection as the Principles and will notify the organization if it makes a determination that it can no longer meet this obligation. The contract shall provide that when such a determination is made the third party controller ceases processing or takes other reasonable and appropriate steps to remediate.
- b. To transfer personal data to a third party acting as an agent, organizations must: (i) transfer such data only for limited and specified purposes; (ii) ascertain that the agent is obligated to provide at least the same level of privacy protection as is required by the Principles; (iii) take reasonable and appropriate steps to ensure that the agent effectively processes the personal information transferred in a manner consistent with the organization's obligations under the Principles; (iv) require the agent to notify the organization if it makes a determination that it can no longer meet its obligation to provide the same level of protection as is required by the Principles; (v) upon notice, including under (iv), take reasonable and appropriate steps to stop and remediate unauthorized processing; and (vi) provide a summary or a representative copy of the relevant privacy provisions of its contract with that agent to the Department upon request.

### **4. SECURITY**

- a. Organizations creating, maintaining, using or disseminating personal information must take reasonable and appropriate measures to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction, taking into due account the risks involved in the processing and the nature of the personal data.

### **5. DATA INTEGRITY AND PURPOSE LIMITATION**

- a. Consistent with the Principles, personal information must be limited to the information that is relevant for the purposes of processing.<sup>8</sup> An organization may not process personal information in a way that is incompatible with the purposes for which it has been collected or subsequently authorized by the individual. To the extent necessary for those purposes, an organization must take reasonable steps to ensure that personal data is reliable for its intended use, accurate, complete, and

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<sup>8</sup> Depending on the circumstances, examples of compatible processing purposes may include those that reasonably serve customer relations, compliance and legal considerations, auditing, security and fraud prevention, preserving or defending the organization's legal rights, or other purposes consistent with the expectations of a reasonable person given the context of the collection.

current. An organization must adhere to the Principles for as long as it retains such information.

- b. Information may be retained in a form identifying or making identifiable<sup>9</sup> the individual only for as long as it serves a purpose of processing within the meaning of 5(a). This obligation does not prevent organizations from processing personal information for longer periods for the time and to the extent such processing reasonably serves the purposes of archiving in the public interest, journalism, literature and art, scientific or historical research, and statistical analysis. In these cases, such processing shall be subject to the other principles and provisions of the Swiss-U.S. DPF. Organizations should take reasonable and appropriate measures in complying with this provision.

## **6. ACCESS**

- a. Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, or has been processed in violation of the Principles, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

## **7. RECOURSE, ENFORCEMENT AND LIABILITY**

- a. Effective privacy protection must include robust mechanisms for assuring compliance with the Principles, recourse for individuals who are affected by non-compliance with the Principles, and consequences for the organization when the Principles are not followed. At a minimum such mechanisms must include:
  - i. readily available independent recourse mechanisms by which each individual's complaints and disputes are investigated and expeditiously resolved at no cost to the individual and by reference to the Principles, and damages awarded where the applicable law or private-sector initiatives so provide;
  - ii. follow-up procedures for verifying that the attestations and assertions organizations make about their privacy practices are true and that privacy practices have been implemented as presented and, in particular, with regard to cases of non-compliance; and
  - iii. obligations to remedy problems arising out of failure to comply with the Principles by organizations announcing their adherence to them and consequences for such organizations. Sanctions

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<sup>9</sup> In this context, if, given the means of identification reasonably likely to be used (considering, among other things, the costs of and the amount of time required for identification and the available technology at the time of the processing) and the form in which the data is retained, an individual could reasonably be identified by the organization, or a third party if it would have access to the data, then the individual is "identifiable."



must be sufficiently rigorous to ensure compliance by organizations.

- b. Organizations and their selected independent recourse mechanisms will respond promptly to inquiries and requests by the Department for information relating to the Swiss-U.S. DPF. All organizations must respond expeditiously to complaints regarding compliance with the Principles referred by the FDPIC through the Department. Organizations that have chosen to cooperate with the FDPIC, including organizations that process human resources data, must respond directly to the FDPIC with regard to the investigation and resolution of complaints.
- c. Organizations are obligated to arbitrate claims and follow the terms as set forth in Annex I, provided that an individual has invoked binding arbitration by delivering notice to the organization at issue and following the procedures and subject to conditions set forth in Annex I.
- d. In the context of an onward transfer, a participating organization has responsibility for the processing of personal information it receives under the Swiss-U.S. DPF and subsequently transfers to a third party acting as an agent on its behalf. The participating organization shall remain liable under the Principles if its agent processes such personal information in a manner inconsistent with the Principles, unless the organization proves that it is not responsible for the event giving rise to the damage.
- e. When an organization becomes subject to a court order that is based on non-compliance or an order from a U.S. statutory body (*e.g.*, FTC or DOT) listed in the Principles or in a future annex to the Principles that is based on non-compliance, the organization shall make public any relevant Swiss-U.S. DPF-related sections of any compliance or assessment report submitted to the court or U.S. statutory body to the extent consistent with confidentiality requirements. The Department has established a dedicated point of contact for the FDPIC for any problems of compliance by participating organizations. The FTC and the DOT will give priority consideration to referrals of non-compliance with the Principles from the Department and the FDPIC, and will exchange information regarding referrals with the referring state authority on a timely basis, subject to existing confidentiality restrictions.

### **III. SUPPLEMENTAL PRINCIPLES**

#### **1. Sensitive Data**

- a. An organization is not required to obtain affirmative, express consent (*i.e.*, opt in) with respect to sensitive data where the processing is:
  - i. in the vital interests of the data subject or another person;
  - ii. necessary for the establishment of legal claims or defenses;
  - iii. required to provide medical care or diagnosis;
  - iv. carried out in the course of legitimate activities by a foundation, association or any other non-profit body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to the persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects;
  - v. necessary to carry out the organization's obligations in the field of employment law; or
  - vi. related to data that are manifestly made public by the individual.

#### **2. Journalistic Exceptions**

- a. Given U.S. constitutional protections for freedom of the press and the Swiss exemption for journalistic material, where the rights of a free press embodied in the First Amendment of the U.S. Constitution intersect with privacy protection interests, the First Amendment must govern the balancing of these interests with regard to the activities of U.S. persons or organizations.
- b. Personal information that is gathered for publication, broadcast, or other forms of public communication of journalistic material, whether used or not, as well as information found in previously published material disseminated from media archives, is not subject to the requirements of the Principles.

#### **3. Secondary Liability**

- a. Internet Service Providers ("ISPs"), telecommunications carriers, and other organizations are not liable under the Principles when on behalf of another organization they merely transmit, route, switch, or cache information. The Swiss-U.S. DPF does not create secondary liability. To the extent that an organization is acting as a mere conduit for data transmitted by third parties and does not determine the purposes and means of processing those personal data, it would not be liable.

#### **4. Performing Due Diligence and Conducting Audits**

- a. The activities of auditors and investment bankers may involve processing personal data without the consent or knowledge of the individual. This is permitted by the Notice, Choice, and Access Principles under the circumstances described below.
- b. Public stock corporations and closely held companies, including participating organizations, are regularly subject to audits. Such audits, particularly those looking into potential wrongdoing, may be jeopardized if disclosed prematurely. Similarly, a participating organization involved in a potential merger or takeover will need to perform, or be the subject of, a “due diligence” review. This will often entail the collection and processing of personal data, such as information on senior executives and other key personnel. Premature disclosure could impede the transaction or even violate applicable securities regulation. Investment bankers and attorneys engaged in due diligence, or auditors conducting an audit, may process information without knowledge of the individual only to the extent and for the period necessary to meet statutory or public interest requirements and in other circumstances in which the application of these Principles would prejudice the legitimate interests of the organization. These legitimate interests include the monitoring of organizations’ compliance with their legal obligations and legitimate accounting activities, and the need for confidentiality connected with possible acquisitions, mergers, joint ventures, or other similar transactions carried out by investment bankers or auditors.

#### **5. The Role of the Federal Data Protection and Information Commissioner**

- a. Organizations will implement their commitment to cooperate with the FDPIC as described below. Under the Swiss-U.S. DPF, U.S. organizations receiving personal data from Switzerland must commit to employ effective mechanisms for assuring compliance with the Principles. More specifically as set out in the Recourse, Enforcement and Liability Principle, participating organizations must provide: (a)(i) recourse for individuals to whom the data relate; (a)(ii) follow-up procedures for verifying that the attestations and assertions they have made about their privacy practices are true; and (a)(iii) obligations to remedy problems arising out of failure to comply with the Principles and consequences for such organizations. An organization may satisfy points (a)(i) and (a)(iii) of the Recourse, Enforcement and Liability Principle if it adheres to the requirements set forth here for cooperating with the FDPIC.
- b. An organization commits to cooperate with the FDPIC by declaring in its Swiss-U.S. DPF self-certification submission to the Department (*see* Supplemental Principle on Self-Certification) that the organization:

- i. elects to satisfy the requirement in points (a)(i) and (a)(iii) of the Recourse, Enforcement and Liability Principle by committing to cooperate with the FDPIC;
- ii. will cooperate with the FDPIC in the investigation and resolution of complaints brought under the Principles; and
- iii. will comply with any advice given by the FDPIC where the FDPIC takes the view that the organization needs to take specific action to comply with the Principles, including remedial or compensatory measures for the benefit of individuals affected by any non-compliance with the Principles, and will provide the FDPIC with written confirmation that such action has been taken.

c. Cooperation with the FDPIC

- i. The cooperation with the FDPIC will be provided in the form of information and advice in the following way:
  - 1. The advice of the FDPIC will be delivered directly.
  - 2. The FDPIC will provide advice to the U.S. organizations concerned on unresolved complaints from individuals about the handling of personal information that has been transferred from Switzerland under the Swiss-U.S. DPF. This advice will be designed to ensure that the Principles are being correctly applied and will include any remedies for the individual(s) concerned that the FDPIC considers appropriate.
  - 3. The FDPIC will provide such advice in response to referrals from the organizations concerned and/or to complaints received directly from individuals against organizations which have committed to cooperate with the FDPIC for Swiss-U.S. DPF purposes, while encouraging and if necessary helping such individuals in the first instance to use the in-house complaint handling arrangements that the organization may offer.
  - 4. Advice will be issued only after both sides in a dispute have had a reasonable opportunity to comment and to provide any evidence they wish. The FDPIC will seek to deliver advice as quickly as this requirement for due process allows. As a general rule, the FDPIC will aim to provide advice within 60 days after receiving a complaint or referral and more quickly where possible.
  - 5. The FDPIC will make public the results of its consideration of complaints submitted to it, if it sees fit.
  - 6. The delivery of advice through the FDPIC will not give rise to any liability for the FDPIC.

- ii. As noted above, organizations choosing this option for dispute resolution must undertake to comply with the advice of the FDPIC. If an organization fails to comply within 25 days of the delivery of the advice and has offered no satisfactory explanation for the delay, the FDPIC will give notice of its intention either to refer the matter to the FTC, the DOT, or other U.S. federal or state body with statutory powers to take enforcement action in cases of deception or misrepresentation, or to conclude that the agreement to cooperate has been seriously breached and must therefore be considered null and void. In the latter case, the FDPIC will inform the Department so that the Data Privacy Framework List can be duly amended. Any failure to fulfill the undertaking to cooperate with the FDPIC, as well as failures to comply with the Principles, will be actionable as a deceptive practice under Section 5 of the FTC Act (15 U.S.C. § 45), 49 U.S.C. § 41712, or other similar statute.
- d. An organization that wishes its Swiss-U.S. DPF benefits to cover human resources data transferred from Switzerland in the context of the employment relationship must commit to cooperate with the FDPIC with regard to such data (*see* Supplemental Principle on Human Resources Data).

## 6. Self-Certification

- a. Swiss-U.S. DPF benefits are assured from the date on which the Department places the organization on the Data Privacy Framework List. The Department will only place an organization on the Data Privacy Framework List after having determined that the organization's initial self-certification submission is complete, and will remove the organization from that list if it voluntarily withdraws, fails to complete its annual re-certification, or if it persistently fails to comply with the Principles (*see* Supplemental Principle on Dispute Resolution and Enforcement).
- b. To initially self-certify or subsequently re-certify for the Swiss-U.S. DPF, an organization must on each occasion provide to the Department a submission by a corporate officer on behalf of the organization that is self-certifying or re-certifying (as applicable) its adherence to the Principles<sup>10</sup>, that contains at least the following information:
  - i. the name of the self-certifying or re-certifying U.S. organization, as well as the name(s) of any of its U.S. entities or U.S. subsidiaries also adhering to the Principles that the organization wishes to cover;

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<sup>10</sup> The submission must be made via the Department's Data Privacy Framework website by an individual within the organization who is authorized to make representations on behalf of the organization and any of its covered entities regarding its adherence to the Principles.

- ii. a description of the activities of the organization with respect to personal information that would be received from Switzerland under the Swiss-U.S. DPF;
  - iii. a description of the organization’s relevant privacy policy/ies for such personal information, including:
    - 1. if the organization has a public website, the relevant web address where the privacy policy is available, or if the organization does not have a public website, where the privacy policy is available for viewing by the public; and
    - 2. its effective date of implementation;
  - iv. a contact office within the organization for the handling of complaints, access requests, and any other issues arising under the Principles<sup>11</sup>, including:
    - 1. the name(s), job title(s) (as applicable), e-mail address(es), and telephone number(s) of the relevant individual(s) or relevant contact office(s) within the organization; and
    - 2. the relevant U.S. mailing address for the organization;
  - v. the specific statutory body that has jurisdiction to hear any claims against the organization regarding possible unfair or deceptive practices and violations of laws or regulations governing privacy (and that is listed in the Principles or a future annex to the Principles);
  - vi. the name of any privacy program in which the organization is a member;
  - vii. the method of verification (*i.e.*, self-assessment; or outside compliance reviews, including the third party that completes such reviews);<sup>12</sup> and
  - viii. the relevant independent recourse mechanism(s) available to investigate unresolved Principles-related complaints.<sup>13</sup>
- c. Where the organization wishes its Swiss-U.S. DPF benefits to cover human resources information transferred from Switzerland for use in the context of the employment relationship, it may do so where a statutory body listed in the Principles or a future annex to the Principles has jurisdiction to hear claims against the organization arising out of the processing of human resources information. In addition, the organization must indicate this in its initial self-certification submission, as well as in any re-certification submissions, and declare its commitment to cooperate with the FDPIC in conformity with the Supplemental Principles on Human Resources Data and the Role of the

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<sup>11</sup> The primary “organization contact” or the “organization corporate officer” cannot be external to the organization (*e.g.*, outside counsel or an external consultant).

<sup>12</sup> See Supplemental Principle on Verification.

<sup>13</sup> See Supplemental Principle on Dispute Resolution and Enforcement.

Federal Data Protection and Information Commissioner (as applicable) and that it will comply with the advice given by the FDPIIC. The organization must also provide the Department with a copy of its human resources privacy policy and provide information where the privacy policy is available for viewing by its affected employees.

- d. The Department will maintain and make publicly available the Data Privacy Framework List of organizations that have filed completed, initial self-certification submissions and will update that list on the basis of completed, annual re-certification submissions, as well as notifications received pursuant to the Supplemental Principle on Dispute Resolution and Enforcement. Such re-certification submissions must be provided not less than annually; otherwise the organization will be removed from the Data Privacy Framework List and Swiss-U.S. DPF benefits will no longer be assured. All organizations that are placed on the Data Privacy Framework List by the Department must have relevant privacy policies that comply with the Notice Principle and state in those privacy policies that they adhere to the Principles.<sup>14</sup> If available online, an organization's privacy policy must include a hyperlink to the Department's Data Privacy Framework website and a hyperlink to the website or complaint submission form of the independent recourse mechanism that is available to investigate unresolved, Principles-related complaints free of charge to the individual.
- e. The Principles apply immediately upon self-certification. Participating organizations that previously self-certified to the Swiss-U.S. Privacy Shield Framework Principles will need to update their privacy policies to instead refer to the "Swiss-U.S. Data Privacy Framework Principles". Such organizations shall include this reference as soon as possible, and in any event no later than three months from the effective date for the Swiss-U.S. Data Privacy Framework Principles.
- f. An organization must subject to the Principles all personal data received from Switzerland in reliance on the Swiss-U.S. DPF. The undertaking to adhere to the Principles is not time-limited in respect of personal data received during the period in which the organization enjoys the benefits of the Swiss-U.S. DPF; its undertaking means that it will continue to apply the Principles to such data for as long as the organization stores, uses or discloses them, even if it subsequently leaves the Swiss-U.S. DPF for any reason. An organization that wishes to withdraw from the Swiss-U.S. DPF must notify the Department of this in advance. This notification must also indicate what the organization will do with the personal data that it received in reliance on the Swiss-U.S. DPF (*i.e.*, retain, return, or delete the data, and if it will retain the data, the

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<sup>14</sup> An organization self-certifying for the first time may not claim Swiss-U.S. DPF participation in its final privacy policy until the Department notifies the organization that it may do so. The organization must provide the Department with a draft privacy policy, which is consistent with the Principles, when it submits its initial self-certification. Once the Department has determined that the organization's initial self-certification submission is otherwise complete, the Department will notify the organization that it should finalize (*e.g.*, publish where applicable) its Swiss-U.S. DPF-consistent privacy policy. The organization must promptly notify the Department as soon as the relevant privacy policy is finalized, at which time the Department will place the organization on the Data Privacy Framework List.

authorized means by which it will provide protection to the data). An organization that withdraws from the Swiss-U.S. DPF, but wants to retain such data must either affirm to the Department on an annual basis its commitment to continue to apply the Principles to the data or provide “adequate” protection for the data by another authorized means (for example, using a contract that fully reflects the requirements of the relevant standard contractual clauses approved, established or recognized by the FDPIC); otherwise, the organization must return or delete the information.<sup>15</sup> An organization that withdraws from the Swiss-U.S. DPF must remove from any relevant privacy policy any references to the Swiss-U.S. DPF that imply that the organization continues to participate in the Swiss-U.S. DPF and is entitled to its benefits.

- g. An organization that will cease to exist as a separate legal entity due to a change in corporate status, such as a result of a merger, takeover, bankruptcy, or dissolution must notify the Department of this in advance. The notification should also indicate whether the entity resulting from the change in corporate status will (i) continue to participate in the Swiss-U.S. DPF through an existing self-certification; (ii) self-certify as a new participant in the Swiss-U.S. DPF (*e.g.*, where the new entity or surviving entity does not already have an existing self-certification through which it could participate in the Swiss-U.S. DPF); or (iii) put in place other safeguards, such as a written agreement that will ensure continued application of the Principles to any personal data that the organization received under the Swiss-U.S. DPF and will be retained. Where neither (i), (ii), nor (iii) applies, any personal data that has been received under the Swiss-U.S. DPF must be promptly returned or deleted.
- h. When an organization leaves the Swiss-U.S. DPF for any reason, it must remove all statements implying that the organization continues to participate in the Swiss-U.S. DPF or is entitled to the benefits of the Swiss-U.S. DPF. The Swiss-U.S. DPF certification mark, if used, must also be removed. Any misrepresentation to the general public concerning an organization’s adherence to the Principles may be actionable by the FTC, DOT, or other relevant government body. Misrepresentations to the Department may be actionable under the False Statements Act (18 U.S.C. § 1001).

## 7. Verification

- a. Organizations must provide follow-up procedures for verifying that the attestations and assertions they make about their Swiss-U.S. DPF

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<sup>15</sup> If an organization elects at the time of its withdrawal to retain the personal data that it received in reliance on the Swiss-U.S. DPF and affirm to the Department on an annual basis that it continues to apply the Principles to such data, the organization must verify to the Department once a year following its withdrawal (*i.e.*, unless and until the organization provides “adequate” protection for such data by another authorized means, or returns or deletes all such data and notifies the Department of this action) what it has done with that personal data, what it will do with any of that personal data that it continues to retain, and who will serve as an ongoing point of contact for Principles-related questions.



privacy practices are true and those privacy practices have been implemented as represented and in accordance with the Principles.

- b. To meet the verification requirements of the Recourse, Enforcement and Liability Principle, an organization must verify such attestations and assertions either through self-assessment or outside compliance reviews.
- c. Where the organization has chosen self-assessment, such verification must demonstrate that its privacy policy regarding personal information received from Switzerland is accurate, comprehensive, readily available, conforms to the Principles, and is completely implemented (*i.e.*, is being complied with). It must also indicate that individuals are informed of any in-house arrangements for handling complaints and of the independent recourse mechanism(s) through which they may pursue complaints; that it has in place procedures for training employees in its implementation, and disciplining them for failure to follow it; and that it has in place internal procedures for periodically conducting objective reviews of compliance with the above. A statement verifying that the self-assessment has been completed must be signed by a corporate officer or other authorized representative of the organization at least once a year and made available upon request by individuals or in the context of an investigation or a complaint about non-compliance.
- d. Where the organization has chosen outside compliance review, such verification must demonstrate that its privacy policy regarding personal information received from Switzerland is accurate, comprehensive, readily available, conforms to the Principles, and is completely implemented (*i.e.*, is being complied with). It must also indicate that individuals are informed of mechanism(s) through which they may pursue complaints. The methods of review may include, without limitation, auditing, random reviews, use of “decoys”, or use of technology tools as appropriate. A statement verifying that an outside compliance review has been successfully completed must be signed either by the reviewer or by the corporate officer or other authorized representative of the organization at least once a year and made available upon request by individuals or in the context of an investigation or a complaint about compliance.
- e. Organizations must retain their records on the implementation of their Swiss-U.S. DPF privacy practices and make them available upon request in the context of an investigation or a complaint about non-compliance to the independent dispute resolution body responsible for investigating complaints or to the agency with unfair and deceptive practices jurisdiction. Organizations must also respond promptly to inquiries and other requests for information from the Department relating to the organization’s adherence to the Principles.

## **8. Access**

- a. The Access Principle in Practice

- i. Under the Principles, the right of access is fundamental to privacy protection. In particular, it allows individuals to verify the accuracy of information held about them. The Access Principle means that individuals have the right to:
  1. obtain from an organization confirmation of whether or not the organization is processing personal data relating to them;<sup>16</sup>
  2. have communicated to them such data so that they could verify its accuracy and the lawfulness of the processing; and
  3. have the data corrected, amended or deleted where it is inaccurate or processed in violation of the Principles.
- ii. Individuals do not have to justify requests for access to their personal data. In responding to individuals' access requests, organizations should first be guided by the concern(s) that led to the requests in the first place. For example, if an access request is vague or broad in scope, an organization may engage the individual in a dialogue so as to better understand the motivation for the request and to locate responsive information. The organization might inquire about which part(s) of the organization the individual interacted with or about the nature of the information or its use that is the subject of the access request.
- iii. Consistent with the fundamental nature of access, organizations should always make good faith efforts to provide access. For example, where certain information needs to be protected and can be readily separated from other personal information subject to an access request, the organization should redact the protected information and make available the other information. If an organization determines that access should be restricted in any particular instance, it should provide the individual requesting access with an explanation of why it has made that determination and a contact point for any further inquiries.

b. Burden or Expense of Providing Access

- i. The right of access to personal data may be restricted in exceptional circumstances where the legitimate rights of persons other than the individual would be violated or where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question. Expense and burden are important factors and should be taken into account but they are not controlling factors in determining whether providing access is reasonable.

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<sup>16</sup> The organization should answer requests from an individual concerning the purposes of the processing, the categories of personal data concerned, and the recipients or categories of recipients to whom the personal data is disclosed.

- ii. For example, if the personal information is used for decisions that will significantly affect the individual (*e.g.*, the denial or grant of important benefits, such as insurance, a mortgage, or a job), then consistent with the other provisions of these Supplemental Principles, the organization would have to disclose that information even if it is relatively difficult or expensive to provide. If the personal information requested is not sensitive or not used for decisions that will significantly affect the individual, but is readily available and inexpensive to provide, an organization would have to provide access to such information.
- c. Confidential Commercial Information
  - i. Confidential commercial information is information that an organization has taken steps to protect from disclosure, where disclosure would help a competitor in the market. Organizations may deny or limit access to the extent that granting full access would reveal its own confidential commercial information, such as marketing inferences or classifications generated by the organization, or the confidential commercial information of another that is subject to a contractual obligation of confidentiality.
  - ii. Where confidential commercial information can be readily separated from other personal information subject to an access request, the organization should redact the confidential commercial information and make available the non-confidential information.
- d. Organization of Data Bases
  - i. Access can be provided in the form of disclosure of the relevant personal information by an organization to the individual and does not require access by the individual to an organization's data base.
  - ii. Access needs to be provided only to the extent that an organization stores the personal information. The Access Principle does not itself create any obligation to retain, maintain, reorganize, or restructure personal information files.
- e. When Access May be Restricted
  - i. As organizations must always make good faith efforts to provide individuals with access to their personal data, the circumstances in which organizations may restrict such access are limited, and any reasons for restricting access must be specific. As under the FADP, an organization can restrict access to information to the extent that disclosure is likely to interfere with the safeguarding of important countervailing public interests, such as national security; defense; or public security. In addition, where personal

information is processed solely for research or statistical purposes, access may be denied. Other reasons for denying or limiting access are:

1. interference with the execution or enforcement of the law or with private causes of action, including the prevention, investigation or detection of offenses or the right to a fair trial;
  2. disclosure where the legitimate rights or important interests of others would be violated;
  3. breaching a legal or other professional privilege or obligation;
  4. prejudicing employee security investigations or grievance proceedings or in connection with employee succession planning and corporate re-organizations; or
  5. prejudicing the confidentiality necessary in monitoring, inspection or regulatory functions connected with sound management, or in future or ongoing negotiations involving the organization.
- ii. An organization which claims an exception has the burden of demonstrating its necessity, and the reasons for restricting access and a contact point for further inquiries should be given to individuals.
- f. Right to Obtain Confirmation and Charging a Fee to Cover the Costs for Providing Access
- i. An individual has the right to obtain confirmation of whether or not this organization has personal data relating to him or her. An individual also has the right to have communicated to him or her personal data relating to him or her. An organization may charge a fee that is not excessive.
  - ii. Charging a fee may be justified, for example, where requests for access are manifestly excessive, in particular because of their repetitive character.
  - iii. Access may not be refused on cost grounds if the individual offers to pay the costs.
- g. Repetitious or Vexatious Requests for Access
- i. An organization may set reasonable limits on the number of times within a given period that access requests from a particular individual will be met. In setting such limitations, an organization should consider such factors as the frequency with which information is updated, the purpose for which the data are used, and the nature of the information.
- h. Fraudulent Requests for Access

- i. An organization is not required to provide access unless it is supplied with sufficient information to allow it to confirm the identity of the person making the request.
- i. Timeframe for Responses
  - i. Organizations should respond to access requests within a reasonable time period, in a reasonable manner, and in a form that is readily intelligible to the individual. An organization that provides information to data subjects at regular intervals may satisfy an individual access request with its regular disclosure if it would not constitute an excessive delay.

## **9. Human Resources Data**

- a. Coverage by the Swiss-U.S. DPF
  - i. Where an organization in Switzerland transfers personal information about its employees (past or present) collected in the context of the employment relationship, to a parent, affiliate, or unaffiliated service provider in the United States participating in the Swiss-U.S. DPF, the transfer enjoys the benefits of the Swiss-U.S. DPF. In such cases, the collection of the information and its processing prior to transfer will have been subject to the national laws of Switzerland where it was collected, and any conditions for or restrictions on its transfer according to those laws will have to be respected.
  - ii. The Principles are relevant only when individually identified or identifiable records are transferred or accessed. Statistical reporting relying on aggregate employment data and containing no personal data or the use of anonymized data does not raise privacy concerns.
- b. Application of the Notice and Choice Principles
  - i. A U.S. organization that has received employee information from Switzerland under the Swiss-U.S. DPF may disclose it to third parties or use it for different purposes only in accordance with the Notice and Choice Principles. For example, where an organization intends to use personal information collected through the employment relationship for non-employment-related purposes, such as marketing communications, the U.S. organization must provide the affected individuals with the requisite choice before doing so, unless they have already authorized the use of the information for such purposes. Such use must not be incompatible with the purposes for which the personal information has been collected or subsequently authorized by the individual. Moreover, such choices must not be used to restrict employment opportunities or take any punitive action against such employees.

- ii. In addition, employers should make reasonable efforts to accommodate employee privacy preferences. This could include, for example, restricting access to the personal data, anonymizing certain data, or assigning codes or pseudonyms when the actual names are not required for the management purpose at hand.
  - iii. To the extent and for the period necessary to avoid prejudicing the ability of the organization in making promotions, appointments, or other similar employment decisions, an organization does not need to offer notice and choice.
- c. Application of the Access Principle
- i. The Supplemental Principle on Access provides guidance on reasons which may justify denying or limiting access on request in the human resources context. Of course, employers in Switzerland must comply with local regulations and ensure that Swiss employees have access to such information as is required by Swiss law, regardless of the location of data processing and storage. The Swiss-U.S. DPF requires that an organization processing such data in the United States will cooperate in providing such access either directly or through the Swiss employer.
- d. Enforcement
- i. In so far as personal information is used only in the context of the employment relationship, primary responsibility for the data vis-à-vis the employee remains with the organization in Switzerland. It follows that, where Swiss employees make complaints about violations of their data protection rights and are not satisfied with the results of internal review, complaint, and appeal procedures (or any applicable grievance procedures under a contract with a trade union), they should be directed to the FDPIC or labor authority in the jurisdiction where the employees work. This includes cases where the alleged mishandling of their personal information is the responsibility of the U.S. organization that has received the information from the employer and thus involves an alleged breach of the Principles. This will be the most efficient way to address the often overlapping rights and obligations imposed by local labor law and labor agreements as well as data protection law.
  - ii. A U.S. organization participating in the Swiss-U.S. DPF that uses Swiss human resources data transferred from Switzerland in the context of the employment relationship and that wishes such transfers to be covered by the Swiss-U.S. DPF must therefore commit to cooperate in investigations by and to comply with the advice of the FDPIC in such cases.
- e. Application of the Accountability for Onward Transfer Principle

- i. For occasional employment-related operational needs of the participating organization with respect to personal data transferred under the Swiss-U.S. DPF, such as the booking of a flight, hotel room, or insurance coverage, transfers of personal data of a small number of employees can take place to controllers without application of the Access Principle or entering into a contract with the third-party controller, as otherwise required under the Accountability for Onward Transfer Principle, provided that the participating organization has complied with the Notice and Choice Principles.

## 10. Obligatory Contracts for Onward Transfers

### a. Data Processing Contracts

- i. When personal data is transferred from Switzerland to the United States only for processing purposes, a contract will be required, regardless of participation by the processor in the Swiss-U.S. DPF.
- ii. Data controllers in Switzerland are always required to enter into a contract when a transfer for mere processing is made, whether the processing operation is carried out inside or outside Switzerland, and whether or not the processor participates in the Swiss-U.S. DPF. The purpose of the contract is to make sure that the processor:
  - 1. acts only on instructions from the controller;
  - 2. provides appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, and understands whether onward transfer is allowed; and
  - 3. taking into account the nature of the processing, assists the controller in responding to individuals exercising their rights under the Principles.
- iii. Because adequate protection is provided by participating organizations, contracts with such organizations for mere processing do not require prior authorization.

### b. Transfers within a Controlled Group of Corporations or Entities

- i. When personal information is transferred between two controllers within a controlled group of corporations or entities, a contract is not always required under the Accountability for Onward Transfer Principle. Data controllers within a controlled group of corporations or entities may base such transfers on other instruments, such as Binding Corporate Rules or other intra-group instruments (*e.g.*, compliance and control programs), ensuring the continuity of protection of personal information under the Principles. In case of such transfers, the

participating organization remains responsible for compliance with the Principles.

c. Transfers between Controllers

- i. For transfers between controllers, the recipient controller need not be a participating organization or have an independent recourse mechanism. The participating organization must enter into a contract with the recipient third-party controller that provides for the same level of protection as is available under the Swiss-U.S. DPF, not including the requirement that the third party controller be a participating organization or have an independent recourse mechanism, provided it makes available an equivalent mechanism.

**11. Dispute Resolution and Enforcement**

- a. The Recourse, Enforcement and Liability Principle sets out the requirements for Swiss-U.S. DPF enforcement. How to meet the requirements of point (a)(ii) of the Principle is set out in the Supplemental Principle on Verification. This Supplemental Principle addresses points (a)(i) and (a)(iii), both of which require independent recourse mechanisms. These mechanisms may take different forms, but they must meet the Recourse, Enforcement and Liability Principle's requirements. Organizations satisfy the requirements through the following: (i) compliance with private sector developed privacy programs that incorporate the Principles into their rules and that include effective enforcement mechanisms of the type described in the Recourse, Enforcement and Liability Principle; (ii) compliance with legal or regulatory supervisory authorities that provide for handling of individual complaints and dispute resolution; or (iii) commitment to cooperate with the FDPIC or its authorized representative.
- b. This list is intended to be illustrative and not limiting. The private sector may design additional mechanisms to provide enforcement, so long as they meet the requirements of the Recourse, Enforcement and Liability Principle and the Supplemental Principles. Please note that the Recourse, Enforcement and Liability Principle's requirements are additional to the requirement that self-regulatory efforts must be enforceable under Section 5 of the FTC Act (15 U.S.C. § 45) prohibiting unfair or deceptive acts, 49 U.S.C. § 41712 prohibiting a carrier or ticket agent from engaging in an unfair or deceptive practice in air transportation or the sale of air transportation, or another law or regulation prohibiting such acts.
- c. In order to help ensure compliance with their Swiss-U.S. DPF commitments and to support the administration of the program, organizations, as well as their independent recourse mechanisms, must provide information relating to the Swiss-U.S. DPF when requested by the Department. In addition, organizations must respond expeditiously to complaints regarding their compliance with the Principles referred



through the Department by the FDPIC. The response should address whether the complaint has merit and, if so, how the organization will rectify the problem. The Department will protect the confidentiality of information it receives in accordance with U.S. law.

d. Recourse Mechanisms

- i. Individuals should be encouraged to raise any complaints they may have with the relevant organization before proceeding to independent recourse mechanisms. Organizations must respond to an individual within 45 days of receiving a complaint. Whether a recourse mechanism is independent is a factual question that can be demonstrated notably by impartiality, transparent composition and financing, and a proven track record. As required by the Recourse, Enforcement and Liability Principle, the recourse available to individuals must be readily available and free of charge to individuals. Independent dispute resolution bodies should look into each complaint received from individuals unless they are obviously unfounded or frivolous. This does not preclude the establishment of eligibility requirements by the independent dispute resolution body operating the recourse mechanism, but such requirements should be transparent and justified (for example, to exclude complaints that fall outside the scope of the program or are for consideration in another forum), and should not have the effect of undermining the commitment to look into legitimate complaints. In addition, recourse mechanisms should provide individuals with full and readily available information about how the dispute resolution procedure works when they file a complaint. Such information should include notice about the mechanism's privacy practices, in conformity with the Principles. They should also cooperate in the development of tools, such as standard complaint forms to facilitate the complaint resolution process.
- ii. Independent recourse mechanisms must include on their public websites information regarding the Principles and the services that they provide under the Swiss-U.S. DPF. This information must include: (1) information on or a link to the Principles' requirements for independent recourse mechanisms; (2) a link to the Department's Data Privacy Framework website; (3) an explanation that their dispute resolution services under the Swiss-U.S. DPF are free of charge to individuals; (4) a description of how a Principles-related complaint can be filed; (5) the timeframe in which Principles-related complaints are processed; and (6) a description of the range of potential remedies.
- iii. Independent recourse mechanisms must publish an annual report providing aggregate statistics regarding their dispute resolution services. The annual report must include: (1) the total number of Principles-related complaints received during the reporting year; (2) the types of complaints received; (3) dispute resolution

quality measures, such as the length of time taken to process complaints; and (4) the outcomes of the complaints received, notably the number and types of remedies or sanctions imposed.

- iv. As set forth in Annex I, an arbitration option is available to an individual to determine, for residual claims, whether a participating organization has violated its obligations under the Principles as to that individual, and whether any such violation remains fully or partially unremedied. This option is available only for these purposes. This option is not available, for example, with respect to the exceptions to the Principles<sup>17</sup> or with respect to an allegation about the adequacy of the Swiss-U.S. DPF. Under this arbitration option, the “Swiss-U.S. Data Privacy Framework Panel” (consisting of one or three arbitrators, as agreed by the parties) has the authority to impose individual-specific, non-monetary equitable relief (such as access, correction, deletion, or return of the individual’s data in question) necessary to remedy the violation of the Principles only with respect to the individual. Individuals and participating organizations will be able to seek judicial review and enforcement of the arbitral decisions pursuant to U.S. law under the Federal Arbitration Act.

- e. Remedies and Sanctions

- i. The result of any remedies provided by the independent dispute resolution body should be that the effects of non-compliance are reversed or corrected by the organization, insofar as feasible, and that future processing by the organization will be in conformity with the Principles and, where appropriate, that processing of the personal data of the individual who brought the complaint will cease. Sanctions need to be rigorous enough to ensure compliance by the organization with the Principles. A range of sanctions of varying degrees of severity will allow dispute resolution bodies to respond appropriately to varying degrees of non-compliance. Sanctions should include both publicity for findings of non-compliance and the requirement to delete data in certain circumstances.<sup>18</sup> Other sanctions could include suspension and removal of a seal, compensation for individuals for losses incurred as a result of non-compliance and injunctive awards. Private-sector independent dispute resolution bodies and self-regulatory bodies must notify failures of participating organizations to comply with their rulings to the governmental body with applicable jurisdiction or the courts, as appropriate, and the Department.

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<sup>17</sup> The Principles, Overview, para. 5.

<sup>18</sup> Independent dispute resolution bodies have discretion about the circumstances in which they use these sanctions. The sensitivity of the data concerned is one factor to be taken into consideration in deciding whether deletion of data should be required, as is whether an organization has collected, used, or disclosed information in blatant contravention of the Principles.

f. FTC Action

- i. The FTC has committed to reviewing on a priority basis referrals alleging non-compliance with the Principles received from: (i) privacy self-regulatory bodies and other independent dispute resolution bodies; (ii) the FDPIC; and (iii) the Department, to determine whether Section 5 of the FTC Act prohibiting unfair or deceptive acts or practices in commerce has been violated. If the FTC concludes that it has reason to believe Section 5 has been violated, it may resolve the matter by seeking an administrative cease and desist order prohibiting the challenged practices or by filing a complaint in a federal district court, which if successful could result in a federal court order to same effect. This includes false claims of adherence to the Principles or participation in the Swiss-U.S. DPF by organizations, which either are no longer on the Data Privacy Framework List or have never self-certified to the Department. The FTC may obtain civil penalties for violations of an administrative cease and desist order and may pursue civil or criminal contempt for violation of a federal court order. The FTC will notify the Department of any such actions it takes. The Department encourages other government bodies to notify it of the final disposition of any such referrals or other rulings determining adherence to the Principles.

g. Persistent Failure to Comply

- i. If an organization persistently fails to comply with the Principles, it is no longer entitled to benefit from the Swiss-U.S. DPF. Organizations that have persistently failed to comply with the Principles will be removed from the Data Privacy Framework List by the Department and must return or delete the personal information they received under the Swiss-U.S. DPF.
- ii. Persistent failure to comply arises where an organization that has self-certified to the Department refuses to comply with a final determination by any privacy self-regulatory, independent dispute resolution, or government body, or where such a body, including the Department, determines that an organization frequently fails to comply with the Principles to the point where its claim to comply is no longer credible. In cases where such a determination is made by a body other than the Department the organization must promptly notify the Department of such facts. Failure to do so may be actionable under the False Statements Act (18 U.S.C. § 1001). An organization's withdrawal from a private-sector privacy self-regulatory program or independent dispute resolution mechanism does not relieve it of its obligation to comply with the Principles and would constitute a persistent failure to comply.
- iii. The Department will remove an organization from the Data Privacy Framework List for persistent failure to comply,

including in response to any notification it receives of such non-compliance from the organization itself, a privacy self-regulatory body or another independent dispute resolution body, or a government body, but only after first providing the organization with 30 days' notice and an opportunity to respond<sup>19</sup>. Accordingly, the Data Privacy Framework List maintained by the Department will make clear which organizations are assured and which organizations are no longer assured of Swiss-U.S. DPF benefits.

- iv. An organization applying to participate in a self-regulatory body for the purposes of requalifying for the Swiss-U.S. DPF must provide that body with full information about its prior participation in the Swiss-U.S. DPF.

## **12. Choice – Timing of Opt Out**

- a. Generally, the purpose of the Choice Principle is to ensure that personal information is used and disclosed in ways that are consistent with the individual's expectations and choices. Accordingly, an individual should be able to exercise "opt out" choice of having personal information used for direct marketing at any time subject to reasonable limits established by the organization, such as giving the organization time to make the opt out effective. An organization may also require sufficient information to confirm the identity of the individual requesting the "opt out." In the United States, individuals may be able to exercise this option through the use of a central "opt out" program. In any event, an individual should be given a readily available and affordable mechanism to exercise this option.
- b. Similarly, an organization may use information for certain direct marketing purposes when it is impracticable to provide the individual with an opportunity to opt out before using the information, if the organization promptly gives the individual such opportunity at the same time (and upon request at any time) to decline (at no cost to the individual) to receive any further direct marketing communications and the organization complies with the individual's wishes.

## **13. Travel Information**

- a. Airline passenger reservation and other travel information, such as frequent flyer or hotel reservation information and special handling needs, such as meals to meet religious requirements or physical assistance, may be transferred to organizations located outside Switzerland in several different circumstances. Under the FADP, personal data may, in the absence of a recognition of adequacy, be disclosed abroad if an adequate level of data protection is guaranteed by appropriate safeguards pursuant to Article 16 paragraph 2 FADP or, in specific situations, if one of the conditions of Article 17 FADP is

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<sup>19</sup> The Department will indicate within the notice the amount of time, which will necessarily be less than 30 days, the organization has to respond to the notice.

fulfilled (*e.g.*, where the data subject has explicitly consented to disclosure). U.S. organizations subscribing to the Swiss-U.S. DPF provide adequate protection for personal data and may therefore receive data transfers from Switzerland on the basis of Article 16 paragraph 1 FADP without having to put in place a transfer instrument pursuant to Article 16 paragraph 2 FADP or meet the conditions of Article 17 FADP. Since the Swiss-U.S. DPF includes specific rules for sensitive information, such information (which may need to be collected, for example, in connection with customers' needs for physical assistance) may be included in transfers to participating organizations. In all cases, however, the organization transferring the information has to respect the law in Switzerland, which may *inter alia* impose special conditions for the handling of sensitive data.

#### **14. Pharmaceutical and Medical Products**

##### **a. Application of Swiss Laws or the Principles**

- i. Swiss law applies to the collection of the personal data and to any processing that takes place prior to the transfer to the United States. The Principles apply to the data once they have been transferred to the United States. Data used for pharmaceutical research and other purposes should be anonymized when appropriate.

##### **b. Future Scientific Research**

- i. Personal data developed in specific medical or pharmaceutical research studies often play a valuable role in future scientific research. Where personal data collected for one research study are transferred to a U.S. organization in the Swiss-U.S. DPF, the organization may use the data for a new scientific research activity if appropriate notice and choice have been provided in the first instance. Such notice should provide information about any future specific uses of the data, such as periodic follow up, related studies, or marketing.
- ii. It is understood that not all future uses of the data can be specified, since a new research use could arise from new insights on the original data, new medical discoveries and advances, and public health and regulatory developments. Where appropriate, the notice should therefore include an explanation that personal data may be used in future medical and pharmaceutical research activities that are unanticipated. If the use is not consistent with the general research purpose(s) for which the personal data were originally collected, or to which the individual has consented subsequently, new consent must be obtained.

##### **c. Withdrawal from a Clinical Trial**

- i. Participants may decide or be asked to withdraw from a clinical trial at any time. Any personal data collected previous to withdrawal may still be processed along with other data

collected as part of the clinical trial, however, if this was made clear to the participant in the notice at the time he or she agreed to participate.

d. Transfers for Regulatory and Supervision Purposes

- i. Pharmaceutical and medical device companies are allowed to provide personal data from clinical trials conducted in Switzerland to regulators in the United States for regulatory and supervision purposes. Similar transfers are allowed to parties other than regulators, such as company locations and other researchers, consistent with the Principles of Notice and Choice.

e. “Blinded” Studies

- i. To ensure objectivity in many clinical trials, participants, and often investigators as well, cannot be given access to information about which treatment each participant may be receiving. Doing so would jeopardize the validity of the research study and results. Participants in such clinical trials (referred to as “blinded” studies) do not have to be provided access to the data on their treatment during the trial if this restriction has been explained when the participant entered the trial and the disclosure of such information would jeopardize the integrity of the research effort.
- ii. Agreement to participate in the trial under these conditions is a reasonable forgoing of the right of access. Following the conclusion of the trial and analysis of the results, participants should have access to their data if they request it. They should seek it primarily from the physician or other health care provider from whom they received treatment within the clinical trial, or secondarily from the sponsoring organization.

f. Product Safety and Efficacy Monitoring

- i. A pharmaceutical or medical device company does not have to apply the Principles with respect to the Notice, Choice, Accountability for Onward Transfer, and Access Principles in its product safety and efficacy monitoring activities, including the reporting of adverse events and the tracking of patients/subjects using certain medicines or medical devices, to the extent that adherence to the Principles interferes with compliance with regulatory requirements. This is true both with respect to reports by, for example, health care providers to pharmaceutical and medical device companies, and with respect to reports by pharmaceutical and medical device companies to government agencies like the Food and Drug Administration.

g. Key-coded Data

- i. Invariably, research data are uniquely key-coded at their origin by the principal investigator so as not to reveal the identity of individual data subjects. Pharmaceutical companies sponsoring

such research do not receive the key. The unique key code is held only by the researcher, so that he or she can identify the research subject under special circumstances (*e.g.*, if follow-up medical attention is required). A transfer from Switzerland to the United States of data coded in this way that is Swiss personal data under Swiss law would be covered by the Principles.

## **15. Public Record and Publicly Available Information**

- a. An organization must apply the Principles of Security, Data Integrity and Purpose Limitation, and Recourse, Enforcement and Liability to personal data from publicly available sources. These Principles shall apply also to personal data collected from public records (*i.e.*, those records kept by government agencies or entities at any level that are open to consultation by the public in general).
- b. It is not necessary to apply the Notice, Choice, or Accountability for Onward Transfer Principles to public record information, as long as it is not combined with non-public record information, and any conditions for consultation established by the relevant jurisdiction are respected. Also, it is generally not necessary to apply the Notice, Choice, or Accountability for Onward Transfer Principles to publicly available information unless the Swiss transferor indicates that such information is subject to restrictions that require application of those Principles by the organization for the uses it intends. Organizations will have no liability for how such information is used by those obtaining such information from published materials.
- c. Where an organization is found to have intentionally made personal information public in contravention of the Principles so that it or others may benefit from these exceptions, it will cease to qualify for the benefits of the Swiss-U.S. DPF.
- d. It is not necessary to apply the Access Principle to public record information as long as it is not combined with other personal information (apart from small amounts used to index or organize the public record information); however, any conditions for consultation established by the relevant jurisdiction are to be respected. In contrast, where public record information is combined with other non-public record information (other than as specifically noted above), an organization must provide access to all such information, assuming it is not subject to other permitted exceptions.
- e. As with public record information, it is not necessary to provide access to information that is already publicly available to the public at large, as long as it is not combined with non-publicly available information. Organizations that are in the business of selling publicly available information may charge the organization's customary fee in responding to requests for access. Alternatively, individuals may seek access to their information from the organization that originally compiled the data.

## **16. Access Requests by Public Authorities**

- a. In order to provide transparency in respect of lawful requests by public authorities to access personal information, participating organizations may voluntarily issue periodic transparency reports on the number of requests for personal information they receive by public authorities for law enforcement or national security reasons, to the extent such disclosures are permissible under applicable law.
- b. The information provided by the participating organizations in these reports together with information that has been released by the intelligence community, along with other information, can be used to inform the periodic joint review of the functioning of the Swiss-U.S. DPF in accordance with the Principles.
- c. Absence of notice in accordance with point (a)(xii) of the Notice Principle shall not prevent or impair an organization's ability to respond to any lawful request.



## ANNEX I: ARBITRAL MODEL

This Annex I provides the terms under which organizations participating in the Swiss-U.S. DPF are obligated to arbitrate claims, pursuant to the Recourse, Enforcement and Liability Principle. The binding arbitration option described below applies to certain “residual” claims as to data covered by the Swiss-U.S. DPF. The purpose of this option is to provide a prompt, independent, and fair mechanism, at the option of individuals, for resolution of any claimed violations of the Principles not resolved by any of the other Swiss-U.S. DPF mechanisms.

### A. Scope

This arbitration option is available to an individual to determine, for residual claims, whether a participating organization has violated its obligations under the Principles as to that individual, and whether any such violation remains fully or partially unremedied. This option is available only for these purposes. This option is not available, for example, with respect to the exceptions to the Principles<sup>20</sup> or with respect to an allegation about the adequacy of the Swiss-U.S. DPF.

### B. Available Remedies

Under this arbitration option, the “Swiss-U.S. Data Privacy Framework Panel” (the arbitration panel consisting of one or three arbitrators, as agreed by the parties) has the authority to impose individual-specific, non-monetary equitable relief (such as access, correction, deletion, or return of the individual’s data in question) necessary to remedy the violation of the Principles only with respect to the individual. These are the only powers of the Swiss-U.S. Data Privacy Framework Panel with respect to remedies. In considering remedies, the Swiss-U.S. Data Privacy Framework Panel is required to consider other remedies that already have been imposed by other mechanisms under the Swiss-U.S. DPF. No damages, costs, fees, or other remedies are available. Each party bears its own attorney’s fees.

### C. Pre-Arbitration Requirements

An individual who decides to invoke this arbitration option must take the following steps prior to initiating an arbitration claim: (1) raise the claimed violation directly with the organization and afford the organization an opportunity to resolve the issue within the timeframe set forth in section (d)(i) of the Supplemental Principle on Dispute Resolution and Enforcement; (2) make use of the independent recourse mechanism under the Principles, at no cost to the individual; and (3) raise the issue through the FDPIC to the Department and afford the Department an opportunity to use best efforts to resolve the issue within the timeframes set forth in the Letter from the Department’s International Trade Administration, at no cost to the individual.

This arbitration option may not be invoked if the individual’s same claimed violation of the Principles (1) has previously been subject to binding arbitration; (2) was the subject of a final judgment entered in a court action to which the individual was a party; or (3) was previously settled by the parties. In addition, this option may not be invoked if the FDPIC (1) has authority under the Supplemental Principle on the Role of the Federal Data Protection and Information Commissioner or the Supplemental Principle on Human Resources Data; or (2)

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<sup>20</sup> The Principles, Overview, para. 5.

has the authority to resolve the claimed violation directly with the organization. The FDPIC's authority to resolve the same claim against a Swiss data controller does not alone preclude invocation of this arbitration option against a different legal entity not bound by the FDPIC's authority.

#### **D. Binding Nature of Decisions**

An individual's decision to invoke this binding arbitration option is entirely voluntary. Arbitral decisions will be binding on all parties to the arbitration. Once invoked, the individual forgoes the option to seek relief for the same claimed violation in another forum, except that if non-monetary equitable relief does not fully remedy the claimed violation, the individual's invocation of arbitration will not preclude a claim for damages that is otherwise available in the courts.

#### **E. Review and Enforcement**

Individuals and participating organizations will be able to seek judicial review and enforcement of the arbitral decisions pursuant to U.S. law under the Federal Arbitration Act.<sup>21</sup> Any such cases must be brought in the federal district court whose territorial coverage includes the primary place of business of the participating organization.

This arbitration option is intended to resolve individual disputes, and arbitral decisions are not intended to function as persuasive or binding precedent in matters involving other parties, including in future arbitrations or in Swiss or U.S. courts, or FTC proceedings.

#### **F. The Arbitration Panel**

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<sup>21</sup> Chapter 2 of the Federal Arbitration Act ("FAA") provides that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in [section 2 of the FAA], falls under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997 ("New York Convention").]" 9 U.S.C. § 202. The FAA further provides that "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." *Id.* Under Chapter 2, "any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said [New York] Convention." *Id.* § 207. Chapter 2 further provides that "[t]he district courts of the United States . . . shall have original jurisdiction over . . . an action or proceeding [under the New York Convention], regardless of the amount in controversy." *Id.* § 203.

Chapter 2 also provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the [New York] Convention as ratified by the United States." *Id.* § 208. Chapter 1, in turn, provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. Chapter 1 further provides that "any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]." *Id.* § 9.

The parties will select arbitrators for the Swiss-U.S. Data Privacy Framework Panel from the list of arbitrators developed under the EU-U.S. DPF, as supplemented by a list of arbitrators with European or Swiss expertise to be selected as discussed below.

Consistent with applicable law, the Department and the Swiss Federal Administration will develop a supplemental list of up to 5 arbitrators, chosen on the basis of independence, integrity, and expertise. The following shall apply in connection with this process:

Arbitrators:

- (1) will remain on the list for a period of 3 years, absent exceptional circumstances or removal for cause, renewable by the Department, with prior notification to the Swiss Federal Administration, for additional 3-year terms;
- (2) shall not be subject to any instructions from, or be affiliated with, either party, or any participating organization, or the United States, Switzerland, EU, or any EU Member State or any other governmental authority, public authority, or enforcement authority; and
- (3) must be admitted to practice law in the United States and be experts in U.S. privacy law, with expertise in European or Swiss data protection law.

## **G. Arbitration Procedures**

The Department and the Swiss Federal Administration have agreed, consistent with applicable law, to the adoption of arbitration rules that govern proceedings before the Swiss-U.S. Data Privacy Framework Panel.<sup>22</sup> In the event the rules governing the proceedings need to be changed, the Department and the Swiss Federal Administration will agree to amend those rules or adopt a different set of existing, well-established U.S. arbitral procedures, as appropriate, subject to each of the following considerations:

1. An individual may initiate binding arbitration, subject to the pre-arbitration requirements provision above, by delivering a “Notice” to the organization. The Notice shall contain a summary of steps taken under Paragraph C to resolve the claim, a description of the alleged violation, and, at the choice of the individual, any supporting documents and materials and/or a discussion of law relating to the alleged claim.
2. Procedures will be developed to ensure that an individual’s same claimed violation does not receive duplicative remedies or procedures.
3. FTC action may proceed in parallel with arbitration.
4. No representative of the United States, Switzerland, EU, or any EU Member State or any other governmental authority, public authority, or enforcement authority may participate in these arbitrations, provided, that at the request of a Swiss individual, the FDPIC may provide assistance in the preparation only of the Notice but the FDPIC may not have access to discovery or any other materials related to these arbitrations.

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<sup>22</sup> The International Centre for Dispute Resolution (“ICDR”), the international division of the American Arbitration Association (“AAA”) (collectively “ICDR-AAA”), was selected by the Department to administer arbitrations pursuant to and manage the arbitral fund identified in Annex I of the Principles. On March 29, 2018, the Department and the Swiss Federal Administration agreed to the adoption of a set of arbitration rules to govern binding arbitration proceedings described in Annex I of the Principles, as well as a code of conduct for arbitrators that is consistent with generally accepted ethical standards for commercial arbitrators and Annex I of the Principles. The Department and the Swiss Federal Administration agreed to adapt the arbitration rules and code of conduct to reflect the updates under the Swiss-U.S. DPF, and the Department will work with the ICDR-AAA to make those updates.

5. The location of the arbitration will be the United States, and the individual may choose video or telephone participation, which will be provided at no cost to the individual. In-person participation will not be required.
6. The language of the arbitration will be English unless otherwise agreed by the parties. Upon a reasoned request, and taking into account whether the individual is represented by an attorney, interpretation at the arbitral hearing, as well as translation of arbitral materials will be provided at no cost to the individual, unless the Swiss-U.S. Data Privacy Framework Panel finds that, under the circumstances of the specific arbitration, this would lead to unjustified or disproportionate costs.
7. Materials submitted to arbitrators will be treated confidentially and will only be used in connection with the arbitration.
8. Individual-specific discovery may be permitted if necessary, and such discovery will be treated confidentially by the parties and will only be used in connection with the arbitration.
9. Arbitrations should be completed within 90 days of the delivery of the Notice to the organization at issue, unless otherwise agreed to by the parties.

## **H. Costs**

Arbitrators should take reasonable steps to minimize the costs or fees of the arbitrations.

The Department will, consistent with applicable law, facilitate the maintenance of a fund, to which participating organizations will be required to contribute, based in part on the size of the organization, which will cover the arbitral cost, including arbitrator fees, up to maximum amounts (“caps”). The fund will be managed by a third party, which will report regularly to the Department on the operations of the fund. The Department will work with the third party to periodically review the operation of the fund, including the need to adjust the amount of the contributions or of the caps on the arbitral cost, and consider, among other things, the number of arbitrations and the costs and timing of the arbitrations, with the understanding that there will be no excessive financial burden imposed on participating organizations. The Department will notify the Swiss Federal Administration of the outcome of such reviews with the third party and will provide the Swiss Federal Administration with prior notification of any adjustments of the amount of the contributions. Attorney’s fees are not covered by this provision or any fund under this provision.



July 14, 2023

Her Excellency Elisabeth Baume-Schneider  
Federal Councillor  
Federal Department of Justice and Police (FDJP)  
Bundeshaus West  
3003 Bern

His Excellency Guy Parmelin  
Federal Councillor  
The Federal Department of Economic Affairs,  
Education and Research (EAER)  
Bundeshaus Ost  
3003 Bern

Dear Federal Councillor Baume-Schneider and Federal Councillor Parmelin:

On behalf of the United States, I am pleased to transmit herewith a package of Swiss-U.S. Data Privacy Framework materials that, combined with Executive Order 14086, “Enhancing Safeguards for United States Signals Intelligence Activities” and 28 CFR part 201 amending Department of Justice regulations to establish the “Data Protection Review Court”, reflects important and detailed negotiations to strengthen privacy and civil liberties protections. These negotiations have resulted in new safeguards to ensure that U.S. signals intelligence activities are necessary and proportionate in the pursuit of defined national security objectives and a new mechanism for Swiss individuals to seek redress if they believe they are unlawfully targeted by signals intelligence activities, which together will ensure the privacy of Swiss personal data. The Swiss-U.S. Data Privacy Framework will underpin an inclusive and competitive digital economy. We should both be proud of the improvements reflected in that Framework, which will enhance the protection of privacy around the world. This package, along with the Executive Order, Regulations, and other materials available from public sources, provides a very strong basis for Switzerland to recognize the adequacy of protection provided by the Swiss-U.S. Data Privacy Framework.

The following materials are attached:

- The Swiss-U.S. Data Privacy Framework Principles, including the Supplemental Principles (collectively “the Principles”) and Annex I of the Principles (*i.e.*, an annex providing the terms under which Data Privacy Framework organizations are obligated to arbitrate certain residual claims as to personal data covered by the Principles);
- A letter from the Department’s International Trade Administration, which administers the Data Privacy Framework program, describing the commitments that our Department has made to ensure that the Swiss-U.S. Data Privacy Framework operates effectively;
- A letter from the Federal Trade Commission describing its enforcement of the Principles;

- A letter from the Department of Transportation describing its enforcement of the Principles; and
- A letter prepared by the Department of Justice regarding safeguards and limitations on U.S. Government access for law enforcement and public interest purposes.

In addition, with respect to references to national security, I refer you to the letter of December 9, 2022 addressed to the Department and prepared by the Office of the Director of National Intelligence regarding safeguards and limitations applicable to U.S. national security authorities. That letter will be available on the Department's Data Privacy Framework website.

The Principles and Annex I of the Principles will be effective on July 17, 2023 though personal data cannot be received from Switzerland in reliance on the Swiss-U.S. Data Privacy Framework until the date of entry into force of Switzerland's recognition of adequacy. The full Swiss-U.S. Data Privacy Framework Package will be published on the Department's Data Privacy Framework website together with relevant information with regard to the date of entry into force of Switzerland's recognition of adequacy and its relevance for personal data received from Switzerland in reliance on the Swiss-U.S. Data Privacy Framework.

You can be assured that the United States takes these commitments seriously. We look forward to working with you as the Swiss-U.S. Data Privacy Framework is implemented and as we embark on the next phase of this process together.

Sincerely,



Gina M. Raimondo



July 13, 2023

Her Excellency Elisabeth Baume-Schneider  
Federal Councillor  
Federal Department of Justice and Police (FDJP)  
Bundeshaus West  
3003 Bern

His Excellency Guy Parmelin  
Federal Councillor  
The Federal Department of Economic Affairs,  
Education and Research (EAER)  
Bundeshaus Ost  
3003 Bern

Dear Federal Councillor Baume-Schneider and Federal Councillor Parmelin:

On behalf of the International Trade Administration (“ITA”), I am pleased to describe the commitments the Department of Commerce (“the Department”) has made to ensure the protection of personal data through its administration and supervision of the Data Privacy Framework program. Finalizing the Swiss-U.S. Data Privacy Framework (“Swiss-U.S. DPF”) is a major achievement for privacy and for businesses on both sides of the Atlantic, as it will offer confidence to Swiss individuals that their data will be protected and that they will have legal remedies to address concerns related to their data, and will enable thousands of businesses to continue to invest and otherwise engage in trade and commerce across the Atlantic to the benefit of our respective economies and citizens. The Swiss-U.S. DPF reflects years of hard work, and collaboration with you and your colleagues in the Swiss Federal Administration. We look forward to continuing to work with the Swiss Federal Administration and the Federal Data Protection and Information Commissioner (“the FDPIC”) to ensure that this collaborative effort functions effectively.

The Swiss-U.S. DPF will yield significant benefits for both individuals and businesses. First, it provides an important set of privacy protections for the data of Swiss individuals transferred to the United States. It requires participating U.S. organizations to develop a conforming privacy policy; publicly commit to comply with the “Swiss-U.S. Data Privacy Framework Principles,” including the Supplemental Principles (collectively “the Principles”), and Annex I of the Principles (*i.e.*, an annex providing the terms under which Swiss-U.S. DPF organizations are obligated to arbitrate certain residual claims as to personal data covered by the Principles), so that the commitment becomes enforceable under U.S. law<sup>1</sup>;

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<sup>1</sup> The effective date of the Principles and Annex I of the Principles is July 17, 2023; however, personal data cannot be received from Switzerland in reliance on the Swiss-U.S. DPF until the date of entry into force of Switzerland’s

annually re-certify their compliance to the Department; provide free, independent dispute resolution to Swiss individuals; and be subject to the investigatory and enforcement authority of a U.S. statutory body listed in the Principles (*e.g.*, the Federal Trade Commission (the “FTC”) and Department of Transportation (the “DOT”)), or a U.S. statutory body listed in a future annex to the Principles. While an organization’s decision to self-certify is voluntary, once an organization publicly commits to the Swiss-U.S. DPF, its commitment is enforceable under U.S. law by the FTC, DOT, or another U.S. statutory body depending on which body has jurisdiction over the participating organization. Second, the Swiss-U.S. DPF will enable businesses in the United States, including subsidiaries of European businesses located in the United States, to receive personal data from Switzerland to facilitate data flows that support transatlantic trade. Data flows between the United States and Switzerland underpin the \$660 billion U.S.-Swiss economic relationship, which supports millions of jobs on both sides of the Atlantic. Businesses that rely on transatlantic data flows come from all industry sectors and include major Fortune 500 firms, as well as many small and medium-sized enterprises. Transatlantic data flows allow U.S. organizations to process data required to offer goods, services, and employment opportunities to European individuals.

The Department is committed to working closely and productively with our Swiss counterparts to effectively administer and supervise the Data Privacy Framework program. This commitment is reflected in the Department’s development and continued refinement of a variety of resources to assist organizations with the self-certification process, creation of a website to provide targeted information to stakeholders, collaboration with the Swiss Federal Administration and the FDPIC to develop guidance that clarifies important elements of the Swiss-U.S. DPF, outreach to facilitate increased understanding of organizations’ data protection obligations, and oversight and monitoring of organizations’ compliance with the program’s requirements.

Our ongoing cooperation with valued Swiss counterparts will enable the Department to ensure that the Swiss-U.S. DPF functions effectively. The United States Government has a long history of working with the Swiss Federal Administration to promote shared data protection principles, bridging the differences in our respective legal approaches while furthering trade and economic growth in Switzerland and the United States. We believe that the Swiss-U.S. DPF, which is an example of this cooperation, will allow Switzerland to recognize the adequacy of protection provided by the Swiss-U.S. DPF thereby enabling organizations to use the Swiss-U.S. DPF to transfer personal data from Switzerland to the United States consistent with Swiss law.

## **Administration and Supervision of the Data Privacy Framework Program by the Department of Commerce**

The Department is firmly committed to the effective administration and supervision of the Data Privacy Framework program and will undertake appropriate efforts and dedicate appropriate resources to ensure that outcome. The Department will maintain and make available to the public an authoritative list of U.S. organizations that have self-certified to the Department

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recognition of adequacy. The Principles and Annex I of the Principles apply immediately upon self-certification and organizations that self-certified their commitment to comply with the Swiss-U.S. Privacy Shield Framework Principles and wish to enjoy the benefits of participating in the Swiss-U.S. DPF must comply with the “Swiss-U.S. Data Privacy Framework Principles”. This commitment to comply with the “Swiss-U.S. Data Privacy Framework Principles” shall be reflected in the privacy policies of such participating organizations as soon as possible, and in any event no later than three months from the effective date for the “Swiss-U.S. Data Privacy Framework Principles”. (*See* section (e) of the Supplemental Principle on Self-Certification).



and declared their commitment to adhere to the Principles (“the Data Privacy Framework List”), which it will update on the basis of annual re-certification submissions made by participating organizations and by removing organizations when they voluntarily withdraw, fail to complete the annual re-certification in accordance with the Department’s procedures, or are found to persistently fail to comply. The Department will also maintain and make available to the public an authoritative record of U.S. organizations that have been removed from the Data Privacy Framework List and will identify the reason each organization was removed. The aforementioned authoritative list and record will remain available to the public on the Department’s Data Privacy Framework website. The Data Privacy Framework website will include a prominently placed explanation indicating that any organization removed from the Data Privacy Framework List must cease making claims that it participates in or complies with the Swiss-U.S. DPF and that it may receive personal information pursuant to the Swiss-U.S. DPF. Such an organization must nevertheless continue to apply the Principles to the personal information that it received while it participated in the Swiss-U.S. DPF for as long as it retains such information. The Department, in furtherance of its overarching, ongoing commitment to the effective administration and supervision of the Data Privacy Framework program, specifically undertakes to do the following:

### Verify Self-Certification Requirements

- The Department will, prior to finalizing an organization’s initial self-certification or annual re-certification (collectively “self-certification”) and placing or maintaining an organization on the Data Privacy Framework List, verify that the organization has, at a minimum, met the relevant requirements set forth in the Supplemental Principle on Self-Certification concerning what information an organization must provide in its self-certification submission to the Department and provided at an appropriate time a relevant privacy policy that informs individuals about all 13 of the enumerated elements set forth in the Notice Principle. The Department will verify that the organization has:
  - identified the organization that is submitting its self-certification, as well as any U.S. entities or U.S. subsidiaries of the self-certifying organization that are also adhering to the Principles that the organization wishes to be covered by its self-certification;
  - provided required organization contact information (*e.g.*, contact information for specific individual(s) and/or office(s) within the self-certifying organization responsible for handling complaints, access requests, and any other issues arising under the Swiss-U.S. DPF);
  - described the purpose(s) for which the organization would collect and use personal information received from Switzerland;
  - indicated what personal information would be received from Switzerland in reliance on the Swiss-U.S. DPF and therefore be covered by its self-certification;
  - if the organization has a public website, provided the web address where the relevant privacy policy is readily available on that website, or if the organization does not have a public website, provided the Department with a copy of the relevant privacy policy and where that privacy policy is available for viewing by affected individuals (*i.e.*, affected employees if the relevant privacy policy is a human resources privacy policy or the public if the relevant privacy policy is not a human resources privacy policy);
  - included in its relevant privacy policy at the appropriate time (*i.e.*, initially only in a draft privacy policy provided along with the submission if that submission is an initial self-certification; otherwise, in a final and where applicable published privacy policy)

- a statement that it adheres to the Principles and a hyperlink to or the web address for the Department’s Data Privacy Framework website (*e.g.*, the homepage or the Data Privacy Framework List web page);
- included in its relevant privacy policy at the appropriate time all of the 12 other enumerated elements set forth in the Notice Principle (*e.g.*, the possibility, under certain conditions, for the affected Swiss individual to invoke binding arbitration; the requirement to disclose personal information in response to lawful requests by public authorities, including to meet national security or law enforcement requirements; and its liability in cases of onward transfers to third parties);
  - identified the specific statutory body that has jurisdiction to hear any claims against the organization regarding possible unfair or deceptive practices and violations of laws or regulations governing privacy (and that is listed in the Principles or a future annex to the Principles);
  - identified any privacy program in which the organization is a member;
  - identified whether the relevant method (*i.e.*, follow-up procedures that it must provide) for verifying its compliance with the Principles is “self-assessment” (*i.e.*, in-house verification) or “outside compliance review” (*i.e.*, third-party verification) and if it identified the relevant method as outside compliance review, also identified the third party that has completed that review;
  - identified the appropriate independent recourse mechanism that is available to address complaints brought under the Principles and provide appropriate recourse free of charge to the affected individual.
    - If the organization has selected an independent recourse mechanism provided by a private-sector alternative dispute resolution body, it included in its relevant privacy policy a hyperlink to or the web address for the relevant website or complaint submission form of the mechanism that is available to investigate unresolved complaints brought under the Principles.
    - If the organization either is required to (*i.e.*, with respect to human resources data transferred from Switzerland in the context of the employment relationship) or has elected to cooperate with the FDPIC in the investigation and resolution of complaints brought under the Principles, it declared its commitment to such cooperation with the FDPIC and compliance with its related advice to take specific action to comply with the Principles.
- The Department will also verify that the organization’s self-certification submission is consistent with its relevant privacy policy/ies. Where a self-certifying organization wishes to cover any of its U.S. entities or U.S. subsidiaries that have separate, relevant privacy policies, the Department will also review the relevant privacy policies of such covered entities or subsidiaries to ensure that they include all of the required elements set forth in the Notice Principle.
  - The Department will work with statutory bodies (*e.g.*, FTC and DOT) to verify that the organizations are subject to the jurisdiction of the relevant statutory body identified in their self-certification submissions, where the Department has reason to doubt that they are subject to that jurisdiction.
  - The Department will work with private-sector alternative dispute resolution bodies to verify that the organizations are actively registered for the independent recourse mechanism identified in their self-certification submissions; and work with those bodies to verify that the organizations are actively registered for the outside compliance review identified in their self-certification submissions, where those bodies may offer both types of services.

- The Department will work with the third party selected by the Department to administer arbitrations pursuant to and manage the arbitral fund identified in Annex I of the Principles to verify that the organizations have contributed to that arbitral fund.
- Where the Department identifies any issues during its review of organizations' self-certification submissions, it will inform them that they must address all such issues within the appropriate timeframe designated by the Department.<sup>2</sup> The Department will also inform them that failure to respond within timeframes designated by the Department or other failure to complete their self-certification in accordance with the Department's procedures will lead to those self-certification submissions being considered abandoned, and that any misrepresentation about an organization's participation in or compliance with the Swiss-U.S. DPF may be subject to enforcement action by the FTC, the DOT, or other relevant government body. The Department will inform the organizations through the means of contact that the organizations provided to the Department.

#### Facilitate Cooperation with Alternative Dispute Resolution Bodies That Provide Principles-Related Services

- The Department will work with private-sector alternative dispute resolution bodies providing independent recourse mechanisms, which are available to investigate unresolved complaints brought under the Principles, to verify that they meet, at a minimum, the requirements set forth in the Supplemental Principle on Dispute Resolution and Enforcement. The Department will verify that they:
  - include information on their public websites regarding the Principles and the services that they provide under the Swiss-U.S. DPF, which must include: (1) information on or a hyperlink to the Principles' requirements for independent recourse mechanisms; (2) a hyperlink to the Department's Data Privacy Framework website; (3) an explanation that their dispute resolution services under the Swiss-U.S. DPF are free of charge to individuals; (4) a description of how a Principles-related complaint can be filed; (5) the timeframe in which Principles-related complaints are processed; and (6) a description of the range of potential remedies. The Department will provide the bodies with timely notice of material changes to the Department's supervision and administration of the Data Privacy Framework program, where such changes are imminent or have already been made and such changes are relevant to the role that the bodies play under the Swiss-U.S. DPF;
  - publish an annual report providing aggregate statistics regarding their dispute resolution services, which must include: (1) the total number of Principles-related complaints received during the reporting year; (2) the types of complaints received; (3) dispute resolution quality measures, such as the length of time taken to process complaints; and (4) the outcomes of the complaints received, notably the number and types of remedies or sanctions imposed. The Department will provide the bodies with specific, complementary guidance on what information they should provide in those annual reports elaborating upon those requirements (*e.g.*, listing the specific criteria that a complaint must meet to be considered a Principles-related complaint for purposes of the annual report), as well as identifying other types of information they should provide (*e.g.*, if the body also provides a Principles-related verification service, a description of how the body avoids any actual or potential conflicts of

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<sup>2</sup> *E.g.*, As regards re-certification, the expectation would be that organizations address all such issues within 45 days; subject to the designation by the Department of a different, appropriate timeframe.

interest in situations when it provides an organization with both verification services and dispute resolution services). The additional guidance provided by the Department will also specify the date by which the bodies' annual reports should be published for the relevant reporting period.

#### Follow Up with Organizations That Wish to Be or Have Been Removed from the Data Privacy Framework List

- If an organization wishes to withdraw from the Swiss-U.S. DPF, the Department will require that the organization remove from any relevant privacy policy any references to Swiss-U.S. DPF that imply that it continues to participate in the Swiss-U.S. DPF and that it may receive personal data pursuant to the Swiss-U.S. DPF (*see* description of the Department's commitment to search for false claims of participation). The Department will also require that the organization complete and submit to the Department an appropriate questionnaire to verify:
  - its wish to withdraw;
  - which of the following it will do with the personal data that it received in reliance on the Swiss-U.S. DPF while it participated in the Swiss-U.S. DPF: (a) retain such data, continue to apply the Principles to such data, and affirm to the Department on an annual basis its commitment to apply the Principles to such data; (b) retain such data and provide "adequate" protection for such data by another authorized means; or (c) return or delete all such data by a specified date; and
  - who within the organization will serve as an ongoing point of contact for Principles-related questions.
- If an organization elected (a) as described immediately above, the Department will also require that it complete and submit to the Department each year after its withdrawal (*i.e.*, by the first anniversary of its withdrawal, as well as by every subsequent anniversary unless and until the organization either provides "adequate" protection for such data by another authorized means or returns or deletes all such data and notifies the Department of this action) an appropriate questionnaire to verify what it has done with that personal data, what it will do with any of that personal data that it continues to retain, and who within the organization will serve as an ongoing point of contact for Principles-related questions.
- If an organization has allowed its self-certification to lapse (*i.e.*, neither completed its annual re-certification of its adherence to the Principles nor was removed from the Data Privacy Framework List for some other reason, such as withdrawal), the Department will direct it to complete and submit to the Department an appropriate questionnaire to verify whether it wishes to withdraw or re-certify:
  - and if it wishes to withdraw, further verify what it will do with the personal data that it received in reliance on the Swiss-U.S. DPF while it participated in the Swiss-U.S. DPF (*see* previous description of what an organization must verify if it wishes to withdraw);
  - and if it intends to re-certify, further verify that during the lapse of its certification status it applied the Principles to personal data received under the Swiss-U.S. DPF and clarify what steps it will take to address the outstanding issues that have delayed its re-certification.
- If an organization is removed from the Data Privacy Framework List for any of the following reasons: (a) withdrawal from the Swiss-U.S. DPF, (b) failure to complete the annual re-certification of its adherence to the Principles (*i.e.*, either started, but failed to complete the annual re-certification process in a timely manner or did not even start the annual re-

certification process), or (c) “persistent failure to comply”, the Department will send a notification to the contact(s) identified in the organization’s self-certification submission specifying the reason for the removal and explaining that it must cease making any explicit or implicit claims that it participates in or complies with the Swiss-U.S. DPF and that it may receive personal data pursuant to the Swiss-U.S. DPF. The notification, which may also include other content tailored to fit the reason for the removal, will indicate that organizations misrepresenting their participation in or compliance with the Swiss-U.S. DPF, including where they represent that they are participating in the Swiss-U.S. DPF after having been removed from the Data Privacy Framework List, may be subject to enforcement action by the FTC, the DOT, or other relevant government body.

#### Search for and Address False Claims of Participation

- On an ongoing basis, when an organization: (a) withdraws from participation in the Swiss-U.S. DPF, (b) fails to complete the annual re-certification of its adherence to the Principles (*i.e.*, either started, but failed to complete the annual re-certification process in a timely manner or did not even start the annual re-certification process), (c) is removed as a participant in the Swiss-U.S. DPF notably for “persistent failure to comply,” or (d) fails to complete an initial self-certification of its adherence to the Principles (*i.e.*, started, but failed to complete the initial self-certification process in a timely manner), the Department will undertake, on an *ex officio* basis action to verify that any relevant published privacy policy of the organization does not contain references to the Swiss-U.S. DPF that imply that the organization participates in the Swiss-U.S. DPF and that it may receive personal data pursuant to the Swiss-U.S. DPF. Where the Department finds such references, the Department will inform the organization that the Department will, as appropriate, refer the matter to the relevant agency for potential enforcement action if the organization continues to misrepresent its participation in the Swiss-U.S. DPF. The Department will inform the organization through the means of contact the organization provided to the Department or where necessary other appropriate means. If the organization neither removes the references nor self-certifies its compliance under the Swiss-U.S. DPF in accordance with the Department’s procedures, the Department will *ex officio*, refer the matter to the FTC, DOT, or other appropriate enforcement agency, or take other appropriate action to ensure proper use of the Swiss-U.S. DPF certification mark;
- The Department will undertake other efforts to identify false claims of Swiss-U.S. DPF participation and improper use of the Swiss-U.S. DPF certification mark, including by organizations that unlike the organizations described immediately above have never even started the self-certification process (*e.g.*, conducting appropriate Internet searches to identify references to Swiss-U.S. DPF in organizations’ privacy policies). Where through such efforts the Department identifies false claims of Swiss-U.S. DPF participation and improper use of the Swiss-U.S. DPF certification mark, the Department will inform the organization that the Department will, as appropriate, refer the matter to the relevant agency for potential enforcement action if the organization continues to misrepresent its participation in the Swiss-U.S. DPF. The Department will inform the organization through the means of contact, if any, the organization provided to the Department or where necessary other appropriate means. If the organization neither removes the references nor self-certifies its compliance under the Swiss-U.S. DPF in accordance with the Department’s procedures, the Department will *ex officio*, refer the matter to the FTC, DOT, or other appropriate enforcement agency, or take other appropriate action to ensure proper use of the Swiss-U.S. DPF certification mark;

- The Department will promptly review and address specific, non-frivolous complaints about false claims of Swiss-U.S. DPF participation that the Department receives (*e.g.*, complaints received from the FDPIIC, independent recourse mechanisms provided by private-sector alternative dispute resolution bodies, data subjects, Swiss and U.S. businesses, and other types of third parties); and
- The Department may take other appropriate corrective action. Misrepresentations to the Department may be actionable under the False Statements Act (18 U.S.C. § 1001).

#### Conduct Periodic *ex officio* Compliance Reviews and Assessments of the Data Privacy Framework Program

- On an ongoing basis, the Department will undertake efforts to monitor effective compliance by Swiss-U.S. DPF organizations to identify issues that may warrant follow-up action. In particular, the Department will conduct, on an *ex officio* basis routine spot checks of randomly selected Swiss-U.S. DPF organizations, as well as *ad hoc* spot checks of specific Swiss-U.S. DPF organizations when potential compliance deficiencies are identified (*e.g.*, potential compliance deficiencies brought to the attention of the Department by third parties) to verify: (a) that the point(s) of contact responsible for the handling of complaints, access requests, and other issues arising under the Swiss-U.S. DPF are available; (b) where applicable, that the organization's public-facing privacy policy is readily available for viewing by the public both on the organization's public website and via a hyperlink on the Data Privacy Framework List; (c) that the organization's privacy policy continues to comply with the self-certification requirements described in the Principles; and (d) that the independent recourse mechanism identified by the organization is available to address complaints brought under the Swiss-U.S. DPF. The Department will also actively monitor the news for reports that provide credible evidence of non-compliance by Swiss-U.S. DPF organizations;
- As part of the compliance review, the Department will require that a Swiss-U.S. DPF organization complete and submit to the Department a detailed questionnaire when: (a) the Department has received any specific, non-frivolous complaints about the organization's compliance with the Principles, (b) the organization does not respond satisfactorily to inquiries by the Department for information relating to the Swiss-U.S. DPF, or (c) there is credible evidence that the organization does not comply with its commitments under the Swiss-U.S. DPF. Where the Department has sent such a detailed questionnaire to an organization and the organization fails to satisfactorily reply to the questionnaire, the Department will inform the organization that the Department will, as appropriate, refer the matter to the relevant agency for potential enforcement action if the Department does not receive a timely and satisfactory response from the organization. The Department will inform the organization through the means of contact the organization provided to the Department or where necessary other appropriate means. If the organization does not provide a timely and satisfactory response, the Department will *ex officio* refer the matter to the FTC, DOT, or other appropriate enforcement agency, or take other appropriate action towards ensuring compliance. The Department shall, when appropriate, consult with the competent data protection authorities about such compliance reviews; and
- The Department will assess periodically the administration and supervision of the Data Privacy Framework program to ensure that its monitoring efforts, including any such efforts undertaken through the use of search tools (*e.g.*, to check for broken links to Swiss-U.S. DPF organizations' privacy policies), are appropriate to address existing issues and any new issues as they arise.

## Tailor the Data Privacy Framework Website to Targeted Audiences

The Department will tailor the Data Privacy Framework website to focus on the following target audiences: Swiss individuals, Swiss businesses, U.S. businesses, and the FDPIC. The inclusion of material targeted directly to Swiss individuals and Swiss businesses will facilitate transparency in a number of ways. With regard to Swiss individuals, the website will clearly explain: (1) the rights the Swiss-U.S. DPF provides to Swiss individuals; (2) the recourse mechanisms available to Swiss individuals when they believe an organization has breached its commitment to comply with the Principles; and (3) how to find information pertaining to an organization's Swiss-U.S. DPF self-certification. With regard to Swiss businesses, it will facilitate verification of: (1) whether an organization is a participant in the Swiss-U.S. DPF; (2) the type of information covered by an organization's Swiss-U.S. DPF self-certification; (3) the privacy policy that applies to the covered information; and (4) the method the organization uses to verify its adherence to the Principles. With regard to U.S. businesses, it will clearly explain: (1) the benefits of Swiss-U.S. DPF participation; (2) how to join the Swiss-U.S. DPF, as well as how to re-certify to and withdraw from the Swiss-U.S. DPF; and (3) how the United States administers and enforces the Swiss-U.S. DPF. The inclusion of material targeted directly to the FDPIC (*e.g.*, information about the Department's dedicated point of contact for the FDPIC and a hyperlink to Principles-related content on the FTC website) will facilitate both cooperation and transparency. The Department will also work on an *ad hoc* basis with the Swiss Federal Administration and the FDPIC to develop additional, topical material (*e.g.*, answers to frequently asked questions) for use on the Data Privacy Framework website, where such information would facilitate the efficient administration and supervision of the Data Privacy Framework program.

## Facilitate Cooperation with the FDPIC

To increase opportunities for cooperation with the FDPIC, the Department will maintain a dedicated point of contact at the Department to act as a liaison with the FDPIC. In instances where the FDPIC believes that a Swiss-U.S. DPF organization is not complying with the Principles, including following a complaint from a Swiss individual, the FDPIC will be able to reach out to the dedicated point of contact at the Department to refer the organization for further review. The Department will make its best effort to facilitate resolution of the complaint with the Swiss-U.S. DPF organization. Within 90 days after receipt of the complaint, the Department will provide an update to the FDPIC. The dedicated point of contact will also receive referrals regarding organizations that falsely claim to participate in the Swiss-U.S. DPF. The dedicated point of contact will track all referrals from the FDPIC received by the Department, and the Department will provide in the joint review described below a report analyzing in aggregate the complaints it receives each year. The dedicated point of contact will assist the FDPIC when it seeks information related to a specific organization's self-certification or previous participation in the Swiss-U.S. DPF, and the dedicated point of contact will respond to the FDPIC's inquiries regarding the implementation of specific Swiss-U.S. DPF requirements. In addition, the Department will provide the FDPIC with material regarding the Swiss-U.S. DPF for inclusion on the FDPIC's own website to increase transparency for Swiss individuals and Swiss businesses. Increased awareness regarding the Swiss-U.S. DPF and the rights and responsibilities it creates should facilitate the identification of issues as they arise, so that these can be appropriately addressed.

## Fulfill Its Commitments under Annex I of the Principles

The Department will fulfill its commitments under Annex I of the Principles, including maintaining a supplemental list of arbitrators chosen with the Swiss Federal Administration on the basis of independence, integrity, and expertise; and supporting, as appropriate, the third party selected by the Department to administer arbitrations pursuant to and manage the arbitral fund identified in Annex I of the Principles.<sup>3</sup> The Department will work with the third party to, among other things, verify that the third party maintains a website with guidance on the arbitration process, including: (1) how to initiate proceedings and submit documents; (2) the lists of arbitrators maintained by the Department and how to select arbitrators from those lists;<sup>4</sup> (3) the governing arbitral procedures and arbitrator code of conduct adopted by the Department and the Swiss Federal Administration;<sup>5</sup> and (4) the collection and payment of arbitrator fees. In addition, the Department will work with the third party to periodically review the operation of the arbitral fund, including the need to adjust the amount of the contributions or the caps (*i.e.*, maximum amounts) on the arbitral cost, and consider, among other things, the number of arbitrations and the costs and timing of the arbitrations, with the understanding that there will be no excessive financial burden imposed on Swiss-U.S. DPF organizations. The Department will notify the Swiss Federal Administration of the outcome of such reviews with the third party and will provide the Swiss Federal Administration with prior notification of any adjustments of the amount of the contributions.

## Conduct Joint Reviews of the Functioning of the Swiss-U.S. DPF

The Department and other agencies, as appropriate, will hold meetings on a periodic basis with the Swiss Federal Administration, and the FDPIC, where the Department will provide updates on the Swiss-U.S. DPF. The meetings will include discussion of current issues related to the functioning, implementation, supervision, and enforcement of the Data Privacy Framework program. The meetings may, as appropriate, include discussion of related topics, such as other data transfer mechanisms that benefit from the safeguards under the Swiss-U.S. DPF.

## Update of Laws

The Department will make reasonable efforts to inform the Swiss Federal Administration of material developments in the law in the United States so far as they are relevant to the Swiss-U.S. DPF in the field of data privacy protection and the limitations and safeguards applicable to access to personal data by U.S. authorities and its subsequent use.

## U.S. Government Access to Personal Data

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<sup>3</sup> The International Centre for Dispute Resolution (“ICDR”), the international division of the American Arbitration Association (“AAA”) (collectively “ICDR-AAA”), was selected by the Department to administer arbitrations pursuant to and manage the arbitral fund identified in Annex I of the Principles.

<sup>4</sup> Parties will select arbitrators for the Swiss-U.S. Data Privacy Framework Panel from the list of arbitrators developed under the EU-U.S. Data Privacy Framework (“EU-U.S. DPF”), as supplemented by a list developed under the Swiss-U.S. DPF. (*See* Annex I of the Principles, para. F [The Arbitration Panel]).

<sup>5</sup> On March 29, 2018, the Department and the Swiss Federal Administration agreed to the adoption of a set of arbitral rules to govern binding arbitration proceedings described in Annex I of the Principles, as well as a code of conduct for arbitrators that is consistent with generally accepted ethical standards for commercial arbitrators and Annex I of the Principles. The Department and the Swiss Federal Administration agreed to adapt the arbitration rules and code of conduct to reflect the updates under the Swiss-U.S. DPF, and the Department will work with the ICDR-AAA to make those updates.



The United States has issued Executive Order 14086, “Enhancing Safeguards for United States Signals Intelligence Activities” and 28 CFR part 201 amending Department of Justice regulations to establish the Data Protection Review Court (the “DPRC”), which provide strong protection for personal data with respect to government access to data for national security purposes. The protection provided includes: strengthening privacy and civil liberties safeguards to ensure that U.S. signals intelligence activities are necessary and proportionate in the pursuit of defined national security objectives; establishing a new redress mechanism with independent and binding authority; and enhancing the existing rigorous and layered oversight of U.S. signals intelligence activities. Through these protections, Swiss individuals may seek redress from a new multi-layer redress mechanism that includes an independent DPRC that would consist of individuals chosen from outside the U.S. Government who would have full authority to adjudicate claims and direct remedial measures as needed. The Department will maintain a record of Swiss individuals who submit a qualifying complaint pursuant to Executive Order 14086 and 28 CFR part 201. Five years after the date of this letter, and on a five-year basis thereafter, the Department will contact relevant agencies regarding whether information pertaining to the review of qualifying complaints or review of any applications for review submitted to the DPRC has been declassified. If such information has been declassified, the Department will work with the FDPIC to inform the Swiss individual. These enhancements confirm that Swiss personal data transferred to the United States will be treated in a manner consistent with Swiss legal requirements with respect to government access to data.

On the basis of the Principles, Executive Order 14086, 28 CFR part 201, and the accompanying letters and materials, including the Department’s commitments regarding the administration and supervision of the Data Privacy Framework program, our expectation is that Switzerland will determine that the Swiss-U.S. DPF provides adequate protection for the purposes of Swiss law and data transfers from Switzerland will continue to organizations that participate in the Swiss-U.S. DPF. We also expect that transfers to U.S. organizations made in reliance on other data transfer mechanisms under Swiss law will be further facilitated by the terms of those arrangements.

Very truly yours,

A handwritten signature in black ink that reads "Marisa Lago". The signature is written in a cursive, slightly slanted style.

Marisa Lago

Under Secretary for International Trade



UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

Office of the Chair

July 13, 2023

Her Excellency Elisabeth Baume-Schneider  
Federal Councillor  
Federal Department of Justice and Police (FDJP)  
Bundeshaus West  
3003 Bern

His Excellency Guy Parmelin  
Federal Councillor  
The Federal Department of Economic Affairs,  
Education and Research (EAER)  
Bundeshaus Ost  
3003 Bern

Dear Federal Councillor Baume-Schneider and Federal Councillor Parmelin:

The United States Federal Trade Commission (“FTC”) appreciates the opportunity to address its enforcement role in connection with the Swiss-U.S. Data Privacy Framework (“Swiss-U.S. DPF”) Principles. The FTC has long committed to protecting consumers and privacy across borders, and we are committed to enforcement of the commercial sector aspects of this framework. The FTC has performed such a role since the year 2009, in connection with the U.S.-Swiss Safe Harbor Framework, and most recently since 2016, in connection with the Swiss-U.S. Privacy Shield Framework.<sup>1</sup> On July 16, 2020, the Court of Justice of the European Union (“CJEU”) invalidated the European Commission’s adequacy decision underlying the EU-U.S. Privacy Shield Framework, on the basis of issues other than the commercial principles that the FTC enforced. On September 8, 2020, the Swiss Federal Data Protection and Information Commissioner (“FDPIC”) issued an opinion concluding, on the basis of issues other than the commercial principles that the FTC enforced, that the Swiss-U.S. Privacy Shield Framework does not provide an adequate level of protection for data transfers from Switzerland to the United States pursuant to Switzerland’s Federal Act on Data Protection (“FADP”). The United States and the European Commission have since negotiated the EU-U.S. Data Privacy Framework to

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<sup>1</sup> Letter from Chairwoman Edith Ramirez to Federal Councillor Johann N. Schneider-Ammann, Head of the Department of Economic Affairs, Education and Research (EAER), Swiss Federal Administration, Describing Federal Trade Commission Enforcement of the Swiss-U.S. Privacy Shield Framework (Jan. 12, 2017), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/letter-chairwoman-edith-ramirez-johann-n-schneider-ammann-head-department-economic-affairs-education>. The FTC also previously committed to enforce the U.S-Swiss Safe Harbor Framework. Letter from William Kovacic, FTC Chairman, to Hanspeter Thür, Swiss Federal Data Protection and Information Commissioner (FDPIC) (Nov. 25, 2008). This letter replaces those earlier commitments.

address that CJEU ruling, and relatedly the United States and the Swiss Federal Administration have since negotiated the Swiss-U.S. Data Privacy Framework.

I write to confirm the FTC’s commitment to vigorous enforcement of the Swiss-U.S. DPF Principles. Notably, we affirm our commitment in three key areas: (1) referral prioritization and investigations; (2) seeking and monitoring orders; and (3) enforcement cooperation with the FDPIC.

## **I. Introduction**

### **a. FTC Privacy Enforcement and Policy Work**

The FTC has broad civil enforcement authority to promote consumer protection and competition in the commercial sphere. As part of its consumer protection mandate, the FTC enforces a wide range of laws to protect the privacy and security of consumers and their data. The primary law enforced by the FTC, the FTC Act, prohibits “unfair” or “deceptive” acts or practices in or affecting commerce.<sup>2</sup> The FTC also enforces targeted statutes that protect information relating to health, credit, and other financial matters, as well as children’s online information, and has issued regulations implementing each of these statutes.<sup>3</sup>

The FTC has also recently pursued numerous initiatives to strengthen our privacy work. In August of 2022 the FTC announced it is considering rules to crack down on harmful commercial surveillance and lax data security.<sup>4</sup> The goal of the project is to build a robust public record to inform whether the FTC should issue rules to address commercial surveillance and data security practices, and what those rules should potentially look like.

Our “PrivacyCon” conferences continue to gather leading researchers to discuss the latest research and trends related to consumer privacy and data security. We also have increased our agency’s ability to keep pace with the technology developments at the center of much of our privacy work, building a growing team of technologists and interdisciplinary researchers. We also recently issued a report to Congress warning about harms associated with using artificial

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<sup>2</sup> 15 U.S.C. § 45(a). The FTC does not have jurisdiction over criminal law enforcement or national security matters. Nor can the FTC reach most other governmental actions. In addition, there are exceptions to the FTC’s jurisdiction over commercial activities, including with respect to banks, airlines, the business of insurance, and the common carrier activities of telecommunications service providers. The FTC also does not have jurisdiction over most non-profit organizations, though it does have jurisdiction over sham charities or other non-profits that in fact operate for profit. The FTC also has jurisdiction over non-profit organizations that operate for the profit of their for-profit members, including by providing substantial economic benefits to those members. In some instances, the FTC’s jurisdiction is concurrent with that of other law enforcement agencies. We have developed strong working relationships with federal and state authorities, and work closely with them to coordinate investigations or make referrals where appropriate.

<sup>3</sup> See Privacy and Security, <https://www.ftc.gov/business-guidance/privacy-security>.

<sup>4</sup> See Press Release, Fed. Trade Comm’n, FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>.

intelligence (“AI”) to address online harms identified by Congress. This report raised concerns regarding inaccuracy, bias, discrimination, and commercial surveillance creep.<sup>5</sup>

### **b. U.S. Legal Protections Benefitting Swiss Consumers**

The Swiss-U.S. DPF operates in the context of the larger U.S. privacy landscape, which also protects Swiss consumers in a number of ways. The FTC Act’s prohibition on unfair or deceptive acts or practices is not limited to protecting U.S. consumers from U.S. companies, as it includes those practices that (1) cause or are likely to cause reasonably foreseeable injury in the United States, or (2) involve material conduct in the United States. Further, the FTC can use all remedies that are available to protect domestic consumers when protecting foreign consumers.<sup>6</sup>

The FTC also enforces other targeted laws whose protections extend to non-U.S. consumers, such as the Children’s Online Privacy Protection Act (“COPPA”). Among other things, COPPA requires that operators of child-directed websites and online services, or general audience sites that knowingly collect personal information from children under the age of 13, provide parental notice and obtain verifiable parental consent. U.S.-based websites and services that are subject to COPPA and collect personal information from foreign children are required to comply with COPPA. Foreign-based websites and online services must also comply with COPPA if they are directed to children in the United States, or if they knowingly collect personal information from children in the United States. Moreover, in addition to the U.S. federal laws enforced by the FTC, other federal and state consumer protection, data breach, and privacy laws may provide additional benefits to Swiss consumers.

### **c. FTC Enforcement Activity**

The FTC brought cases under the U.S.-EU Safe Harbor and the U.S.-Swiss Safe Harbor frameworks, and the EU-U.S. Privacy Shield and the Swiss-U.S. Privacy Shield frameworks and continued to enforce the EU-U.S. Privacy Shield and the Swiss-U.S. Privacy Shield frameworks even after the CJEU invalidation of the adequacy decision underlying the EU-U.S. Privacy Shield Framework and the FDPIC opinion calling into question the adequacy of protection provided by the Swiss-U.S. Privacy Shield Framework.<sup>7</sup> Several of the FTC’s recent complaints have included counts alleging that firms violated EU-U.S. Privacy Shield and Swiss-U.S. Privacy

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<sup>5</sup> See Press Release, Fed. Trade Comm’n, FTC Report Warns About Using Artificial Intelligence to Combat Online Problems (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-report-warns-about-using-artificial-intelligence-combat-online-problems>.

<sup>6</sup> 15 U.S.C. § 45(a)(4)(B). Further, “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States. 15 U.S.C. § 45(a)(4)(A).

<sup>7</sup> See Appendix A for a list of FTC Safe Harbor and Privacy Shield matters.

Shield provisions, including in proceedings against Twitter,<sup>8</sup> CafePress,<sup>9</sup> and Flo.<sup>10</sup> In the enforcement action against Twitter, the FTC secured \$150 million from Twitter for its violation of an earlier FTC order with practices affecting more than 140 million customers, including violating EU-U.S. Privacy Shield and Swiss-U.S. Privacy Shield Principle 5 (Data Integrity and Purpose Limitation). Further, the agency's order requires that Twitter allow users to employ secure multi-factor authentication methods that do not require users to provide their telephone numbers.

In *CafePress*, the FTC alleged that the company failed to secure consumers' sensitive information, covered up a major data breach, and violated EU-U.S. Privacy Shield and Swiss-U.S. Privacy Shield Principles 2 (Choice), 4 (Security), and 6 (Access). The FTC's order requires the company to replace inadequate authentication measures with multifactor authentication, substantively limit the amount of data it collects and retains, encrypt Social Security numbers, and have a third party assess its information security programs and provide the FTC with a copy that can be publicized.

In *Flo*, the FTC alleged that the fertility-tracking app disclosed user health information to third-party data analytics providers after commitments to keep such information private. The FTC complaint specifically notes the company's interactions with EU consumers and that Flo violated EU-U.S. Privacy Shield and Swiss-U.S. Privacy Shield Principles 1 (Notice), 2 (Choice), 3 (Accountability for Onward Transfer), and 5 (Data Integrity and Purpose Limitation). Among other things, the agency's order requires Flo to notify affected users about the disclosure of their personal information and to instruct any third party that received users' health information to destroy that data. Importantly, FTC orders protect all consumers worldwide who interact with a U.S. business, not just those consumers who have lodged complaints.

Many past U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor, and EU-U.S. Privacy Shield and Swiss-U.S. Privacy Shield enforcement cases involved organizations that completed an initial self-certification through the Department of Commerce, but failed to maintain their annual self-certification while they continued to represent themselves as current participants. Other cases involved false claims of participation by organizations that never completed an initial self-certification through the Department of Commerce. Going forward, we expect to focus our proactive enforcement efforts on the types of substantive violations of the Swiss-U.S. DPF Principles alleged in cases such as Twitter, CafePress, and Flo. Meanwhile, the Department of Commerce will administer and supervise the self-certification process, maintain the authoritative list of Swiss-U.S. DPF participants, and address other program participation claim

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<sup>8</sup> See Press Release, Fed. Trade Comm'n, FTC Charges Twitter with Deceptively Using Account Security Data to Sell Targeted Ads (May 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads>.

<sup>9</sup> See Press Release, Fed. Trade Comm'n, FTC Takes Action Against CafePress for Data Breach Cover Up (March 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-cafepress-data-breach-cover>.

<sup>10</sup> See Press Release, Fed. Trade Comm'n, FTC Finalizes Order with Flo Health, a Fertility-Tracking App that Shared Sensitive Health Data with Facebook, Google, and Others (June 22, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-finalizes-order-flo-health-fertility-tracking-app-shared-sensitive-health-data-facebook-google>.

issues.<sup>11</sup> Importantly, organizations claiming Swiss-U.S. DPF participation may be subject to substantive enforcement of the Swiss-U.S. DPF Principles even if they fail to make or maintain their self-certification through the Department of Commerce.

## **II. Referral Prioritization and Investigations**

As we did under the U.S.-Swiss Safe Harbor Framework and the Swiss-U.S. Privacy Shield Framework, the FTC commits to give priority consideration to Swiss-U.S. DPF Principles referrals from the Department of Commerce and the FDPIC. We will also prioritize consideration of referrals for non-compliance with the Swiss-U.S. DPF Principles from privacy self-regulatory organizations and other independent dispute resolution bodies.

To facilitate referrals under the Swiss-U.S. DPF from the FDPIC, the FTC has created a standardized referral process and has provided guidance to the FDPIC on the type of information that would best assist the FTC in its inquiry into a referral. As part of this effort, the FTC has designated an agency point of contact for FDPIC referrals. It is most useful when the FDPIC has conducted a preliminary inquiry into the alleged violation and can cooperate with the FTC in an investigation.

Upon receipt of such a referral from the Department of Commerce, the FDPIC, or self-regulatory organization or other independent dispute resolution bodies the FTC can take a range of actions to address the issues raised. For example, we may review the organization's privacy policies, obtain further information directly from the organization or from third parties, follow up with the referring entity, assess whether there is a pattern of violations or significant number of consumers affected, determine whether the referral implicates issues within the purview of the Department of Commerce, assess whether additional efforts to put market participants on notice would be helpful, and, as appropriate, initiate an enforcement proceeding.

In addition to prioritizing Swiss-U.S. DPF Principles referrals from the Department of Commerce, the FDPIC, and privacy self-regulatory organizations or other independent dispute resolution bodies,<sup>12</sup> the FTC will continue to investigate significant Swiss-U.S. DPF Principles violations on its own initiative where appropriate, using a range of tools. As part of the FTC's program of investigating privacy and security issues involving commercial organizations, the agency has routinely examined whether the entity at issue was making Swiss-U.S. Privacy Shield representations. If the entity made such representations and the investigation revealed apparent violations of the Swiss-U.S. Privacy Shield Principles, the FTC included allegations of Swiss-

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<sup>11</sup> Letter from Marisa Lago, Under Secretary of Commerce for International Trade, to Her Excellency Elisabeth Baume-Schneider, Federal Councillor, Federal Department of Justice and Police (FDJP), and His Excellency Guy Parmelin, Federal Councillor, The Federal Department of Economic Affairs, Education and Research (EAER), Swiss Federal Administration (July 13, 2023).

<sup>12</sup> Although the FTC does not resolve or mediate individual consumer complaints, the FTC affirms that it will prioritize Swiss-U.S. DPF Principles referrals from the FDPIC. In addition, the FTC uses complaints in its Consumer Sentinel database, which is accessible by many other law enforcement agencies, to identify trends, determine enforcement priorities, and identify potential investigative targets. Swiss individuals can use the same complaint system available to U.S. consumers to submit a complaint to the FTC at <https://reportfraud.ftc.gov/>. For individual Swiss-U.S. DPF Principles complaints, however, it may be most useful for Swiss individuals to submit complaints to the FDPIC or independent dispute resolution body.

U.S. Privacy Shield violations in its enforcement actions. We will continue this proactive approach, now with respect to the Swiss-U.S. DPF Principles.

### **III. Seeking and Monitoring Orders**

The FTC also affirms its commitment to seek and monitor enforcement orders to ensure compliance with the Swiss-U.S. DPF Principles. We will require compliance with the Swiss-U.S. DPF Principles through a variety of appropriate injunctive provisions in future FTC Swiss-U.S. DPF Principles orders. Violations of the FTC's administrative orders can lead to civil penalties of up to \$ 50,120 per violation, or \$50,120 per day for a continuing violation,<sup>13</sup> which, in the case of practices affecting many consumers, can amount to millions of dollars. Each consent order also has reporting and compliance provisions. The entities under order must retain documents demonstrating their compliance for a specified number of years. The orders must also be disseminated to employees responsible for ensuring order compliance.

The FTC systematically monitors compliance with existing Swiss-U.S. Privacy Shield Principles orders, as it does with all of its orders, and brings actions to enforce them when necessary.<sup>14</sup> Importantly, FTC orders will continue to protect all consumers worldwide who interact with a business, not just those consumers who have lodged complaints. Finally, the FTC will maintain an online list of companies subject to orders obtained in connection with enforcement of the Swiss-U.S. DPF Principles.<sup>15</sup>

### **IV. Enforcement Cooperation with the FDPIC**

The FTC recognizes the important role that the FDPIC can play with respect to Swiss-U.S. DPF Principles compliance and encourages increased consultation and enforcement cooperation. Indeed, a coordinated approach to the challenges posed by current digital market developments, and data-intensive business models, is increasingly critical. The FTC will exchange information on referrals with referring enforcement authorities, including the status of referrals, subject to confidentiality laws and restrictions. To the extent feasible given the number and type of referrals received, the information provided will include an evaluation of the referred matters, including a description of significant issues raised and any action taken to address law violations within the jurisdiction of the FTC. The FTC will also provide feedback to the referring authority on the types of referrals received in order to increase the effectiveness of efforts to address unlawful conduct. If a referring enforcement authority seeks information about the status of a particular referral for purposes of pursuing its own enforcement proceeding, the FTC will respond, taking into account the number of referrals under consideration and subject to confidentiality and other legal requirements.

The FTC will also work closely with the FDPIC to provide enforcement assistance. In appropriate cases, this could include information sharing and investigative assistance pursuant to

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<sup>13</sup> 15 U.S.C. § 45(m); 16 C.F.R. § 1.98. This amount is periodically adjusted for inflation.

<sup>14</sup> Last year the FTC voted to streamline the process for investigating repeat offenders. *See* Press Release, Fed. Trade Comm'n, FTC Authorizes Investigations into Key Enforcement Priorities (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities>.

<sup>15</sup> *Cf.* FTC, Privacy Shield, <https://www.ftc.gov/business-guidance/privacy-security/privacy-shield>.

the U.S. SAFE WEB Act, which authorizes FTC assistance to foreign law enforcement agencies when the foreign agency is enforcing laws prohibiting practices that are substantially similar to those prohibited by laws the FTC enforces.<sup>16</sup> As part of this assistance, the FTC can share information obtained in connection with an FTC investigation, issue compulsory process on behalf of the FDPIC conducting its own investigation, and seek oral testimony from witnesses or defendants in connection with the FDPIC's enforcement proceeding, subject to the requirements of the U.S. SAFE WEB Act. The FTC regularly uses this authority to assist other authorities around the world in privacy and consumer protection cases.

In addition to any consultation with the FDPIC on case-specific matters, the FTC will participate in periodic meetings with the FDPIC to discuss in general terms how to improve enforcement cooperation. The FTC will also participate, along with the Department of Commerce, the Swiss Federal Administration, and FDPIC representatives, in the periodic review of the Swiss-U.S. DPF to discuss its implementation. The FTC also encourages the development of tools that will enhance enforcement cooperation with the FDPIC, as well as other privacy enforcement authorities around the world. The FTC is pleased to affirm its commitment to enforcing the commercial sector aspects of the Swiss-U.S. DPF. We see our partnership with Swiss colleagues as a critical part of providing privacy protection for both our citizens and yours.

Sincerely,



Lina M. Khan  
Chair, Federal Trade Commission

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<sup>16</sup> In determining whether to exercise its U.S. SAFE WEB Act authority, the FTC considers, inter alia: "(A) whether the requesting agency has agreed to provide or will provide reciprocal assistance to the Commission; (B) whether compliance with the request would prejudice the public interest of the United States; and (C) whether the requesting agency's investigation or enforcement proceeding concerns acts or practices that cause or are likely to cause injury to a significant number of persons." 15 U.S.C. § 46(j)(3). This authority does not apply to enforcement of competition laws.



**Appendix A**  
**Privacy Shield and Safe Harbor Enforcement**

	<b>Docket/FTC File No.</b>	<b>Case</b>	<b>Link</b>
1	FTC File No. 2023062 Case No. 3:22-cv-03070 (N.D. Cal.)	US v. <b>Twitter, Inc.</b>	<a href="#">Twitter</a>
2	FTC File No. 192 3209	In the Matter of Residual Pumpkin Entity, LLC, formerly d/b/a <b>CafePress</b> , and PlanetArt, LLC, d/b/a <b>CafePress</b>	<a href="#">CafePress</a>
3	FTC File No. 192 3133 Docket No. C-4747	In the Matter of <b>Flo Health, Inc.</b>	<a href="#">Flo Health</a>
4	FTC File No. 192 3050 Docket No. C-4723	In the Matter of <b>Ortho-Clinical Diagnostics, Inc.</b>	<a href="#">Ortho-Clinical</a>
5	FTC File No. 192 3092 Docket No. C-4709	In the Matter of <b>T&amp;M Protection, LLC</b>	<a href="#">T&amp;M Protection</a>
6	FTC File No. 192 3084 Docket No. C-4704	In the Matter of <b>TDARX, Inc.</b>	<a href="#">TDARX</a>
7	FTC File No. 192 3093 Docket No. C-4706	In the Matter of <b>Global Data Vault, LLC</b>	<a href="#">Global Data</a>
8	FTC File No. 192 3078 Docket No. C-4703	In the Matter of <b>Incentive Services, Inc.</b>	<a href="#">Incentive Services</a>
9	FTC File No. 192 3090 Docket No. C-4705	In the Matter of <b>Click Labs, Inc.</b>	<a href="#">Click Labs</a>
10	FTC File No. 182 3192 Docket No. C-4697	In the Matter of <b>Medable, Inc.</b>	<a href="#">Medable</a>
11	FTC File No. 182 3189 Docket No. 9386	In the Matter of NTT Global Data Centers Americas, Inc., as successor in interest to <b>RagingWire Data Centers, Inc.</b>	<a href="#">RagingWire</a>
12	FTC File No. 182 3196 Docket No. C-4702	In the Matter of <b>Thru, Inc.</b>	<a href="#">Thru</a>
13	FTC File No. 182 3188 Docket No. C-4698	In the Matter of <b>DCR Workforce, Inc.</b>	<a href="#">DCR Workforce</a>
14	FTC File No. 182 3194 Docket No. C-4700	In the Matter of <b>LotaData, Inc.</b>	<a href="#">LotaData</a>
15	FTC File No. 182 3195 Docket No. C-4701	In the Matter of <b>EmpiriStat, Inc.</b>	<a href="#">EmpiriStat</a>
16	FTC File No. 182 3193 Docket No. C-4699	In the Matter of 214 Technologies, Inc., also d/b/a <b>Trueface.ai</b>	<a href="#">Trueface.ai</a>

17	FTC File No. 182 3107 Docket No. 9383	In the Matter of <b>Cambridge Analytica, LLC</b>	<a href="#">Cambridge Analytica</a>
18	FTC File No. 182 3152 Docket No. C-4685	In the Matter of <b>SecureTest, Inc.</b>	<a href="#">SecureTest</a>
19	FTC File No. 182 3144 Docket No. C-4664	In the Matter of <b>VenPath, Inc.</b>	<a href="#">VenPath</a>
20	FTC File No. 182 3154 Docket No. C-4666	In the Matter of <b>SmartStart Employment Screening, Inc.</b>	<a href="#">SmartStart</a>
21	FTC File No. 182 3143 Docket No. C-4663	In the Matter of <b>mResourceLLC</b> , d/b/a Loop Works LLC	<a href="#">mResource</a>
22	FTC File No. 182 3150 Docket No. C-4665	In the Matter of <b>IDmission LLC</b>	<a href="#">IDmission</a>
23	FTC File No. 182 3100 Docket No. C-4659	In the Matter of <b>ReadyTech Corporation</b>	<a href="#">ReadyTech</a>
24	FTC File No. 172 3173 Docket No. C-4630	In the Matter of <b>Decusoft, LLC</b>	<a href="#">Decusoft</a>
25	FTC File No. 172 3171 Docket No. C-4628	In the Matter of <b>Tru Communication, Inc.</b>	<a href="#">Tru</a>
26	FTC File No. 172 3172 Docket No. C-4629	In the Matter of <b>Md7, LLC</b>	<a href="#">Md7</a>
30	FTC File No. 152 3198 Docket No. C-4543	In the Matter of <b>Jhayrmaine Daniels (d/b/a California Skate-Line)</b>	<a href="#">Jhayrmaine Daniels</a>
31	FTC File No. 152 3190 Docket No. C-4545	In the Matter of <b>Dale Jarrett Racing Adventure, Inc.</b>	<a href="#">Dale Jarrett</a>
32	FTC File No. 152 3141 Docket No. C-4540	In the Matter of <b>Golf Connect, LLC</b>	<a href="#">Golf Connect</a>
33	FTC File No. 152 3202 Docket No. C-4546	In the Matter of <b>Inbox Group, LLC</b>	<a href="#">Inbox Group</a>
34	File No. 152 3187 Docket No. C-4542	In the Matter of <b>IOActive, Inc.</b>	<a href="#">IOActive</a>
35	FTC File No. 152 3140 Docket No. C-4549	In the Matter of <b>Jubilant Clinsys, Inc.</b>	<a href="#">Jubilant</a>
36	FTC File No. 152 3199 Docket No. C-4547	In the Matter of <b>Just Bagels Manufacturing, Inc.</b>	<a href="#">Just Bagels</a>
37	FTC File No. 152 3138 Docket No. C-4548	In the Matter of <b>NAICS Association, LLC</b>	<a href="#">NAICS</a>
38	FTC File No. 152 3201 Docket No. C-4544	In the Matter of <b>One Industries Corp.</b>	<a href="#">One Industries</a>
39	FTC File No. 152 3137 Docket No. C-4550	In the Matter of <b>Pinger, Inc.</b>	<a href="#">Pinger</a>

40	FTC File No. 152 3193 Docket No. C-4552	In the Matter of <b>SteriMed Medical Waste Solutions</b>	<a href="#">SteriMed</a>
41	FTC File No. 152 3184 Docket No. C-4541	In the Matter of <b>Contract Logix, LLC</b>	<a href="#">Contract Logix</a>
42	FTC File No. 152 3185 Docket No. C-4551	In the Matter of <b>Forensics Consulting Solutions, LLC</b>	<a href="#">Forensics Consulting</a>
43	FTC File No. 152 3051 Docket No. C-4526	In the Matter of <b>American Int'l Mailing, Inc.</b>	<a href="#">AIM</a>
44	FTC File No. 152 3015 Docket No. C-4525	In the Matter of <b>TES Franchising, LLC</b>	<a href="#">TES</a>
45	FTC File No. 142 3036 Docket No. C-4459	In the Matter of <b>American Apparel, Inc.</b>	<a href="#">American Apparel</a>
46	FTC File No. 142 3026 Docket No. C-4469	In the Matter of <b>Fantage.com, Inc.</b>	<a href="#">Fantage</a>
47	FTC File No. 142 3017 Docket No. C-4461	In the Matter of <b>Apperian, Inc.</b>	<a href="#">Apperian</a>
48	FTC File No. 142 3018 Docket No. C-4462	In the Matter of <b>Atlanta Falcons Football Club, LLC</b>	<a href="#">Atlanta Falcons</a>
49	FTC File No. 142 3019 Docket No. C-4463	In the Matter of <b>Baker Tilly Virchow Krause, LLP</b>	<a href="#">Baker Tilly</a>
50	FTC File No. 142 3020 Docket No. C-4464	In the Matter of <b>BitTorrent, Inc.</b>	<a href="#">BitTorrent</a>
51	FTC File No. 142 3022 Docket No. C-4465	In the Matter of <b>Charles River Laboratories, Int'l</b>	<a href="#">Charles River</a>
52	FTC File No. 142 3023 Docket No. C-4466	In the Matter of <b>DataMotion, Inc.</b>	<a href="#">DataMotion</a>
53	FTC File No. 142 3024 Docket No. C-4467	In the Matter of <b>DDC Laboratories, Inc., d/b/a DNA Diagnostics Center</b>	<a href="#">DDC</a>
54	FTC File No. 142 3028 Docket No. C-4470	In the Matter of <b>Level 3 Communications, LLC</b>	<a href="#">Level 3</a>
55	FTC File No. 142 3025 Docket No. C-4468	In the Matter of <b>PDB Sports, Ltd., d/b/a the Denver Broncos Football Club, LLP</b>	<a href="#">Broncos</a>
56	FTC File No. 142 3030 Docket No. C-4471	In the Matter of <b>Reynolds Consumer Products, Inc.</b>	<a href="#">Reynolds</a>
57	FTC File No. 142 3031 Docket No. C-4472	In the Matter of <b>Receivable Management Services Corporation</b>	<a href="#">Receivable Mgmt</a>
58	FTC File No. 142 3032 Docket No. C-4473	In the Matter of <b>Tennessee Football, Inc.</b>	<a href="#">Tennessee Football</a>
59	FTC File No. 102 3058 Docket No. C-4369	In the Matter of <b>Myspace LLC</b>	<a href="#">Myspace</a>

60	FTC File No. 092 3184 Docket No. C-4365	In the Matter of <b>Facebook, Inc.</b>	<a href="#">Facebook</a>
61	FTC File No. 092 3081 Civil Action No. 09-CV- 5276 (C.D. Cal.)	FTC v. Javian Karnani, and <b>Balls of Kryptonite, LLC</b> , d/b/a Bite Size Deals, LLC, and Best Priced Brands, LLC	<a href="#">Balls of Kryptonite</a>
62	FTC File No. 102 3136 Docket No. C-4336	In the Matter of <b>Google, Inc.</b>	<a href="#">Google</a>
63	FTC File No. 092 3137 Docket No. C-4282	In the Matter of <b>World Innovators, Inc.</b>	<a href="#">World Innovators</a>
64	FTC File No. 092 3141 Docket No. C-4271	In the Matter of <b>Progressive Gaitways LLC</b>	<a href="#">Progressive Gaitways</a>
65	FTC File No. 092 3139 Docket No. C-4270	In the Matter of <b>Onyx Graphics, Inc.</b>	<a href="#">Onyx Graphics</a>
66	FTC File No. 092 3138 Docket No. C-4269	In the Matter of <b>ExpatEdge Partners, LLC</b>	<a href="#">ExpatEdge</a>
67	FTC File No. 092 3140 Docket No. C-4281	In the Matter of <b>Directors Desk LLC</b>	<a href="#">Directors Desk</a>
68	FTC File No. 092 3142 Docket No. C-4272	In the Matter of <b>Collectify LLC</b>	<a href="#">Collectify</a>



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, DC 20590

July 14, 2023

Her Excellency Elisabeth Baume-Schneider  
Federal Councillor  
Federal Department of Justice and Police (FDJP)  
Bundeshaus West  
3003 Bern

His Excellency Guy Parmelin  
Federal Councillor  
The Federal Department of Economic Affairs,  
Education and Research (EAER)  
Bundeshaus Ost  
3003 Bern

Dear Federal Councillor Baume-Schneider and Federal Councillor Parmelin:

The United States Department of Transportation (“Department” or “DOT”) appreciates the opportunity to describe its role in enforcing the Swiss-U.S. Data Privacy Framework (“Swiss-U.S. DPF”) Principles. The Swiss-U.S. DPF will play a critical role in protecting personal data provided during commercial transactions in an increasingly interconnected world. It will enable businesses to conduct important operations in the global economy, while at the same time ensuring that Swiss consumers retain important privacy protections.

The DOT first publicly expressed its commitment to enforcement of the U.S.-Swiss Safe Harbor Framework in a letter sent to the Swiss Federal Administration over 14 years ago, commitments that were repeated and expanded upon in a 2017 letter regarding the Swiss-U.S. Privacy Shield Framework. The DOT pledged to vigorously enforce the U.S.-Swiss Safe Harbor Privacy Principles, and then the Swiss-U.S. Privacy Shield Principles, in those letters. The DOT extends this commitment to the Swiss-U.S. DPF Principles and this letter memorializes that commitment.

Notably, the DOT confirms its commitment in the following key areas: (1) prioritizing investigation of alleged Swiss-U.S. DPF Principles violations; (2) appropriate enforcement action against entities making false or deceptive claims of Swiss-U.S. DPF participation; and (3) monitoring and making public enforcement orders concerning Swiss-U.S. DPF Principles violations. We provide information about each of these commitments and, for necessary context, pertinent background about the DOT’s role in protecting consumer privacy and enforcing the Swiss-U.S. DPF Principles.

## **I. Background**

### **A. DOT's Privacy Authority**

The Department is strongly committed to ensuring the privacy of information provided by consumers to airlines and ticket agents. The DOT's authority to take action in this area is found in 49 U.S.C. 41712, which prohibits a carrier or ticket agent from engaging in "an unfair or deceptive practice" in air transportation or the sale of air transportation. Section 41712 is patterned after Section 5 of the Federal Trade Commission (FTC) Act (15 U.S.C. 45). Recently, DOT issued regulations defining unfair and deceptive practices, consistent with both DOT and FTC precedent (14 CFR § 399.79). Specifically, a practice is "unfair" if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. A practice is "deceptive" to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service. Aside from these general principles, DOT specifically interprets section 41712 as prohibiting carriers and ticket agents from: (1) violating the terms of its privacy policy; (2) violating any rule issued by the Department that identifies specific privacy practices as unfair or deceptive; or (3) violating the Children's Online Privacy Protection Act (COPPA) or FTC rules implementing COPPA; or (4) failing, as a participant in the Swiss-U.S. DPF, to comply with the Swiss-U.S. DPF Principles.<sup>1</sup>

As noted above, under federal law, the DOT has exclusive authority to regulate the privacy practices of airlines, and it shares jurisdiction with the FTC with respect to the privacy practices of ticket agents in the sale of air transportation.

As such, once a carrier or seller of air transportation publicly commits to the Swiss-U.S. DPF Principles, the Department is able to use the statutory powers of section 41712 to ensure compliance with those principles. Therefore, once a passenger provides information to a carrier or ticket agent that has committed to honoring the Swiss-U.S. DPF Principles, any failure to do so by the carrier or ticket agent would be a violation of section 41712.

### **B. Enforcement Practices**

The Department's Office of Aviation Consumer Protection ("OACP")<sup>2</sup> investigates and prosecutes cases under 49 U.S.C. 41712. It enforces the statutory prohibition in section 41712 against unfair and deceptive practices primarily through negotiation, preparing cease and desist orders, and drafting orders assessing civil penalties. The office learns of potential violations largely from complaints it receives from individuals, travel agents, airlines, and U.S. and foreign government agencies. Consumers may use the DOT's website to file privacy complaints against airlines and ticket agents.<sup>3</sup>

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<sup>1</sup> <https://www.transportation.gov/individuals/aviation-consumer-protection/privacy>.

<sup>2</sup> Formerly known as the Office of Aviation Enforcement and Proceedings.

<sup>3</sup> <http://www.transportation.gov/airconsumer/privacy-complaints>.

If a reasonable and appropriate settlement in a case is not reached, OACP has the authority to institute an enforcement proceeding involving an evidentiary hearing before a DOT administrative law judge (“ALJ”). The ALJ has the authority to issue cease-and-desist orders and civil penalties. Violations of section 41712 can result in the issuance of cease and desist orders and the imposition of civil penalties of up to \$37,377 for each violation of section 41712.

The Department does not have the authority to award damages or provide pecuniary relief to individual complainants. However, the Department does have the authority to approve settlements resulting from investigations brought by its OACP that directly benefit consumers (e.g., cash, vouchers) as an offset to monetary penalties otherwise payable to the U.S. Government. This has occurred in the past, and may also occur in the context of the Swiss-U.S. DPF Principles when circumstances warrant. Repeated violations of section 41712 by an airline would also raise questions regarding the airline’s compliance disposition which could, in egregious situations, result in an airline being found to be no longer fit to operate and, therefore, losing its economic operating authority.

To date, the DOT has received relatively few complaints involving alleged privacy violations by ticket agents or airlines. When they arise, they are investigated according to the principles set forth above.

### C. DOT Legal Protections Benefiting Swiss Consumers

Under section 41712, the prohibition on unfair or deceptive practices in air transportation or the sale of air transportation applies to U.S. and foreign air carriers as well as ticket agents. The DOT frequently takes action against U.S. and foreign airlines for practices that affect both foreign and U.S. consumers on the basis that the airline’s practices took place in the course of providing transportation to or from the United States. The DOT does and will continue to use all remedies that are available to protect both foreign and U.S. consumers from unfair or deceptive practices in air transportation by regulated entities.

The DOT also enforces, with respect to airlines, other targeted laws whose protections extend to non-U.S. consumers such as the Children’s Online Privacy Act (“COPPA”). Among other things, COPPA requires that operators of child-directed websites and online services, or general audience sites that knowingly collect personal information from children under 13 provide parental notice and obtain verifiable parental consent. U.S.-based websites and services that are subject to COPPA and collect personal information from foreign children are required to comply with COPPA. Foreign-based websites and online services must also comply with COPPA if they are directed to children in the United States, or if they knowingly collect personal information from children in the United States. To the extent that U.S. or foreign airlines doing business in the United States violate COPPA, the DOT would have jurisdiction to take enforcement action.

## II. **Swiss-U.S. DPF Principles Enforcement**

If an airline or ticket agent chooses to participate in the Swiss-U.S. DPF and the Department receives a complaint that such an airline or ticket agent had allegedly violated the Swiss-U.S.

DPF Principles, the Department would take the following steps to vigorously enforce the Swiss-U.S. DPF Principles.

A. Prioritizing Investigation of Alleged Violations

The Department's OACP will investigate each complaint alleging Swiss-U.S. DPF Principles violations, including complaints received from the Swiss Federal Data Protection and Information Commissioner ("FDPIC") and take enforcement action where there is evidence of a violation. Further, OACP will cooperate with the FTC and Department of Commerce and place a priority on allegations that the regulated entities are not complying with privacy commitments made as part of the Swiss-U.S. DPF.

Upon receipt of an allegation of a violation of the Swiss-U.S. DPF Principles, OACP may take a range of actions as part of its investigation. For example, it may review the ticket agent or airline's privacy policies, obtain further information from the ticket agent or airline or from third parties, follow up with the referring entity, and assess whether there is a pattern of violations or significant number of consumers affected. In addition, it would determine whether the issue implicates matters within the purview of the Department of Commerce or FTC, assess whether consumer education and business education would be helpful, and as appropriate, initiate an enforcement proceeding.

If the Department becomes aware of potential Swiss-U.S. DPF Principles violations by ticket agents, it will coordinate with the FTC on the matter. We will also advise the FTC and the Department of Commerce of the outcome of any Swiss-U.S. DPF Principles enforcement action.

B. Addressing False or Deceptive Participation Claims

The Department remains committed to investigating Swiss-U.S. DPF Principles violations, including false or deceptive claims of participation in the Swiss-U.S. DPF. We will give priority consideration to referrals from the Department of Commerce regarding organizations that it identifies as improperly holding themselves out to be Swiss-U.S. DPF participants or using the Swiss-U.S. DPF certification mark without authorization.

In addition, we note that if an organization's privacy policy promises that it complies with the Swiss-U.S. DPF Principles, its failure to make or maintain a self-certification through the Department of Commerce likely will not, by itself, excuse the organization from DOT enforcement of those commitments.

C. Monitoring and Making Public Enforcement Orders Concerning Swiss-U.S. DPF Violations

The Department's OACP also remains committed to monitoring enforcement orders as needed to ensure compliance with the Swiss-U.S. DPF Principles. Specifically, if the office issues an order directing an airline or ticket agent to cease and desist from future violations of the Swiss-U.S. DPF Principles and section 41712, it will monitor the entity's compliance with the cease-and-



Her Excellency Elizabeth Baume-Schneider

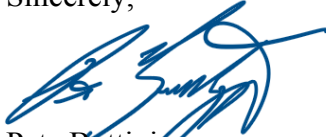
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desist provision in the order. In addition, the office will ensure that orders resulting from Swiss-U.S. DPF Principles cases are available on its website.

We look forward to our continued work with our federal partners and Swiss stakeholders on Swiss-U.S. DPF matters.

I hope that this information proves helpful. If you have any questions or need further information, please feel free to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Pete Buttigieg", is written over the word "Sincerely,".

Pete Buttigieg



U.S. Department of Justice

Criminal Division

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Office of Assistant Attorney General

Washington, D.C. 20530

July 14, 2023

Her Excellency Elisabeth Baume-Schneider  
Federal Councillor  
Federal Department of Justice and Police (FDJP)  
Bundeshaus West  
3003 Bern

His Excellency Guy Parmelin  
Federal Councillor  
The Federal Department of Economic Affairs,  
Education and Research (EAER)  
Bundeshaus Ost 3003 Bern

Dear Federal Councillor Baume-Schneider and Federal Councillor Parmelin:

This letter provides a brief overview of the primary investigative tools used to obtain commercial data and other record information from corporations in the United States for criminal law enforcement or public interest (civil and regulatory) purposes, including the access limitations set forth in those authorities.<sup>1</sup> All the legal processes described in this letter are nondiscriminatory in that they are used to obtain information from corporations in the United States, including from companies that will self-certify through the Swiss-U.S. Data Privacy Framework, without regard to the nationality or place of residence of the data subject. Further, corporations that receive legal process in the United States may challenge it in court as discussed below.<sup>2</sup>

Of particular note with respect to the seizure of data by public authorities is the Fourth Amendment to the United States Constitution, which provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

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<sup>1</sup> This overview does not describe the national security investigative tools used by law enforcement in terrorism and other national security investigations, including National Security Letters (NSLs) for certain record information in credit reports, financial records, and electronic subscriber and transaction records, 12 U.S.C. § 3414; 15 U.S.C. § 1681u; 15 U.S.C. § 1681v; 18 U.S.C. § 2709, 50 U.S.C. § 3162, and for electronic surveillance, search warrants, business records, and other collection of information pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq.

<sup>2</sup> This letter discusses federal law enforcement and regulatory authorities. Violations of state law are investigated by state law enforcement authorities and are tried in state courts. State law enforcement authorities use warrants and subpoenas issued under state law in essentially the same manner as described herein, but with the possibility that state legal process may be subject to additional protections provided by state constitutions or statutes that exceed those of the U.S. Constitution. State law protections must be at least equal to those of the U.S. Constitution, including but not limited to the Fourth Amendment.

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. As the United States Supreme Court stated in *Berger v. State of New York*, “[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” 388 U.S. 41, 53 (1967) (citing *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967)). In domestic criminal investigations, the Fourth Amendment generally requires law enforcement officers to obtain a court-issued warrant before conducting a search. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Standards for the issuance of a warrant, such as the probable cause and particularity requirements, apply to warrants for physical searches and seizures as well as to warrants for the stored content of electronic communications issued under the Stored Communications Act as discussed below. When the warrant requirement does not apply, government activity is still subject to a “reasonableness” test under the Fourth Amendment. The Constitution itself, therefore, ensures that the U.S. government does not have limitless, or arbitrary, power to seize private information.<sup>3</sup>

#### Criminal Law Enforcement Authorities:

Federal prosecutors, who are officials of the Department of Justice (DOJ), and federal investigative agents including agents of the Federal Bureau of Investigation (FBI), a law enforcement agency within DOJ, are able to compel production of documents and other record information from corporations in the United States for criminal investigative purposes through several types of compulsory legal processes, including grand jury subpoenas, administrative subpoenas, and search warrants, and may acquire other communications pursuant to federal criminal wiretap and pen register authorities.

Grand Jury or Trial Subpoenas: Criminal subpoenas are used to support targeted law enforcement investigations. A grand jury subpoena is an official request issued from a grand jury (usually at the request of a federal prosecutor) to support a grand jury investigation into a particular suspected violation of criminal law. Grand juries are an investigative arm of the court and are empaneled by a judge or magistrate. A subpoena may require someone to testify at a proceeding, or to produce or make available business records, electronically stored information, or other tangible items. The information must be relevant to the investigation and the subpoena cannot be unreasonable because it is overbroad, or because it is oppressive or burdensome. A recipient can file a motion to challenge a subpoena based on those grounds. See Fed. R. Crim. P. 17. In limited circumstances, trial subpoenas for documents may be used after the case has been indicted by the grand jury.

Administrative Subpoena Authority: Administrative subpoena authorities may be exercised in criminal or civil investigations. In the criminal law enforcement context, several federal statutes authorize the use of administrative subpoenas to produce or make available business records, electronically stored information, or other tangible items relevant to

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<sup>3</sup> With respect to the Fourth Amendment principles on safeguarding privacy and security interests that are discussed above, U.S. courts regularly apply those principles to new types of law enforcement investigative tools that are enabled by developments in technology. For example, in 2018 the Supreme Court ruled that the government’s acquisition in a law enforcement investigation of historical cell-site location information from a cell phone company for an extended period of time is a “search” subject to the Fourth Amendment warrant requirement. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

investigations involving health care fraud, child abuse, Secret Service protection, controlled substance cases, and Inspector General investigations implicating government agencies. If the government seeks to enforce an administrative subpoena in court, the recipient of the administrative subpoena, like the recipient of a grand jury subpoena, can argue that the subpoena is unreasonable because it is overbroad, or because it is oppressive or burdensome.

Court Orders For Pen Register and Trap and Traces: Under criminal pen register and trap-and-trace provisions, law enforcement may obtain a court order to acquire real-time, non-content dialing, routing, addressing, and signaling information about a phone number or email upon certification that the information provided is relevant to a pending criminal investigation. See 18 U.S.C. §§ 3121-3127. The use or installation of such a device outside the law is a federal crime.

Electronic Communications Privacy Act (ECPA): Additional rules govern the government's access to subscriber information, traffic data, and stored content of communications held by internet service providers (also known as "ISPs"), telephone companies, and other third-party service providers, pursuant to Title II of ECPA, also called the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. The SCA sets forth a system of statutory privacy rights that limit law enforcement access to data beyond what is required under Constitutional law from customers and subscribers of ISPs. The SCA provides for increasing levels of privacy protections depending on the intrusiveness of the collection. For subscriber registration information, Internet Protocol (IP) addresses and associated time stamps, and billing information, criminal law enforcement authorities must obtain a subpoena. For most other stored, non-content information, such as email headers without the subject line, law enforcement must present specific facts to a judge demonstrating that the requested information is relevant and material to an ongoing criminal investigation. To obtain the stored content of electronic communications, generally, criminal law enforcement authorities must obtain a warrant from a judge based on probable cause to believe the account in question contains evidence of a crime. The SCA also provides for civil liability and criminal penalties.<sup>4</sup>

Court Orders for Surveillance Pursuant to Federal Wiretap Law: Additionally, law enforcement may intercept in real time wire, oral, or electronic communications for criminal investigative purposes pursuant to the federal wiretap law. See 18 U.S.C. §§ 2510-2523. This authority is available only pursuant to a court order in which a judge finds, inter alia, that there is probable cause to believe that the wiretap or electronic interception will produce evidence of a federal crime, or the whereabouts of a fugitive fleeing from prosecution. The statute provides for civil liability and criminal penalties for violations of the wiretapping provisions.

Search Warrant —Fed. R. Crim. P. Rule 41: Law enforcement can physically search premises in the United States when authorized to do so by a judge. Law enforcement must

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<sup>4</sup> In addition, section 2705(b) of the SCA authorizes the government to obtain a court order, based on a demonstrated need for protection from disclosure, prohibiting a communications services provider from voluntarily notifying its users of the receipt of SCA legal process. In October 2017, Deputy Attorney General Rod Rosenstein issued a memorandum to DOJ attorneys and agents setting out guidance to ensure that applications for such protective orders are tailored to the specific facts and concerns of an investigation and establishing a general one-year ceiling on how long an application may seek to delay notice. In May 2022, Deputy Attorney General Lisa Monaco issued supplementary guidance on the topic, which among other matters established internal DOJ approval requirements for applications to extend a protective order beyond the initial one-year period and required the termination of protective orders at the close of an investigation.

demonstrate to the judge based on a showing of probable cause that a crime was committed or is about to be committed and that items connected to the crime are likely to be found in the place specified by the warrant. This authority is often used when a physical search by police of a premise is needed due to the danger that evidence may be destroyed if a subpoena or other production order is served on the corporation. A person subject to a search or whose property is subject to a search may move to suppress evidence obtained or derived from an unlawful search if that evidence is introduced against that person during a criminal trial. See *Mapp v. Ohio*, 367 U.S. 643 (1961). When a data holder is required to disclose data pursuant to a warrant, the compelled party may challenge the requirement to disclose as unduly burdensome. See *In re Application of United States*, 610 F.2d 1148, 1157 (3d Cir. 1979) (holding that “due process requires a hearing on the issue of burdensomeness before compelling a telephone company to provide” assistance with a search warrant); *In re Application of United States*, 616 F.2d 1122 (9th Cir. 1980) (reaching same conclusion based on court’s supervisory authority).

DOJ Guidelines and Policies: In addition to these Constitutional, statutory, and rule-based limitations on government access to data, the Attorney General has issued guidelines that place further limits on law enforcement access to data, and that also contain privacy and civil liberties protections. For instance, the Attorney General’s Guidelines for Domestic FBI Operations (September 2008) (hereinafter AG FBI Guidelines), available at <http://www.justice.gov/archive/opa/docs/guidelines.pdf>, set limits on use of investigative means to seek information related to investigations that involve federal crimes. These guidelines require that the FBI use the least intrusive investigative methods feasible, taking into account the effect on privacy and civil liberties and the potential damage to reputation. Further, they note that “it is axiomatic that the FBI must conduct its investigations and other activities in a lawful and reasonable manner that respects liberty and privacy and avoids unnecessary intrusions into the lives of law-abiding people.” AG FBI Guidelines at 5. The FBI has implemented these guidelines through the FBI Domestic Investigations and Operations Guide (DIOG), available at <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29>, a comprehensive manual that includes detailed limits on use of investigative tools and guidance to assure that civil liberties and privacy are protected in every investigation. Additional rules and policies that prescribe limitations on the investigative activities of federal prosecutors are set out in the Justice Manual, also available online at <https://www.justice.gov/jm/justice-manual>.

#### Civil and Regulatory Authorities (Public Interest):

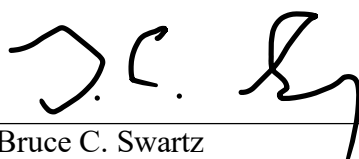
There are also significant limits on civil or regulatory (i.e., “public interest”) access to data held by corporations in the United States. Agencies with civil and regulatory responsibilities may issue subpoenas to corporations for business records, electronically stored information, or other tangible items. These agencies are limited in their exercise of administrative or civil subpoena authority not only by their organic statutes, but also by independent judicial review of subpoenas prior to potential judicial enforcement. See, e.g., Fed. R. Civ. P. 45. Agencies may seek access only to data that is relevant to matters within their scope of authority to regulate. Further, a recipient of an administrative subpoena may challenge the enforcement of that subpoena in court by presenting evidence that the agency has not acted in accordance with basic standards of reasonableness, as discussed earlier.

There are other legal bases for companies to challenge data requests from administrative agencies based on their specific industries and the types of data they possess. For example, financial institutions can challenge administrative subpoenas seeking certain types of information as violations of the Bank Secrecy Act and its implementing regulations. 31 U.S.C. § 5318; 31 C.F.R. Chapter X. Other businesses can rely on the Fair Credit Reporting Act, 15 U.S.C. § 1681b, or a host of other sector specific laws. Misuse of an agency's subpoena authority can result in agency liability, or personal liability for agency officers. See, e.g., Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3423. Courts in the United States thus stand as the guardians against improper regulatory requests and provide independent oversight of federal agency actions.

Finally, any statutory power that administrative authorities have to physically seize records from a company in the United States pursuant to an administrative search must meet requirements based on the Fourth Amendment. See *See v. City of Seattle*, 387 U.S. 541 (1967).

#### Conclusion:

All law enforcement and regulatory activities in the United States must conform to applicable law, including the U.S. Constitution, statutes, rules, and regulations. Such activities must also comply with applicable policies, including any Attorney General Guidelines governing federal law enforcement activities. The legal framework described above limits the ability of U.S. law enforcement and regulatory agencies to acquire information from corporations in the United States—whether the information concerns U.S. persons or citizens of foreign countries—and in addition permits judicial review of any government requests for data pursuant to these authorities.



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Bruce C. Swartz  
Deputy Assistant Attorney General and  
Counselor for International Affairs

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, DC 20511

December 9, 2022

Leslie B. Kiernan  
General Counsel  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Dear Ms. Kiernan,

On October 7, 2022, President Biden signed Executive Order 14086, *Enhancing Safeguards for United States Signals Intelligence Activities*, which bolsters the rigorous array of privacy and civil liberties safeguards that apply to U.S. signals intelligence activities. These safeguards include: requiring signals intelligence activities to meet enumerated legitimate objectives; explicitly barring such activities for the purpose of specific prohibited objectives; putting in place novel procedures for ensuring that signals intelligence activities further these legitimate objectives and do not further prohibited objectives; requiring that signals intelligence activities be conducted only following a determination, based on a reasonable assessment of all relevant factors, that the activities are necessary to advance a validated intelligence priority and only to the extent and in a manner that is proportionate to the validated intelligence priority for which they have been authorized; and directing Intelligence Community (IC) elements to update their policies and procedures to reflect the Executive Order's required signals intelligence safeguards. Most significantly, the Executive Order also introduces an independent and binding mechanism enabling individuals from "qualifying states," as designated pursuant to the Executive Order, to seek redress if they believe they were subjected to unlawful U.S. signals intelligence activities, including activities violating the protections found in the Executive Order.

President Biden's issuance of Executive Order 14086 marked the culmination of well over a year of detailed negotiations between representatives from the European Commission (EC) and the United States and directs the steps the United States will take to implement its commitments under the EU-U.S. Data Privacy Framework. Consistent with the cooperative spirit that produced the Framework, it is my understanding that you have received two sets of questions from the EC about how the IC will implement the Executive Order. I am happy to address these questions with this letter.

*Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA Section 702)*

The first set of questions concerns FISA Section 702, which allows the collection of foreign intelligence information through the targeting of non-U.S. persons reasonably believed to be located outside the United States with the compelled assistance of electronic communication service providers. Specifically, the questions concern the interplay between that provision and Executive Order 14086, as well as the other safeguards that apply to activities conducted pursuant to FISA Section 702.

To begin, we can confirm that the IC will apply the safeguards set forth in Executive Order 14086 to activities conducted pursuant to FISA Section 702.

In addition, numerous other safeguards apply to the Government's use of FISA Section 702. For example, all FISA Section 702 certifications must be signed by both the Attorney General and Director of National Intelligence (DNI), and the Government must submit all such certifications for approval by the Foreign Intelligence Surveillance Court (FISC), which is comprised of independent, life-tenured judges who serve non-renewable seven-year terms. The certifications identify categories of foreign intelligence information to be collected, which must meet the statutory definition of foreign intelligence information, through the targeting of non-U.S. persons reasonably believed to be located outside the United States. The certifications have included information concerning international terrorism and other topics, such as the acquisition of information concerning weapons of mass destruction. Each annual certification must be submitted to the FISC for approval in a certification application package that includes the Attorney General's and DNI's certifications, affidavits by certain heads of intelligence agencies, and targeting procedures, minimization procedures, and querying procedures that are binding on the Government. The targeting procedures require, among other things, that the IC reasonably assess, based on the totality of the circumstances, that the targeting will likely lead to the collection of foreign intelligence information identified in a FISA Section 702 certification.

Moreover, when collecting information pursuant to FISA Section 702, the IC must: provide a written explanation of the basis for their assessment, at the time of targeting, that the target is expected to possess, is expected to receive, or is likely to communicate foreign intelligence information identified in a FISA Section 702 certification; confirm that the targeting standard as set forth in FISA Section 702 targeting procedures remains satisfied; and cease collection if the standard is no longer satisfied. *See* U.S. Government Submission to Foreign Intelligence Surveillance Court, *2015 Summary of Notable Section 702 Requirements*, at 2-3 (July 15, 2015).

Requiring the IC to record in writing, and regularly affirm the validity of, its assessment that FISA Section 702 targets meet the applicable targeting standards facilitates the FISC's supervision of the IC's targeting activities. Each recorded targeting assessment and rationale is reviewed on a bimonthly basis by intelligence oversight attorneys in the Department of Justice (DOJ), who conduct this oversight function independently from foreign intelligence operations. The DOJ section performing this function is then responsible under a long-established FISC rule to report to the FISC any violations of the applicable procedures. This reporting, along with regular meetings between the FISC and this DOJ section regarding oversight of FISA Section 702 targeting, enables the FISC to enforce compliance with the FISA Section 702 targeting and other procedures and otherwise ensure that the Government's activities are lawful. In particular, the FISC can do this in a number of ways, including by issuing binding remedial decisions to terminate the Government's authority to collect against a particular target, or to modify or delay FISA Section 702 data collection. The FISC also can require the Government to provide further reporting or briefing on its compliance with targeting and other procedures or require changes to those procedures.



## *The “Bulk” Collection of Signals Intelligence*

The second set of questions concerns the “bulk” collection of signals intelligence, which is defined by Executive Order 14086 as “the authorized collection of large quantities of signals intelligence data that, due to technical or operational considerations, is acquired without the use of discriminants (for example, without the use of specific identifiers or selection terms).”

With respect to these questions, we first note that neither FISA nor National Security Letters authorize bulk collection. With respect to FISA:

- Titles I and III of FISA, which respectively authorize electronic surveillance and physical searches, require a court order (with limited exceptions, such as emergency circumstances) and always require probable cause to believe that the target is a foreign power or an agent of a foreign power. *See* 50 U.S.C. §§ 1805, 1824.
- The USA FREEDOM Act of 2015 amended Title IV of FISA, which authorizes the use of pen registers and trap and trace devices, pursuant to court order (except in emergency circumstances), to require the Government to base requests on a “specific selection term.” *See* 50 U.S.C. § 1842(c)(3).
- Title V of FISA, which permits the Federal Bureau of Investigation (FBI) to obtain certain types of business records, requires a court order based on an application that specifies that “there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.” *See* 50 U.S.C. § 1862(b)(2)(B).<sup>1</sup>
- Finally, FISA Section 702 authorizes the “targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” *See* 50 U.S.C. § 1881a(a). Thus, as the Privacy and Civil Liberties Oversight Board has noted, the Government’s collection of data under FISA Section 702 “consists entirely of targeting individual persons and acquiring communications associated with those persons, from whom the government has reason to expect it will obtain certain types of foreign intelligence,” such that the “program does not operate by collecting communications in bulk.” Privacy and Civil Liberties Oversight Board, *Report on the*

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<sup>1</sup> From 2001 until 2020, Title V of FISA permitted the FBI to seek authorization from the FISC to obtain “tangible things” that are relevant to certain authorized investigations. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, § 215 (2001). This language, which has sunset and is thus no longer the law, provided the authority pursuant to which the Government at one time collected telephony metadata in bulk. Even before the provision sunset, however, the USA FREEDOM Act had amended it to require the Government to base an application to the FISC on a “specific selection term.” *See* USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268, § 103 (2015).

*Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, at 103 (July 2, 2014).*<sup>2</sup>

With respect to National Security Letters, the USA FREEDOM Act of 2015 imposes a “specific selection term” requirement on the use of such letters. *See* 12 U.S.C. § 3414(a)(2); 15 U.S.C. § 1681u; 15 U.S.C. § 1681v(a); 18 U.S.C. § 2709(b).

Further, Executive Order 14086 provides that “[t]argeted collection shall be prioritized” and that, when the IC does conduct bulk collection, the “bulk collection of signals intelligence shall be authorized only based on a determination . . . that the information necessary to advance a validated intelligence priority cannot reasonably be obtained by targeted collection.” *See* Executive Order 14086, § 2(c)(ii)(A).

Moreover, when the IC determines that bulk collection satisfies these standards, Executive Order 14086 provides additional safeguards. Specifically, the Executive Order requires the IC, when conducting bulk collection, to “apply reasonable methods and technical measures in order to limit the data collected to only what is necessary to advance a validated intelligence priority, while minimizing the collection of non-pertinent information.” *See id.* The Order also states that “signals intelligence activities,” which include the querying of signals intelligence obtained by bulk collection, “shall be conducted only following a determination, based on a reasonable assessment of all relevant factors, that the activities are necessary to advance a validated intelligence priority.” *See id.* § 2(a)(ii)(A). The Order further implements this principle by stating that the IC may only query unminimized signals intelligence obtained in bulk in pursuit of six permissible objectives, and that such queries must be conducted according to policies and procedures that “appropriately take into account the impact [of the queries] on the privacy and civil liberties of all persons, regardless of their nationality or wherever they might reside.” *See id.* § 2(c)(iii)(D). Lastly, the Order provides for handling, security, and access controls for data collected. *See id.* § 2(c)(iii)(A) and § 2(c)(iii)(B).

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We hope these clarifications are of assistance. Please do not hesitate to contact us if you have further questions about how the U.S. IC plans to implement Executive Order 14086.

Sincerely,



Christopher C. Fonzone  
General Counsel

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<sup>2</sup> Sections 703 and 704, which authorize the IC to target U.S. persons located overseas, require a court order (except in emergency circumstances) and always require probable cause to believe that the target is a foreign power, an agent of a foreign power, or an officer or employee of a foreign power. *See* 50 U.S.C. §§ 1881b, 1881c.