The Sedona Conference WG6 Brainstorming Group Outline – International Legal Holds

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PROPOSED GUIDELINES AND COMMENTARY ON THE HARMONIZATION OF LEGAL HOLDS IN INTERNATIONAL LITIGATION

WG6 Brainstorming Group

I. Introduction

A. The U.S. permits full pretrial disclosure of information relevant to a matter's claims and defenses.

1. The philosophy of full pretrial disclosure was put in place in 1938 through the adoption of the Federal Rules of Civil Procedure.

2. All states in the U.S. have followed suit and the philosophy is embedded in their procedural rules.

B. Other countries approach pretrial disclosure in a variety of ways, but few require the extent of disclosure that U.S. procedures require.

C. Many countries grant broad privacy rights to individuals even over material created at work in the fulfillment of their duties to their employer. The General Data Protection Regulation ("GDPR") recently promulgated by the EU is the most prominent example of such a legal regime.

D. Consequently, non-U.S. litigants, courts and governments may not be familiar with U.S. practices, including the broad duty to preserve discoverable evidentiary material.

E. Additionally, the lack of preservation law in many jurisdictions may leave practitioners without guidance as to what steps are appropriate and how to balance those steps with competing legal obligations in the forum country where the preservation should be implemented, including the privacy rights of the subject individuals.

F. The purpose of this paper is to provide guidance to people and entities who are or may be involved in litigation in the U.S. that could require the preservation of discoverable material lodged in different countries.

1. A country-by-country recitation of the law pertaining to the pretrial preservation of discoverable material and legal holds is beyond its scope.

2. This paper will instead provide high level guidance on principles and recommended approaches that such persons and entities may employ as they navigate their legal obligations concerning preservation in the context

of litigation, legal actions and government and internal investigations both in the U.S. and elsewhere.

G. Intended Audience

1. U.S. lawyers handling cross-border issues in investigations or litigation

2. Lawyers outside U.S. assisting with U.S. litigation or parallel inquiries

3. International lawyers trying to comply with preservation requirements in their own countries as it relates to cross-border litigation in the U.S.

4. Judges both in the U.S. and abroad attempting to address whether, how and under what circumstances parties should be required to preserve data subject to privacy issues

5. Government Agencies/Authorities that may seek the preservation of information in jurisdictions with protections from personal data.

II. Summary of the US law of legal hold with cross reference to Sedona Guidelines and Commentary.

A. What is the Duty to Preserve?

Parties to U.S. civil litigation (or subject to investigations and other regulatory requests) have a duty to identify, locate, and preserve information and tangible evidence that is relevant to specific and identifiable litigation or regulatory requests.

Obligation arises from U.S. procedural as well as case law.

B. When Does the Obligation to Preserve Arise?

1. A party in the U.S. has an obligation to preserve information once it has notice of litigation, an investigation or regulatory proceeding.

2. A party also has an obligation to preserve information when it "reasonably anticipates" litigation. Zubulake v. UBS Warburg ("Zubulake IV") 220 F.R.D. 212 (S.D.N.Y. 2003).

3. Reasonable anticipation of litigation arises when a person or an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation. The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2018).

4. *But See Cache La Poudre Feeds, LLP v. Land O'Lakes, Inc*., 244, F.R.D. 614, (D. Colo. 2007) ("while a party should not be permitted to destroy relevant evidence after receiving unequivocal notice of impending

litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation"); *Goodman v. Praxair Services, Inc.*, 2009 WL 1955804, *12 (D. Md.) (J. Grimm) ("The mere existence of a dispute does not necessarily mean that the parties should reasonably anticipate litigation or that the duty to preserve arises").

5. Ultimately, the determination of reasonable anticipation should be based on the facts and circumstances known at the time the decision was made. It is thus an objective standard and not simply whether the individual knew of a particular threat. The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2010) (Guidelines 1 and 4).

6. The following factors may be considered in making this determination:

   a. The nature and specificity of the notice of potential claim or threat

   b. The person or entity making the claim

   c. The business relationship between the accused and accusing parties

   d. Whether the threat is direct, implied, or inferred

   e. Whether the party or counsel making the claim is known to be aggressive or litigious

   f. Whether a party who could assert a claim is aware of the claim

   g. The strength, scope, or value of a known, reasonably anticipated, or threatened claim

   h. Whether the organization has knowledge or information about similar claims

   i. The relevant experience in the industry with regard to such claims

   j. Reputable press or industry coverage of the issue, either directly pertaining to the organization or regarding complaints against others similarly situated

   k. Whether a party has retained counsel or is seeking advice of counsel in connection with defending against or filing a claim

   l. Whether an organization that is considering bringing a claim has begun to mark documents to indicate that they fall under the work-product doctrine

   m. Whether a potential claimant has sent or received a demand, cease-and-desist, or complaint letter

Sedona Conference 2018 Commentary on Legal Holds. These factors are

not exhaustive, and no single factor is necessarily determinative of what response is reasonable. All factors must be evaluated reasonably and in good faith.

7. Generally, reasonable anticipation is a fact-specific inquiry based upon the circumstances at issue. *See* SEDONA CONFERENCE 2018 COMMENTARY ON LEGAL HOLDS at 15 ("Whether litigation can be reasonably anticipated should be based on a good-faith and reasonable evaluation of the facts and circumstances as they are known at the time.")

8. With that said, courts have been willing to find that a party is on notice where it had previously participated in a similar lawsuit involving substantially the same subject matter and issues. *Telectron*, *Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987); *Struthers Patent Corp. v. The Nestle Company*, *Inc.*, 558 F. Supp. 747 (D. N.J. 1981).

9. Courts have also found a party is on notice to preserve documents where it is specifically threatened with litigation. *See*, *e.g.*, *Capellupo*, 126 F.R.D. at 547 (employee had threatened class action suit to manager, who directed a memo to the general counsel expressing concern of the filing of a class action); *but see Wal-Mart v. Johnson*, 106 S.W.3d 718 (Tex. 2003) (holding that, despite an investigation of customer injured by reindeer statues falling from shelf, Wal-Mart did not reasonably anticipate litigation as customer indicated no serious injuries upon leaving the store).

C. **"Reasonable" and Proportional Preservation**

1. The obligation to preserve ESI requires reasonableness and good faith efforts, but it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."

2. U.S. courts have long recognized that the federal rules do not require a party to go to "extraordinary measures" to preserve all potential evidence. *Wiginton v. CB Richard Ellis*, 2003 WL 22439865, at *4 (N.D. Ill. Oct. 27, 2003); *see also Pension Comm. of the Univ. of Montreal v. Banc of Am. Sec. LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) (Am. Op. May 28, 2010) ("[c]ourts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated. . . ."), *abrogated in part by Chin v. Port Authority*, 685 F.3d 135, 162 (2d Cir. 2012). Once the obligation to preserve arises (because a party anticipates or knows of litigation), a party is ***not*** required to preserve every document in its possession. *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no'. Such a rule would cripple large corporations").

D. **Implementing Reasonable Preservation**

The following reflects best practices in the U.S. in implementing reasonable and proportional preservation:

1. The relevant stakeholders (e.g., legal department, information technology, information governance) should design a reasonable and proportional preservation plan:

    a. The organization should consider the sources of information within its "possession, custody, and control" that are likely to include relevant, unique information and are proportional to the needs of the case.

    b. The most obvious of these sources are those that the organization physically has in its possession or custody—for example, the file cabinets of documents in its office, the emails that reside on its servers located in its corporate headquarters — but also may include sources such as thumb drives, company furnished laptops, and PDAs used by employees for business purposes.

    The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2018).

2. Legal Hold Notice: The organization should issue a legal hold notice to custodians that are likely to have relevant and proportional information.

    a. A legal hold notice should be directed to all individuals/employees who may possess evidence (electronic or otherwise) that is relevant to a claim or defense. It should also be directed to data stewards (e.g. IT departments) who are involved in the preservation or destruction of data. The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2018).

    b. A legal hold notice should:

        1. Communicate in a clear manner to notify the subject of the obligation to preserve evidence and the reasons for preservation.

        2. Provide information on how preservation should be undertaken and offer to help with questions regarding the scope of the duty.

        3. Include a mechanism to acknowledge the hold.

    c. The hold should be periodically reviewed and amended (if necessary) and followed by periodic reminder notices. The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2018) (Guideline 8(f)).

d. What are the consequences of failing to issue a legal hold?

1. The failure to institute a written litigation hold alone will not automatically lead to sanctions as long as data is not lost. The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2018) (Guideline 8).

2. However, the failure to issue a hold may result in the inadvertent destruction or loss of data which can lead to curative measures or, with a showing of intent, sanctions. Kinnally v. Rogers Corporation 2008 WL 4850116, at 7 (D. Ariz. Nov. 7, 2008).

3. Other preservation steps that should be considered:

a. Automated preservation of dynamic data. Certain information tends to be dynamic (i.e., subject to constant change, including deletion). Consideration should be given as to whether the preservation of such data sources can be automated, rather than reliance upon individual custodians.

b. Collection. In certain instances, it may be appropriate to simply collect the information as opposed to reliance on individual custodial preservation.

c. Retention of back up media. It may be appropriate in other instances to take back-up media or the latest version of back-up media off line.

d. Consultation with Opposing Counsel or the Court. In some instances, the cost and burden of preservation may require a meet and confer with opposing counsel or intervention by a court to ensure that the preservation is reasonable and proportional in scope.

E. **What are the consequences of failing to preserve data?**

Fed. R. Civ. P. 37(e) provides that a court can take certain actions and impose curative measures or sanctions if: "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery[.]"

1. The Comments to the Rule suggest that neither curative measures nor sanctions are available where a party has undertaken "reasonable steps" to preserve potentially relevant evidence.

2. These can range from curative measures for unintentional conduct, to punitive measures for intentional conduct. See Fed R. Civ. Pro 37(e)(1)

and (2)

3. Sanctions can include requiring that the factfinder make unfavorable presumptions about what the data might have held, monetary sanctions, or outright dismissal of claims and defenses. See Fed R. Civ. Pro 37(e)(2)

F. **Preservation in the context of investigations**

1. The duty to implement a legal hold also applies in the context of government investigation

2. The obligation may also arise in context of an internal investigation that might constitute the "reasonable anticipation" of litigation.

III. Guidelines

Guideline 1 – A party should take reasonable steps to preserve information that is relevant and proportional to claims and defenses.

Guideline 1(A). Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions (including whether a preservation is necessary and how it should be implemented) at the time that they are made.

Guideline 1(B). Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

Guideline 2 - Fulfilling the duty to preserve involves reasonable and good faith efforts, to identify and, as necessary, notify persons likely to have information relevant to the claims and defenses in the matter that they must preserve that information.

Guideline 2(A). Factors that may be considered in determining the scope of information that should be preserved include the parties to and nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

Guideline 2(B). Good faith efforts for preservation should include issuance of a Legal Hold Notice to custodians and data stewards most likely to have relevant and proportional information.

Guideline 2(C). Good faith efforts for preservation may include other additional "reasonable steps" beyond the issuance of a Legal Hold Notice.

Guideline 3 With regard to data subject to preservation that may ultimately be subject to disclosure or discovery in a U.S. legal proceeding, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any

person who is subject to or benefits from such laws. (International Principles – Principle 1 – modified[1]))

Guideline 3(A). Preservation of Protected Data should be limited in scope to that which is relevant and proportional to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject. (International Principles – Principle 3)

Guideline 3(B). Data Protection Laws should be construed and implemented in a manner that strikes an appropriate balance between the protecting a Data Subjects Rights and Ensuring the Compliance with Legal Obligations to Preserve relevant and proportional information.

Guideline 3(C). Unless otherwise exempted by the laws of any foreign sovereign, data owners should be given timely notice that their information is subject to preservation, including whether any automated or technical actions will be undertaken to preserve the information, and be provided information on applicable data protection implications and rights.

Guideline 3(D). Data Controllers should preserve any Protected Data only as long as the legal matter is pending or reasonably anticipated. (International Principles – Principle 6 – Modified).

Guideline 3(E). Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order should be employed to protect Protected Data and minimize the conflict. (International Principles – Principle 2 – modified).

Guideline 4. In the same way that courts and parties should give comity to the privacy laws of other jurisdictions, courts, authorities and practitioners should be cognizant of and respect the privilege laws that protect the preservation process when preservation steps are taken in furtherance of a matter for a jurisdiction that recognizes the privilege.

[1] "Modified" is used here and below to note that the guideline was derived from, and intended to be consistent with, the indicated International Litigation Principle, although it does not track the Principle word for word.

IV. Guidelines and Incorporated Commentary to Guidelines

Guideline 1 A party should take reasonable steps to preserve information that is relevant and proportional to claims and defenses.

Guideline 1(A). Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions (including whether a preservation is necessary and how it should be implemented) at the time that they are made.

1. Preservation obligations vary widely outside the U.S.

    a. Common law countries typically have recognized the obligation to preserve relevant documents in the context of civil litigation and investigations. The scope of preservation, however, is generally more limited compared to U.S. broad notions of relevancy.

    Example U.K: Officers of the court owe a positive duty to ensure that their clients understand their duty of disclosure. PD 31A.44. A party is required to preserve and disclose all documents on which it relies as well as those that adversely affect its case or support another party's case. CPR 31.6

    b. Civil law countries typically have limited preservation obligations that do not delve beyond what a corporation is obligated to retain under existing statutes or regulations.

    Example Spain: does not impose upon parties to proceedings an obligation to preserve electronically stored information beyond general legal or record retention provisions relating to the duty to preserve certain documents. As an example, Section 30 of the Spanish Commercial code imposes a general duty on a businessman to keep the books and correspondence of the business entity for six years.

2. Creating consistency across jurisdictions creates business and legal efficiencies, reduces risk of data spoliation, and increases overall process defensibility.

3. The duty to preserve information relevant and proportional to U.S. litigation may extend to potentially relevant and proportional information of parties where such information is located outside the U.S.

    a. Consideration should be given to whether a party to U.S. litigation has possession, custody and control of information of its affiliates or related entities located outside the U.S. and, if so, whether that affiliate or related entity should preserve information that is

relevant and proportional to the claim and defenses in that U.S. litigation.

1. The U.S. applies a doctrine of "possession, custody or control" to determine whether a party may have an obligation to preserve information not within its physical custody. The doctrine also limits a producing party's preservation obligation to those sources over which it has control. See WG1 Possession, Custody and Control paper, which advocates the adoption of a legal right standard across all U.S. jurisdictions.

2. International affiliates of U.S. organizations may have an obligation to preserve information relevant and proportional to the ligation.

The obligation of a party to preserve information may apply to third-party service providers that maintain that party's documents and information, such as cloud or SAAS providers.

Guideline 1(B). Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

1. Outside the U.S., the concept of when the duty to preserve is triggered is not well defined and varies widely. For example, in the UK, legal representatives are required to notify their clients of their need to preserve disclosable documents as soon as litigation is contemplated. PD 31B.7.

2. Ultimately, the determination of reasonable anticipation should be based on the facts and circumstances known at the time the decision to preserve was made. It should be an objective standard and not simply whether the individual knew of a particular threat.

Guideline 2 - Fulfilling the duty to preserve involves reasonable and good faith efforts to identify and, as necessary, notify persons likely to have information relevant to the claims and defenses in the matter that they must preserve that information.

Guideline 2(A). Factors that may be considered in determining the scope of information that should be preserved include the parties to and nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

1. Concepts to consider to ensure preservation is reasonable

    a. The obligation to preserve ESI requires reasonableness and good faith efforts, but it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."

b. Sedona Principle 6: In the U.S. a guiding principle is that responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information. Sedona Conference Principles, Third Edition – Principles 6 at 119 -120 ("To meet its preservation and production obligations, the responding party must make a myriad of determinations necessary to identify, preserve, collect, process, analyze, review, and produce relevant and discoverable ESI for each case.")

i. The lack of uniformity and varying degrees of complexity in organizations and their information systems often require a very specific, in-depth understanding of how that party handles its own information. Additionally, determining what is relevant and proportional under the circumstances for each matter often requires a highly fact-specific inquiry. The responding party—not the court or requesting party—is tasked with making those determinations and generally in a better position to make those decisions.

ii. U.S. courts do not typically allow requesting parties to second guess or go behind producing parties' preservation efforts unless there is some showing of abuse.

2. Courts have a right to expect that litigants and counsel will take necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated. The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2010).

a. Key Players: The duty to preserve typically extends to those employees likely to have relevant information, the key players in the case.

b. Non-Custodial Data Sources: Counsel should consider whether potentially relevant non-custodial data sources are relevant and should be considered for preservation, such as databases, structured data, and file-shares. See also The Sedona Conference, "The Sedona Conference Database Principles: Addressing the Preservation and Production of Databases and Database Information in Civil Litigation," The Sedona Conf. J. Vol. XV at 189.

c. It is a best practice to document the preservation plan in writing. The plan should consider: (i) key players; (ii) non-custodial data sources; (iii) issuance of a legal hold notice; and (iv) other steps to be undertaken to preserve potentially relevant documents, such as suspension of automatic data deletion routines or policies.

Guideline 2(B). Good faith efforts for preservation should include issuance of a Legal Hold Notice to custodians and data stewards most likely to have relevant and proportional information.

1. Legal Hold Notice: A legal hold notice is a communication issued as a result of current or anticipated litigation or other such matter that notifies recipients of their obligations to preserve related information and otherwise suspend the normal disposition of records. A legal hold notice should be communicated to relevant companies, subsidiaries, departments and individuals. See The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (2018) (Guideline 8).

    a. The notice should be tailored to the facts of the particular case, and should include: (i) a description of the general nature of the legal matter; (ii) a summary of the obligation to preserve potentially relevant records (including paper records, media, electronic mail, and other electronic records); (iii) a description of those records to be preserved and how preservation is to be undertaken; and (iv) the name of a contact person within the legal department to answer any questions regarding the legal hold notice.

    b. Timing of issuance, reminders and dissemination

    c. Tracking

        i. One of the ways in which organizations may support preservation directive compliance is by requiring an affirmative acknowledgement of the recipient's understanding of the directive and agreement to comply.

        ii. Organizations may further support preservation directives' effectiveness and efficiency by escalating instances of non-acknowledgement to supervisory staff in order to facilitate timely acknowledgements.

        iii. Automated systems that support legal hold distribution, tracking, and recipient acknowledgements relieve the burden of manual tracking and can automatically, internally "self-document" evidence of the legal hold activities, acknowledgements, escalations, and related data.

    d. Coordinating a legal hold notice across jurisdictions

        i. Should you use the same hold notice for all jurisdictions?

        ii. Do you need to translate the legal hold notice into relevant languages?

Jurisdictional Requirements: Some international jurisdictions have laws requiring translation of certain business and/or employee communications. Does this apply to legal hold notices issued to custodians in these jurisdictions for: 1) U.S. litigation, and/or 2) litigation outside the United States?

France, Spain, Quebec, Turkey, Saudi Arabia, Kuwait, Mongolia, Venezuela, Belgium, Slovakia, Poland and others appear to have translation requirements that should be considered. For example, France imposes penalties on employers who do not provide documents related to work obligations in French. However, the Code Du Travail (Labor Code) does not require translation for documents received from abroad. A legal hold notice sent by an American company in English might not trigger a fine. Is it a best practice to provide French translation?

Guideline 2(C). Good faith efforts for preservation may include other additional "reasonable steps" beyond the issuance of a Legal Hold.

1. Reasonable steps to preserve documents may require additional steps to be undertaken to preserve information relevant and proportional to the claims and defenses in U.S. litigation.

2. Certain information is dynamic in nature in that it is constantly changing, easily deleted or difficult for the individual custodian to preserve. Accordingly, it may be appropriate or necessary to take additional steps beyond issuing a legal hold notice to ensure the data is not inadvertently lost or destroyed. Reasonable steps might include:

    a. Automation. Use of tools or settings within certain applications that are able to preserve information without custodial intervention.

    b. Archiving Applications. Applications or systems that are able to archive or create preservation versions of information, again with little or no human intervention.

    c. Creation of Preservation Copies. Directing information technology staff or vendors to create preservation copies of the information.

    d. Backup Media. Taking a set or subset of back-up media off line.

Guideline 3. With regard to data that is subject to preservation that may ultimately be subject to disclosure, or discovery in a U.S. legal proceeding, courts and parties should demonstrate due respect to the data protection laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws. (International Principles – Principle 1 – modified))

Guideline 3(A). Preservation of Protected Data should be limited in scope to that which is relevant and proportional to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject. (International Principles – Principle 3)

1. Globalization of data typically has required data from non-U.S. sources to be preserved and potentially produced.

2. Multinational companies are often involved as parties or indirectly as affiliates to parties in U.S. litigation that may bring those organizations within the scope of the U.S. courts and thereby trigger an associated obligation to preserve and ultimately produce documents.

3. Multinational companies should also be aware that some foreign jurisdictions have similar obligations to those in the U.S. to preserve evidence.

4. There is a need to balance preservation obligations with legal frameworks within those countries in which they arise, including constitutional, statutory and regulatory notions of privacy, and to consider proportionality concepts.

    a. Preservation may be considered processing and implicate privacy laws.

        i. Preservation could involve storing data, which is typically considered to be processing. Thus, preservation could violate privacy laws.

            a) Under GDPR, processing means "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

            b) Privacy laws/principles under European jurisprudence:

1.) The European Convention on Human Rights and case law from the European Court of Human Rights guarantee the protection of human rights within the EU.

2.) The European Convention and the European Charter of Fundamental Rights have provisions on privacy, under which everyone has the right to respect for his or her private and family life, home, and communications.

3.) The European Charter of Fundamental Rights also explicitly protects personal data.

b. When undertaking document preservation, one should consider:

i. Does the data to be preserved contain Protected Data (e.g., Personal Data) subject to protection under an applicable privacy law?

ii. Does the preservation of that Protected Data constitute processing?

a) Issuance of a legal hold notice?

b) A previously issued legal hold in place?

c) Creating a preservation copy?

d) Archiving?

iii. Is there a legal principle permitting such processing?

Under GDPR, for example, one of six principles must be satisfied prior to processing person data:

a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

c) processing is necessary for compliance with a legal obligation to which the controller is subject;

d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; or

f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

(GDRP Art. 6).

Guideline 3(B). Data Protection Laws should be construed and implemented in a manner that strikes an appropriate balance between protecting a Data Subjects Rights and Ensuring the Compliance with Legal Obligations to Preserve relevant and proportional information.

Data protection authorities, regulators and courts outside the U.S. are vested with authority to interpret, promulgate regulations, implement and enforce the various Data Protection Laws around the world. In undertaking to do so, such authorities should undertake to strike an appropriate balance with the need to ensure the adequate protection of Protected Data against U.S. litigants' obligations to comply with their preservation obligations.

Issuance of Legal Hold Notices should be interpreted to be an appropriate basis upon which to process Protected Data. In the GDPR, for example, the European Data Protection Board and member state DPA should define the issuance of Legal Holds and other reasonable steps to preserve data within the member state country to fall within the legitimate principles for processing (i) necessary in order for compliance with a legal obligation to which the controller is subject; and/or (ii) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party.

Note: It remains unclear whether the above principles will apply to preservation in the context of U.S. litigation.

Guideline 3(C). Unless otherwise exempted by the laws of any foreign sovereign, data owners should be given timely notice that their information is subject to preservation, including whether any automated or technical actions will be undertaken to preserve the information, and be provided information on applicable data protection implications and rights.

1. Transparency

    a. Form of notice

    b. Content of notice

        Note: Take care in describing the matter requiring the legal hold, so as to minimize conflicts with privacy laws.

    c. Timing

    d. Notice/consultation with Data Protection Authorities or Works Councils (workers' rights organizations).

    e. Providing notice to each data subject mentioned in an email may be onerous.

    f. How is this notice different from the legal hold notice?

    g. There should be an exception to notice requirements when the data subject is a suspected wrongdoer and could engage in spoliation.

2. Complying with the data subject's rights (opt out, right to be forgotten, rectification, withdraw consent)

    a. Right to require consent (and where applicable, to withdraw consent)

        i. How should an organization seek custodian consent to comply with a preservation obligation? What are best practices when seeking consent? Should consent be disfavored as a basis for transfer given the practical limitations (except in jurisdictions where consent is mandatory)? -- e.g., reducing scope as much as possible through proportionality and burden arguments, being transparent as to what subsequent actions may be taken, or gaining approval of hold instructions in advance such as from Works Councils.

ii. How can cost/burden and risk associated with non-U.S. preservation be measured?

iii. How might cooperation with opposing counsel be sought when dealing with preservation issues beyond U.S. borders? How can the courts help? Are there court cases that can help inform "reasonable and good faith" preservation efforts?

iv. What can be done if consent is refused by the custodian, or a custodian later seeks to withdraw consent? If data has been collected to preserve, does withdrawing consent require destruction of collected ESI?

v. How does the organization's need to investigate issues (including bad actors) conflict with privacy rights?

b. Right to request that businesses delete the individual's personal data

i. How can an organization protect itself from a custodian withdrawing consent and/or asking for their data to be deleted? Is this the right question to ask or should the focus be on how to defend against deletion requests? Does this right extend beyond personally identifiable information?

ii. Can an individual's right to have personal data extend to data that is in the custody or control of other custodians (i.e., preserved by someone else)?

c. Right to object to certain uses

i. Typically seeking consent for "legal proceedings" use – are there specific requirements that must be applied?

d. Right to complain to supervisory authorities

i. What are best practices with dealing with supervisory authorities? Should an organization be proactive (e.g., role of the DPO)?

Guideline 3(D). Data Controllers should preserve Protected Data only as long as the legal matter is pending or reasonably anticipated. (International Principles – Principle 6 – Modified).

Guideline 3(E). Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order

should be employed to protect Protected Data and minimize the conflict. (International Principles – Principle 2 – modified).

Guideline 4. In the same way that courts and parties should give comity to the privacy laws of other jurisdictions, courts and authorities should respect the privilege laws that protect the preservation process when preservation steps are taken in furtherance of a matter for a jurisdiction that recognizes the privilege.

1. U.S. courts have typically upheld the privileged and work product nature of legal hold notices. *See Gibson v. Ford Motor Co*., 510 F. Supp. 2d 1116, 1123-1124 (N.D. Ga. 2007).

2. Consider whether outside counsel should draft the legal hold so as to maintain privilege in U.S. jurisdictions.

3. But note that when spoliation is alleged and/or preservation is at issue, legal hold notices may be discoverable. *Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. LEXIS 68128 (D.N.J. Aug. 4, 2009); *Keir v. Unumprovident Corp*., 2003 U.S. Dist. LEXIS 14522, 2003 WL 21997747 at *6 (S.D.N.Y. Aug. 22, 2003) (allowing detailed analysis of emails pertaining to defendant's preservation efforts after finding that electronic records which had been ordered preserved had been erased). In that case, counsel should attempt to secure an agreement with opposing counsel that the disclosure of the LHN or the instructions relating to the preservation of records does not constitute a broader waiver of the attorney-client privilege or attorney-work product. *See White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, No. 07-civ-2319, 2009 WL 4571848 (D. Kan. Sept. 18, 2009) (parties agreed that production of litigation hold "shall not operate as a waiver of Defendants' claims of attorney-client privilege or work product").