Data and Technology Transactions in a Digital Age: What Your Organization Needs to Know

July 29, 2021

Kelly DeMarchis Bastide
Partner | +1 202.344.4722 | KABastide@Venable.com

Christopher J. Kim
Associate | +1 202.344.4418 | CJKim@Venable.com

VENABLE LLP

Contracts

Privacy Considerations

VENABLE LLP

Approaching Contract Review

- Consider what “side” you represent
  - E.g., service provider vs. service recipient
- Understand what you want out of the deal
- Flag provisions relevant to privacy and security for review, and bring in relevant personnel (IT, marketing, etc.)
  - Privacy
  - Security
  - Data-related provisions
- Understand data flows, disclosures, transfers, and other processing activities

Terms to Review

- Terms relating to personal information and information derived from personal information
    - Restrictions/rights for use and disclosure
        - Use of aggregated/deidentified information
    - Compliance obligations
- Terms relating to information security and breach notification
- Terms relating to confidentiality
- Terms relating to privacy and data-related regulatory / self-regulatory compliance
- Stand-alone DPAs or information security addenda

Approaching Regulatory Compliance

- Figure out what laws may apply to a specific arrangement
- Exclude laws that should not apply (e.g., CCPA, FCRA, COPPA)
- Assign roles to the parties (e.g., service provider)
- Consider where the risk lies
  - If representing a service provider, consider whether the counterparty bears the risk for failing to include a legally required term or restriction
- Certain laws have specific contracting implications. Examples:
  - CCPA/CPRA: Service provider / contractor terms
  - GDPR: Processor terms (Article 28), data transfer terms
  - GLBA: Service provider requirements (privacy and security)
  - HIPAA: Business associate agreements
- In general, call out laws important to the arrangement

Addressing Regulatory Compliance

- Allocate responsibility for carrying out required tasks.
- Examples:
  - Breach response
  - Responding to individual rights requests

- There are often ways to mitigate the impact of required contractual terms.
- Examples:
  - Cost-shifting
  - GDPR audit right in Article 28(3)(h)
    - Limit frequency of audit
    - Add required notice period
    - Shift costs to auditing party
    - Accept SOC 2 or ISO 27001 report in lieu of initial audit
    - Use commercially reasonable efforts to minimize business impact of audit

VENABLE LLP

Special Contracting Situations

- Not always two parties
  - Multi-party data licensing / sharing / co-op arrangements
- External terms referenced in contracts but not provided/attached
  - Privacy policies, supplier codes of conduct, acceptable use policies
- Formulaic Contracts
  - Data Processing / Protection Agreements (DPAs)
  - Standard Contractual Clauses (SCCs)

Contracts

CCPA + GDPR Deep Dive

VENABLE LLP

Who Are the Key CCPA Players?

- "Business"—the (for-profit) party that collects personal information, subject to CCPA
- Service Provider—a for-profit entity that
  - Processes personal information on behalf of the business
  - Pursuant to a written contract that prohibits them from retaining, using, or disclosing the personal information for any purpose other than performing the contracted-for services
- Third Party—not "the" business or a service provider in a particular transaction (but may be a business also)
- Consumers—natural persons who are CA residents

Who Are the Key GDPR Players?

- Controller—the party who decides key elements of data processing (controls the manner and means)
- Joint controller—more than one actor is involved in the processing, jointly participating in determination of purposes/means of processing
    - Common decision
    - Converging decision
- Processor—processes personal data on behalf of the controller

Service Provider Contracts vs. GDPR DPA

GDPR, Art. 28 DPA	CCPA Agreement for Service Providers
• Processors must process personal data only on documented instructions from controller	• Prohibits sale of data
• Processor must ensure persons authorized to process personal data are subject to confidentiality obligations + data security	
• Requirements around engaging subprocessors	
• Processors must assist controllers with individual rights and other obligations (breach notification)	
• Requirements to delete/return personal data	• Prohibits retaining, using, or disclosing personal information except for services in contract or outside of the business relationship
• Controller audit rights	

VENABLE LLP

Specific Contracting Scenarios: Third-Party Contracts + C2Cs

CCPA

- 1798.120: A business that sells personal information **to third parties** shall provide **notice** to consumers (per home page) that this information may be sold and that consumers have the "right to opt out" of sale
- 1798.115(d): A third party shall not sell personal information about a consumer that has been sold to the third party by a business unless the consumer has received **explicit notice** and is provided an opportunity to exercise the right to opt out pursuant to 1798.120
  - Notice requirements may be satisfied by data broker registration. See 999.305(e)
- Explicit notice is not defined

GDPR

- Controllers: ?
- Joint Controllers: Need to define respectively responsibilities for GDPR compliance

Specific Contracting Scenarios: SCCs

- SCCs: Contract provisions governing cross-border data transfer. Took effect June 27, 2021 (Previous version good through Sept. 27, 2021.)
- Modular approach:
  - C2C
  - C2P
  - P2P
  - P2C
- Requirement to warrant that there is no reason to believe that the laws and practices applicable to the data importer are not in line with the SCCs. **A formal assessment must be conducted**

Contracts

Common Provisions

VENABLE LLP

Liability Provisions

- **Data Breach vs. Contract Breach**
  - Distinctions in defined terms and wording
  - “At fault” security breach vs. “factual” or “actual” security breach
  - Timelines and mitigation
- **Limitations and Disclaimers**
  - Exclusion of special damages
  - Liability cap and carveouts
  - Specific disclaimers
- **Indemnification**
  - General material breach vs. security breach specific
  - Interaction with general breach and IP infringement indemnification
- **Government Fines and Investigations**

VENABLE LLP

Confidentiality

- Seeming overlap in subject matter
- Variety of approaches
  - Full segregation of concepts – "Data" is not "Confidential Information"
  - Full overlap – "Data" is "Confidential Information," full stop
  - Limited overlap – "Data" is "Confidential Information" but excluded from certain obligations/procedures
- Evaluate advantages of each approach regarding procedures and potential liabilities
- External sources of confidentiality obligations – NDAs, DPAs, etc.
- Confidentiality vs. "information security"

Proprietary Rights

- IP challenges
  - Data is valuable, but how does the law define the asset?
  - Importance of contract language
- License vocabulary and technical facts
- System/platform access vs. data access
- Deliverables, modifications, derivative works
- Overlapping data sets

Representations and Warranties

- Compliance with law
  - Specific callouts to data privacy, information security, consumer protection, applicable international laws
- Compliance with specifications
  - Interaction with DPA or security spec attachments
- Non-infringement
  - IP, privacy rights, other proprietary rights
- Antivirus
  - Interaction with security evaluation and audits

Insurance

- Contractually mandated coverage
  - General commercial liability
  - E&O
  - Cyber
  - Umbrella
- Procedures and documentation
- Involvement of insurance rep and/or risk management professional

Audits

- Preliminary security evaluation vs. audits during the Term
- Recordkeeping
- Use of third-party auditor
- Scope and timing of audit
- Costs
- Survival

VENABLE LLP

Questions?

Kelly DeMarchis Bastide
Partner
+1 202.344.4722
KABastide@Venable.com

Christopher J. Kim
Associate
+1 202.344.4418
CJKim@Venable.com

© 2021 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP