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## Choppy Seas for Companies Falsely Claiming Compliance with U.S.-EU Safe Harbor

Ensuring and maintaining compliance with the U.S.-EU Safe Harbor principles should be a priority for U.S. entities receiving personal data relating to EU residents, in no small part to avoid the FTC leveling the charge and accompanying penalties of “deceptive trade practices.”

Last month, the Federal Trade Commission (the “FTC”) issued draft Consent Orders with two U.S. companies, TES Franchising, LLC (“TES”) and American International Mailing, Inc. (“AIM”), settling claims by the FTC that the companies had engaged in deceptive trade practices by representing that they were certified under the U.S.-EU Safe Harbor when their certifications had lapsed years earlier.<sup>1</sup>

As a general matter, the European Commission’s Directive on Data Protection (the “Directive”) requires that personal data relating to residents of the European Union (the “EU”) only be transferred to countries that have implemented adequate safeguards for the protection of personal data (as determined by the European Commission). While some countries’ practices have been deemed adequate by the EU, the United States’ practices have not. Recognizing that a significant number of companies based in the United States have a need to receive data relating to EU residents, the U.S. Department of Commerce (in partnership with the European Commission) developed the U.S.-EU Safe Harbor, which allows U.S. companies to self-certify compliance with the Directive and, accordingly, provide the “adequate” privacy protection necessary to receive data pertaining to EU residents. The self-certification must be renewed annually with the U.S. Department of Commerce. Companies under the jurisdiction of the FTC and the Department of Transportation are eligible to participate in the U.S.-EU Safe Harbor.

The FTC considers failure to comply with the U.S.-EU Safe Harbor, as well as making misrepresentations regarding participation in the U.S.-EU Safe Harbor, to be deceptive trade practices. The Consent Orders penalize TES and AIM by requiring them each to: (1) cease all misrepresentations regarding the U.S.-EU Safe Harbor; (2) for a period of five years, maintain (and provide to the FTC upon request) all advertising and promotional materials implicated by the Consent Orders; (3) deliver a copy of the Consent Order to all “current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order”; (4) notify the FTC at least thirty (30) days in advance of any change in its business that may affect its compliance obligations under the Consent Order; and (5) file a report with the FTC setting forth in detail its compliance with the Consent Order. Each Consent Order remains in effect for a period of 20 years, subjecting TES and AIM to ongoing scrutiny and oversight from the FTC. Complying with the U.S.-EU Safe Harbor does require some effort, but it is less onerous than requirements that can result from the FTC’s consent orders.

More information regarding the U.S.-EU Safe Harbor is available at: [www.export.gov/safeharbor](http://www.export.gov/safeharbor).

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<sup>1</sup> Also at issue were claims that TES had misrepresented the dispute resolution mechanisms used to resolve disputes under the U.S.-EU Safe Harbor and its certification by TRUSTe, a private privacy compliance scheme.

*This document is intended to provide you with general information regarding U.S.-EU Safe Harbor compliance. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

**Emily Holmes, CIPP/US**

Associate

[eholmes@bhfs.com](mailto:eholmes@bhfs.com)

303.223.1142