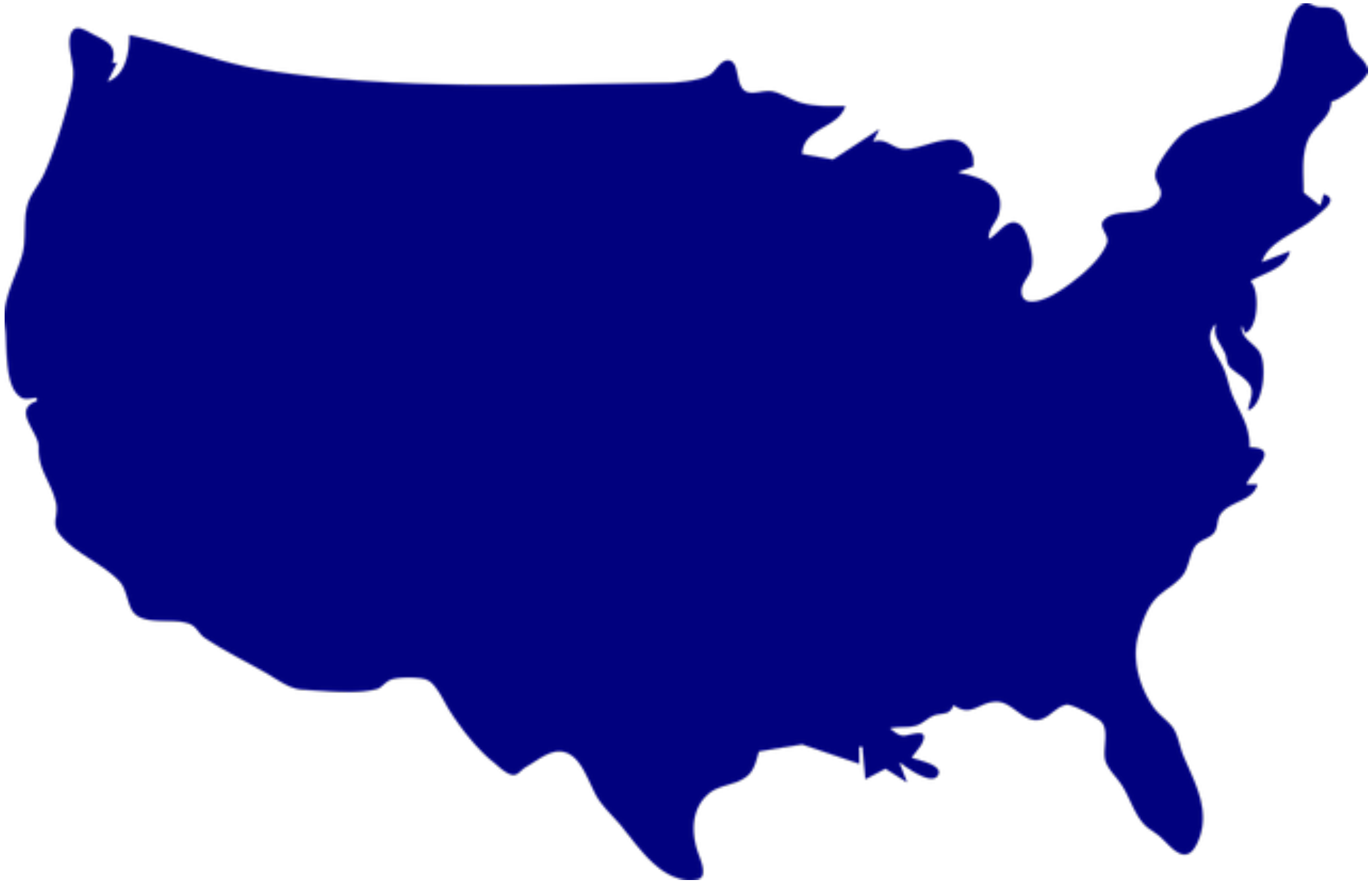
What's Next? Consumer Data Regulation in the U.S.

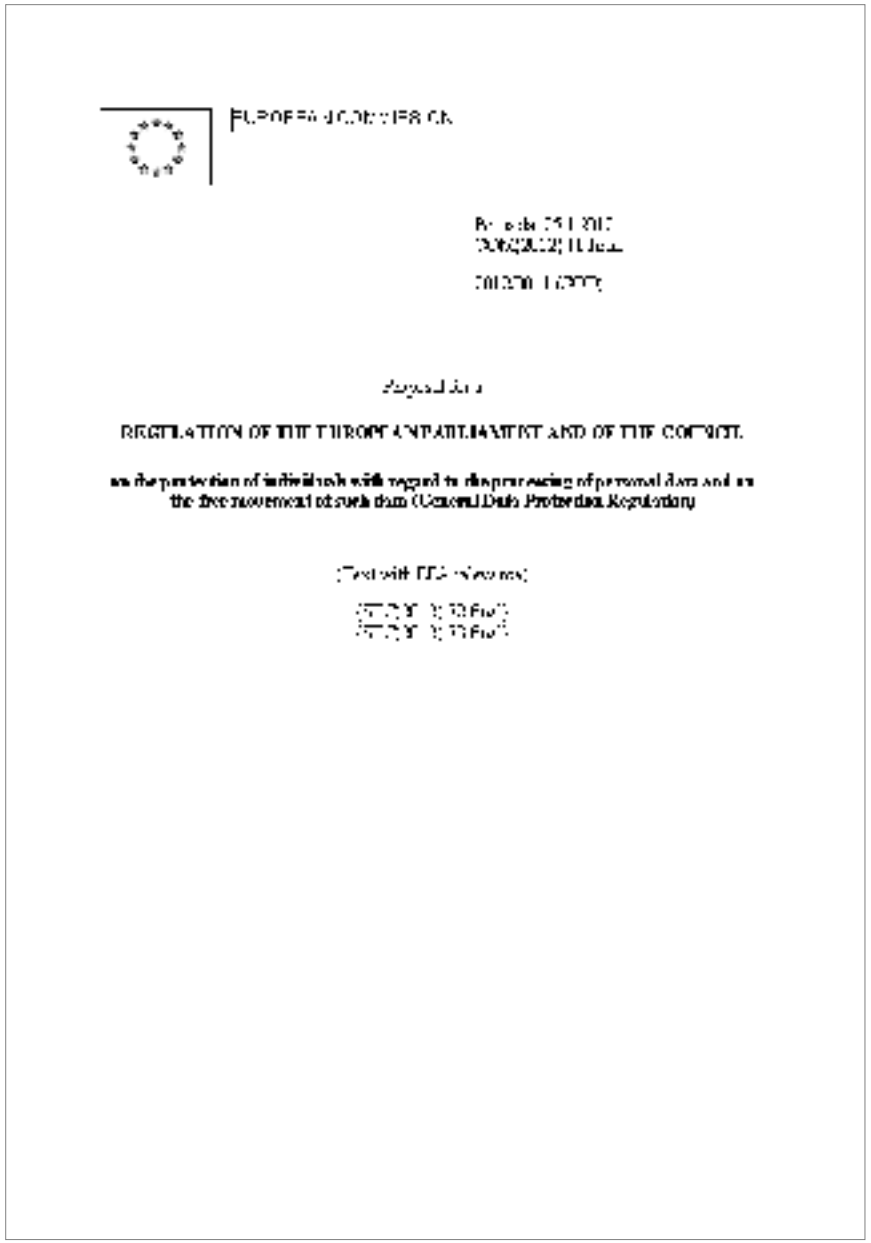
Mike Hintze

Partner, Hintze Law PLLC

Affiliate Instructor of Law,
University of Washington School of Law

Senior Fellow, Future of Privacy Forum





REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

EU General Data Protection Regulation

- Came into effect May 2018
- Broad scope
- Broad set of rights for individuals & substantive obligations for orgs
- New process and documentation obligations
- Expansive jurisdiction
- Restrictions on transfers of data to countries outside the EU / EEA
- Max penalties of 4% of company's annual worldwide revenue

Cross-Border Data Transfer Restrictions

- The GDPR restricts data exports from Europe (EU/EEA) to countries that have not been deemed “adequate” by the European Commission
- Several options to enable exports
  - Consent of the data subject
  - Model Contractual Clauses
  - Binding Corporate Rules
  - EU-U.S. Privacy Shield
- Switzerland has similar restrictions

EU-U.S. Privacy Shield

- Companies can choose to participate to enable them to move data from the EU
- Substantive requirements largely mirror requirements of EU data protection law
- Enforceable by FTC based on requirement to publicly declare adherence to Privacy Shield principles

Beyond Europe

- Global impact of GDPR
- Number of privacy laws around the world has grown dramatically in recent years
- Broad similarities based on principles, but significant differences in the details
- Wide variations in enforcement

Privacy Law in the United States

- Section 5 of the FTC Act & state equivalents
  - Prohibits unfair or deceptive trade practices
  - Turns every privacy notice, help file, marketing statement, etc. into a legally binding promise
  - FTC settlements and orders that create a sort-of "common law"
- Patchwork of state and federal sectoral and issue-specific laws. Examples:
  - Gramm-Leach-Bliley Act (financial institutions)
  - HIPAA (health care providers)
  - CAN-SPAM Act (email marketing)
  - TCPA and Telemarketing Sales Rule (phone and SMS marketing)
  - Children's Online Privacy Protection Act (COPPA)
  - Fair Credit Reporting Act
  - Electronic Communications Privacy Act (ECPA) (wiretaps and stored communications)
  - 50 state security breach notification laws
  - Many, many more
- Common Law Privacy Torts
- U.S. and State Constitutional privacy protections
  - Fourth Amendment prohibits unreasonable searches & seizures
  - First, Third and Fifth Amendments also implicate privacy
  - Cases building on "penumbra" of rights created by Bill of Rights and substantive due process doctrines
- Contract Law
  - PCI requirements
  - B2B agreements involving data sharing or handling
  - Terms of Use, Service Agreements, etc.
- Industry Self-Regulation
  - TRUSTe privacy seal
  - NAI and DAA rules for behavioral advertising
- Traditionally more of a balance between consumer protections and business needs than in Europe
  - But significant risk of enforcement, class action litigation, etc.

California Consumer Privacy Act

- 6 days in June: Bill introduced, passed unanimously, and signed by Governor
  - Comes into effect 1 January 2020
- Broad definition of personal information
- New obligations regarding notice, security breach
- New rights for individuals to access, port, and delete data, and to opt out of data sales
- Broad application
  - Not limited to CA-based companies.
  - Not limited to B2C businesses.
  - Not limited to online.

What's Next in the U.S.?

- New FTC Commissioners
- Possibility of more state AG enforcement
- Efforts to amend the California Consume Privacy Act (and/or influence Attorney General rulemaking for certain aspects)
- More states following California's lead
- Prospects for Congressional action
  - In response to GDPR?
  - In response to state (California) activity?
  - Impact of 2018 and 2020 elections?

Questions?

Mike Hintze
mike@hintzelaw.com
@mhintze

Hintze Law
Privacy + Security
https://HintzeLaw.com