

Hon Allison Lee, Acting Chair,
U.S. Securities and Exchange Commission
100 F St, NE
Washington DC 20549

06 April 2021

Dear Acting Chair Lee,

Transfers of data from Jersey firms to the U.S. Securities and Exchange Commission.

I am the Information Commissioner for the Bailiwick of Jersey in the Channel Islands. My office is responsible for regulating compliance with the data protection laws for Jersey. This letter is in follow up to mine of 27 October 2020 to former Chair Jay Clayton. I subsequently discussed that letter with officials of the Securities and Exchange Commission (SEC) on 6 January 2021.

The matter regards the Government of Jersey having informed me that Jersey-based firms have been unable to register with the SEC, owing to SEC concerns about the impact of Jersey law on firms' ability to transfer personal data at the request of the SEC for the purpose of its regulatory functions. The Government of Jersey asked me to clarify for the SEC my interpretation of Jersey law governing transfers of data from Jersey to the U.S. for purposes of the SEC's regulatory functions.

Jersey followed the European Union in introducing updated data protection laws on the 25 May 2018. The Data Protection (Jersey) Law 2018 (the DP Law) sets equivalent standards of protection to those of the General Data Protection Regulation of the EU. This legislation brought in enhanced requirements in relation to the purpose for processing personal data and for cross-border transfers, particularly regarding transfers to 'third countries' such as the U.S.

SEC officials have informed me that, under U.S. law, firms that are registered, required to be registered, or otherwise regulated by the SEC, must retain certain books and records. U.S. law also requires such firms to provide books, records, and other materials directly to the SEC and make them available for inspection upon SEC staff's request.

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These officials have also informed me that SEC staff requests these books, records, and other materials to evaluate compliance with U.S. legal obligations. I understand the SEC is legally entitled to request and examine such books and records and has the power and authority to require the production of books and records on demand directly to the SEC. In an examination, SEC staff will send the firm a document request that requires that firm to provide certain enumerated information. Failure to generate and keep such books and records would violate the firm's U.S. regulatory requirements. Failure to provide information as requested would also generally violate the firm's U.S. regulatory requirements, would be deemed to be impeding an examination, and might result in enforcement action.

SEC officials have informed me that the SEC generally does not conduct routine or cycle examinations. In addition, the SEC uses a risk-based approach to identify review areas for its examination.

I understand that SEC examinations are non-public. Information, data, and documents received by the SEC are maintained in a secure manner and, under strict U.S. laws of confidentiality, information about individuals cannot be onward shared save for certain uses publicly disclosed by the SEC, including in an enforcement proceeding, pursuant to a lawful request of the U.S. Congress or a properly issued subpoena, or to other regulators who have demonstrated a need for the information and provide assurances of confidentiality. Information from SEC examinations is also subject to provisions of the U.S. Freedom of Information Act that protect confidential information. The SEC uses what it obtains solely for its own lawful, regulatory purpose and is subject to audit by the U.S. Government Accountability Office and other governmental oversight.

I should clarify that I am providing you with a qualified opinion, based on information that the SEC has supplied.

Assuming that all of the information that I have received is accurate, it is my opinion that the DP Law will permit Jersey firms that are registered, required to be registered, or otherwise regulated by the SEC (Jersey firms) to transfer relevant personal data directly to the SEC in an examination, subject to the Jersey firm meeting certain statutory conditions. These conditions concern the processing of the personal data and the requirements around cross-border transfers.

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For a Jersey firm to process personal data, it must have a valid basis in accordance with a provision in the DP Law. Where the SEC imposes a legal obligation on a Jersey firm to provide personal data to the SEC in response to a request for information in accordance with US law, the Jersey firm may rely on paragraph 7 of Schedule 2 of the DP Law, as long as the transfer of information 'is necessary for compliance with a legal obligation, other than one imposed by contract, to which the controller is subject'. This would include a legal requirement that US law imposes. Therefore, this provision applies in cases where a Jersey firm has an obligation under US law to provide information to the SEC.

I will now turn to the question of cross-border data transfers. Article 66 of the DP Law stipulates that a controller or processor must not transfer personal data to a third country or an international organisation unless the third country or organisation has an adequate level of protection for the rights and freedoms of the data subjects in relation to the processing of personal data. There is an exception in paragraph 9 of Schedule 3 of the DP Law that otherwise permits transfers of personal data to third countries, as long as the circumstances of the transfer meet the following requirements:

1. the transfer is not repetitive;
2. the transfer concerns only a limited number of data subjects;
3. the transfer is necessary for the purposes of compelling legitimate interest pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject;
4. the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided appropriate safeguards with regard to the protection of personal data;
5. the controller informs the Authority of the transfer as soon as practicable; and
6. the controller informs the data subject of the transfer and the compelling legitimate interests pursued.

These requirements deploy terms and phrases that are subject to interpretation. The DP Law does not define these terms and I am unable to elucidate them further, without reference to the specific circumstances of a particular case. The onus would be on the individual Jersey firm who received a request or demand from the SEC to apply the provisions in good faith, to the best of their ability. While this would include informing the JOIC of the transfer, it would not require obtaining approval in advance of the transfer.

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The JOIC generally would not review a transfer in advance, but after receiving a complaint by an affected data subject. The Jersey firm then would be responsible to demonstrate that the transfer met all of these conditions. The JOIC would then determine whether the Jersey firm had complied with these conditions, based on the facts relevant to the particular case.

There are no criteria for determining whether disclosures are repetitive. The intent appears to be to prevent multiple regular disclosures of the same data. It is difficult to see how this would occur in an SEC examination. The same applies with respect to 'a limited number of data subjects'. There is no specific threshold. It would seem reasonable to conclude that the Jersey firm should limit the data it discloses to that of only those data subjects whose data would be relevant to and necessary for the respective regulatory activity.

The questions of appropriate safeguards relates to measures that the controller puts in place during the transfer, but also to the assurances it receives from the party in the third country receiving the data. These safeguards would depend on the circumstances of the case, including the nature of the data disclosed. While the SEC has indicated that it provides strong safeguards to data it receives during the performance of its regulatory functions, the onus would be on the Jersey firm to demonstrate that all of the protections in place throughout the transfer process were commensurate with the level of the sensitivity of the data involved.

It will be important for Jersey firms to satisfy the condition requiring them to notify the data subject of the transfer of their data to the SEC. The law does not prescribe a particular method of notification or its timing. Therefore, there could be a number of satisfactory options. There might be circumstances where providing the appropriate wording in a general privacy notice to the data subject at the time of collecting personal information would meet this objective. In other circumstances, some Jersey firms may be able to comply by including relevant language in a client or employment agreement. The acceptable options that might be available to a Jersey firm in a particular case, however, would depend on the specific circumstances of that case.

While I have not verified the facts of any particular case, the information I have cited above with respect to an SEC examination gives me no reason to doubt the ability of a Jersey firm to provide all relevant personal data to the SEC in response to a request for information in accordance with US law under the conditions stipulated above, including the compelling legitimate interests requirement. The Jersey firm must also properly record its decision making process and matters related to the examination. In the event a Jersey firm received a request for information from the SEC, the JOIC would be available to assist the firm in understanding its responsibilities with respect to compliance with the DP Law.

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With respect to my regulation of any future transfers to the SEC, I do not plan to conduct proactive audits in the near future. Therefore, the only circumstance in which I would need to evaluate compliance with paragraph 9 of Schedule 3 of the Law would be in response to a complaint from a data subject whose personal data had been involved in a transfer. In investigating such a complaint, I would contact the particular firm and require it to demonstrate how it had complied with law in facilitating the transfer. Providing that the firm was able to verify that the transfer met the all of the appropriate requirements, as set out above, I would expect to find that the firm would not be in breach of the DP Law.

I note that my jurisdiction applies only to regulating the activities of Jersey data controllers and processors. It does not extend to the activities of law enforcement and regulatory agencies outside of Jersey that might receive data from Jersey. Consequently, the DP Law cannot impose personal liability on SEC staff.

Therefore, I currently have no concerns about Jersey firms providing the SEC with personal data to meet U.S. legal obligations, as the DP Law provides an adequate mechanism for the provision of this information.

Please let me know whether you have any questions or concerns.

Yours sincerely,

Jay Fedorak
Jersey Information Commissioner

cc Kathleen Hutchinson, Acting Director, OIA
Peter Driscoll, Director, Division of Examinations
Stephanie Peat, Government of Jersey