

Congress Explores Consumer Privacy Protection: New Privacy Legislation and FTC Testimony Indicates Direction of Privacy Legislation

BY DANA B. ROSENFELD, ALYSA ZELTZER HUTNIK,
MARGARET E. HARDON & MEGAN L. OLSEN

Dana B. Rosenfeld (drosenfeld@kelleydrye.com) and Alysa Z. Hutnik (ahutnik@kelleydrye.com) are partners, Margaret E. Hardon (mhardon@kelleydrye.com) is a Senior Advisor, and Megan L. Olsen (molsen@kelleydrye.com) is an associate in the Washington, D.C. offices of Kelley Drye.

Introduction

The emergence of privacy legislation from several committees in both chambers of Congress in the past months, combined with the ongoing Federal Trade Commission (“FTC”) scrutiny of existing privacy practices of companies during the past year, reflect a growing concern for consumer privacy that may well lead to the establishment of standardized data security and data privacy regulations in the United States. Both chambers of Congress held hearings in the past two weeks to discuss the current status of consumer privacy protection and the creation of new privacy protection measures.

On Thursday, July 22, 2010, the House Energy and Commerce Committee’s Subcommittee on Commerce, Trade, and Con-

sumer Protection, chaired by Representative Bobby Rush (D-IL), conducted a hearing to discuss the Chairman’s recently introduced H.R. 5777—“Building Effective Strategies To Promote Responsibility Accountability Choice Transparency Innovation Consumer Expectations and Safeguards Act” (The Best Practices Act). Witnesses included key stakeholders on privacy policy—representatives from privacy advocacy organizations and private industry, and notably, David

CONTINUED ON PAGE 3

Article REPRINT

Reprinted from the e-Commerce Law Report. Copyright © 2010 Thomson Reuters. For more information about this publication please visit www.west.thomsonreuters.com

WEST®

Table of CONTENTS

© 2010 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

For subscription information, please contact the publisher at: west.legalworkspublications@thomson.com

Editorial Board

EDITOR-IN-CHIEF:

MICHAEL D. SCOTT,
Professor of Law
Southwestern School of Law

BOARD OF EDITORS:

MARCIA ADAMS
Corporate Counsel,
Hewlett-Packard Co.
Palo Alto, CA

IAN C. BALLON
Greenberg Traurig
Silicon Valley, CA

HENRY BECK
Heller Ehrman White & McAuliffe LLP
New York, NY

THOMAS J. D'AMICO
Dickstein Shapiro Morin & Oshinsky LLP,
Washington, DC

GEORGES C. FISCHER
Fischer & Forster
Sao Paulo, Brazil

PETER FRAZZA
Budd Larner Gross Rosenbaum Greenberg & Sade,
Short Hills, NJ

MARC S. FRIEDMAN
Sills Cummis Epstein & Gross P.C.
Newark, NJ

ERIC GOLDMAN

Assistant Professor,
Academic Dir., High Tech Law Institute
Santa Clara University School of Law
Santa Clara, CA

MARCELO HALPERN

Latham & Watkins
Chicago, IL

LAWRENCE M. HERTZ

Reed Smith
New York, NY

RICHARD A. HORNING

Fish and Richardson
Palo Alto, CA

DANIEL JANAL, PRESIDENT

Janal Communications
Minneapolis, MN

DEREK JOHNSTON

Russell McVeagh McKenzie Bartlett & Co.,
Wellington, New Zealand

JAMES JORDAN III

Jordan Legal Counsel PC
Atlanta, GA

V. SCOTT KILLINGSWORTH

Powell Goldstein Frazer & Murphy LLP,
Atlanta, GA

GREGG KIRCHHOEFER

Kirkland & Ellis
Chicago, IL

DONALD MACROBERT

Edward Nathan & Friedland, Inc.,
Sandown, Sandton, South Africa

MICHAEL MCNULTY

Perkins Coie Brown & Bain
Tuscon, AZ

J. FRASER MANN

Goldman & Carr L.L.P.
Toronto, Canada

LORELIE S. MASTERS

Anderson, Kill & Olick L.L.P.
Washington, D.C.

EMMANUEL MICHAU

Michau & Associates
Paris, France

ANTONIO MILLE

Estudio Mille
Buenos Aires, Argentina

LEONARD T. NUARA

Thacher Proffitt & Wood
Summit, NJ

RONALD J. PALENSKI

Assistant General Counsel,
GTE Technology & Systems
Arlington, VA

HILARY E. PEARSON

Bird & Bird
London, England

THOMAS J. SMEDINGHOFF, ESQ.

Wildman Harrold LLP
Chicago, IL

OLIVER R. SMOOT

Executive Vice-President,
Information Technology Industry Council
Washington, D.C.

LESLIE SUTTON

Freehill Hollinsdale & Page
Sydney, Australia

HOLLY K. TOWLE

K & L Gates
Seattle, WA

LUIS VERA

Vera Abogados S.C.
Mexico D.F., Mexico

BARRY D. WEISS

Cooley Godward
Boulder, CO

STEVE WEINBERG

Steve Weinberg and Weinberg Legal Group
Phoenix, AZ

NICOLE WONG

Associate General Counsel,
Google, Inc.
Mountain View, CA

Securities Litigation Report

West LegalEdcenter
610 Opperman Drive
Eagan, MN 55123

©2010 Thomson/Reuters

One Year Subscription ■ 11 Issues ■ \$495.00
(ISSN#: PENDING)

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Copyright is not claimed as to any part of the original work prepared by a United States Government officer or employee as part of the person's official duties.

Vladeck, Director of the FTC's Bureau of Consumer Protection.

The Senate Committee on Commerce, Science, and Transportation held their hearing regarding online privacy practices and the future of consumer privacy protection on Tuesday, July 27, 2010. Witnesses included FTC Chairman Jon Leibowitz, Federal Communications Commission ("FCC") Chairman Julius Genachowski, as well as representatives from Google, Apple, and Facebook.

FTC's Consumer Privacy Focus

Chairman Leibowitz and Director David Vladeck testified in their respective hearings to the FTC's heavy focus on privacy over the last year. They highlighted some of the Commission's law enforcement actions that have scrutinized companies' privacy protection practices in a wide array of areas, such as data security, identity theft, children's privacy, and spam, spyware, and telemarketing practices.

The FTC's testimony addressed the Commission's recent review of privacy regulations, including a review of the Children's Online Privacy Protection Act, as well as noting the issues raised in the FTC's series of privacy roundtables designed to explore privacy protection challenges.

Chairman Leibowitz's testimony in Congress provided some insight into the issues the FTC plans to address with a report discussing the privacy roundtables, including:

- How companies should incorporate privacy and security protections into their everyday business practices;
- Whether and how to simplify privacy choices presented to consumers to help ensure that consumer choices about privacy are made in a meaningful and informed manner; and
- Improving privacy policies and other privacy notifications to increase transparency about commercial data practices.

The FTC has indicated that it will provide a comprehensive report later this year discussing these issues and other topics raised at the privacy roundtables.

New Draft Privacy Legislation

The broad and detailed comments on privacy principles, consumer education, and privacy practices offered by the FTC at the hearings point toward a strong interplay between the FTC and Congress in the development of privacy standards and regulation in the coming year. Critical to building support for the legislation will be the support of stakeholders from consumer privacy groups and private industry, and that support will depend upon both the scope of new policy, and the parameters of enforcement.

The Chairman Rush Best Practices Act released last week aims to codify certain privacy fair information practices and "foster transparency about the commercial use of personal information, provide consumers with meaningful choice about the collection, use, and disclosure of such information, and for other purposes."¹

H.R. 5777 would regulate how organizations must disclose privacy practices, obtain consent to collect and use consumer information, and protect stored consumer data. For example, businesses would be required to disclose their privacy practices in "a concise, meaningful, timely, prominent, and easy-to-understand [format] in accordance with regulations issued by the [FTC]" and would be required to obtain opt-in consent for certain information practices, such as sharing information with third parties, collecting or using "sensitive information," or monitoring consumer's Internet activity.

The FTC has expressed support for key proposals in both the previously released draft bill from Chairman Boucher and Representative Stearns and the Chairman Rush bill, praising portions of the legislation that create data security and accuracy requirements, provide the FTC with rulemaking authority under the Administrative Procedures Act to promulgate specific privacy regulations, and require organizations to simplify privacy notice and consent procedures.

Keeping with the FTC's focus on simplifying privacy procedures, Mr. Vladeck expressed concern during his testimony over portions of H.R. 5777 that would provide a safe harbor for entities in compliance with Commission-approved self-regulatory programs. According to the FTC's

testimony at the House Subcommittee hearing, the Commission believes that creating multiple privacy compliance standards, through industry self-regulatory programs, would interfere with goals to simplify privacy practices for consumers.

Federal Privacy Legislation Moving Forward

In addition to House privacy proposals, which are likely to be merged into a single House privacy bill, Senator Kerry (D-MA) has indicated that he intends to introduce an online privacy bill into the Senate to create standards for how consumer data is collected, used, and shared, and provide consumers with more control over their personal information.

According to prepared statements by Senator Kerry, he hopes to pass privacy legislation early in the next Congress. A bill introduced by Senator Kerry could go beyond regulation of targeted advertising, as the Senator has noted that “[p]rotecting the privacy of consumers online involves much more than the targeted advertising to which they are subjected . . . [s]uch advertising is just one result of the information that is routinely collected about us online.” Senator Kerry also went on to note that consumers have the right to con-

trol the distribution of personal information and that it is problematic that current laws do not adequately protect a consumer’s right to control the collection, use, and distribution of their personal information.

Given Congress’ and the FTC’s recent scrutiny of consumer privacy protection, it is likely that new privacy regulation or legislation will emerge from this debate. Recognizing the limited number of legislative days left in the 111th Congress and the fact that both Chambers face a number of other priorities, it is unclear whether new privacy legislation can be enacted this year—that said, the legislative proposals currently under discussion will no doubt lay the groundwork for consideration in the next Congress. We will continue to monitor the FTC’s actions and legislative updates as lawmakers and regulators focus on the future of consumer privacy protection.

NOTES:

1. A copy of H.R. 5777 is available at http://www.house.gov/rush/pdf/BPACT_004.pdf.