

# Global Privacy & Data Security

## ADVISORY

October 2, 2009

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### SUMMARY OF OCTOBER 1 PRIVACY & DATA SECURITY WORKSHOP

We are pleased to provide you with this summary of the workshop — entitled “Global Privacy and Data Security Law and Policy for the Web” — that we hosted yesterday at our offices in Washington, DC. The workshop featured keynote remarks by Congressman Rick Boucher (D-VA), in which he presented a framework for his anticipated online privacy bill.

In addition to Congressman Boucher’s keynote address, the workshop featured speakers from government, industry, and the advocacy community who addressed privacy and data security issues associated with online advertising, cloud computing, and cross-border data transfer practices. The session ended with closing remarks from our colleague, Michael Chertoff, former Secretary of Homeland Security, who offered insights into current and emerging privacy and security issues.

### CONGRESSMAN BOUCHER’S KEYNOTE ADDRESS

Congressman Boucher, Chairman of the Subcommittee on Communications, Technology, and the Internet, outlined a framework for his anticipated online privacy bill, noting that he has bi-partisan support for such legislation, including from the Ranking Member of the Subcommittee, Congressman Stearns (R-FL), as well as others. The following are the key provisions of the bill that Congressman Boucher described:

- **Notice:** Websites would be required to provide a privacy policy that uses “thorough and concise” language to disclose a website’s treatment of users’ information, including the collection, use, or retention of that information, its combination with other information, or any sale of that information to third parties. Such a policy also would be required to describe how consumers can access their information, control the collection and use of their information, and contact the website about questions. Websites also would be required to provide a link to a Federal Trade Commission (FTC) consumer response center.
- **Collection:** Websites would be required to provide choice with respect to the collection of information. Collection of certain information, such as name, mailing address, and email address, and IP address when coupled with other information “about an individual, including preferences,” generally would require an opt-out choice. The collection of more sensitive information (including information about children and adolescents, medical information, financial information, sexual preference information, Social Security Numbers, and “geographic location information,”) would be subject to a higher, opt-in standard.
- **Use:** “First-party” entities (including affiliated entities under the same corporate control or certain contracted entities) that engage in online tailored advertising would be required to provide consumers with the ability to opt out of such use. Such entities would be required to obtain opt-in consent for sharing information with unaffiliated third parties unless such parties fall within the bill’s safe harbor provision. The current thinking is

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that this safe harbor regime would apply to ad networks that follow best practices to provide users with a “higher level” of control (such as an option that allows users to opt out of having their information shared or used by all or certain websites within an ad network or allows them to access information collected for online advertising purposes and to modify their ad preferences).

- *Other provisions:* The draft bill would preempt state laws and grant the FTC rulemaking and enforcement authority, including civil penalty authority.

Congressman Boucher indicated that he expects to release soon a discussion draft of his bill and that he encourages industry feedback on it. During the question and answer session, Congressman Boucher indicated that he is not opposed to applying the legislation to offline information practices, noting that his hope is that the framework he develops for the online ecosystem easily could apply to offline activities as well.

## ONLINE ADVERTISING

*Moderator: Erin Egan, Covington & Burling LLP. Speakers: Michael Hintze, Associate General Counsel, Legal & Corporate Affairs, Microsoft Corporation; Tim Jucovy, Associate Counsel, The Washington Post; Jessica Rich, Acting Director, Division of Privacy and Identity Protection, FTC; Ari Schwartz, Deputy Director, Center for Democracy and Technology (CDT); Tim Sparapani, Director, Public Policy, Facebook; Rachel Welch, Vice President, Global Public Policy, Time Warner.*

The panelists considered the online privacy framework that Congressman Boucher proposed during his opening remarks. The panel expressed general support for online privacy legislation, with some panelists suggesting that a privacy bill also should apply to information collected offline. The panel agreed that a safe harbor provision would be appropriate to allow for technological innovation, recognizing that the authority for developing a safe harbor would rest with the FTC (akin to COPPA). The FTC voiced its hope that Congress gives it authority to develop meaningful safe harbor programs that go beyond current practices.

There also was general agreement that state attorneys general, in addition to the FTC, should have enforcement authority, although there was debate over whether legislation should include a private right of action. Panelists also raised concerns about applying any choice obligation to the collection (as opposed to the use) of information for online advertising, as information sometimes must be collected for purposes unrelated to the delivery of ads. The panel discussed the applicability of a legislative framework to Internet service providers engaged in online advertising practices, and debated how such activity should be treated. Finally, the panelists agreed that privacy policies serve a necessary function but noted that additional notice and other steps are important to help consumers control the use of their information online.

Jessica Rich, the Acting Director of the Division of Privacy and Identity Protection, indicated that the FTC will continue to explore online advertising, and other practices that raise privacy issues, during the FTC’s December workshops. Ms. Rich downplayed Director David Vladeck’s use of the term “dignity” to describe a framework for analyzing these issues and suggested that the statement was meant to make clear that that privacy protection means more than protection against financial harm.

## CLOUD COMPUTING

*Moderator: David Fagan, Covington & Burling LLP. Speakers: Elizabeth Banker, Vice President, Associate General Counsel, Yahoo!, Inc.; Deborah Butler, Chief Privacy Officer, Wyeth Pharmaceuticals; Rick Gordon, Managing Director, Civitas Group; Kathryn Ratté, Senior Attorney, Division of Privacy and Identity Protection, FTC.*

The cloud computing panel tackled the difficult task of defining the “cloud,” with agreement among the panelists that while there are various cloud models and services, the basic concept — computing services provided remotely — is not new. The panel discussed whether the cloud represents a truly new paradigm, or simply is a natural evolution of outsourcing-based services. There was general agreement that the cloud in some sense represents a natural evolution from existing business practices, but that the volume of computing and data that is being shifted to the cloud and the potential risks and harms flowing from single points of failure within the cloud are novel. Another potential issue raised by cloud computing, according to the panelists, is the degree to which it could result in a greater loss of consumer control over data. For these reasons, the prevailing view among the panelists was that the cloud presents new and complex privacy and data security issues.

The panel discussed how, on the regulatory front, the FTC takes the position that it has broad authority under Section 5 of the FTC Act to consider the privacy and security risks associated with the use of cloud services. The FTC also has experience applying that Section 5 authority to emerging technologies, which is how it is viewing and evaluating cloud computing — i.e., as an emerging technology. To this end, and in connection with its upcoming privacy and security roundtables, Kathryn Ratté noted that the FTC is soliciting input and comments on how it should evaluate the risks inherent in cloud computing, the appropriate protections to mitigate the risk, and whether its existing authority in this area is sufficient to protect consumers.

Finally, the panel discussed the need for transparency and trust in the cloud. There was broad consensus that transparency and trust between service providers and users is vital both for security and for the ultimate success of cloud computing. The toughest question, the panelists agreed, is how to achieve such transparency and trust. Most panelists agreed that, as a measure of security, SAS-70 certifications are not sufficient, and instead cloud service providers would be better served by certifying to the ISO 27000-series for information security. Rick Gordon emphasized the importance of strong identity controls in the cloud.

## **INTERNATIONAL COMPLIANCE & CROSS-BORDER TRANSFER ISSUES**

*Moderator: **Dan Cooper**, Covington & Burling LLP. Speakers: **Vanessa Cooper**, Associate General Counsel IP & Privacy, Kaplan; **Damon Greer**, Director, U.S. Department of Commerce; **Marc Rotenberg**, Executive Director, Electronic Privacy Information Center (EPIC).*

This panel considered whether existing methods for regulating data transfers (including the U.S.-EU Safe Harbor Framework) are sufficient. Some panelists indicated that there are positive indications that the Safe Harbor program had raised awareness about international data transfer issues, as reflected by, among other things, increased enrollment in Safe Harbor by companies offering online applications. However, there was some criticism of the Safe Harbor program discussed during the session resulting from an apparent lack of robust enforcement under the program. The panelists debated whether this was a result of an enforcement mechanism that relies on referral from non-U.S. authorities.

The panel also considered the likelihood that there would be an international consensus on the appropriate safeguards for cross-border data transfers and generally acknowledged that there are cultural barriers to such consensus.

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We were very pleased to host yesterday’s workshop, and we appreciated the lively and substantive discussion from our various speakers, panelists, and the audience. We look forward to continuing the dialogue on these issues with our clients and friends.

If you have any questions concerning the material discussed in this advisory, please contact the following members of our global privacy & data security practice group:

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