ABA SECTION OF ANTITRUST LAW

Promoting Competition Protecting Consumers

ABA Privacy and Data Security Update

May 14, 2013

David Keating
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ALSTON & BIRD LLP

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Overview

- Cybersecurity
- Legislative Developments
- Health Privacy
- Privacy and Technology
- International

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Cybersecurity Update

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Understanding the threat

From exploitation to disruption to destruction

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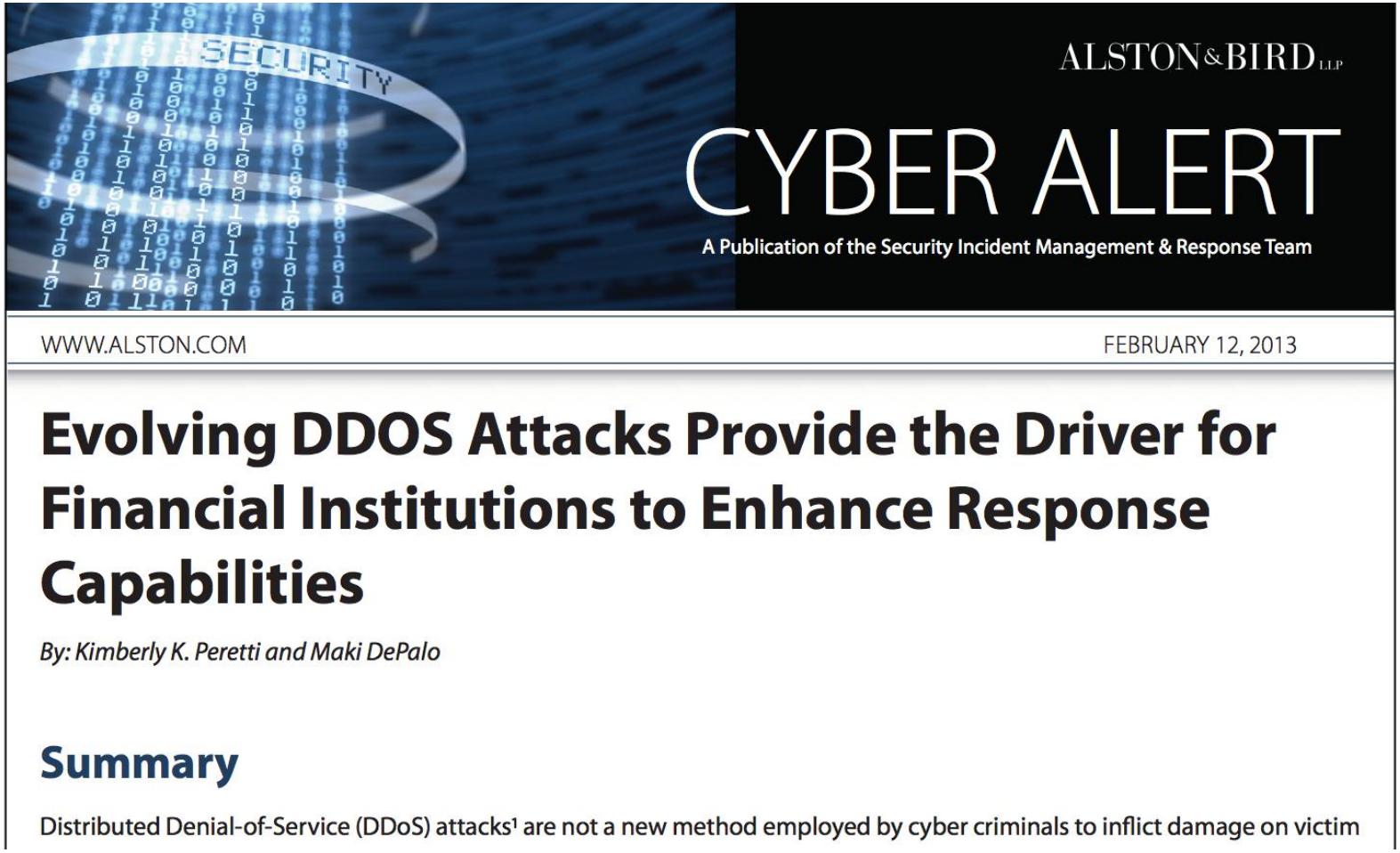
DDOS Attacks - disruption



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CYBER ALERT

A Publication of the Security Incident Management & Response Team

WWW.ALSTON.COM FEBRUARY 12, 2013

Evolving DDOS Attacks Provide the Driver for Financial Institutions to Enhance Response Capabilities

By: Kimberly K. Peretti and Maki DePalo

Summary

Distributed Denial-of-Service (DDoS) attacks[1] are not a new method employed by cyber criminals to inflict damage on victim

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North Korea - destruction

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South Korean banks and media report computer network crash, causing speculation of North Korea cyberattack

/ *Published March 20, 2013* / *Associated Press*

South Korea on alert after hack attack

Did NASA contractor spy for China?

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Protecting against the threat

Government response

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Executive Order

WWW.ALSTON.COM FEBRUARY 13, 2013

White House Releases Executive Order Governing Critical Infrastructure

By Todd McClelland

Yesterday, the White House released an Executive Order titled "Improving Critical Infrastructure Cybersecurity" (the "Order"). The Order was signed by the President yesterday and announced during his State of the Union Address. The Order represents an attempt by the President to improve a perceived vulnerability to cyber attacks within the Nation's critical infrastructure.

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EO process developments

- Framework development
  - NIST RFI, responses, workshops
- Other areas of private sector input
  - Integrated task force
  - SSAs and Councils
  - CIPAC
- Government tasks/timetable
  - List of “greatest risk” critical infrastructure
  - Incentives

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Data Breach Update

Investigations, regulatory inquires, litigation

Investigations

WWW.ALSTON.COM MARCH 26, 2013

Breach Investigations, Part 1: Right-Sizing the Data Breach Investigation

By Kim Peretti

Introduction

In the age of targeted intrusions, sophisticated criminal and nation-state actors are often compromising hundreds of systems within a single company's environment. However, companies are often only seeing a small portion of the entire incident, as their response to such invasions can be, and often is, too narrowly shaped by state security breach notification requirements, industry rules governing payment card breaches and the absence of a direct legal obligation requiring a more comprehensive review.[1] If a company has a less-than-complete understanding of the nature and scope of the intrusion, it could be exposed when the criminals revisit the enterprise for further exploitation or when regulators and class-action plaintiffs begin probing into details of the company's response.

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Breaches, Regulator Inquiries

CRN

LivingSocial Data Breach Affects Millions

By Robert Westervelt, CRN 10:05 AM EST Mon. Apr. 29, 2013

LivingSocial, an e-commerce startup, revealed a massive data security breach late Friday, informing at least 50 million of its users that attackers had infiltrated its systems and gained access to some of its customer data.

The Washington, D.C.-based company, which aims to provide users with a local marketplace experience, said the attackers accessed names, email addresses and the date of birth of its users. The breach also included encrypted passwords. The company hashes and salts its passwords, the firm said in its message to users.

The company said credit card data was stored on separate systems segmented from the rest of its network and was not impacted by the breach. Users of LivingSocial that connect via Facebook also were not impacted, the company said.

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Privacy class actions

Suzanne Choney, NBC News – 32 days

Privacy lawsuit against comScore given class-action status

Featurepics.com

A lawsuit charging that well-known Internet data measuring firm comScore uses surreptitious ways to gather data was given class-action status by a federal judge this week.

The suit, filed by two men, one from California, the other from Illinois, was originally filed ir 2011 in federal court in Chicago, with allegations that the firm has violated the Electronic Communications Privacy Act, the Stored Communications Act, and the Computer Fraud and Abuse Act.

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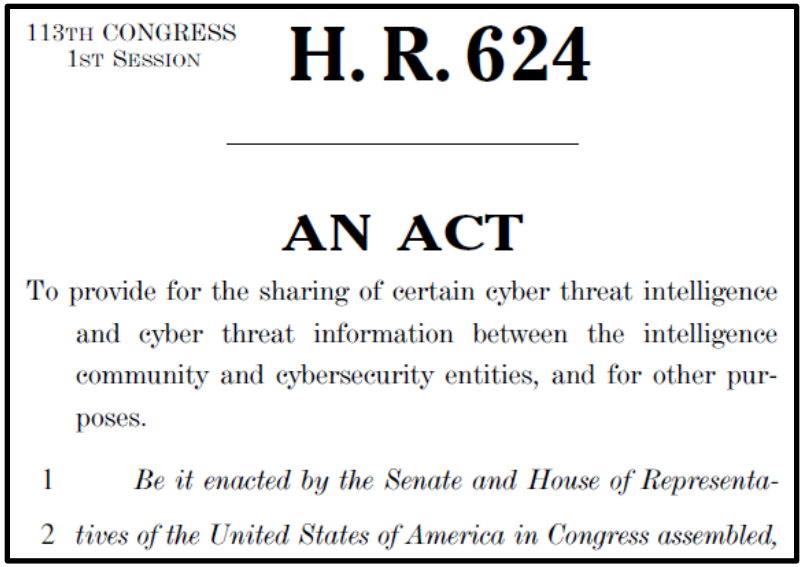
Legislative Developments in Cybersecurity, Data Security & Privacy



113TH CONGRESS
1ST SESSION

H. R. 624

AN ACT

To provide for the sharing of certain cyber threat intelligence and cyber threat information between the intelligence community and cybersecurity entities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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Cybersecurity Legislation

WWW.ALSTON.COM FEBRUARY 21, 2013

Chairman Rogers and Ranking Member Ruppersberger Reintroduce Cyber Intelligence Sharing and Protection Act (CISPA)

By Jeff Sural and Paul Martino

On February 13, 2013, Chairman of the House Permanent Select Committee on Intelligence Mike Rogers (R-MI) and the Committee's Ranking Member Dutch Ruppersberger (D-MD) introduced their cybersecurity bill, H.R. 624, the "Cyber Intelligence Sharing and Protection Act." The bill is identical to the amended version of their legislation from last Congress, H.R. 3523, which passed the House of Representatives by a margin of 248-168 on April 26, 2012.

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U.S. House of Representatives Passes CISPA

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- Data Security

House Passes Updated CISPA Cybersecurity Legislation With Broader Bipartisan Support After Privacy Amendments Adopted

April 18, 2013 | Posted by Jeff Sural and Paul Martino | Topic(s): US Congress, Legislation, Marketing, Data Security, Cybersecurity, Privacy, House of Representatives

Today the House voted 288-127 to pass the Cyber Intelligence Sharing and Protection Act (CISPA), H.R. 624. The bill passed by a wider margin than last Congress, with 92 Democrats voting in favor of H.R. 624. Several amendments regarding privacy concerns were adopted. House Intelligence Committee Ranking Member Dutch Ruppersberger (D-MD) stated after the vote "CISPA recognizes that you can't have true security without privacy, and you can't have privacy without security. This bill effectively works to protect both."

Among the amendments agreed to were one from Rep. Michael McCaul (R-TX), calling for designation of entities within the Departments of Justice and Homeland Security to receive self-reported notice of threats which fall under the National Security Act of 1947, requiring dissemination of such notice to the appropriate Federal agencies in real time. The amendment was adopted by the Committee of the Whole 409-5.

Rep. Joe Barton (R-TX), former Chairman of the House Energy & Commerce Committee, sponsored an amendment adopted by voice vote to ensure that the Act could not be construed to provide any new authority, or alter any existing authority, for businesses to "sell personal information of a consumer to another entity for marketing purposes."

An amendment from Rep. Loretta Sanchez (D-CA) would require the Department of Homeland Security to provide an annual report to Congress (along with other agencies, including the Director of National

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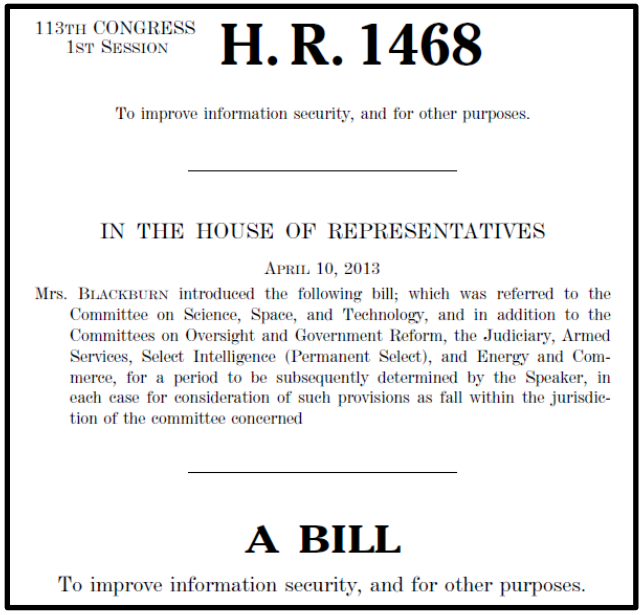
Other Cybersecurity Legislation in House: Rep. Blackburn Introduces SECURE IT Act

- Rep. Marsha Blackburn (R-TN), Vice Chair of House Energy & Commerce Cmte. Introduces H.R. 1468, The SECURE IT Act of 2013, on April 10, 2013
- Text largely based on Senate Republican cybersecurity legislation of 2012
- Also includes a data security title based on Sen. Toomey's data security and breach notification bill from last Congress (S. 3333 in the 112th Congress)



113TH CONGRESS
1ST SESSION

H. R. 1468

To improve information security, and for other purposes.

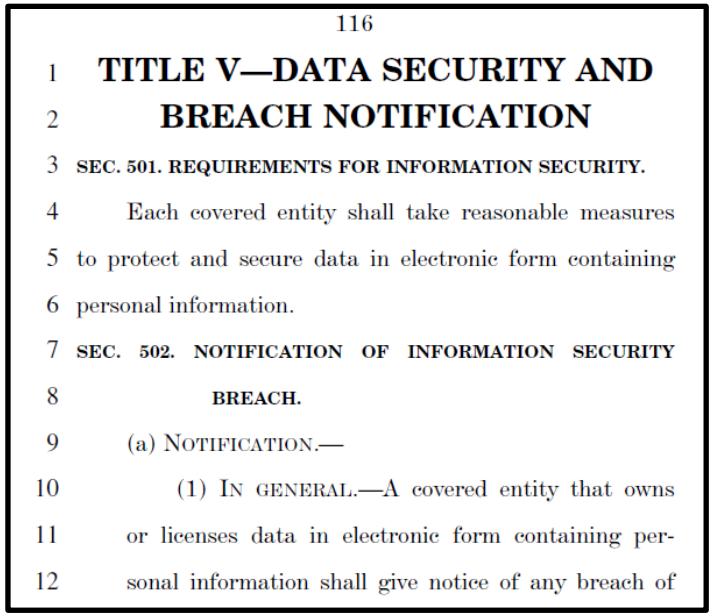
IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 2013

Mrs. BLACKBURN introduced the following bill; which was referred to the Committee on Science, Space, and Technology, and in addition to the Committees on Oversight and Government Reform, the Judiciary, Armed Services, Select Intelligence (Permanent Select), and Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To improve information security, and for other purposes.



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TITLE V—DATA SECURITY AND BREACH NOTIFICATION

SEC. 501. REQUIREMENTS FOR INFORMATION SECURITY.

Each covered entity shall take reasonable measures to protect and secure data in electronic form containing personal information.

SEC. 502. NOTIFICATION OF INFORMATION SECURITY BREACH.

(a) NOTIFICATION.—

(1) IN GENERAL.—A covered entity that owns or licenses data in electronic form containing personal information shall give notice of any breach of

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State Privacy Legislation

- More States Enact Laws to Restrict Employer Access to Social Media Accounts:
  - Arkansas Enacts H.B. 1901 and 1902; both signed by Governor in April 2013
  - Colorado Legislature Passes H.B. 1046 in April 2013; sent to Governor on May 1, 2013
  - New Mexico Enacts S.B. 371 and S.B. 422; both signed by Governor in April 2013
  - Washington Legislature Passes S.B. 5211; sent to Governor on April 28, 2013
- California Assembly Cancels its April Hearing on a Bill to Amend Cal-OPPA:

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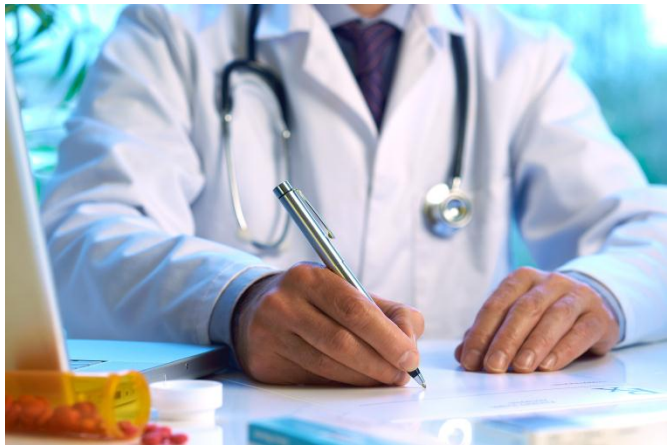
HIPAA/HITECH Act Omnibus Final Rule

Developments Since March



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Rule Publication/Effective Date

- The Office of Civil Rights of the U.S. Department of Health and Human Services published the Omnibus Final Rule on January 25, 2013.

- The Omnibus Final Rule will became effective on March 26, 2013, and requires compliance 180 days later, on September 23, 2013.

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New Statements Required In Notice of Privacy Practices (NPPs)

- The Omnibus Rule modified the Privacy Rule to require the addition of several statements:
  - Where applicable, a statement indicating that most uses and disclosures of psychotherapy notes require authorization.
  - A statement indicating uses and disclosures of PHI for marketing purposes, and disclosures that constitute a sale of PHI require authorization.
  - A statement that other uses and disclosures not described in the NPP will be made only with authorization from the individual.
  - If the covered entity intends to contact the individual for fundraising purposes, the NPP must include a statement informing the individual of the potential contact as well as the individual's right to opt out of receiving fundraising communications. The covered entity is not required to state the mechanism for opting out of fundraising communications, but may do so.
  - A statement informing the individual of his or her right to restrict disclosures of PHI to a health plan if the disclosure is for payment or health care operations and pertains to a health care item or service for which the individual has paid out of pocket in full.
  - A statement explaining the right of affected individuals to be notified following a breach of unsecured PHI.

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NPP Distribution Obligations for Health Plans

- When publishing the Final Rule, HHS confirmed that the Rule's required revisions to NPPs constitute "material changes" to a covered entity's NPPs.
- Accordingly, the material changes trigger distribution obligations.
- A health plan that currently posts its NPP on its website must
  - Prominently post the material change or its revised NPP on its website by the effective date of the material change to the NPP; and
  - Provide the revised NPP, or information about the material change and how to obtain the revised notice, in the health plan's next annual mailing to individuals covered by the plan.

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NPP Distribution Obligations for Other Health Care Providers

- The Omnibus Rule did not revise the current distribution obligations regarding revised NPPs of health care providers who have a direct treatment relationship with an individuals.
- Those providers must make the NPP available upon request or after the revision's effective date, must have the NPP available at the delivery site and must post the notice in a clear and prominent location.
- HHS confirmed that health care providers need not hand out a revised NPP to all individuals.

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The Privacy Rule's Revised Definition of Marketing

- The new definition of "marketing" encompasses all treatment and health care operations communications where the covered entity (or business associate or subcontractor) receives financial remuneration for making such communications from a third party whose product or service is being marketed and, thus, requires prior authorization from the individual.
- These type of communications require advance authorization from the individual.
- Furthermore, all subsidized treatment communications that promote a health-related product or service will be treated as marketing communications that require authorization.

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Privacy Rule Marketing Considerations

- The only exception to the definition of marketing that permits the covered entity to receive remuneration is for refill reminders and other communications about currently prescribed drugs, but only if the remuneration received in exchange for making the communication is reasonably related to the cost of making the communication.
- Recently, CVS announced that it would stop using data from its prescription drug records to mail prescription refill notices to customers on behalf of pharmaceutical manufacturers. CVS cited the Omnibus Rule as the reason for the change.

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Privacy Developments

- Children's Privacy
- Mobile Technologies
- Standards
- International

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Privacy and Technology: Children's Online Privacy

- FTC Publishes FAQs for Amended COPPA Rule
  - Duties as to newly covered information collected prior to July 1
  - Level of due diligence required as to third-party services
  - Mobile app standards
- FTC votes to retain July 1st effective date

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Privacy and Technology: Mobile Device Privacy

- Landmark CalOPPA suit on FlyDelta app dismissed
- New FTC guidance on kids' mobile apps
- Public forum on mobile devices scheduled for June 4
- CNIL issues Statement on Article 29 WP Opinion on mobile apps

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Privacy and Technology: NIST SP 800-53 Rev 4

- First comprehensive update since 2005
- Criticism
- Specifics:
  - Cybersecurity hygiene
  - Advanced Persistent Threats
  - Mobile and cloud computing
  - Supply chain threats

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International Data Protection

- Status of Data Protection Regulation
- Art 29 Working Party Activities
  - Secondary Processing
  - BCRs and Processor Status
  - Coordination with FTC
- DPA Activities

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