

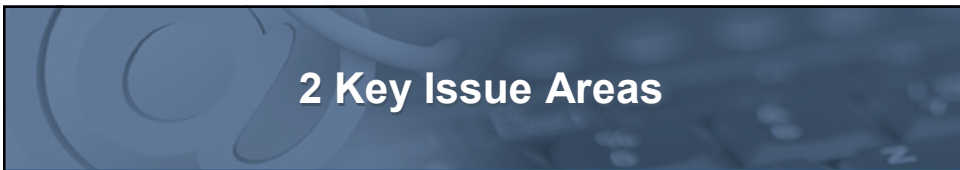
Legislative and Regulatory Update –

How Washington's Concerns with Privacy and Data Security Impact Your Business

What Should You Do About It?

March 31, 2009
Los Angeles, CA
Paul Martino

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2 Key Issue Areas

- **Online Behavioral Targeting**
 - Is Government “Crying Wolf” or Is This a “Wake-Up” Call?
 - Overview of Latest FTC Staff Report (*Released Feb. 2009*)
 - Recent Remarks of Key Washington Policy Makers
 - Industry’s Policy Response
 - Steps for Companies to Consider

- **Other Privacy and Data Security Legislation**
 - Personal Health Information: ARRA Significantly Revises HIPAA
 - Comprehensive Federal Privacy Legislation
 - Federal Data Security Legislation Gives Way to States

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Online Behavioral Targeting (OBT)

- **This is Industry's Wake-Up Call**
 - New FTC Chairman Leibowitz Means Business About OBT...
 - And So Does Senate and House Commerce Committees...
 - IF Industry Doesn't Act Convincingly to Assuage Their Concerns

- **But Can Self Regulation Work?**
 - An Unsure U.S. Government is Applying Pressure to Industry
 - FTC Town Hall (11/07), OBT Principles (12/07), Staff Report (2/09)
 - Senate and House Hearings (Summer/Fall 2008; More Planned)
 - Industry is Engaged in Various Efforts to Create Best Practices
 - What If Industry's Framework Does Not Work?

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Overview of FTC Staff Report on OBT

- **Scope of the FTC Principles**
 - "Any data [PII or Non-PII] collected for online behavioral advertising that reasonably could be associated with a particular consumer or with a particular computer or device"
 - 2 Types of Online Advertising Excluded from Definition of OBT
 - "First Party Advertising" (Site to Customer; No 3rd Party Data Sharing)
 - "Contextual Advertising" (Ad Based on Single Site Visit/Search Query)

- **The 4 Principles**
 - Transparency & Consumer Control ("Prominent" Notice/Opt-Out)
 - Reasonable Security and Limited Data Retention
 - Opt-In for Material Changes to Existing Privacy Promises
 - Opt-In for Use of "Sensitive" Data (Undefined)

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Recent Remarks of FTC Chairman

- **FTC Chairman Leibowitz**

- Industry is not protecting consumer privacy interests related to OBT
- The FTC principles are a guide to improving the online environment
- Industry should adopt self-regulatory policies similar to the FTC principles...and do it soon
- A self-regulatory regime can be the fastest way to get the changes needed online to better protect consumers' privacy interests but...
- If industry does not improve these practices, the FTC and Congress will move to a more regulatory model for behavioral advertising

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Recent Remarks of House Telecom Chairman

- **House Telecom Subcmte. Chairman Boucher (D-VA)**

- The subcommittee held hearings and legislation may be necessary
- Behavioral advertising is another in a line of data privacy issues
- A few key principles being considered for possible legislation:
 - All websites must have a privacy policy
 - A website collecting "any" data from a consumer must conspicuously provide notice of what data is collected and how that data may be used
 - If the data is to be used for marketing, the site must provide an opt-out
 - Sharing data with "unaffiliated" 3rd parties should be prohibited without first obtaining an Internet users' affirmative consent (i.e., an opt-in)

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Industry's Policy Response in Washington

- **Self-Regulatory Efforts**
 - Efforts to Develop Industry Standard Guidelines and Principles
 - Re-Examination of Opt-Out Cookies and Technology
 - Discussion of Creative New Procedures for Advertising Notices
- **Legislative and Regulatory Policy Campaigns**
 - Submission of Comments (Formal & Informal) to FTC Principles
 - Lobbying Key Committees and Members of Congress on Bills
 - Formation of "Consumer-Focused" Business Forums
 - While Bill Passage Unlikely This Year, Negative Media Looms

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Steps for Companies to Consider

- **Meet Internally to Review Current Online Ad Practices**
 - Prominence of Notice and Clarity of Choice Offered to Consumers
 - Pay Special Attention to Any Use of Sensitive Data
 - Consider Appropriate Data Security and Retention Practices
 - Determine Triggers for Material Changes to Consumer Privacy Promises
- **Assess Regulatory and Legislative Risk**
 - Analyze Potential Impact to Business Practices of Current Proposals
 - Determine Corporate Priorities and Flexibility to Change Ad Models
- **Actively Monitor *but also* Consider a Policy Campaign**
 - Make Use of Washington Office and Outside Resources for Information
 - Join Appropriate Groups to Form Strategic Public Policy Alliances
 - Effectively "Shaping" Policy Now Helps Reduce Business Costs Later

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Effective Public Policy Campaigns

- **Effectively Addressing Regulatory Proposals Can...**
 - Reduce potential impact on existing or future advertising models
 - Minimize regulatory risk to business and expanded liability
 - Increase business certainty in value of investing in greater range of targeted online advertising practices to win more customers
- **Compliance with Self-Regulatory Standards Can...**
 - Assure customers that your advertising practices are consumer-friendly and consistent with best business practices
 - Avoid the greater cost, rigidity and uncertainty of regulatory regimes

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Other Privacy and Data Security Issues

- **Personal Health Information (PHI)**
 - ARRA Significantly Revises HIPAA Privacy and Security Rules
 - Compliance Required by February 2010
- **Comprehensive Federal Privacy Legislation**
 - Will This Be the Congress That Finally Does It?
 - *Probably Not.*
- **Federal Data Security Legislation Gets Less Likely**
 - Approach Balkanized – First the Vets, Now HIPAA, What's Next?
 - State Data Security Breach Laws Continue to Evolve

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Personal Health Information (PHI): New Privacy and Data Security Rules

- **ARRA Significantly Revises HIPAA Rules**
 - American Recovery and Reinvestment Act of 2009 (“ARRA”) Amends Privacy and Security Rules under Health Information Portability and Accounting Act of 1996 (“HIPAA Rules”)
 - President Obama signed into law on February 17, 2009
 - One Year for Companies to Come Into Compliance with New Rules
- **Four Significant Changes**
 - Broader Application to Business Associates, Vendors of Personal Health Records (PHRs) & Other Non-HIPAA-Covered Entities
 - Statutory Security Breach Notification Requirements for PHI
 - New Patient Protections for Electronic Health Records (EHRs)
 - Expanded Civil Enforcement including State AG Actions

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Comprehensive Federal Privacy Legislation: Continued Calls Go Unanswered

- **Privacy is a Complicated Statutory Issue**
 - Few members of Congress understand it in depth
 - Difficult for staff to draft carefully tailored definitions and provisions
- **“One-Size-Fits-All” Legislation Rarely Fits Any One**
 - U.S. has had a Sector-Specific Approach to Privacy Protections
 - Creation of a Harmonized Overlay Raises Questions of Necessity
- **Congress Continues to Bite Off Smaller Chunks**
 - ARRA Amends HIPAA Privacy and Security Rules
 - Financial Services Regulatory Restructuring? *Watch Out, Folks!*

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Federal Data Security Legislation: Effort at Federal Law Gives Way to States

- **Well-Publicized Data Security Breaches Had Effect**
 - Negative media attention harmful to brands and customer retention
 - Industry practices and systems technology improved as a result
- **Businesses Understand Data Security and Improving**
 - Protecting business data is understandable and achievable objective
 - Increasing prevalence across businesses of CSOs and CISOs
 - Still some “bad apples” out there
- **State Data Security Breach Notification Laws**
 - Many states first followed California’s law and compliance was not difficult
 - Industry call for federal law preemptive of state laws waned over last 4 yrs
 - However, some states are getting more aggressive with legislation
 - Could this be the start of new calls for a federal bill? *We’ll see...*

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THANK YOU!

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SUPPORTING MATERIALS

Health Care Advisory

American Recovery and Reinvestment Act of 2009:
Privacy and Security Provisions "Up the Ante" for
Covered Entities, Business Associates and Non-
Covered HIPAA Entities

March 3, 2009

<http://www.alston.com/files/Publication/73254df7-2e6d-4c31-a6a5-3d4991819521/Presentation/PublicationAttachment/634e7eb8-3e64-4061-adc6-3fe1c3918499/ARRA%20Act%20of%202009.pdf>

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Privacy & Security Task Force ADVISORY

States Adopting Aggressive New Privacy and Data Security Laws and Regulations

October 7, 2008

<http://www.alston.com/files/Publication/05c1737d-ccfc-44a2-9252-1ffbea8953d3/Presentation/PublicationAttachment/a5a0be6c-e8c5-4b3c-ad17-134c3b6f0cd6/Privacy%20Post%20Vol%204.pdf>

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Intellectual Property/Legislative ADVISORY

Patent Reform Act of 2009 Introduced in Senate and House; Senate Judiciary Committee Holds First Hearing

March 13, 2009

<http://www.alston.com/files/Publication/6f0a5842-86f0-4486-be9e-0218cb5623cf/Presentation/PublicationAttachment/f4893e93-bcde-45b7-9d8f-508a07c5143a/Patent%20Act%20of%202009.pdf>

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Outlook for the 111th Congress & President-elect Barack Obama

November 6, 2008 11:54 AM

<http://www.alston.com/files/Publication/201d90a9-aec6-48fe-b27b-5a63cd00f28d/Presentation/PublicationAttachment/396476ac-b2bf-47d6-a4ad-981e118bacfa/Post%20Election%20Advisory.pdf>

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