

Morrison & Foerster Client Alert

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White House Offers First Look at Consumer Privacy Legislation

By Patrick Bernhardt and Julie O'Neill

President Obama continued his push for privacy legislation by recently unveiling a draft Consumer Privacy Bill of Rights Act ("Draft Bill"). To move forward, the Draft Bill must be sponsored by a member of Congress and is very likely to undergo substantial revisions both before that happens and after. According to press reports, the proposal has already drawn criticism from lawmakers, the Federal Trade Commission (FTC), industry associations and consumer advocates. Nonetheless, the Draft Bill provides insight into what the administration is thinking. The proposal would require covered entities to comply with so-called fair information practice principles (FIPPs) and impose civil penalties in the event of noncompliance, but it would also provide a safe harbor for those that adhere to codes of conduct approved by the FTC.

The Draft Bill defines personal data broadly, with a few exceptions, as any nonpublic data under the control of a covered entity that is linked or linkable not only to an individual, but even to his or her device. It would establish FIPPs-based obligations for a covered entity that collects, creates, processes, retains, uses or discloses personal data. These include requirements to:

- Provide individuals with notice about its privacy and security practices;
- Provide individuals with control over the processing of their personal data;
- Conduct a privacy risk analysis in connection with certain practices that are "not reasonable in light of context" and, in some cases, provide heightened notice and choice with respect to them;
- Collect, retain and use personal data in a manner that is reasonable in light of context;
- Meet certain data security requirements;
- Provide individuals with the opportunity to access, correct or delete their personal data and establish procedures to ensure that personal data is accurate; and
- Establish procedures to ensure compliance, such as through employee training, evaluations, privacy by design, and contractual restrictions.

UNITED STATES

California

Tiffany Cheung	(415) 268-6848
Rebekah Kaufman	(415) 268-6148
Christine E. Lyon	(650) 813-5770
David F. McDowell	(213) 892-5383
Purvi G. Patel	(213) 892-5296
Andrew Serwin	(858) 720-5134
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
David M. Walsh	(213) 892-5262

New York

Cindy Abramson	(212) 336-4178
Melissa Crespo	(212) 336-4354
John F. Delaney	(212) 468-8040
Michael B. Miller	(212) 468-8009
Sotirios Petrovas	(212) 336-4377
Suhna N. Pierce	(212) 336-4150
Marian Waldmann Agarwal	(212) 336-4230
Miriam H. Wugmeister	(212) 506-7213

Washington, D.C.

Patrick Bernhardt	(202) 887-8771
L. Richard Fischer	(202) 887-1566
Adam J. Fleisher	(202) 887-8781
Libby J. Greisman	(202) 778-1607
Julie O'Neill	(202) 887-8764
Cynthia J. Rich	(202) 778-1652
Nathan David Taylor	(202) 778-1644

EUROPE

Berlin

Hanno Timmer	49 30 72622-1332
Lokke Moerel	44 20 79204054
Alex van der Wolk	44 20 79204054

Brussels

Karin Retzer	32 2 340 7364
Alja Poler De Zwart	32 2 340 7360

London

Amy Collins	44 20 79204180
Susan McLean	44 20 79204045

ASIA

Beijing

Gabriel Bloch	86 10 5909 3367
Jingxiao Fang	86 10 5909 3382
Paul D. McKenzie	86 10 5909 3366

Hong Kong

Gordon A. Milner	852 2585 0808
------------------	---------------

Singapore

Daniel P. Levison	65 6922 2041
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Tokyo

Toshihiro So	81 3 3214 6568
Yukihiko Terazawa	81 3 3214 6585

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Importantly, the Draft Bill would create a safe harbor from enforcement for those that adhere to FTC-approved codes of conduct.

The Draft Bill would preempt state laws that impose requirements on the processing of personal data, which could include, for example, provisions in California's Online Privacy Protection Act and Shine the Light law. The Draft Bill would not, however, affect other federal privacy and security laws, preempt general state consumer protection laws, or preempt certain other state or local laws, such as those addressing the processing of health or financial information, data breach notification requirements, or the privacy of minors or K-12 students.

If the Draft Bill were to become law as currently drafted, the FTC would have the authority to enforce it under Section 5 of the FTC Act, as well as to impose civil penalties of up to \$25 million in the event of a violation with actual or implied knowledge. State Attorneys General could seek injunctive relief, but there would be no private right of action.

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