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# Missions & Visions

# MORRISON FOERSTER



**Julie O'Neill**

*Advising clients at the intersection of privacy law and consumer protection, Morrison & Foerster LLP's Julie O'Neill aims to help companies realize their business goals and achieve compliance with both state and federal laws and regulations. With privacy a "hot topic" for lawmakers and regulators around the country, she leverages her experience as a former Federal Trade Commission staff attorney to stay on top of the ever-changing landscape for companies ranging from startups to established businesses.*

*O'Neill recently sat down with Massachusetts Lawyers Weekly.*

**Q: What privacy trends are you watching?**

**A:** We are keeping a close eye on privacy these days because it is such a hot topic in the United States. Many countries around the world have put in place omnibus privacy laws that apply across all sectors. Here in the U.S., we've taken a different, more risk-based approach that regulates the collection and use of personal information only if it gives rise to sensitivity issues, such as financial information or health information.

However, on Jan. 1, 2020, the California Consumer Privacy Act took effect. This first-of-its-kind law in the U.S. looks more like laws from other countries, broadly defining personal information across all sectors and imposing requirements on businesses that meet certain income and record thresholds, as well as granting rights to consumers such as the ability to access their information or have it deleted. Over the past year, we've spent a lot of time working with our clients to come into compliance with the CCPA. We are also watching not only what develops in California in terms of enforcement both by private citizens and the Attorney General but what other states are doing. A large



**Julie O'Neill**  
PARTNER  
MORRISON &  
FOERSTER LLP

number of states have jumped on the CCPA bandwagon and bills are pending across the country, so we are tracking that movement.

**Q: Should companies in Massachusetts be concerned with other states' privacy laws?**

**A:** The short answer is that Massachusetts companies should be concerned enough to take a look to determine whether or not the privacy laws of other states may apply to them. For example, the CCPA speaks broadly in terms of "doing business" in California, but that term isn't defined in the law itself. Our judgment is that if a Massachusetts company is selling products online to California residents, it is probably covered if it meets one of the thresholds for income or records under the law.

**Q: What risks can companies avoid with compliance programs that address consumer marketing, such as text messages and social media?**

**A:** Most companies, if not all, communicate with their customers by phone and text message and may not realize that federal law prohibits such communications if the company doesn't have the appropriate form of prior consent from recipients pursuant to the Telephone Consumer Protection Act. It comes as a surprise to companies when we explain that we frequently see million-dollar settlements

company may not have the ability to transfer consumer information in a sale. It may seem like people wouldn't even realize or notice, but the FTC has intervened in sales in the past, for example, the transfer of Borders' customer list when Barnes & Noble purchased the company.

We have also worked on a number of deals where the startup has been actively texting or calling customers or prospects possibly without the necessary consent under the TCPA and clients have had to take a second look at an acquisition because of potentially huge exposure under the statute.

**Q: Are all companies — small, larger or a new start — subject to Federal Trade Commission scrutiny?**

**A:** Yes, all companies are subject to FTC scrutiny. But that doesn't mean the agency will not give smaller companies, such as a startup or a less mature company, an opportunity to come into compliance instead of bringing an enforcement action right out of the gate.

**Q: What can companies do to help avoid the scrutiny of the FTC or state Attorneys General?**

**A:** The FTC does a really good job of letting the industry know what it is interested in. The use of endorsements by influencers is a good example. Before it started to file enforcement actions, the FTC engaged in education efforts, held

***"We do a lot of due diligence for clients when they are looking to acquire or start up a company in the privacy realm."***

— even tens of millions of dollars — in lawsuits filed alleging violations of the TCPA. This is an area that requires some caution.

The social media space also presents risks for companies, particularly with the use of influencers. In recent years, the FTC has brought a number of enforcement actions against companies that use influencers to promote their products. In the FTC's view, if a company compensates an influencer to endorse a product with a coupon, a payment, a free product or even something as minor as a sweepstakes entry, the individual has to disclose that payment in their endorsement because the fact of that payment can affect the way consumers view the endorsement. This is a really hot area of enforcement for the FTC, and it is not going away.

**Q: What key privacy risks should a startup consider when contemplating acquisition?**

**A:** We do a lot of due diligence in the privacy realm for clients when they are looking to acquire a company and one of the biggest issues we see, particularly for consumer-facing companies, is that a privacy policy may be in place but the

workshops, issued guidelines and generally tried to get the news out there that it was taking a look at this issue. It also went on a spree of issuing warning letters to companies and influencers about their obligations and what they need to do to avoid a charge under Section 5 of the FTC Act.

Companies are then on notice that the FTC is serious about the issue and can take a look at the examples to understand what they need to do to be compliant. One tip that I share with clients is to sign up for the FTC and state AGs' press releases, even just to scan the headlines and see what is on the regulators' radar screen.

## BOSTON LOCATION

John Hancock Tower  
200 Clarendon Street, Floor 20  
Boston, MA 02116  
(617) 648-4700