

An Excerpt From:

K&L Gates Global Government SolutionsSM 2011: Annual Outlook



January 2011

K&L | GATES

The Year of Privacy Protection

Significant commercial, technological and policy developments in 2010 have all set the stage for new privacy laws and regulations to emerge in Europe and the United States in 2011. We expect the United States and the European Commission to actively consider imposing new requirements on companies to address the collection, use, protection, retention and disposal of personally identifiable information ("PII").

Commercial and Technological Developments

There is an increasing recognition by governments, businesses and individuals that existing laws protecting privacy have been outrun by the pace of technological development. Consider:

- Publicly reported data breach incidents in the United States in recent years show no meaningful reduction in the number of such incidents or the number of personal records exposed each year. In the EU, there is a growing concern that data breaches are under-reported and that this issue must be addressed for both consumer protection and public policy reasons.
- During 2010, *The Wall Street Journal* published a landmark series of investigative articles that detail the powerful new technologies and their extensive and hard-to-detect use that enable Internet business to build up extremely accurate "profiles" of individual users.
- Some Internet companies have begun deeming "public" certain previously private information requiring users to take greater affirmative actions to protect their information.
- The European Union and the United States have been involved for several years in negotiations to establish a comprehensive framework for privacy protection to address information (such as financial and airline passenger data) exchanged for law enforcement purposes.

Policy Developments in the United States

2010 brought a number of significant policy developments in the United States, including:

- **Federal Trade Commission Report:** In the United States, the FTC has significant federal jurisdiction over privacy protection. During 2009-2010, the FTC held a series of privacy roundtables dealing with technological developments and privacy concerns. In December 2010, these resulted in the release of a preliminary FTC report entitled "Protecting Consumer Privacy in an Era of Rapid Change" ("FTC Proposal"). The FTC Proposal sets forth a broad new framework that seeks to significantly expand the current legal regime for privacy protection in the United States.
- **Department of Commerce Report:** A major Internet privacy report was issued by the U.S. Department of Commerce's Internet Policy Task Force on December 16, 2010. The report is a "Green Paper" entitled "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework."
- **White House Group:** The White House recently created a Privacy and Internet Policy Subcommittee of the National Science and Technology Council. More than a dozen federal departments, agencies and offices are represented. The purpose of the subcommittee is to develop principles and strategic directions with the goal of fostering consensus in legislative,

regulatory and international Internet policy realms.

- **Congressional Interest:** The new Chairman (and ranking Democrats) of the House Commerce and Judiciary Committee and key subcommittees all have demonstrated interest in privacy legislation. Indeed, the new Republican chairman and ranking Democratic member of the key House Subcommittee are known for being aggressive on privacy matters. They join their Senate counterparts who held hearings and began developing legislation this year.
- **Massachusetts Law:** In the absence of national legislation, the states continue to adopt new laws dealing with privacy protection and information security. Perhaps the most notable development is the comprehensive data protection regulations adopted by Massachusetts that took effect in March 2010. These regulations purport to apply to the personal data of residents of Massachusetts wherever they may be located and wherever it may be gathered. While several states have security obligations, Massachusetts' regulations are the most comprehensive and include broad and detailed personal information protection and computer system security obligations for all businesses.

Developments in Europe

Europe also had a number of significant developments regarding privacy protection in 2010, including:

- **Data Protection Directive Update:** On November 4, 2010, the European Commission issued a Communication concerning "A comprehensive approach to personal data protection in the European Union" ("Communication"). The



Communication, which like both the FTC Proposal and the Green Paper was preceded by careful public consultation, is intended to set the strategy for revision of the EU's Data Protection Directive, which would raise the collective bar for privacy protection in Europe.

- **European Parliament Resolution on New Advertising Practices:** On December 15, 2010, the European Parliament approved a strong and comprehensive resolution asking the EU Commission to carry out an in-depth study of "new advertising practices," including behavioral advertising.
- **Council of Europe Recommendation on Profiling:** Regarding individual profiling, the Committee of Ministers of the Council of Europe added a powerful European voice in the direction of opt-in controls on profiling. It adopted a recommendation to all member states that profiling be permitted, subject to certain exception, only if "the data subject or her or his legal representative has given her or his free, specific and informed consent."
- **Data Breaches:** The annual report of the UK Information Commissioner's Office ("ICO") for the 2009-2010 reporting year states that during that period 464 security breaches were reported, and that the ICO entered into 57 remedial "undertakings" with entities that had breached their privacy protection obligations.
- **EU Enforcement Actions:** On November 22, 2010, UK ICO imposed a fine of £100,000 on a local council for sending sensitive personal information by fax to the wrong recipients, twice in two weeks. On the same day, it imposed a fine of £60,000 on a private employment services company that kept an unencrypted database of sensitive personal information on a lap-top that was stolen. On November 23, 2010, the Data Protection Authority of the German federal state of Hamburg imposed a fine of €200,000 against a financial institution for profiling its customers and for permitting its customer service representatives to have improper access to the sensitive data of the institution's customers.

Common Themes

Though there are significant differences, the developments in Europe and the United States have common themes, which are illustrated by comparing the FTC Proposal and the EU Communication. Both of these proposals deal with nearly all the same essential topics and both do so in the same general policy direction. Examples include:

- Promoting greater transparency in the sense of shorter and standardized privacy information and providing them in more accessible ways;
- Introducing stricter prior consent mechanisms;
- Considering the use of "privacy by design" concepts;
- Addressing profiling by various technological and legal means;
- Imposing clearer and shorter data retention requirements (including a "right to be forgotten");
- Providing stronger remedies and sanctions for violations of privacy; and
- Requiring privacy impact assessments.

Need for Involvement

As the U.S. federal government and the EU develop legislative and regulatory proposals, companies should engage to shape these proposals so that they do not impinge upon domestic or international business operations or impose unnecessary burdens, while still enabling individuals to trust in their businesses. The significant integration of the U.S. and EU economies, the presence of multiple corporate offices in each others' jurisdictions, and significant personal data flows between the two economies also underscore the need to seek convergence in the legal regimes for privacy protection.

Bruce J. Heiman (Washington, D.C.)
bruce.heiman@klgates.com

Samuel R. Castic (Seattle)
sam.castic@klgates.com

Henry L. Judy (Washington, D.C.)
henry.judy@klgates.com

K&L | GATES

Anchorage Austin Beijing Berlin Boston Charlotte Chicago Dallas Dubai Fort Worth Frankfurt Harrisburg Hong Kong London
Los Angeles Miami Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh Research Triangle Park
San Diego San Francisco Seattle Shanghai Singapore Spokane/Coeur d'Alene Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of 36 offices located in North America, Europe, Asia and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information, visit www.klgates.com.

K&L Gates comprises multiple affiliated entities: a limited liability partnership with the full name K&L Gates LLP qualified in Delaware and maintaining offices throughout the United States, in Berlin and Frankfurt, Germany, in Beijing (K&L Gates LLP Beijing Representative Office), in Dubai, U.A.E., in Shanghai (K&L Gates LLP Shanghai Representative Office), in Tokyo, and in Singapore; a limited liability partnership (also named K&L Gates LLP) incorporated in England and maintaining offices in London and Paris; a Taiwan general partnership (K&L Gates) maintaining an office in Taipei; a Hong Kong general partnership (K&L Gates, Solicitors) maintaining an office in Hong Kong; a Polish limited partnership (K&L Gates Jamka sp.k.) maintaining an office in Warsaw; and a Delaware limited liability company (K&L Gates Holdings, LLC) maintaining an office in Moscow. K&L Gates maintains appropriate registrations in the jurisdictions in which its offices are located. A list of the partners or members in each entity is available for inspection at any K&L Gates office.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2011 K&L Gates LLP. All Rights Reserved.