Monday, October 25
11:00am-12:30pm

210 - New Regulatory Requirements and Legal Developments on the Internet and Privacy

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General Counsel & Secretary
Provide Commerce

James Brashear
General Counsel & Corporate Secretary
Zix Corporation

Norbert Kaut
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Session 210

Faculty Biographies

James Brashear

James F. Brashear is general counsel and corporate secretary of Zix Corporation, the leading provider of email encryption services.

Mr. Brashear previously was a corporate securities partner at Haynes and Boone; a senior vice president, deputy general counsel, corporate secretary and chief governance officer at the global travel commerce company Sabre Holdings Corporation; an attorney at AMR Corporation's subsidiary American Airlines, Inc.; and an associate at Skadden, Arps, Slate, Meagher & Flom and at O'Melveny & Myers.

He serves as a national director of The Society of Corporate Secretaries and Governance Professionals.

Mr. Brashear received a JD, magna cum laude, from the University of San Diego School of Law, where he served as executive editor of the law review. He obtained a BA from the University of California at San Diego.

Blake Bilstad

Blake Bilstad serves as the SVP, general counsel and secretary of Provide Commerce, Inc., a profitable e-commerce group, that specializes in the delivery of custom gifts and perishables direct from suppliers to consumers through its brands: ProFlowers(R), RedEnvelope(R), Cherry Moon Farms(R), Personal Creations(R) and Shari's Berries(R). His responsibilities include managing all legal matters for the group including commercial contracts, M&A, IP, privacy/Internet law, corporate governance, employment/benefits, securities, governmental compliance and litigation/insurance. He played a key role in Provide Commerce's acquisition by Liberty Media, as well as the company's more recent acquisitions of RedEnvelope and Personal Creations.

Previously, Mr. Bilstad worked for MP3.com, a pioneering online music company, and its eventual acquirer Vivendi Universal, a French-owned media conglomerate, consolidating 38 US Internet companies to form VUNet USA and serving most recently as the group's SVP-legal affairs and secretary. Prior to which, Mr. Bilstad was a business associate at the law firm of Cooley Godward.

Mr. Bilstad has served in appointed leadership positions with non-profits such as the MP3.com Foundation and San Diego Social Venture Partners, on several subsidiary boards of directors, and on the advisory board for Blissport.com, a travel planning start-up.

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Mr. Bilstad holds a JD cum laude from Harvard Law School, where he was the Executive Editor of the Harvard Journal of Law & Technology and winner of the Irving Oberlin Memorial Award writing prize, and holds a BA magna cum laude from Duke University.

Norbert Kaut

Norbert W. Kaut serves as general counsel--corporate group at Meredith Corporation, a NYSE-listed media and marketing company. He manages legal services for and advises the company regarding corporate governance and securities, compliance, finance, employee benefits, information technology, licensing, online media, acquisitions, production & distribution, and general corporate business. He also serves as director or officer for several company subsidiaries.

Prior to joining Meredith, Mr. Kaut practiced at Nyemaster Goode law firm representing primarily banks and insurance companies in commercial transactions and litigation and software licensing and was an author of the Iowa anti-UCITA "bomb-shelter" statute. After law school he served in a two-year federal judicial clerkship. Mr. Kaut designed and taught the three credit-hour Cyberspace and the Law seminar at Drake Law School. Before law school, Mr. Kaut managed a college community center in Papua, New Guinea.

Mr. Kaut is active with state and national bar associations-currently serving as president of the ACC's Iowa Chapter. He is serving or has recently served on the boards of Iowans for Fair and Impartial Courts (also as treasurer), the Des Moines Public Library Foundation, the Des Moines Symphony Association, Des Moines Symphony Academy (also as president), and has coached youth soccer for the last ten years.

Mr. Kaut is a University of Iowa Liberal Arts College and College of Law graduate and was managing editor of the Iowa Law Review.

Kathryn Reid

Kathryn A. Reid is assistant vice president and counsel in the compliance and ethics section of Unum Group's Law Department. Her responsibilities include providing legal counsel regarding privacy and information security matters.

Prior to joining Unum, Ms. Reid served as in-house counsel and director of regulatory services for a privately held managing general underwriter, where her responsibilities included the oversight of contract compliance and filing and the management of consumer and regulatory complaints, corporate licensing, and legislative analysis, as well as providing general legal support.

Ms. Reid is a member of the ACC's IT, Privacy and e-Commerce Committee. She also is a member of the International Association of Privacy Professionals and is a Certified Information Privacy Professional.

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Ms. Reid is a graduate of the University of Maine School of Law and of Bowdoin College.

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New Regulatory Requirements and Legal Developments on the Internet and Privacy

Presented by:

Blake Bilstad, Jim Brashear, Norbert Kaut & Kathryn Reid

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Agenda

- Protecting Sensitive Data
- State Law Updates
- Federal Law Updates
- "Flash" Cookies
- General Developments in Case Law/Recent Enforcement Actions
- Privacy Developments in Employment
- Pending Federal Legislation
- Hot Button Issues – Online Privacy Regulation/Litigation
- On the Horizon

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Protecting Sensitive Data

- Protecting Social Security Numbers
- Protecting Credit Card Data
- Protecting Other Personal Information

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Protecting Social Security Numbers

What Legal Requirements Apply to the Collection, Use, and Retention of SSNs?

- 33 States have laws protecting SSNs
- These laws typically prohibit or restrict:
  - Public disclosure of SSN
  - Use of SSN as an identifier, log-in, or authenticator
  - Internet transmission of SSN without encryption
  - Display SSN on ID cards
  - Print SSN on any materials to be sent by mail

What Trends are Emerging in State SSN Legislation?

- Requirement of SSN protection policy
  - CT: H.B. 5658, 2008 Gen. Assem., Reg. Sess. (Conn. 2008)
  - MA: 201 Mass. Code Regs. §§ 17.01-04 (2008)
  - MI: Mich. Comp. Laws § 445.84
  - NM: N.M. Stat. §§ 57-12B-2, 3
  - NY: N.Y. Gen. Bus. Law § 399-dd(4)
  - TX: Tex. Bus. & Com. Code § 501.051-53
- Prohibition of encoding or embedding SSN into documents or cards
  - CA: Cal. Civ. Code §§ 1798.85-1798.86
  - NY: N.Y. Gen. Bus. Law § 399-dd

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SSNs: Emerging Trends (cont.)

- Application to truncated or derivative #
  - AZ: Ariz. Rev. Stat. § 44-1373
  - IL: 815 Ill. Comp. Stat. 505/2RR
  - MI: Mich. Comp. Laws §§ 445.81 TO 445.87
  - NE: Neb. Rev. Stat. § 48-237
  - NJ: N.J. Stat. Ann. § 56:8-164
  - NY: N.Y. Gen. Bus. Law § 399-dd (2007)
  - SC: S.C. Code § 37-20-180
- Proper destruction requirements
  - CT: Substitute House Bill 5658
  - CO: Colo. Rev. Stat. 6-1-712
  - GA: Ga. Code Ann. 10-15-1
  - MI: Mich. Comp. Laws Ann. § 445.84

SSNs: Emerging Trends (cont.)

- Prohibition of transmitting an electronic document or facsimile with SSN
  - MD: Md. Code Ann. Com. Law § 3402(a)(6)
- Prohibition of sale of SSN to third parties
  - AK: A.S. 45.48.420
  - MN: Minn. Stat. § 325E.59(a)(7)
  - NC: N.C. Gen. Stat. § 75-62(a)(6)
  - VT: Vt. Stat. Ann. tit. 9, § 2440(a)(6)
- Limitations on the Right to Collect SSN
  - AK: A.S. 45.48.410
  - KS: Kan. Stat. Ann. § 75-3520 (2006)

SSNs: What Do You Need to Do?

- Identify if and when your company requires SSNs
- Eliminate use of SSNs as a log-in, authenticator, or identifier
- Prevent transmission of SSNs through mail and by facsimile
- Discontinue the sale of SSNs to third parties
- Create a written SSN Policy
- Create a SSN Destruction Policy

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Protecting Credit Card Data

Payment Card Industry Data Security Standard (PCI DSS)

- PCI DSS is a comprehensive, multifaceted security standard.
- Created for "Merchants" – Any entity that accepts payment cards bearing the logos of any of the 5 members of PCI SSC (American Express, Discover, JCB, MasterCard or Visa) for goods or services.
- Includes requirements for security management, policies, procedures, network architecture, software design and other critical protective measures to help Merchants proactively protect customer account data.
- Current rules are v1.2.
- PCI Security Standards Council will continue to enhance as needed.

PCI DSS (cont.)

- July 1, 2010 – Security rules tightened for smaller cos.
- August 12, 2010 – PCI SSC released proposed revisions to PCI DSS and PA-DSS.
- September 1, 2010 – Further security mandate requires large scale card-accepting businesses to be fully PCI DSS compliant going forward.
- Three states have codified PCI DSS.
  - MN: MN. Stat. 325E.64
  - NV: Chapter 603A of NRS
  - WA: 2009 H.B. 1149, effective July 1, 2010
- Other states considering:
  - CA and TX, MA, CT, and NJ

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Complying with PCI DSS – A Checklist

- Complete a detailed self-assessment form.
- Figure out deadlines for compliance and meet them.
- Receive quarterly network scans from an independent auditor, if necessary.
- Complete a detailed on-site assessment (if > 6M transactions/yr.).
- Consider employing a PCI DSS consultant.
- Document your compliance.
- Remember that compliance requirements will continue to change and evolve with security threats — keep up!
- Great Resource - PCI Council's website: https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml

Laws on Security of Credit Card Data

- Fair and Accurate Credit Transactions Act of 2003 (FACTA) (PL 108-159, 12/04/03)
  - Amended the Fair Credit Reporting Act (FCRA), which promotes accuracy in consumer reports and is meant to ensure the privacy in them.
  - FACTA provisions intended to reduce identity theft include:
    - No credit card expiration dates can be included on receipts.
    - No more than the last five digits of the credit card number can be on receipts.

Laws on Security of Credit Card Data (cont.)

- Federal Trade Commission (FTC) Act:
  - Section 5 of the FTC Act prohibits unfair or deceptive acts and practices in or affecting commerce; relied upon by the FTC to challenge deceptive claims that companies have made about the privacy and security of their customers' personal information.
  - A representation, omission, or practice is deceptive if:
    - It is likely to mislead consumers acting reasonably under the circumstances; and, it is material—likely to affect consumer conduct or decisions with respect to the product at issue.
- FTC Disposal Rule:
  - Any business or individual who uses a consumer report for a business purpose must properly dispose of information in consumer reports and records to protect against "unauthorized access to or use of the information."
- FTC Safeguards Rule:
  - Requires financial institutions to take appropriate measures to protect customer information.

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Protecting Other Personal Information

State Laws Prohibiting Disclosure of Personally Identifiable Information

- MN: Minnesota Statutes §§ 325M.01 to .09
  - Requires Internet Service Providers to keep Personal Information private unless the customer consents to its disclosure.
    - Personal Information includes information that identifies a consumer by physical or electronic address or telephone number; a consumer as having requested or obtained specific materials or services from an Internet service provider; internet or online sites visited by a consumer; or any of the contents of a consumer's data-storage devices.

State Laws Prohibiting Disclosure of Personally Identifiable Information

- NV: Nevada Revised Statutes § 205.498
  - Requires Internet Service Providers to keep Personal Information confidential, with the exception of email address, and must provide consumers with notice of these confidentiality rights.
    - "All information concerning a subscriber, other than the electronic mail address of the subscriber, unless the subscriber gives permission, in writing or by electronic mail, to the provider of Internet service to disclose the information and the electronic mail address of a subscriber, if the subscriber requests, in writing or by electronic mail, to have the electronic mail address of the subscriber kept confidential."
    - Internet Service Providers shall provide notice of the above requirements to each of its subscribers. The notice must include, without limitation, a conspicuous statement that a subscriber may request, in writing or by electronic mail, to have the electronic mail address of the subscriber kept confidential.

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State Laws Requiring Disclosure to Customers of the Sale or Sharing of Their Personal Information

- CA: California Civil Code §§ 1798.83 to .84
  - Requires all nonfinancial businesses to disclose to customers, in writing or by electronic mail, the types of personal information the business shares with or sells to a third party for direct marketing purposes or for compensation.
  - Businesses may post a privacy statement that gives customers the opportunity to choose not to share information at no cost
- UT: Utah Code §§ 13-37-101, -102, -201, -202, -203
  - Also requires all nonfinancial businesses to disclose to customers, in writing or by electronic mail, the types of personal information the business shares with or sells to a third party for direct marketing purposes or for compensation.

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State Law Updates

- Security Breach Legislation in 2010
- Expanding Scope of Security Breach Notification Laws
- Update on Maine's COPPA 2.0

New or Amended State Legislation

- MS: House Bill 538; effective July 1, 2011
  - Requires notice of security breach if a breach involves a name with Social Security number, driver's license, or account number in combination with any required security code, access code or password that would permit access to an individual's financial account.
  - This bill leaves only four states without a notification law: Alabama, Kentucky, New Mexico, and South Dakota.
- VA: 2010 H.B. 1039, Va. Code § 18.2-186.6; effective January 1, 2011
  - Requires notification to residents of the Commonwealth if unauthorized access and acquisition of unencrypted and unredacted computerized data occurs that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud.

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New or Amended State Legislation (cont.)

- WA: 2010 H.B. 1149, amended Wash. Rev. Code § 19.255.010; effective July 1, 2010
  - Requires businesses that own or license computerized data that includes personal information to disclose any breach of the security system if a reasonable person would believe that the breach could cause unencrypted data to be acquired by an unauthorized person.
  - Encourages financial institutions to reissue credit and debit cards to consumers when appropriate to help reduce the incidence of identity theft and associated costs.
  - Permits financial institutions to recoup data breach costs associated with such reissuance from large businesses and card processors who are negligent in maintaining or transmitting card data.

Other related pending state legislation

- CA: S.B. 1166
  - Requires any agency, person, or business required to issue a security breach notification that is required to issue a security breach notification to more than a specified number of residents to electronically submit a single sample copy of that security breach notification to the Attorney General. Requires the toll-free telephone numbers and addresses of the major credit reporting agencies if the breach exposed a social security number, a driver's license or a state identification card number; as of August 23, 2010, passed by CA Legislature and sent to Governor for signature.
- IL: H.B. 5708
  - Mends the Personal Information Protection Act; provides that "breach of the security of the system data" includes the unauthorized use of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by a data collector; provides that a data collector that owns or licenses personal information shall notify the Attorney General of a breach.

Other related pending state legislation (cont.)

- NJ: A.B. 175; enhances duty and broadens liability concerning security of personal information, and response to breach of security, under Identity Theft Prevention Act.
- NY: S.B. 3760; provides for notification of persons whose private information is subject to an unauthorized acquisition.
- PA: H.B. 1458; requires disclosure to customers of any breach of security of computerized records.

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Expanding Scope of Security Breach Notification Laws

- August 2009 - Department of Health and Human Services and FTC published rules on when and how covered entities under HIPAA and vendors of personal health records must notify individuals of security breaches concerning their unsecured protected health information.
- States have recently begun amending their security breach notification laws to include breach medical and other health information, in line with the federal requirements.

Expanding Scope of Security Breach Notification Laws (cont.)

- CA: A.B. 1298; effective January 1, 2008
  - Expands application of the Confidentiality of Medical Information Act (CMIA) to include any business organized for the purpose of maintaining medical information in order to make the information available to an individual or a provider of health care for purposes of managing health care information or for treatment or diagnosis, even if the business is not organized for the primary purpose of maintaining medical information for treatment or diagnosis.
  - Expands definition of "personal information," as used in the data breach notification laws, to include medical and health information. This security breach notification requirement applies to all entities, whether or not they are health care providers under the CMIA.
- TX: H.B. 2004; amended; §521.002(a)(2); effective April 1, 2009
  - "Sensitive personal information" amended to include health care information, such as information about an individual's physical or mental health or payment for health care services.

Expanding Scope of Security Breach Notification Laws (cont.)

- MO: Mo. Rev. Stat. § 407.1500; effective August 28, 2009
  - "Medical information" and "health insurance information" is included in their definition of personal information.
- VA: Va. Code §32.1-127.1:05; effective January 1, 2011 enacts a Medical Breach law
  - "Medical information" includes any information regarding an individual's medical or mental health history, mental or physical condition or medical treatment or diagnosis by a health care professional; or an individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history.
  - At this time only pertains to government entities and organizations supported by public funds.

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Update on Maine's COPPA 2.0

- August 28, 2009: Attorney General of Maine promised he would not enforce the law as written.
- New bill was enacted, then signed into law on March 29, 2010, repealing the original COPPA 2.0 law and replacing it.
- Strictly interpreted, the new law creates two strict liability offenses:
  - One for collection of information if the reason for the collection is to promote pharmaceutical sales
  - One for the use of any information about a minor to promote pharmaceutical sales, whether or not the information was originally collected for that purpose
  - Extends to minors of ages 13-16

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New Federal Legislation

HITECH Act

- Health Information Technology for Economic and Clinical Health Act, Sec. 13001 of the American Recovery and Reinvestment Act of 2009 (H.R. 1; P.L. 111-005)
- Amended HIPAA, including provisions re: use of Personal Data
  - Establishes electronic records plan to boost security and privacy controls beyond the HIPAA requirements.
  - Requires doctors to track any disclosure of a patient's medical information.
- Established HIPAA Security Breach Notification Rules
  - Apply to Covered Entities: health plans, health plan clearinghouses, and health care providers who transmit any health information in electronic forms in connection with a transaction covered by a HIPAA standard
  - Also apply to Business Associates and some third party vendors of personal health care records
  - Impacts on providers and other Covered Entities include: Requires doctors to post information about security breaches if a breach affects 10 or more patients; if a security breach affects $\geq$ 500 patients, practices must notify all of their patients, a local media outlet, and the HHS sec'y.
- HHS promulgating rules; state attorneys general authorized to enforce HIPAA. Aggressive fines for violations.

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Dodd-Frank Wall Street Reform and Consumer Protection Act [H.R. 4173]

- Changes advertising standards for financial services.
- Mandates certain information be included in ads.
- Does away with "abusive" advertising practices.
  - No definition given for "abusive"
- Must disclose costs, benefits, and risks of financial services in plain English.

What do you need to do?

- Comply with standards in the Dodd-Frank Bill
- Evaluate HITECH impact
  - Review compliance requirements and implement as appropriate for your business.
  - Adhere to the new privacy standards concerning health information.
  - Note: These are stricter than HIPAA requirements.

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"Flash" Cookies

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"Flash" Cookies

- Defined:
  - Uses Adobe Flash Player to save user information on a computer as a cookie.
    - Are not controlled by browser privacy settings.
    - Cannot be deleted by using browser tools.
    - Can be deleted on the Adobe website.
  - Can store up to twenty-five (25) times more data.
- How They Work:
  - Websites use the same user ID in its HTML and Flash Cookies.
  - When the user deletes the HTML cookie, the website operator uses their Flash storage bin and retrieve the user's old number.
  - The website operator reapplies the old number to the user's browsing history, making these cookies reappear.

"Flash" Cookies (cont.)

- Complaints
  - Repopulation of deleted HTML Cookies
  - Violation of user privacy
  - Hacking concerns
    - The "Flash" cookies circumvent user's browser cookie preferences.
- Legal Action
  - Joseph Malley *et al.* against Quantcast, Facebook, Netflix, Myspace, and several other companies
    - Alleges that the use of Flash Cookies to re-create cookies previously deleted by internet users violated eavesdropping and hacking laws.
    - The plaintiffs brought this court case in a U.S. District Court in Central California in July of 2010.

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General Developments in Case Law and Recent Enforcement Actions

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General Developments in Case Law

- Viacom Int'l v. Youtube (SD NY June 23, 2010)
  - Southern District Court of New York held that the Digital Millennium Copyright Act's "safe harbor" provision protected Youtube from Viacom's copyright infringement claims.
    - Decision reaffirmed the notion that online services are protected when they work in conjunction with copyright holders to protect their rights online.
- Major v. McAllister (Mo. App. December 23, 2009)
  - Missouri Court of Appeals case affirms the binding nature of "browserwrap" agreements.
    - Links to terms and conditions must be viable on every page and when entering into the contract.

General Developments in Case Law (cont.)

- Actuate Corp v. IBM (Ca. N. District December 16, 2009)
  - Northern District Court of California concluded that unauthorized use of a password may constitute circumvention under the DMCA.
- Clear v. Superior Court, (Cal.App. 4 Dist. May 24, 2010)
  - Social Networking Case
  - Involved the defendant (Clear) creating a false MySpace profile of a pastor which stated that he engaged in homosexual acts and used narcotics.
  - The court determined that the defendant could be charged with criminal "personation" due because the allegations could cause him to be fired or otherwise defamed.

Recent Enforcement Actions

- In the Matter of Twitter, Inc. (FTC, No. 092 3093, settlement preliminary approval 6/24/10)
  - FTC complaint alleged that serious lapses in Twitter's data security allowed hackers to obtain unauthorized administrative control of Twitter, including access to non-public user information, tweets that consumers had designated private, and the ability to send out phony tweets from any account.
  - FTC charged that Twitter deceived consumers and put their privacy at risk by failing to safeguard their personal information, violating Section 5(a) of the FTC Act.
- In the Matter of Dave & Buster's , Inc. (FTC, No. 082 3153, May 20, 2010)
  - FTC complaint alleged that company left consumers' credit and debit card information vulnerable to hackers, resulting in several hundred thousand dollars in fraudulent charges.
  - FTC charged that Dave & Buster's failure to employ reasonable and appropriate security measures to protect personal injury is an unfair act or practice in or affecting commerce in violation of Section 5(a) of the FTC Act.

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Privacy in Employment

Unmasking Anonymous Commenters

- Anonymous Online Speakers v. United States District of Nevada Reno [C.A. 9, Jul. 12, 2010]
  - Makes it easier in the Ninth District for employers and executives to unmask users who anonymously post attacks of these employers and executives on the Internet.
- Maxom v. Ottawa Pub. Co. (Appellate Court, 3rd Dist. 2010)
  - Allows for plaintiffs who claim sufficient defamation to unmask anonymous online commenters.
- 20/20 Financial Consulting, Inc. v. Does 1-5 (United States District Court of Colorado, 2010)
  - Authorizes the use of Fed. R. Civ. P. 26(f) for the purpose of identifying unknown online defendants.

Privacy in Communications

- City of Ontario v. Quon (529 F. 3d 892)
  - Essential Lessons from the Decision:
    - Make sure that electronic resources policy is not limited to email or to communications transmitted through the company's email server.
    - Avoid a situation where a management level official countermands corporate policy aimed at defeating employee's privacy expectations.
    - Act reasonably when searching and reviewing employee's electronic communications.
    - Even a perfectly crafted electronic resources policy might be deemed too intrusive.

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Legislation Changes: The Dodd-Frank Bill

- Employees who complain to the SEC are automatically covered by the anti-retaliation provision
  - Employees must satisfy the reasonable belief standard.
- Invalidates any effort to require claims to be arbitrated rather than go to court and be heard by a jury.
- Rewards employee whistle blowers
- Essential Lessons:
  - Reward employee whistle blowers
  - Make sure to create an environment void of retaliation
  - Be diligent in investigating cases of fraud

Social Networking Sites

- Widespread use requires updating electronic resources policy.
- Companies must adapt by including social media policies in their electronic resources policy
  - Set-up rules of engagement and other guidelines to address how employees should conduct themselves on social networking sites when discussing their jobs and/or employers.

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Pending Federal Legislation

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Pending Federal Legislation

Subject Matter	Bill	Description
Breach Notification	**H.R. 2211**: *Data Accountability and Trust Act*	Requires entities to implement safeguards to secure PII; Establishes data breach notification procedures; Provides for some state preemption
	S. 139: *Data Breach Notification Act*	Requires data breach notification
Cybersecurity	**S. 733**: *Cybersecurity Act of 2009*	Provides the President with an Internet "kill switch" in the event of a cyber terrorist attack; Establishes of a Cybersecurity Advisory Panel
	H.R. 4061: *Cybersecurity Enhancement Act of 2010*	Authorizes grants for cybersecurity research, develops cybersecurity workforce, strengthens the relationship between the public and private sectors concerning cyber security
Health	**S. 444**: *National Health Information Technology and Privacy Advancement Act of 2009*	Provides for the establishment of a national health information technology and privacy system.
	H.R. 2630: *Protect Patients and Physicians Privacy Act*	Creates opt-out for federally mandated electronic records system; Opposes requirements imposed by Patient Protection and Affordable Healthcare Act (Healthcare Reform)

Pending Federal Legislation (cont.)

Subject Matter	Bill	Description
Identity Theft	**H.R. 123**: *Credit Agencies ID Theft Responsibilities Act of 2009*	Requires consumer reporting agencies to evaluate and report potential identity theft.
	H.R. 220: *Identity Theft Protection Act of 2009*	Prohibits the use of SSNs except in limited circumstances.
	S. 141/H.R. 122: *Protecting the Privacy of Social Security Numbers Act*	Prohibits the display, sale, or purchase of SSNs without affirmative consent.
	S. 1261: *Providing for Additional Security in States' ID Act of 2009*	Helps to better protect the security, confidentiality, and integrity of PII collected by States when issuing driver's licenses and other identification documents.
	H.R. 427: *Notify Americans Before Outsourcing Personal Information Act*	Prohibits the transfer of PII to any business or person outside of America without notice.
Online Advertising	**H.R. 5777**: *BEST PRACTICES Act*	Fosters transparency about commercial use of personal information
	S. 1490: *Personal Data Privacy and Security Act*	Requires interstate businesses to form data breach programs and to notify affected individuals.
	S. 3386: *Restore Online Shoppers' Confidence Act*	Makes it unlawful for an initial merchant to disclose such financial account number or other billing information to a post-transaction third party seller

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Hot Button Issues – Online Privacy Regulation and Litigation

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Hot Button Issues – Online Privacy Regulation and Litigation

- Changes to privacy policies, including handling of information gathered under prior policy and whether consent needed for material changes.
- User controls over privacy settings and changes – opt-out versus opt-in.
- Behavioral Advertising – third party using of cookies, tracking pixels, etc. to target advertisements based on behavior across multiple websites. Combining anonymous and specific user data.

Hot Button Issues – Online Privacy Regulation and Litigation (cont.)

- Datapass – passing data, including contact and/or billing and payment information to third party marketing partners.
- Future Regulation – FTC comments that notice and control do not seem to be working. Also, online companies continue to push the envelope (*e.g.*, Affinion, WebLoyalty).
  - Chairman Rockefeller and Senate Subcommittee very active in pursuit (*e.g.*, S.3386 and 8/4/10 "Live Check" investigation of Affinion)

Resources on Privacy and "Best Practices"

- FTC webpage regarding Behavioral Advertising principles: http://www.ftc.gov/opa/2009/02/behavad.shtm
- FTC website regarding privacy: http://www.ftc.gov/privacy/
- FTC website regarding information security: http://www.ftc.gov/infosecurity/
- California Office of Privacy Protection Business tab: http://privacy.ca.gov/business.htm

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Other Issues on the Horizon

Other Issues on the Horizon

- Warrantless Personal Email Searches
  - In a number of cases, the Federal Government has tried to demand that an email provider turn over emails without a warrant.
    - This practice has been deemed illegal in two districts but still is attempted and might be allowed by a court.
- Internet Human Rights Bill
  - Establishes corporate liability for aiding foreign countries to violate human rights
    - Companies could be subject to criminal and civil charges
  - Bill would require companies to take reasonable steps to protect human rights.

Other Issues on the Horizon (cont.)

- FTC's Review of Children's Online Privacy Protection Act of 1998 (COPPA) (15 U.S.C. 6501 et seq.) and Children's Online Privacy Protection Rule (16 C.F.R. §312.1 et seq.)
  - FTC thinks that changes in the Internet and social media services warrant a re-examining of the COPPA Rule; indicated that they seek to expand COPPA; seeking comment on broad array of issues www.ftc.gov/privacy/privacyinitiatives/childrens2010rulereview.html
- Enforcement of Identity Theft Red Flags Rule Further Delayed
  - FTC enforcement of the "Red Flags" Rule through December 31, 2010, while Congress considers legislation that would affect the scope of covered entities; this delay does not affect other federal agencies' enforcement of the original November 1, 2008, deadline for institutions subject to their oversight.
  - ABA and AMA litigation

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Other Issues on the Horizon (cont.)

- FTC's "Do Not Track" Registry
  - FTC and Congress are thinking about implementing a "Do Not Track" Registry.
  - This policy would be similar to the "Do Not Call List."
    - Internet users would be able to sign up for this registry and then opt-out of targeted advertisements.
- Report from FTC Privacy Roundtables
  - FTC held public roundtables in December 2009, and January and March 2010.
  - Obtained input from broad array of stakeholders on existing approaches, developments in the marketplace, and potential new ideas.
  - Themes that emerged have led FTC to consider ways to improve consumer privacy; FTC's report expected later in 2010.

Other Issues on the Horizon (cont.)

- National Strategy for Trusted Identities in Cyberspace
  - Goal: to address the need for secure, interoperable, and easy-to-use online identity management capabilities in the United States.
  - Businesses and government agencies able to rely on an identification process performed, and identity information provided, by any one of several 3d party identity providers; portable across different systems and entities.
  - Draft issued in June of 2010; final plan expected October of 2010.

Other Issues on the Horizon (cont.)

- International Concerns
  - Italy v. Google Case
  - European Union Privacy Developments
  - Possible BlackBerry (RIM) bans

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Presenters

- Blake Bilstad
- Jim Brashear
- Norbert Kaut
- Kathryn Reid

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Questions and Answers

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Appendix

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Appendix – Links to Reference Material

Protecting Sensitive Data

- Requirement of Social Security Number Policy
  - http://www.cga.ct.gov/2008/ACT/PA/2008PA-00167-R00HB-05658-PA.htm (CT: H.B. 5658)
  - http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf (201 Mass. Code Regs. 17.01- 17.04)
  - http://law.justia.com/michigan/codes/mcl-chap445/mcl-445-84.html (Mich Comp. Laws 445.84)
  - http://law.justia.com/newmexico/codes/nmrp/id_57-12b-3-13179.html (N.M. Stat 57-12B-3)
  - http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$GBS399-DD*4$$@TXGBS0399-DD*4+&LIST=SEA4+&BROWSER=EXPLORER+&TOKEN=39297721+&TARGET=VIEW (N.Y. Gen. Bus. Law 399-dd(4))
  - http://www.tlc.state.tx.us/legal/b&c/code/b&c_title11/80C360(3).HTML (Tex. Bus. & Com. Code 501.051-53)
- Application of Derivative or Truncated Numbers
  - http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/44/01373.htm&Title=44&DocType=ARS (Ariz. Rev. Stat. 44-1373)
  - http://www.michigan.gov/documents/Social_Security_Number_Privacy_Act_118553_7.pdf (Mich Comp Laws 445.83)
  - http://www.leg.ne.gov/laws/statutes.php?statute=48-237 (neb. Rev. Stat. 48-237)
  - http://www.njleg.state.nj.us/2004/bills/pl05/226_.htm (N.J. Stat. Ann. 56:8-164)
  - N.Y. Gen. Bus. & Com. Law 399-dd(4)- link same as above
  - http://www.scstatehouse.gov/code/t37c020.htm (S.C. Code 37-20-180)
- Prohibition of Embedding or Encoding Number into Documents or Cards
  - http://law.onecle.com/california/civil/1798.85.html (Cal. Civ. Code 1798.85)
  - N.Y. Gen. Bus. & Com. Law 399-dd(4)- link same as above
- Proper Destruction Requirements
  - http://www.cga.ct.gov/2008/ACT/PA/2008PA-00167-R00HB-05658-PA.htm (CT: H.B. 5658)
  - http://www.state.co.us/gov_dir/leg_dir/olls/sl2004a/sl_393.htm (Colo. Rev. Stat. 6-1-712)
  - http://epic.org/privacy/ssns/sb475.html (Ga. Code Ann. 10-15-2)
  - Mich. Comp. Laws 445.84- link same as above
- Prohibition of Transmitting an Electronic Document or Facsimile with Number
  - http://law.justia.com/maryland/codes/gcd/14-3402.html (Md. Code Ann. Com. Law 3402(a)(6))
- Prohibition of Transmitting an Electronic Document or Facsimile with Number
  - http://law.justia.com/maryland/codes/gcd/14-3402.html (Md. Code Ann. Com. Law 3402(a)(6))

Appendix – Links to Reference Material (cont.)

- Prohibition of Sale of Number to Third Party
  - http://codes.lp.findlaw.com/akstatutes/45/45.48./03./45.48.420 (A.S. 45.48.420)
  - https://www.revisor.mn.gov/bin/getpub.php?pubtype=STAT_CHAP_SEC&year=2006&section=325E.59 (Minn. Stat. 325E.59(a)(7))
  - http://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_75/Article_2A.pdf (N.C. Gen. Stat. 75-62)
  - http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=09&Chapter=062&Section=02440 (Vt. Stat. Ann. Tit 9 2440(a)(6))
- Limitations on the Right to Collect Numbers
  - http://codes.lp.findlaw.com/akstatutes/45/45.48./03./45.48.410 (A.S. 45.48.410)
  - http://kansasstatutes.lesterama.org/Chapter_75/Article_35/75-3520.html (Kan. Stat. Ann. 75-3520)
- PCI DSS Enactment
  - https://www.revisor.mn.gov/statutes/?id=325E.64 (MN. Stat. 325E.64)
  - http://www.leg.state.nv.us/nrs/nrs-603a.html (Chapter 603A of NRS)
  - http://apps.leg.wa.gov/documents/WSLdocs/2009-10/Pdf/Bills/Session%20Law%202010/1149-S2.SL.pdf (WA 2009 H.B. 1149)
- Prohibiting Disclosure of Personally Identifiable Information
  - https://www.revisor.mn.gov/statutes/?id=325M (MN Stat. 325M.01 - .09)
  - http://www.leg.state.nv.us/nrs/NRS-205.html#NRS205Sec498 (NV Rev. Stat. 205.498)
- Requiring Disclosure to Customers of Sale or Sharing
  - http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=01001-02000&file=1798.80-1798.84 (Cal. Civ. Code 1798.83 - .84)
  - http://le.utah.gov/~code/TITLE13/13_37.htm (UT Code 13-37-101, -102, -201, -202, -203)

State Law Updates

- New/Amended Legislation
  - http://billstatus.ls.state.ms.us/documents/2010/pdf/HB/0500-0599/HB0583SG.pdf (MS H.B. 583)
  - http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+HB1039ER (VA H.B. 1039 2010)
  - WA H.B. 1149- link same as above
- Other Pending Legislation
  - http://info.sen.ca.gov/pub/09-10/bill/sen/sb_1151-1200/sb_1166_cfa_20100414_101247_sen_floor.html (CA S.B. 1166 Analysis)
  - http://e-lobbyist.com/gaits/IL/HB5708 (IL H.B. 5708 Summary)

Appendix – Links to Reference Material (cont.)

- Other Pending Legislation
  - http://info.sen.ca.gov/pub/09-10/bill/sen/sb_1151-1200/sb_1166_cfa_20100414_101247_sen_floor.html (CA S.B. 1166 Analysis)
  - http://e-lobbyist.com/gaits/IL/HB5708 (IL H.B. 5708 Summary)
- Expanding Scope of Laws
  - http://info.sen.ca.gov/pub/07-08/bill/asm/ab_1251-1300/ab_1298_cfa_20070905_200232_asm_floor.html (CA A.B. 1298. This contains some analysis with the law.)
  - http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB02004F.pdf (TX H.B. 2004)
  - http://www.moga.mo.gov/statutes/c400-499/4070001500.htm (Mo. Rev. Stat. 407.1500)
  - http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-127.1C05 (Va. Code §32.1-127.1:05)
- Maine's COPPA 2.0 Update
  - http://www.mainelegislature.org/legis/bills/display_ps.asp?id=16778PID=1456&snum=124 (ME LD 1677)

New Federal Legislation

- Recovery and Reinvestment Act (page 150-154)
  - http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf
- Dodd-Frank Act (Subtitle C)
  - http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf

Flash Cookies

- http://www.wired.com/threatlevel/2010/07/zombie-cookies-lawsuit/
- http://blogs.wsj.com/digits/2010/07/30/lawsuit-tackles-files-that-re-spawn-tracking-cookies/tab/print/
- http://www.bbc.co.uk/news/technology-10787882?print=true

General Development in Case Law

- Viacom v. Youtube
  - http://scholar.google.com/scholar_case?case=2164384724298810069&q=viacom+youtube+&hl=en&as_sdt=1000002&as_ylo=2009
- Major v. Servicemagic
  - http://www.courts.mo.gov/file.jsp?id=36294

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Appendix – Links to Reference Material (cont.)

- Actuate v. IBM
  - http://docs.justia.com/cases/federal/district-courts/california/candce/3:2009cv05892/222627/32/
- Clear v. Superior Court of San Bernardino
  - http://scholar.google.com/scholar_case?case=14220419619298328484&q=%22Clear+v+Superior+Court%22+Cal.App.+4+Dist.+May+24,+2010&hl=en&as_sdt=2004

Privacy In Employment

- Anonymous Online Speakers v. United States District Court for the District of Nevada Reno
  - http://www.ca9.uscourts.gov/datastore/opinions/2010/07/12/09-71265.pdf
- Maxon v. Ottawa Publishing Company
  - http://www.state.il.us/court/Opinions/AppellateCourt/2010/3rdDistrict/June/3080805.pdf
- Financial Consulting v. John Does 1-5
  - http://www.scribd.com/doc/31421313/cod-03902818228
- City of Ontario vs. Quon
  - http://www.dorsey.com/eu_le_ontariovsquon_062310/
  - http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf
- Dodd-Frank Act (Section 748, c, h, n)
  - http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf

Pending Federal Legislation

- S. 773—Cybersecurity Act of 2009
  - http://www.eff.org/deeplinks/2009/04/cybersecurity-act
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.00773:
  - http://news.techworld.com/security/3228198/obama-internet-kill-switch-plan-approved-by-us-senate/?olo=rss

Appendix – Links to Reference Material (cont.)

- H.R. 4061—Cybersecurity Enhancement Act of 2010
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.4061:
- S. 444—National Health Information Technology Act
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.00444:
- H.R. 2630—Protect Patients and Physicians Privacy Act
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.02630:
- H.R. 123—Credit Agencies Identity Theft Responsibilities Act
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00123:
- H.R. 220—Identity Theft Prevention Act of 2009
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00220:
- H.R. 122—Protecting the Privacy of Social Security Numbers Act of 2009
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.122:
- S. 1261—PASS ID Act
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.1261:
- H.R. 427—Notify Americans Before Outsourcing Personal Information Acr
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00427:
- H.R. 5777—BEST PRACTICES ACT
  - http://energycommerce.house.gov/documents/20100720/HR5777_introduced.pdf
  - http://www.broadcastingcable.com/article/454975-Rush_Introduces_Opt_Out_In_Privacy_Notification_Bill.php
  - http://www.house.gov/list/press/il01_rush/pr_100719_best_practices_act.shtml
- Consumer Privacy: Boucher Bill
  - http://www.infolawgroup.com/2010/05/articles/behavioral-advertising/breaking-down-the-boucher-bill/
  - http://www.lexology.com/library/detail.aspx?g=b10bf5b1-2b2d-4798-b677-6beb10e2844c

Appendix – Links to Reference Material (cont.)

- Kerry's Consumer Privacy Bill
  - http://www.house.gov/list/press/il01_rush/pr_100719_best_practices_act.shtml
  - http://voices.washingtonpost.com/posttech/2010/07/sen_kerry_to_introduce_interne.html
- S. 3386—Restore Online Shoppers' Confidence Act
  - http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.03386:
  - Committee on Commerce, Science and Transportation (Senate Report)
    - http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=e1b50585-0171-4661-992d-1435a100a09b&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd89d&MonthDisplay=5&YearDisplay=2010
    - http://commerce.senate.gov/public/?a=Files.Serve&File_id=439184c5-0965-4bb9-aa98-4a114b00a42e

Hot Button Issues – Online Privacy Regulation / Litigation

- FTC/state regulatory links
  - http://www.ftc.gov/opa/2009/02/behavad.shtm (Behavioral Advertising)
  - http://www.ftc.gov/privacy/ (privacy issues/best practices)
  - http://www.ftc.gov/infosecurity/ (information security)
  - http://privacy.ca.gov/business.htm (California)
- Chairman Rockefeller/Senate Committee on Commerce, Science and Transportation
  - http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=e1b50585-0171-4661-992d-1435a100a09b&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd89d&MonthDisplay=5&YearDisplay=2010 (aggressive Internet marketing practices)
  - http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=1ca98357-9b4f-466a-9306-cd5aa2a2c8ec&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd89d (Affinion and "live check" practices)

On the Horizon

- Review of COPPA
  - http://www.foxnews.com/scitech/2010/07/07/proposal-include-teens-childrens-online-privacy-act-hurt-free-speech-privacy/print

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Appendix – Links to Reference Material (cont.)

- Unwarranted Searches of Personal Email
  - http://news.cnet.com/8301-13578_3-20002423-38.html?tag=mncol
  - http://news.cnet.com/8301-13578_3-20002722-38.html?tag=mncol;txt
- Internet Human Rights Bill
  - http://www.pcworld.com/article/190579/senator_to_introduce_internet_human_rights_bill.html
- Google/Italy Decision
  - http://www.nytimes.com/2010/02/25/technology/companies/25google.html
- BlackBerry Bans
  - http://www.nytimes.com/2010/08/06/technology/06rim.html
  - http://www.nytimes.com/2010/08/03/technology/03blackberry.html
  - http://www.bloomberg.com/news/print/2010-08-05/indonesia-government-say-it-has-no-plan-to-ban-rim-s-blackberry-service.html
- "Cookies" and EU Law
  - http://www.lexology.com/library/detail.aspx?g=cce87cdb-1bcb-491a-b9ad-e94519575af0
- Google/Europe
  - http://online.wsj.com/article/SB10001424052748704017904575408990991983992.html?mod=googlenews_wsj

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