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## **Data Protection Administration Repeats Call for Privacy Bill: Laws Could Enhance Competitiveness Abroad**

*by Tamlin H. Bason*

The Obama administration favors legislation to establish basic data protection guidelines, which could enhance U.S. businesses' competitiveness abroad, a Commerce Department official told federal lawmakers Sept. 15 at a hearing in internet privacy.

If fact, if lawmakers do not enact base privacy guidelines, domestic companies' competitive stance could be harmed in the global marketplace, Nicole Lamb-Hale, assistant secretary for Manufacturing and Services of the International Trade Administration.

Lamb-Hale made her comments at a hearing of the House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade on "Internet Privacy: The Impact and Burden of EU Regulation."

The lack of a privacy framework leaves U.S. companies vulnerable, she told lawmakers.

### **Global Competition at Stake**

Global competitors have been increasingly able to convince clients that the dearth of privacy legislation in the United States will lead to less secure data in the States, Lamb-Hale said.

That perception causes U.S. companies to face market setbacks, even if they comply with the U.S.-EU Safe Harbor Framework, she added.

Lamb-Hale called the safe harbor the most efficient way for U.S. companies to transfer data outside the European Union, but said the administration nonetheless supports legislation.

The safe harbor is a data protection certification registry that allows U.S. companies and organizations that voluntarily pledge compliance with basic data protection safeguards to transfer personal information outside of the European Union without running afoul of the EU Data Protection Directive (95/46/EC).

Lamb-Hale also said that the EU Data Protection Directive has proven to be too inflexible, and therefore should not necessarily serve as a model for U.S. legislation.

“It would help the competitiveness of our businesses if we had baseline consumer privacy protections that are principles, and that are flexible and take into account the changing economy and the changing technologies,” Lamb-Hale said.

The administration has previously expressed its support for pending privacy legislation, including the Commercial Privacy Bill of Rights Act of 2011 (S. 799), cosponsored by Sen. John Kerry (D-Mass.) and Sen. John McCain (R-Ariz.) (71 PRA, 4/13/11).

That bill would create an omnibus data protection regime based on “fair information practice principles,” and set some baseline standards regarding which practices are presumptively acceptable. The proposal would apply broadly across all industry sectors, with certain limitations for already-regulated industries.

### **Bono Mack: Regulation Could Stifle Innovation**

Many of the lawmakers on the subcommittee, including chairwoman Rep. Mary Bono Mack (R-Calif.), voiced concerns that government regulation could stifle innovation. But Bono Mack admitted that some intervention may be needed, given what she described as the industry’s shortcomings in self-regulation.

“I do not believe that the industry has proven that it’s doing enough to protect American consumers. While government, unfortunately, tends to overreach every time it gets involved in the marketplace,” Bono Mack said.

The lawmakers concerned about the effects of the European Union’s approach to online privacy pointed to a study conducted by another witness, Catherine Tucker, from the MIT Sloan School of Management.

Tucker studied the impact of European data protection law on online ads over a 10-year period. The results indicated that on the whole, companies that complied with EU privacy law had a 65 percent reduction in the effectiveness of their online ads.

Although each country in the European Union passed its own legislation to implement the Data Protection Directive, the result in most countries was the erection of substantial barriers that limited the ability of companies to engage in behavioral advertising, Tucker said in her testimony. The inability to target only customers who may be interested in a company’s products decreases the efficiency of advertisements and leads to unintended consequences, she said.

### **Lacking U.S. Privacy Model, Other Countries Follow EU**

Peter P. Swire, a professor at the Mortiz College of Law at the Ohio State University, raised the concern that a number of countries are now either mulling over or implementing their own online privacy legislation.

Swire said that despite its faults, the EU Data Directive serves as a model for most of these countries simply because the United States has not put forward a workable alternative.

“If we had a baseline approach in the United States that was simple and easy to communicate, I think it would be a lot easier for [these countries] to copy the U.S. approach, or at least for us to have U.S. principles recognized around the world,” Swire said. “If we don’t do that, we are risking having a very bad model become the practice generally.”

While Swire and Hale-Lamb advocated one comprehensive privacy law, other witnesses urged the lawmakers to continue the status quo.

The Fair Credit Reporting Act, the Health Insurance Portability and Accountability Act, and the Electronic Communications Privacy Act are just a few industry-specific U.S. privacy statutes. Stuart R. Pratt, of the Consumer Data Industry Association, said that the sector-specific approach has proven efficient.

He said the law resulting from this approach have been narrowly constructed so as not to impinge on the free speech rights of U.S. citizens.

#### **EU Directive Called ‘Dated.’**

**Paula J. Bruening, vice president of the Global Policy Centre for Information Policy Leadership, Hunton & Williams LLP, highlighted in her testimony the “key areas where the Directive is dated.”**

**The EU Data Directive, she said in her written statement, “imposes administrative notification requirements that often do little to advance privacy, but that place significant burdens on companies.”**

**It also “does not in many cases serve the global nature of data flows, and does not sufficiently take into account the way in which data is collected, used, stored, shared and accessed,” she said.**

**Bruening noted the EU rules on the transfer of data to countries outside the European Union do not mesh well with today’s global data flows, which include cloud computing.**

**The rules allow EU data to be transferred only countries that the European Commission deems to provide adequate protections for personal data, and fewer than 10 countries, she said, have received that designation. Alternate mechanisms for transferring data out of the EU to third countries are “cumbersome,” Bruening told lawmakers.**

#### **Risks of Adopting v. Not Adopting Privacy Laws**

A few years ago, the British Columbia determined that U.S. privacy laws were too lax, and barred a number of cloud computing contracts that would have meant sending the data to the

United States. Swire said the example demonstrated the real effects associated with a failure to enact comprehensive online legislation.

According to Swire, these concerns are particularly relevant now because “the risk of protectionism is growing again.” To combat this protectionism, Swire said that American companies needed to be able to demonstrate to their global consumers that the United States does in fact care about privacy.

Rep. Cliff Stearns (R-Fla.) questioned whether the dangers of regulation outweighed the hazards of not enacting privacy legislation.

Stearns said the United States continues to be the primary innovator of new internet applications, pointing to Twitter, Facebook, Groupon, and YouTube. Many of these products, he noted, are supported by behavioral advertisements.

Legislation requiring users to opt-in to having their browsing activity tracked—which many countries in the European Union have enacted—would greatly reduce these types of innovation, Stearns said.

According to Stearns, if the United States does not adopt privacy rules such as those found in Europe, it risks seeing U.S. companies being shut out of certain markets. But if it does enact such legislation, it could cripple innovation, Stearns said.

Swire said that the answer to the problem could come in the form of well-drafted legislation. He suggested legislation that contained many of the non-intrusive principles already established through self-regulatory frameworks, but that also demonstrated to the rest of the world how to compete without the creation of protectionist measures.

“We should maintain our own privacy legal structure based on our own principles, but the risk of that is that if we do so little, the rest of the world may say that we have not done enough,” Swire said.

*The testimony of Nicole Y. Lamb-Hale, Assistant Secretary for Manufacturing and Services, International Trade Administration, Department of Commerce, is available at <http://op.bna.com/pl.nsf/r?Open=byul-8lqur7>.*