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The Top Privacy and Data Security Trends and Issues for Nonprofits in 2018

Thursday, January 18, 2018, 12:30 p.m. – 2:00 p.m. ET Venable LLP, Washington, DC

Moderator

Robert L. Waldman, Esq.

Partner and Co-Chair, Nonprofit Organizations Practice, Venable LLP

Speakers

Kelly DeMarchis Bastide, Esq.

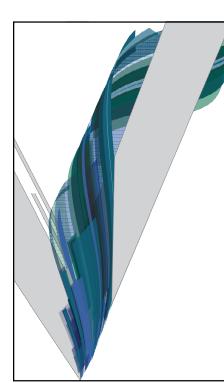
Partner, eCommerce, Privacy and Cybersecurity Practice, Venable LLP

Joel Urbanowicz

Director, Information Security and ICT Process Governance,
Catholic Relief Services



Presentation



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Upcoming Venable Nonprofit Events

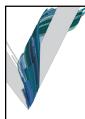
Register Now

- **February 15, 2018:** Nonprofit Mergers, Alliances, and Joint Ventures: Options, Best Practices, and Practical Tips
- March 15, 2018: <u>Sexual Harassment: What Should Your</u>
 <u>Nonprofit Be Doing to Keep Itself Out of the Headlines and Out of Legal Hot Water?</u>

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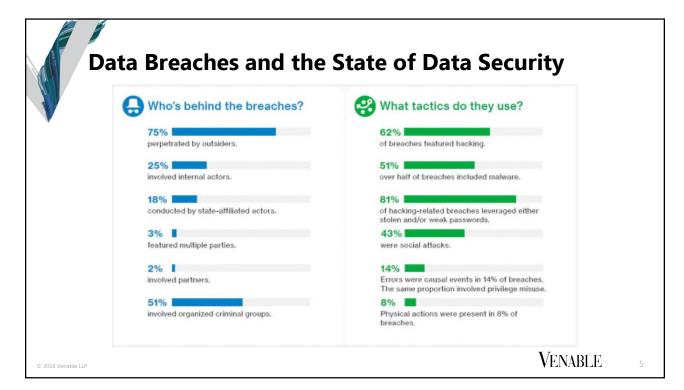
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Data Security Developments

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 A 2017 Verizon Data Breach Investigation Report found that:



- Roughly 1 in 14 users was tricked into following a link or opening an attachment.
- 25% of those who fell for a phishing attempt were duped by such tactics more than once.

61%

of the data breach victims in this year's report are businesses with under 1,000 employees.

95%

of phishing attacks that led to a breach were followed by some sort of software installation.

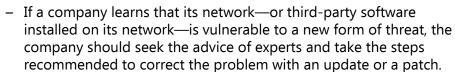
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- Initiate procedures to ensure that security measures are up to date and vulnerabilities will be addressed as they arise.
 - Request a review of the security practices of thirdparty vendors and their security practices, with an emphasis on remote access.





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Software Flaws and Vulnerabilities





Recently disclosed chip flaws, known as **Meltdown** and **Spectre**, render data that is stored on chips, including passwords and other sensitive information, vulnerable to exposure.

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State Breach Laws

- 48 states, in addition to the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, require public and private organizations to give notice to individuals whose personally identifiable information has been involved in a data security breach.
- In 2017, Delaware enacted legislation that expands the definition of a computer security breach and requires that all entities that operate within the state and handle personal information to safeguard such information.



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Best Practices: Information Security Policy

- Practice Data Minimization
- Control Internal and External Access
- Require Authentication
 - ✓ Strong passwords
- Configure Networks Securely
 - ✓ Remote access security
 - ✓ Segmented networks
 - ✓ Safe storage and transmission of sensitive information
- Vet Service Providers' Security Practices
- Establish a Security Protocol
 - ✓ Update procedures and install patches



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- - Daily operation
 - Consumer services

• Think through data collection practices

- Identify and locate sensitive information stored by your organization
 - Determine what is needed and who needs access
- Establish multiple layers of security for sensitive information and secure all points of access
- Configure networks to suspend users' credentials after repeated invalid authentication attempts are made
- Securely store physical documents, media, and devices containing sensitive information
- Train employees in security basics
- Establish a protocol and security measures for remote access
- Continuously evaluate security practices and proactively address threats

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Privacy Developments

The European Union's General Data Protection Regulation (GDPR)

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GDPR - Overview



- Replaces the EU Data Protection Directive; effective May 25, 2018
- Key principles (similar to Directive):
 - Transparency/privacy policy
 - Rights of data subjects
 - Accountability for data controllers and data processors
 - DPOs and PIAs
 - Data security and data breach
 - Election of supervisory authority
 - International data transfers

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- Personal data—Any information relating to an identified or identifiable natural person
 - Identifiable person—One who can be identified, directly or indirectly, by reference to an identifier, including identification number, location data, or an online identifier. Online identifiers can include device identifiers, applications, tools and protocols (such as an IP address), cookie identifiers, or RFID tags.
- **Data Controller:** Legal person who, alone or jointly with others, determines the purposes and means of the processing of personal data
- **Data Processor:** Legal person who processes personal data on behalf of the controller

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7 Data Protection Principles



1. Lawfulness, fairness, and transparency



2. Purpose limitation



3. Data minimization



4. Accuracy



5. Storage limitation



Integrity and confidentiality



Accountability

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The 7 Data Protection Principles Explained

1. Lawfulness, fairness, and transparency

Personal data processing must be lawful, fair, and transparent to the data subject.

2. Purpose limitation

Collect personal data only for specified, explicit, and legitimate purposes. After collecting personal data, make sure any additional personal data processing is conducted in accordance with these purposes.

Data minimization

Personal data processing must be adequate, relevant, and limited to what is necessary for the purposes for which personal data is being processed.

4. Accuracy

Personal data must be accurate and kept up to date (where appropriate). Take reasonable steps to ensure that inaccurate data is erased or corrected without delay, while paying attention to the purposes for the personal data processing.

5. Storage limitation

Store personal data in identifiable form for no longer than necessary, consistent with the purpose for which the personal data is processed.

6. Integrity and confidentiality

Personal data processing must ensure appropriate security. Security measures should protect against unauthorized or unlawful processing and against accidental loss, destruction, or damage. Use appropriate technical or organizational measures to safeguard personal data.

7. Accountability

Data controllers are responsible for demonstrating compliance with these principles.

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Rights of Data Subjects

- Transparent information
- Right of Access
- Right to Rectification
- Right to Erasure
- Right to Restrict Processing
- Right to Data Portability
- Right to Object



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Transparency

- Privacy policies need specific elements under GDPR
- Must disclose:
 - DPO
 - Legal basis for processing (i.e., consent or legitimate interest and, if so, what that interest is)
 - Cross-border data transfer
 - Data retention period
 - Right to correct/erase/restrict processing of personal data
 - Right to withdraw consent
 - Right to lodge complaint with supervisory authority
 - If data provided to third party via contract, consequences of not providing
 - Logic for automated decision making
- Additional requirements when data is not provided directly by an individual
 - Sources of data, including public records

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GDPR – Myth or Fact?

The GDPR doesn't apply to my organization because...

- We have no offices or employees in the EU
- Our EU membership is small
- We are a nonprofit



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GDPR Key Change: Territorial Scope

- The GDPR applies to EU-based controllers and processors but also to non-EU-based organizations.
- Where no EU presence exists, the GDPR will still apply where (1) an EU resident's personal data is processed in connection with goods/services offered to him/her; or (2) the behavior of individuals within the EU is "monitored."
- No exceptions for charities, nonprofits, etc.



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If I have consent (opt-in or opt-out), I can use personal data as needed.

- ✓ I received consent from my members, because they chose to join my organization.
- ✓ I received consent from others who (take the exams we offer, choose to list themselves in our directory, attend our conferences...)



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GDPR Key Change: Consent Requirements



- A clear, affirmative act
- Ticking a box
- Technical settings that indicate that the data subject accepts data processing



- Silence
- Pre-ticked boxes
- Inactivity
- Implied consent

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If Not Consent, Then...?

- Contract Performance: Alternative to consent as basis for processing if processing is "necessary for performance of a contract to which the data subject is party."
- **Legitimate Interests:** Alternative to consent as basis for processing if processing is "**necessary** for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data."
 - Fraud prevention, transfers within a group of affiliated companies for internal administrative purposes, network and information security, reporting criminal acts or threats to public security, and direct marketing purposes
- Intended to be narrowly construed

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GDPR – Myth or Fact?

I can use contracts to allocate responsibility/liability to my vendors and service providers.



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GDPR – Data Protection Agreements

- DPAs are required
- Contracts cannot be used to designate status as controller/processor
- Controllers and processors have designated tasks under the GDPR
- But contracts may be critically important for deciding who will obtain consent and defining what that consent must look like



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GDPR – Myth or Fact?

We need to create a privacy impact assessment (PIA) for everything we do!



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Data Protection Impact Assessments (DPIAs)

- Required in 3 instances:
 - When processing involves systematic and extensive evaluation of individuals' personal characteristics, is automated, and results in legal effects to individuals or otherwise significantly affects them.
 - Large-scale processing of special categories of data or criminal history data.
 - Large-scale, systematic monitoring of publicly accessible areas.

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GDPR – Myth or Fact?



U.S. organizations don't need to appoint a data protection officer.

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- Some organizations must appoint a data protection officer (DPO)
- When to appoint a DPO:
 - Systematically monitor large groups of individuals
 - Carry out large-scale processing of special categories of data, including data related to criminal convictions and offences
- DPO responsibilities:
 - Actively monitor compliance with the GDPR
 - Provide advice on data impact assessments
 - Remain independent and report to "highest management level"



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GDPR – Myth or Fact?

We have great data security. We have (certified to ISO standard/are PCI compliant/are subject to the HIPAA Security Rule...). No changes needed for GDPR.



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GDPR - New Security Requirements

- Approach is flexible and requires safeguards appropriate for the data processing activities you're engaged in, and the risks to that data.
- There are no standards currently recognized by EU authorities.
- Look at best practices:
 - Encryption
 - Measures to ensure ongoing confidentiality, integrity, availability, and resilience of systems
 - Build in regular testing

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GDPR – Myth or Fact?



If there is a data breach, I will follow our incident response plan, which lays out our procedures for a response.

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GDPR Key Change: Data Breach Notification



Breach Notification

- Notification to supervisory authority "without undue delay"
- And, where feasible, not later than 72 hours after becoming aware of the breach
- Notification to consumers in high-risk situations

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GDPR – Myth or Fact?



We pseudonymize/anonymize data, so GDPR doesn't apply.

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Pseudonymized Data

- **Pseudonymization:** Processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organizational measures to ensure that the personal data is not attributed to an identified or identifiable natural person
- It's a safeguard!

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GDPR – Myth or Fact?



I don't need a data transfer mechanism. We store data in the EU.

- ✓ We access it only from the United States.
- ✓ For HR purposes.

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Cross-Border Transfer Mechanisms

- EU-U.S. Privacy Shield + Swiss-U.S. Privacy Shield
- Standard Contractual Clauses ("Model Clauses")
- Binding Corporate Rules (BCRs)
- Adequacy Decision
- Consent
- Contract Performance



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I can monitor my EU employees according to our global employee monitoring policy.

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Don't Forget Your Employees

- You are a data controller regarding your HR data.
- HR data requires additional considerations:
 - Monitoring triggers DPIA requirement
 - Consent is not an option for processing HR data
 - All GDPR requirements must be duplicated here

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GDPR – Myth or Fact?



Our EU operations are only in London.

GDPR doesn't apply to us, thanks to Brexit.

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The UK's Position

- Will still be in EU as of May 2018
- Must follow GDPR during Brexit procedures
- Likely to seek an adequacy decision post-exit



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GDPR – Myth or Fact?



GDPR is a problem for IT and Marketing, not Legal.

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Penalties/Fines



- Tougher sanctions for noncompliance
- Three tiers:
 - Infringement of controller/processor obligations, certifications
 - o 2% of worldwide turnover or €10M (whichever is higher)
 - Infringement of basic principles of processing, data subjects' rights, international transfer
 - o 4% of worldwide turnover or €20M (whichever is higher)
 - Noncompliance with order of supervisory authority
 - o 4% of worldwide turnover or €20M (whichever is higher)

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What to do now?

- Know your data assets
 - Develop a data inventory/data map
 - Answer basic questions: Are you a controller or processor? What is your basis for processing?
- Conduct a GDPR gap assessment. For example:
 - Do you have a privacy policy? Does it cover the elements in the GDPR?
 - Do you have consent to data processing or appropriate contracts?
 - Review procedures to maintain data quality
 - Review privacy program management (employee training)
- Build a cross-functional team and plan
- Triage priorities! You can't do it all before May 25th.







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Questions?

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BAR ADMISSIONS

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EDUCATION

J.D., Stanford Law School, 1981 B.A., Haverford College, 1978

MEMBERSHIPS

American Bar Association Maryland State Bar Association Bob Waldman chairs Venable's Business Division and serves as co-chair of Venable's Nonprofit Organizations Group. Mr. Waldman's practice includes representation of Fortune 500 companies in their corporate social responsibility matters, foundations, hospitals, educational institutions, trade associations, community foundations, and other charitable entities. Mr. Waldman represents some of the country's largest nonprofit organizations and has significant experience in international philanthropy. He also practices extensively in the areas of philanthropic and estate planning, employee benefits, and taxation. Mr. Waldman is the Vice President of the Venable Foundation and former Co-Managing Partner of the firm.

Throughout his career, Mr. Waldman has received numerous accolades for his outstanding achievements in the practice of law, involvement in the profession, and support of the community. He is recognized in *The Best Lawyers in America* in the fields of Employee Benefits Law, Non-Profit/Charities Law, and Tax Law and by *The Daily Record*, the newspaper serving Baltimore's business and legal communities, which honored him with its Leadership in Law award.

HONORS

Listed in *The Best Lawyers in America* for Employee Benefits (ERISA) Law, Non-Profit/Charities Law, and Tax Law 2007-2018

Recognized in *Legal 500, Not*-for-Profit (Nonprofit and Tax Exempt Organizations), 2012 - 2017

ACTIVITIES

Mr. Waldman is active in Baltimore's civic and philanthropic communities. He is an Elected Fellow of the Baltimore City Bar Foundation, is a past Chair of the Board of the Association of Baltimore Area Grantmakers, and serves on the Boards of the Enoch Pratt Free Library and the Downtown Partnership of Baltimore. He has also served on the Board of the Maryland Association of Nonprofit Organizations and is a member of the Best Lawyers Advisory Board.

Mr. Waldman is a member of the American Bar Association Committee on Tax-Exempt Organizations and former chair of the Employee Benefits Subcommittee of the Maryland State Bar Association.

PUBLICATIONS

- March 30, 2017, Dealing with Nonprofit Donors: Risks, Restrictions, and When to Say "No Thanks"
- May 24, 2016, Donor Exposure: Dealing with a Charity in Trouble

- October 21, 2015, Revitalizing Our Cities How Foundations and Grantmakers Can Invest in a Better Economic Future
- August 5, 2015, Employee Engagement Legal Issues and Pitfalls
- October 2, 2014, Nonprofit Tax Issues: Where the IRS Is Today, and Where Congress Is Headed
- November 14, 2013, Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies
- October 8, 2013, Complying (or Deviating) from Donor Intent: Recent Developments for Nonprofits
- May 29, 2013, Legal Issues in International Philanthropy
- March 2013, Tax Considerations of International Grantmaking in Today's World
- March 2013, The FCPA and Anti-Corruption Enforcement: What Does It Mean for Charitable Contributions?
- March 12, 2013, Charity Boards Ethical Considerations under the Microscope
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- November 9, 2004, Summit on Nonprofit Governance: The Other Governance
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SPEAKING ENGAGEMENTS

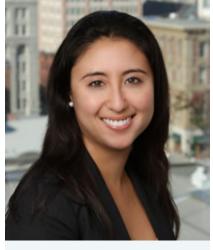
- May 20, 2017, "Ethical Decision Making in the Business World," Haverford College Ethical Leadership Summer Institute
- March 30, 2017, Dealing with Nonprofit Donors: Risks, Restrictions, and When to Say "No Thanks"
- March 14, 2017, Association of Corporate Contribution Professionals (ACCP) Annual Conference
- May 24, 2016, "Donor Exposure: Dealing with a Charity in Trouble," a webcast hosted by the Association of Corporate Contributions Professionals (ACCP)
- October 21, 2015, "Revitalizing Our Cities How Foundations and Grantmakers Can Invest in a Better Economic Future" hosted by Venable and the Forum of Regional Associations of Grantmakers
- August 5, 2015, "Employee Engagement Legal Issues and Pitfalls" for Association of Corporate Contribution Professionals
- October 2, 2014, Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- November 14, 2013, Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies

- October 8, 2013, Legal Quick Hit: "Complying (or Deviating) from Donor Intent: Recent Developments for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 29, 2013, Association of Corporate Counsel Webcast: "Legal Issues in International Philanthropy"
- March 12, 2013, "Charity Boards Ethical Considerations Under the Microscope" at the Bank of America Merrill Lynch Strategic Governance and Leadership Summit
- March 11, 2013, "The FCPA and Anti-Corruption Enforcement: What Does It Mean for Charitable Contributions?" at the Annual Conference of the Association of Corporate Contributions Professionals
- February 5, 2013, "Tax Considerations of Grantmaking in Today's World" at the CliftonLarsonAllen National Foundation Conference
- November 26, 2012, Bank of America Market Presidents Presentation
- April 28, 2011, "Legal Issues of Not-for-Profit Organizations" at the Weinberg Fellows Board Presidents' Day
- May 5, 2010, "Legal Issues of Not-for-Profit Organizations" at the Harry and Jeanette Weinberg Fellows Program
- June 17, 2009, Entertainment Industry Conference
- October 30, 2008, Navigating Philanthropy's Legal Issues
- November 9, 2004, Summit on Nonprofit Governance: The Other Governance
- "Private and Family Foundation Issues," delivered as part of the Institute on Nonprofit Organizations
- "Charity Boards Ethical Considerations Under the Microscope," sponsored by Suburban Hospital and the United Jewish Endowment Fund
- "Legal Issues Affecting Nonprofit Organizations," sponsored by the Harry and Jeanette Weinberg Foundation

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U.S. District Court for the Western District of Pennsylvania

EDUCATION

J.D., University of Virginia School of Law, 2004

Business Editor, Virginia Environmental Law Journal

A.B., Philosophy and English, Duke

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Kelly DeMarchis Bastide is a partner in the firm's eCommerce, Privacy, and Cybersecurity Group, where she advises and represents clients on issues related to privacy and e-commerce.

Ms. Bastide concentrates on U.S. and global personal data privacy issues. She has provided advice to companies responding to data breach and has extensive experience assisting clients in becoming compliant with a number of U.S. privacy statutes, including state breach notification laws, HIPAA, the Fair Credit Reporting Act and others. She has also worked with clients on questions related to global data privacy.

Ms. Bastide also concentrates her practice on e-commerce for both online and bricks-and-mortar clients, and has provided advice to clients on many related statutes, such as the Computer Fraud and Abuse Act, the Digital Millennium Copyright Act, the Electronic Communications Privacy Act, CAN-SPAM, E-SIGN, the Communications Decency Act and the Stored Communications Act.

Ms. Bastide has extensive experience with the laws governing remote gaming and gambling and has represented both gaming operators and online payment processors.

Ms. Bastide has litigated these issues and has extensive experience with internal investigations into a variety of matters.

PUBLICATIONS

Kelly DeMarchis Bastide is a regular contributor to *The Download*, an e-newsletter highlighting developments in e-commerce, privacy, internet advertising, marketing, and information services law and policy, brought to you by Venable's Privacy and Data Security Group.

- July 2017, The Download July 2017, The Download
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SPEAKING ENGAGEMENTS

- May 13, 2016, "Global eXchange around Relevance Get Your Data Passports Ready" at the 2016 Digital Advertising Alliance Summit
- February 11, 2016, "EU and Global Update Implications Leading into 2016" at the Benchmark Data Security and Privacy Forum
- March 4, 2015 March 6, 2015, IAPP Global Privacy Summit 2015
- November 13, 2014, "State Legislative Roundup 2014" for Direct Marketing Association
- September 18, 2014 September 19, 2014, IAPP Privacy Academy and CSA Congress
- April 28, 2014 April 30, 2014, ACG InterGrowth 2014
- August 8, 2013, The Road Map to HIPAA Compliance: What Your Nonprofit Needs to Know
- May 8, 2013, "Data Privacy and Protection: Current Trends and Issues" for the New England Corporate Counsel Association
- September 6, 2012, "Privacy and Information Security Update" for the ABA Section of Antitrust Law
- March 28, 2012, "What's Hot on the Hill Information Technology Legislative Developments," at the ABA 27th Annual Intellectual Property Law Conference





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Joel received a B.A. degree in Communications from Michigan State University and an M.S. in Information Management from Arizona State University. He has actively worked in the information technology service management, governance, and operations domains for the past 12 years at private, public, and not-for-profit

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