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DEVELOPMENTS IN E-COMMERCE, PRIVACY, INTERNET ADVERTISING, MARKETING AND INFORMATION SERVICES LAW AND POLICY

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In this Issue:

Heard on the Hill

Senate Commerce Committee Examines "Do Not Track" Status

On April 24, Senator Jay Rockefeller (D-WV), Chairman of the Senate Commerce Committee, convened a committee hearing titled "A Status Update on the Development of Voluntary Do-Not-Track Standards" to examine the steps industry stakeholders have taken in relation to an agreement to recognize a browser-based choice mechanism with respect to the collection and use of Web viewing data.

The Committee heard from several witnesses, including Mr. Lou Mastria, Managing Director of the Digital Advertising Alliance ("DAA"), who testified about the industry's self-regulatory program for providing consumer choice and transparency for online data collection. Mr. Mastria discussed five attributes of the DAA program that he stated are frequently misrepresented by the program's critics. First, he described how, from its launch, the DAA has offered a simple, easy-to-use, one-button choice mechanism that works regardless of the type of browser used. Second, Mr. Mastria discussed how the DAA Principles apply to the

collection of all Web viewing data across unrelated sites, not just data collected for advertising purposes. Third, he explained that the DAA offers users persistent choice, which continues to work even when users delete their cookies. Fourth, he noted that the DAA Principles restrict both the collection and use of data. Fifth, Mr. Mastria told the Committee that the DAA's enforcement applies to all marketplace participants, regardless of whether they have enrolled in the program.

As described by Mr. Mastria, and discussed by the members of the Senate Committee, the DAA program was praised at a White House event in 2012, at which the DAA announced an agreement to honor the DAA Self-Regulatory Principles through a browser signal when consumers both (1) receive meaningful information about the effect of that choice, and (2) affirmatively make that choice themselves. Mr. Mastria explained that certain browsers short-circuited this agreement by implementing browser-based choice in ways contrary to the consensus standard reached with the White House, Federal Trade Commission, and the Department of Commerce.

Around the Agencies

FTC to Hold Workshop on the Internet of Things

The Federal Trade Commission ("Commission" or "FTC") has announced that it will convene a public workshop on November 21, 2013 to explore potential privacy and security implications of the "Internet of Things." The "Internet of Things" is a phrase that has been coined to refer to everyday devices that communicate with each other. In its announcement, the Commission highlighted a number of benefits created by such "smart" devices, but also cautioned that greater data collection and connectivity may pose privacy and security risks.

In advance of the workshop, the Commission requested comments from the public on the following:

- What are significant developments in services and products that make use of this connectivity?
- What are various technologies that enable this connectivity?
- What types of companies make up the smart ecosystem?
- What are the current and future uses of smart technology?

- How can consumers benefit from the technology?
- What are the unique privacy and security concerns associated with smart technology and its data?
- How should privacy risks be weighed against potential societal benefits?

Meanwhile, the "Internet of Things" has also been a topic of discussion at the U.S. Department of Energy Office of Electricity Delivery and Energy Reliability ("DOE OE"), and the Federal Smart Grid Task Force. These entities have been convening multistakeholder meetings to develop a Voluntary Code of Conduct ("VCC") for utilities and third parties providing consumer energy use services that is expected to address privacy considerations related to data enabled by smart grid technologies.

Federal Trade Commission's Revised COPPA Rule to Take Effect July 1st

The revised Children's Online Privacy Protection Rule ("COPPA Rule") is poised to take effect as scheduled on July 1, 2013. On May 6, 2013, the Federal Trade Commission ("FTC") declined requests filed by numerous trade associations for a six-month extension of the effective date for the revised regulation. The final revisions were published in December 2012, and the associations had requested additional time for companies to review and change their practices in light of the revisions, which affected many aspects of the COPPA Rule and marked the first time the FTC had changed the Rule since its original publication.

In denying the extension requests, the FTC stated that "all stakeholders have had sufficient opportunity to raise issues and articulate their concerns, the [Statement of Basis and Purpose] provides sufficient guidance regarding the obligations the amended Rule will impose on COPPA-covered entities, and the more than six-month time period between issuance of the amended Rule and its effective date is adequate." The FTC noted that staff are available to respond to questions on COPPA and pledged that the FTC would exercise its enforcement discretion with respect to small businesses that make good-faith attempts to comply in the early months following the effective date.

FTC Commissioner Maureen Ohlhausen also recently stated in an interview that the FTC will not begin enforcement immediately following the July 1 effective date and is aware that companies will require time to come into compliance. However, she urged

companies to work toward compliance and to seek clarification if needed.

The FTC's denial of the trade associations' extension request followed the release, in April 2013, of the agency staff's long-awaited updated Frequently-Asked Questions (FAQs), the primary guidance document on the COPPA Rule. Of this set of FAQs, many are consistent with FAQs from the prior COPPA Rule while others are new and reflect the revisions to the regulation. Much of the guidance is drawn from the Statements of Basis and Purpose issued with the 1999 and 2012 rulemakings. The FAQs represent staff's views and are not binding on the FTC.

On the pressing issue of how the revised COPPA Rule will apply to data collected previously, one of the FAQs explains that parental consent should be obtained immediately for geolocation information and should also be obtained if an operator associates new information with a persistent identifier or a screen/user name after the revised COPPA Rule takes effect. In contrast, parental consent is recommended but not required for previously-collected photos, videos, and audio files, and for persistent identifiers or screen/user names that are not associated with new information after the effective date.

FTC Issues COPPA Educational Letters to Industry

As the July 1, 2013 implementation date of the updated Children's Online Privacy Protection Rule ("COPPA Rule") approaches, businesses are working to modify their systems to comply with the new requirements. To help them meet the deadline, the Federal Trade Commission ("FTC" or "Commission") on May 15th sent more than 90 "educational letters" to app developers whose online services appear to collect personal information (as defined under the revised Rule) from children under 13. The letters did not reflect an official evaluation of the companies' COPPA compliance status. The FTC has not published a list of companies that received such letters.

As explained by the Commission, these letters fall into four main categories:

- Letters to domestic companies that may collect images or sounds of children;
- Letters to domestic companies that may collect persistent identifiers from children;

- Letters for foreign companies that may collect images or sounds of children in the United States; and

- Letters to foreign companies that may collect persistent identifiers from children in the United States.

The letters explain to the companies that their mobile apps appear to collect various "personal information" from children in the United States as that term will be defined effective July 1, 2013. Specifically, the letters alert the businesses that the expanded definition of "personal information" will include a photograph or video with a child's image, or audio file with a child's voice. Additionally, the FTC explains that "personal information" will include screen or user names that function as online contact information, and persistent identifiers that can be used to recognize users over time and across different websites or online services.

The letters advise the companies that covered app developers will be required to:

- Give notice and obtain parental consent for personal information collected on their apps from third parties (unless an exception applies);

- Take reasonable steps to release children's personal information only to companies capable of keeping the data secure and confidential; and

- Meet new data retention and deletion requirements.

The letters conclude by encouraging the companies to review their mobile app offerings in advance of the upcoming changes to the COPPA Rule.

FTC Warns Data Companies of Potential FCRA Violations

On May 7, 2013, the Federal Trade Commission (the "FTC" or "Commission") issued warning letters to ten companies described as "data brokers," based on a "test shopping" operation by the FTC that indicated that these companies' practices potentially violated the Fair Credit Reporting Act ("FCRA"). Under the FCRA, companies who distribute personal information about consumers used for making decisions about the consumers' creditworthiness, eligibility for insurance, or suitability for employment, are considered to be "consumer reporting agencies" and are subject to obligations under the FCRA.

Of the ten companies that received letters, according to the FTC, two appeared to offer "pre-screened" lists of consumers for making firm offers of credit, two appeared to market information used for making insurance decisions, and the other six appeared to offer consumer information for employment purposes. None of the companies were accused of wrongdoing by the FTC; instead, the letters were a reminder to the companies to evaluate their practices in order to determine whether they meet the definition of a consumer reporting agency.

The FTC also noted that this action was taken in conjunction with an "international privacy practice transparency sweep" coordinated by the Global Privacy Enforcement Network—a network established to foster cross-border cooperation among privacy authorities.

These letters are only the latest step undertaken to enforce the FCRA against a number of different data companies. In the past two months, the FTC announced a final order settling FCRA charges against marketers of criminal background screening reports and issued warnings to six websites that share information with landlords that they may be subject to the FCRA.

In the States

California Positioning Itself to Press the Eraser Button

California Senate Bill 568, passed unanimously in the California Senate, would mandate an "eraser button" for websites that collect information from minors, defined as under age 18 (not age 13, as in the federal Children's Online Privacy Protection Act, or COPPA). Essentially, the bill would require any website, online service, online application, or mobile application to permit a minor to "remove content or information submitted to or posted on" the website, service, or application by the user. Notice of this right would be required to be provided to all users. Aside from the use of "minor" in the bill, it departs from COPPA in another major way by not limiting its provisions to "personal information" but instead broadly applying them to any content or information.

The bills provides two exceptions: (1) when other laws require that the information be maintained, and (2) when the content or information is submitted by a third party other than the minor, or a third party republishes or resubmits content originally posted by the minor.

The bill separately adds a prohibition on marketing or advertising products or services to minors, if the minor cannot legally purchase the product or participate in the service in California.

If passed, the bill would come into effect on January 1, 2015. It is currently in Committee Process.

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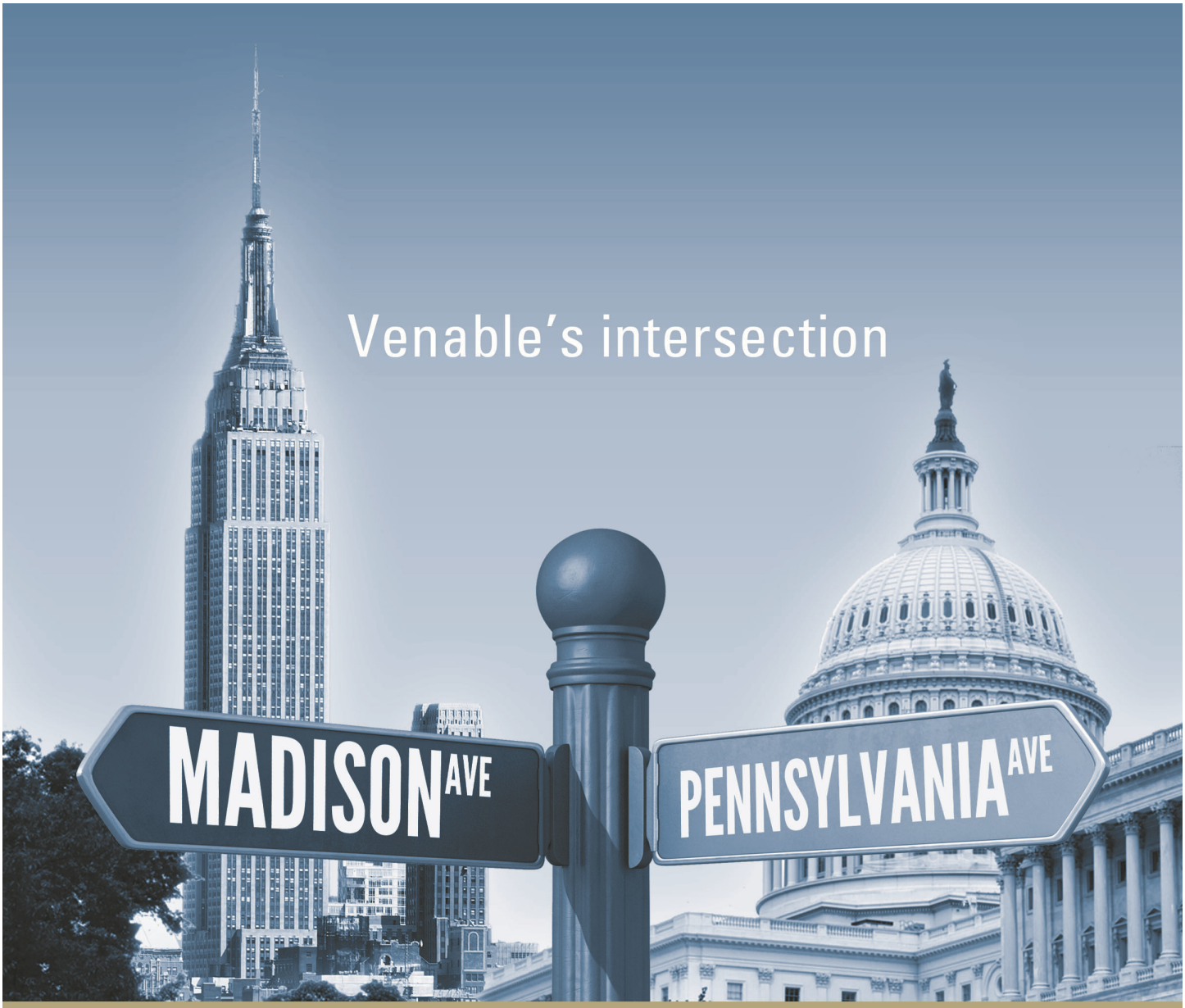

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