Holland & Knight

Data Privacy and Security Report: March 2023

A monthly roundup of federal data privacy and security policy and regulatory news

Welcome back to Holland & Knight's monthly data privacy and security news update that includes the latest in policy, regulatory updates and other significant developments. If you see anything in this report that you would like additional information on, please reach out to authors or members of Holland & Knight's Data Strategy, Security & Privacy Team.

LEGISLATIVE UPDATES

TikTok Takes Center Stage as Lawmakers Consider Action Against Foreign Tech Over Privacy and Security Concerns

TikTok CEO Shou Chew testified before the House Committee on Energy and Commerce on March 23, 2023, on online privacy and safety concerns associated with the app. During the hearing, Chew defended the company as a growing number of lawmakers called for a ban of TikTok in the U.S. Members on both sides of the aisle have raised concerns about China's ability to demand or gain access to sensitive user data because of TikTok's Chinese ownership. In addition to this oversight activity, TikTok faces potential regulatory and legislative action to ban the app or change the company's ownership or structure. The U.S. Department of the Treasury's Committee on Foreign Investment in the United States (CFIUS) has demanded that TikTok sell the China-based ByteDance part of the business, threatening to otherwise ban the app. While TikTok is reportedly considering separating from ByteDance (albeit in a passive way), Chew has argued that divestiture will not solve the data security concerns. TikTok has already agreed to move all data storage to the U.S., but the U.S. has said that is not enough.

Following the hearing, Congress has continued to consider several bills aimed at addressing the privacy and security issues posed by TikTok. In the Senate, Sens. Mark Warner (D-Va.) and John Thune (R-S.D.) recently introduced the Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act (RESTRICT) Act (S. 686), which would give the U.S. Department of Commerce the authority to restrict technology coming from foreign adversaries. The Senate bill has gained traction, with 25 bipartisan cosponsors. While the Biden Administration has given the bill its stamp of approval, support is not coming as easily in the Senate Committee on Commerce, Science, and Transportation, one of the committees of jurisdiction that could advance the bill in order for it to get a vote on the Senate floor. Senate Commerce Committee Chair Maria Cantwell (D-Wash.) has yet to endorse the measure and remains focused primarily on a comprehensive data privacy bill. Moreover, Energy and Commerce Chair Cathy McMorris Rodgers (R-Wash.) has stated that she would prefer a bill targeted specifically at TikTok, which makes the RESTRICT Act's path in the House unclear. Sen. Thune is pushing for a quick markup and is working closely with U.S. Secretary of Commerce Gina Raimondo. Sen. Josh Hawley (R-Mo.) has also been pushing his bill (S. 85) to block TikTok from operating in the U.S., though Sen. Rand Paul (R-Ky.) objected to the bill advancing over freedom of speech concerns.

In the House, Rep. McMorris Rodgers indicated that she plans to introduced her own bill to ban TikTok in the U.S. In addition, House Committee on Foreign Affairs Chair Michael McCaul (R-Texas) introduced, marked up and favorably reported his own TikTok bill, the Deterring America's Technological Adversaries (DATA) Act, through the Committee. The bill would allow the Biden

Administration to ban foreign-owned apps and would require the imposition of sanctions on companies with ties to TikTok. While the legislation advanced out of the Committee, it did so on party lines, with Democrats calling for more information and negotiation on the bill. Despite the bipartisan consensus that TikTok should not be allowed to continue in its current ownership or structure, the previously mentioned House and Senate bills face hurdles to becoming law.

Lawmakers Call for Continued Focus on National Data Security Standard

While many members of Congress are turning their attention to legislative proposals focused on banning TikTok or otherwise addressing foreign technology, others are calling on Congress to focus on passing a comprehensive data privacy bill. The House Energy and Commerce hearing on TikTok brought this issue to light and rejuvenated the push for passage of the American Data Privacy and Protection Act (ADPPA), as several members remarked that – regardless of one's opinions regarding TikTok – comprehensive privacy legislation could ensure all apps cannot access or purchase Americans' private information. While the ADPPA has not yet been reintroduced, bill sponsors Reps. Cathy McMorris Rodgers (R-Wash.) and Frank Pallone (D-N.J.), the top Republican and Democrat on the House Energy and Commerce Committee, have indicated that they plan to reintroduce the bill in the coming weeks.

Meanwhile, the state privacy law patchwork continues to expand. Iowa became the sixth state to implement comprehensive consumer privacy legislation – the Consumer Data Protection Act – on March 28, 2023. The Iowa privacy law is generally seen as business friendly, since it contains no private right of action and a 90-day cure period for businesses to correct deficiencies, among other features. (See Holland & Knight's previous alert, "Aw, Shucks! Iowa Becomes 6th State to Enact Consumer Privacy Law," March 30, 2023.) Nevertheless, other states are also considering privacy bills during current legislative sessions, and several take inspiration from California rather than the Iowa approach.

Moreover, states with existing privacy laws are making progress toward implementation and enforcement. For example, on March 30, 2023, the California Privacy Protection Agency (CPPA) announced that the California Office of Administrative Law (OAL) approved the first substantive rulemaking package after the California Privacy Rights Act (CPRA) was passed. The approved regulations take effect immediately. However, the California Chamber of Commerce sued to delay enforcement of the regulations for a full year, arguing that the regulations were not finalized in a timely manner and therefore do not give businesses enough time to comply.

Senators Find Common Ground on Section 230 Reform: Child Online Safety

On March 8, 2023, the Senate Committee on the Judiciary's Subcommittee on Privacy, Technology, and the Law held a hearing, "Platform Accountability: *Gonzalez* and Reform." The hearing addressed issues surrounding Section 230 of the Communications Decency Act and was held in light of recent arguments in front of the U.S. Supreme Court on Section 230 in the case of *Gonzalez v. Google*. While members and witnesses offered competing views on the the merits of the arguments brought to the court in *Gonzalez*, the hearing highlighted that child safety on the internet is an area of reform that enjoys bipartisan support. Members on both sides of the aisle called for Congress to take action to ensure Section 230 does not prevent victims and families from seeking justice.

The hearing also put into stark relief an emerging dichotomy on Capitol Hill: while there is strong bipartisan support for the notion that Section 230 should be reformed, there is no consensus on how to

amend the liability shield. This phenomenon was also on display at a March 28, 2023, hearing in the House Energy and Commerce Committee focused on content moderation, which largely addressed conservative arguments surrounding platform bias. The hearing once again revealed how difficult it will be to actually craft bipartisan legislation on Section 230.

Overall, the flurry of congressional activity in this area suggests that supporters of comprehensive Section 230 reform face an uphill battle in the 118th Congress. On the other hand, narrowly tailored efforts targeting child online safety and privacy like the Kids Online Safety Act and the Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN It) Act may have a stronger chance of passage.

Senate Commerce Committee Advances Smart Devices Legislation

The Informing Consumers About Smart Devices Act recently cleared the Senate Commerce Committee. The bipartisan bill, introduced by Senate Commerce Chair Maria Cantwell (D-Wash.) and Ranking Member Ted Cruz (R-Texas), would require the Federal Trade Commission (FTC) to create disclosure guidelines for products that have audio and visual recording components. The bill seeks to address the growing number of household devices that include Wi-Fi capability to transmit data without a consumer's knowledge. The House passed the companion version introduced by Reps. Seth Moulton (D-Mass.) and John Curtis (R-Utah) at the end of February.

Wyden Calls for EdTech Privacy

Senate Committee on Finance Chair Ron Wyden (D-Ore.) recently sent a letter to U.S. Secretary of Education Miguel Cardona urging the U.S. Department of Education to protect the privacy of students using education technology. Specifically, he called for the department to provide strong, comprehensive model contracts to lower the burden for school districts and ensure a level playing field between Big Tech companies and under-resourced school administrators. The letter concluded: **"**A nationwide, Department-endorsed approach would give schools greater leverage when negotiating with the largest edtech players. These companies have little incentive to negotiate and instead exploit their market power by telling school districts to 'take it or leave it' when it comes to invasions of their students' privacy. To that end, I urge the Department to help schools to protect students' privacy from unscrupulous edtech vendors. The classroom should be a safe space for children to learn – not an opportunity for tech companies to extract and monetize students' most sensitive data."

House Armed Services Committee Holds Hearing on Defense in the Digital Age

The House Committee on Armed Services' Subcommittee on Cyber, Information Technologies, and Information Systems held a hearing, "Defense in a Digital Era: Artificial Intelligence, Information Technologies, and Securing the Department of Defense." The U.S. Department of Defense (DOD) Chief Information Officer John Sherman and its Chief Digital and Artificial Intelligence Officer Dr. Craig Martell provided testimony. The Digital and Artificial Intelligence Office (CDAO) was established in February 2022 to lead and oversee the strategy development and policy formulation for digital-enabled solutions. The witnesses briefed members of the subcommittee on the department's efforts to accelerate adoption of data analytics and artificial intelligence in order to strengthen the United States' electronic warfare capabilities.

EXECUTIVE AND DEPARTMENTAL UPDATES

CFPB Finalizes Small Business Data Collection Rule

On March 30, 2023, the Consumer Financial Protection Bureau (CFPB) finalized a controversial rule to increase transparency in small business lending by requiring financial institutions to collect and report information about the small business credit applications they receive. As directed by the Dodd-Frank Wall Street Reform and Consumer Protection Act, lenders now will need to collect the geographic and demographic data, lending decisions and the price of credit. House Committee on Financial Services Chair Patrick McHenry (R-N.C.) reacted to the CFPB's rule, stating that "By imposing overly burdensome reporting requirements on smaller lenders, [CFPB] Director [Rohit] Chopra is jeopardizing the privacy and security of small business owners' personal and financial data."

White House to Bolster PPDSA Capabilities

The White House Office of Science and Technology Policy (OSTP) released its National Strategy to Advance Privacy-Preserving Data Sharing and Analytics, outlining its roadmap to enable collective data sharing and analysis while maintaining disassociability and confidentiality. The plan emphasizes how privacy-preserving data sharing and analytics (PPDSA) facilitates collaboration and protects sensitive information. The strategy comes as a part of a larger set of initiatives and strategies related to tech governance announced by the White House in 2022.

FTC Moves Forward on COPPA Violations Case

The Federal Trade Commission (FTC) has been investigating Amazon for possible violations of the Children's Online Privacy Protection Act (COPPA) and will be moving forward with a case claiming that the use of the company's voice assistant breaks the law. The company claims that the voice assistant complies with COPPA because the company requires parental consent and gives parents full control over their children's use of the product. The FTC is preparing to file a complaint with the U.S. Department of Justice (DOJ), and then the DOJ will have 45 days to decide whether to pursue the case.

White House Releases National Cybersecurity Strategy

On March 2, 2023, the White House released its National Cybersecurity Strategy, which provides a roadmap of the actions that the federal government plans to take to align with strategic objectives to enhance U.S. cybersecurity and data privacy and security for consumers. For example, Strategic Objective 3.1, "Hold the Stewards of Our Data Accountable," states that "The Administration supports legislative efforts to impose robust clear, limits on the ability to collect, use, transfer, and maintain personal data and provide strong protections for sensitive data like geolocation and health information." Other strategic objectives include driving the development of secure Internet of Things (IoT) devices, including through the expansion of IoT security labels, and developing a digital identity ecosystem that provides "easier and more secure access to government benefits and services, trusted communication and social networks, and new possibilities for digital contracts and payment systems." The strategy comes at a time when consumer data privacy and security are increasingly tied to national security (e.g., TikTok). The White House Office of the National Cyber Director (ONCD) – which is currently led by Acting Director Kemba Walden, who replaced Director Chris Inglis at the beginning of March – will work with various agencies and Congress to achieve the strategy's goals through regulatory and legislative action.

FTC Finalizes Order on Epic Games

On March 14, 2023, the FTC finalized an order requiring Epic Games – a gaming company that is most notably the maker of popular Fortnite video game – to pay $245 million to consumers to settle charges alleging that Epic deployed a variety of design tricks aimed at getting consumers of all ages to make unintended in-game purchases and as such, violated the Federal Trade Commission Act. Commissioners voted 4-0 to approve the complaint and order.

FTC Issues RFI on Cloud Computing Providers and Data Security

FTC staff are seeking information on the business practices of cloud computing providers, including issues related to the market power of these companies, impact on competition and potential security risks. In a request for information (RFI), the FTC seeks information about the competitive dynamics of cloud computing, the extent to which certain segments of the economy are reliant on cloud service providers and the security risks associated with the industry's business practices. In addition to the potential impact on competition and data security, the FTC is also interested in receiving comments on the impact of cloud computing on specific industries such as healthcare, finance, transportation, e-commerce and defense. Comments are due May 22, 2023.

RELATED HOLLAND & KNIGHT ALERTS

- Holland & Knight Defense Situation Report: March 2023, March 29, 2023
- FERC Approves New Cybersecurity Standards for Low-Impact Electric Assets, March 17, 2023
- Lessons Learned from FTC Enforcement Action Against BetterHelp, March 6, 2023

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