



August 3, 2010



In This Issue

[Linda Goldstein to Participate in ERA Breaking-News Webinar on FTC's Claim Substantiation Standard](#)
[New Privacy Legislation Introduced; Industry Groups Express Concern](#)
[Apple Responds to Questions About Location-Based Data](#)
[Lawsuit Over Failed KFC Promotion Can Go Forward](#)
[FTC Testifies About Teen Privacy](#)
[States Seek Information from Google](#)
[Naked Cowboy v. Naked Cowgirl](#)

Linda Goldstein to Participate in ERA Breaking-News Webinar on FTC's Claim Substantiation Standard

On August 5, 2010, Linda Goldstein, chair of Manatt's Advertising, Marketing & Media Division, will join a panel of distinguished colleagues to discuss a hot button question facing the direct response industry: "Has the FTC Strengthened its Claim Substantiation Standard?"

The breaking-news style webinar, to be hosted by the Electronic Retailing Association, will be held at 2:00 pm ET (11:00 am PT). The panelists will address two significant FTC settlements involving food and dietary supplement products and their far-reaching implications for the industry.

To register for this free event, or for further details, click [here](#).

[back to top](#)

New Privacy Legislation Introduced; Industry Groups Express Concern

Rep. Bobby Rush (D-III.) introduced the Best Practices Act, a new privacy bill that is an attempt to "foster transparency about the commercial use of personal information and provide consumers with meaningful choices about the collection, use and disclosure of such information."



Recognized for Excellence in the areas of Advertising, Marketing and Media



Named a Top Practice Nationally for Marketing and Advertising



Practice leaders included among the prestigious *Best Lawyers* in the country

UPCOMING EVENTS

August 5, 2010

The bill, H.R. 5777 or the Building Effective Strategies To Promote Responsibility Accountability Choice Transparency Innovation Consumer Expectations and Safeguards ("Best Practices") Act, would cover entities that store covered information for at least 15,000 individuals, collect covered information from at least 10,000 individuals over a 12-month period, collect or store "sensitive information," or use covered information to study, monitor, or analyze the behavior of individuals as the entity's primary business.

As drafted, the legislation would require online companies to get consumers' permission before collecting sensitive information, such as Social Security numbers, race or ethnicity, or medical or financial data; companies that share personal information with third parties would also be required to obtain consent and offer opt-outs.

The Federal Trade Commission and state attorneys general would provide enforcement, with fines up to \$5 million.

While the bill is similar to the **privacy legislation** released by Reps. Rick Boucher (D-Va.) and Cliff Stearns (R-Fla.) in May, there are some notable differences. (Click [here](#) for further background).

In the Boucher-Stearns bill, ad networks that track and collect information would be required to obtain opt-in consent unless the network utilizes the behavioral advertising icon to provide prominent notice and allow users to edit their profiles. In Rep. Rush's bill, however, explicit permission would be required before users' personal information could be shared with third parties unless the company takes part in the industry's self-regulatory program.

The new legislation also has a broader definition of "third party": If a consumer would not reasonably expect companies to be related, then such companies would be considered third parties to each other.

The Best Practices Act broadly defines "sensitive information," which requires users' affirmative consent before it can be collected or shared, including medical history or health, race or ethnicity, sexual orientation or sexual behavior, certain financial data, and geolocation data if combined with other data such as a profile or name.

Another key, controversial difference between the two proposed privacy bills: Rep. Rush's law would allow for a private right of action, letting individuals sue companies for up to \$1,000 per violation. The bill does include a safe harbor from suits for companies that are in compliance with the self-regulatory program.

The Boucher-Stearns bill does not allow private lawsuits.

Response to the new proposal has been mixed. Vice President of Public Policy for the Interactive Advertising Bureau Mike Zaneis said Rep. Rush's bill is "more palatable than the Boucher proposal" because it gives greater deference to the industry's self-regulatory program, but

Electronic Retailing Association Webinar

Topic: "Has the FTC Strengthened its Claim Substantiation Standard?"

Speaker: [Linda Goldstein](#)
[for more information](#)

August 15-17, 2010

Affiliate Summit East

Topic: "How to Avoid Becoming a Regulatory Target"

Speaker: [Linda Goldstein](#)

New York, NY

[for more information](#)

August 26, 2010

Thompson Audio Conference

Topic: "Dietary Supplements and Functional Foods: What You Need to Know About 2010 Enforcement"

Speakers: [Ivan](#)

[Wasserman](#) and [Christopher Cole](#)

[for more information](#)

September 21-23, 2010

2010 ERA D2C Convention

Topic: "Best Practices in Advance-Consent Marketing"

Speaker: [Linda Goldstein](#)

Las Vegas, NV

[for more information](#)

September 24, 2010

ACI Conference

Topic: "Sweepstakes, Contests, and Promotions"

Speaker: [Linda Goldstein](#)

has some serious problems.

"The private right of action is problematic," Zaneis said. "The penalties are exorbitant."

Consumer groups praised the measure. "I think we're cautiously optimistic that the Rush bill sets the stage for a much more powerful privacy proposal to emerge that protects consumers, but allows online advertising to flourish," said Jeff Chester, executive director of the Center for Digital Democracy.

To read the Best Practices Act, H.R. 5777, click [here](#).

Why it matters: The legislative debate over privacy has only intensified with the introduction of Rep. Rush's bill. A hearing was held by the House Subcommittee on Commerce, Trade, and Consumer Protection (which Rep. Rush chairs) on both proposed pieces of privacy legislation. At the hearing, FTC Bureau of Consumer Protection Director David Vladeck told legislators that the Commission would not take a position on either bill, instead stressing that consumers need "short and concise notifications" of companies' privacy policies. At the hearing, Rep. Stearns criticized several provisions of the Rush proposal as imposing too many restrictions on business, including the right of consumers to file suit. He also cautioned that the bill gives the FTC too much power to regulate. While the issue of privacy currently has momentum, Sen. Byron Dorgan (D-N.D.) said that it is "unlikely" there will be action in the Senate on either piece of legislation this year, given the limited time left on the 2010 legislative calendar.

[back to top](#)

Apple Responds to Questions About Location-Based Data

Responding to a letter from legislators, Apple said it does not share users' geolocation data with third parties without user permission and that the information is stored anonymously.

Reps. Edward Markey (D-Mass.) and Joe Barton (R-Tex.) sent Apple CEO Steve Jobs a letter last month with a list of questions about the company's use of customers' precise location information from its mobile devices and computers.

Earlier this year, Apple updated its privacy policy so that users were required to agree that the company and its "partners and licensees" could collect and store user location data.

Expressing concern about the change, the legislators asked Apple why the company started collecting the data and how the information is being used.

In its response from General Counsel Bruce Sewell, Apple said it began

New York, NY

[for more information](#)

November 18-19, 2010

32nd Annual Promotion

Marketing Law Conference

Topic/Speaker: "To Tweet or Not

to Tweet: How to Stay Current as

Technology Changes the Game,"

[Linda Goldstein](#)

Topic/Speaker: "Negative

Option/Advance Consent/Affiliate

Upsells," [Marc Roth](#)

Topic/Speaker: "Children's

Marketing," [Christopher Cole](#)

Chicago, IL

[for more information](#)

Newsletter Editors

[Jeffrey S. Edelstein](#)

Partner

jedelstein@manatt.com

212.790.4533

[Linda A. Goldstein](#)

Partner

lgoldstein@manatt.com

212.790.4544

Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

[Practice Group Overview](#)

[Practice Group Members](#)

Info, Resources & Links

[Subscribe](#)

[Unsubscribe](#)

[Newsletter Disclaimer](#)

collecting location data in January 2008 in response to customer demand for location-based apps and programs, and has always provided its customers with the ability to control the location-based service capabilities of their devices.

Under the terms of its privacy policy, Apple said it cannot collect geolocation information without a user's consent because individual users must activate the device's location services and then allow specific applications (such as Google Maps) to utilize location data.

If a user chooses to enable the location services, the company does collect and store the data, the letter said. Apple collects "batched" sets of location data once every 12 hours, utilizing GPS satellite signals or cellular towers and Wi-Fi access points.

That information "does not include any information identifying the particular device or user," according to Apple.

The recently launched iAd also collects longitude and latitude coordinates, which are converted into a zip code. While Apple does not share the coordinates or the zip code with advertisers, it does retain the information for six months, according to the letter.

To read Apple's letter, click [here](#).

Why it matters: In a statement, Reps. Markey and Barton thanked Apple for its response, but said greater transparency about geolocation data is important.

"The new challenges and concerns that present themselves with the collection and use of location-based information are particularly disconcerting," Barton said. "While I applaud Apple for responding to our questions, I remain concerned about privacy policies that run on for pages and pages." Reps. Markey and Barton are not alone – the issue has been addressed as part of the discussion to update the Electronic Communications Privacy Act, and Rep. Rick Boucher (D-Va.) included provisions relative to location data in his proposed privacy bill. Any company using geographic location data should pay close attention to the various developments, which we will continue to cover.

[back to top](#)

Lawsuit Over Failed KFC Promotion Can Go Forward

A U.S. district court refused to dismiss a class action lawsuit against Kentucky Fried Chicken alleging that the company cancelled a promotion just two days after it began.

Last year, KFC introduced a new product called "Kentucky Grilled Chicken" as a healthy fast-food menu option. To promote it, the company launched a campaign that included a giveaway where

consumers could download online coupons to redeem at KFC for a free Kentucky Grilled Chicken meal.

The company announced the promotion on the May 5, 2009, episode of Oprah's talk show and said the deal would run through May 19.

But according to **a class action lawsuit filed by consumers**, KFC "began almost immediately to refuse to honor the coupons." (Click [here](#) for further background).

At first, the company limited the promotion to the first 100 coupons presented at each KFC location, each day, but on May 7, refused to honor any of the Kentucky Grilled Chicken coupons.

According to the complaint, roughly 10.2 million coupons were downloaded over the two-day period but only 4.5 million coupons were actually redeemed at KFC franchises.

KFC tried to dismiss the suit, arguing that it offered consumers the option of applying for a "rain check" when their coupons were refused. If they filled out a form with their name and address, they would be sent a new coupon for a free meal.

But U.S. District Court Judge James F. Holderman said the rain check program was "not a cure, but a requirement for additional performance" by consumers.

"[T]he court finds it plausible that [KFC] never intended to honor the coupon as represented. It can be reasonably inferred from [KFC's] choice to publicize their offer 'on the highly popular "Oprah" show' that [KFC] hoped their promotion would reach millions of consumers. It is also reasonable to assume that [KFC] contemplated the possibility that millions of consumers would seize the opportunity to obtain a free 'Kentucky Grilled Chicken' meal, and that [KFC] considered what would happen if individual KFC restaurants ran out of the advertised product. With these considerations in mind, the court finds that it is plausible [KFC] intended all along to offer a 'rain check' in place of the coupon, or otherwise limit redemption of the coupon beyond the terms stated on its face," the court said.

The plaintiffs' claims of fraud, breach of contract and violations of state consumer protection statutes could therefore go forward, Judge Holderman said.

To read the decision in *In re Kentucky Grilled Chicken*, click [here](#).

Why it matters: Judge Holderman refused to dismiss any of the plaintiffs' claims, and made it clear that KFC should have considered the scale of its promotion – particularly in light of the power of Oprah – when structuring its offer. While KFC tried to manage the response by offering a "rain check," its contingency plan was not sufficient. Companies offering large-scale promotions should attempt to anticipate

redemption rates and consider the potential implications if the estimated response is incorrect.

[back to top](#)

FTC Testifies About Teen Privacy

The Federal Trade Commission provided testimony to the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Protection, Product Safety, and Insurance about teen privacy, saying that while teens are "heavy users" of the digital environment and derive some benefits from the Internet, it also poses "unique challenges" for them.

Jessica Rich, Deputy Director of the FTC's Bureau of Consumer Protection, said that as users of digital media, teens are "more impulsive" than adults and may not always think about the consequences of sharing information online. She used the example of social networking sites, where teens may share personal details that can leave them vulnerable to identity theft, or adversely affect college admissions or potential employment.

Teens are also subject to cyberbullying and "sometimes 'sext' to their peers – send text messages and images with sexual content – without considering the potential legal consequences and harm to their reputations," Rich said.

Rich said approximately three out of four American teenagers use social networking sites, with almost 50 percent doing so every day.

Another area popular with teenagers: mobile devices. According to the testimony, 75 percent of youths aged 12 to 17 had a cell phone in 2009, and are increasingly using them for e-mail, Web browsing, and texting, creating even more opportunities for teens to share personal information.

To read the full text of Rich's testimony, click [here](#).

Why it matters: The testimony noted that privacy concerns for all consumers are a current area of focus for the Commission. The FTC is currently in the process of reviewing the information it received from a recent series of public roundtables and will be drafting initial proposals for public comment to be released later this year. Rich also addressed the Commission's review of COPPA, and said the FTC "questions" whether the extension of the Act's protections to teens would truly be effective in protecting their privacy. "Although the parental notice and consent model works fairly well for young children . . . it may be less effective or appropriate for adolescents," she said. "For example, teens are more likely than younger children to alter their parents' contact information or misrepresent their own ages in order to participate in

online activities their parents might not deem appropriate.”

[back to top](#)

States Seek Information from Google

A group of 38 states recently sent a letter to Google, demanding more information about the company’s Street View data collection.

Google came under fire after the company announced that it had inadvertently captured Wi-Fi signals while its vehicles were taking pictures for its Street View service. The service offers views of streets taken by Google’s vehicles and is offered in about a dozen countries around the world as part of Google Maps. But the company revealed it also collected information, including e-mails, passwords, and Web-browsing history.

Led by Connecticut’s Attorney General Richard Blumenthal, the states are looking for details about locations where the data collection occurred, how it was used, whether it was disclosed to third parties, and if it was used for marketing purposes.

Blumenthal’s letter asked Google whether the company tested its Street View software prior to its use, which he said would have revealed that the program collected other data.

The letter also asks whether the data was sold or otherwise used, and seeks the specific locations where the data collection occurred.

The “investigation will determine whether laws were broken and whether legislation is necessary to prevent future privacy breaches,” Blumenthal said in a press release. “Google must come completely clean, fully explaining how this invasion of personal privacy happened and why.”

Google maintains that the data collection was an accident.

To read a press release from Attorney General Blumenthal, click [here](#).

Why it matters: Google is facing scrutiny over its data collection around the globe. Several countries in Europe – including France and Germany – are also investigating the company’s practices. And Blumenthal made it clear that the state coalition will not hesitate to take legal action, saying that the states “will take all appropriate steps – including potential legal action if warranted – to obtain complete, comprehensive answers.”

[back to top](#)

Naked Cowboy v. Naked Cowgirl

Times Square staple the Naked Cowboy has filed suit against competitor the Naked Cowgirl, alleging trademark infringement

and unfair competition.

Robert Burck, who wears white briefs, a cowboy hat, and cowboy boots while playing the guitar in midtown Manhattan, claims that Sandra Brodsky – who wears a bikini and cowgirl hat and boots to play her guitar nearby – is infringing the look he started 13 years ago.

As the Naked Cowboy, Burck “is a pioneer who for many years spread love, cheer, good humor, and fellowship throughout New York and indeed the world,” according to the complaint.

The Naked Cowboy also offers other hopefuls franchise opportunities to do their own Naked Cowboy work; his suit alleges Brodsky repeatedly refused to sign such an agreement.

Burck, who claims his trademarked look has become “a successful empire” – leading to television and commercial appearances and merchandise like T-shirts and shot glasses – is seeking unspecified damages.

To read the complaint in *Naked Cowboy v. Brodsky*, click [here](#).

Why it matters: The Naked Cowboy is not shy about protecting his asserted intellectual property rights. In 2008, he filed suit against Mars, Inc., the maker of M&M’s, after the company created a blue M&M character that played a guitar while dressed in a cowboy hat and boots and white briefs. He sought \$100 million in punitive damages, but after a district court judge partially dismissed the suit, the parties settled with undisclosed terms.

[back to top](#)

ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)

Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.

© 2010 Manatt, Phelps & Phillips, LLP. All rights reserved.