Data privacy on the menu in Congress and across the country

By Howard Fienberg, PLC

In May, Rep. David McKinley (R-WV-01) expressed his skepticism about the need for data privacy legislation during a meeting with MRA. Joking about what he derisively referred to as the "beltway outcry" about "location privacy" lapses on Apple's smart phones, he listed numerous issues far more important as they pertain to the interests and concerns of his constituents. From his perspective, he noted that the biggest concerns about data privacy seem to be emanating from activist organizations and legislators rather than from consumers at large.

The next month, Senate Commerce Committee Chairman Jay Rockefeller (D-WV) opened a hearing on data privacy with the monologue, "[p]oll after poll shows that Americans are increasingly concerned about their loss of privacy; and those same polls show that Americans don't know what to do about it. It is my intent to change that. I want ordinary consumers to know what is being done with their personal information, and I want to give them the power to do something about it."

Whichever of Rep. McKinley or Sen. Rockefeller may be correct, the ability to collect, use and share consumers' information is under threat in Congress, federal regulatory agencies and state legislatures. Bills currently in Congress purport to comprehensively overhaul data privacy (e.g., Rep. Rush's Best Practices Act, Sen. Kerry's Commercial Privacy Bill of Rights Act, and Rep. Stearns' Consumer Privacy Protection Act), as do proposed regulations from the Federal Trade Commission (FTC) and the Department of Commerce. Meanwhile, state legislation in California (S.B. 761) and in Texas (H.B. 1443) would create additional privacy restrictions, including a near-prohibition on transferring or sharing data with third parties.

Top Data Privacy Topics: Location Privacy

Location data has been a big part of the debate this year. The collection, storage and use of location-based user data has been contentious in the wake of news media reports that indicate mobile devices are collecting customers' personal location data.

Senator Al Franken (D-MN), Chairman of a new Senate Subcommittee on Privacy, Technology and the Law, has dealt at length with privacy concerns about the use of location data and mobile devices and applications, while striving to place them within a broader context of data security and data privacy. Sen. Franken provided during his subcommittee hearing that "a balance [is needed] between all of those wonderful benefits and the public's right to privacy." Nevertheless, according to the Chairman, there has been a fundamental shift in "who has our information and what they're doing with it". He emphasized that his subcommittee would focus on making sure that "privacy protections are keeping up with our technology."

While Chairman Franken opened the hearing by pointing out, "I don't think we're doing enough to protect" consumers, Subcommittee Ranking Member Tom Coburn (R-OK) retorted that the Committee needed a lot more information before they could consider any kind of legislation in this area. Chairman Franken and others have since pursued legislative solutions regardless (which will be discussed further on the MRA website).

The Data Retention and Minimization Debate

A distinct point of confusion among some observers of Chairman Franken's position and perspective comes courtesy of a growing disconnect between the demands of law enforcement and those of privacy and technology advocates when it comes to data retention. During Sen. Franken's subcommittee hearing, a witness from the Department of Justice, Jason Weinstein, deputy assistant attorney general at the Department's Criminal Division, stated that records like Internet Protocol (IP) addresses "are an absolutely necessary link in the investigative chain," and recommended that the subcommittee require data retention on the part of Internet Service Providers (ISPs) and wireless providers. This position contradicts the interests expressed by the Senators in attendance as well as several witnesses, who argued that such information should not be retained much at all and still leaves the status and future of privacy protections in light of technology and innovation unresolved.

MRA entered the data retention debate as part of its advocacy efforts on behalf of data security legislation. MRA pushed an amendment to Rep. Mary Bono Mack's Secure and Fortify Electronic (SAFE) Data Act, H.R. 2577, designed to restrict the authority of the FTC to promulgate regulations on data minimization. As a broad principle, not collecting or maintaining more data than necessary to fulfill a given purpose makes sense. However, data collection limits and retention periods specifically directed by the FTC could be intensely problematic. Within various modes and methods of data collection, and across many different purposes, the need to collect and retain data will vary, and should be properly subject to those needs, not an arbitrary decision by a regulatory body unfamiliar with the processes and practices of those modes, methods and purposes. Prescribed retention periods would diminish the long-term value of data, including survey

and opinion research data. MRA would be very concerned about the FTC setting regulations without being familiar with the processes and practices of all businesses that would be impacted by their implementation.

During a markup of H.R. 2577 in the Commerce Manufacturing and Trade Subcommittee, the Subcommittee considered an amendment MRA helped with and endorsed from Congressmen Cliff Stearns (R-FL-06) and Mike Pompeo (R-KS-04), to prevent FTC rulemaking authority on the "data minimization" provisions in the Act. Reps. Stearns and Pompeo agreed with MRA that such decisions are best left to businesses themselves, at least for now. Although Subcommittee Ranking Member G.K. Butterfield (D-NC-01) complained that the amendment sought to hamper an already hampered agency in doing its job, the MRA-endorsed Stearns-Pompeo amendment on "data minimization" passed the Subcommittee by voice vote. This contentious issue will not go away any time soon and continues to be raised by other parties in the data privacy debate.

Other Issues in the Privacy Debate

Other issues in the privacy debate like online behavioral tracking, (including proposals for state or federal do not track registries), student privacy, and healthcare information restrictions are dealt with on the MRA website.

Generally, in all data privacy areas, legislators and regulators have shown little interest in providing special treatment for survey and opinion research. So, as technology advances and data privacy comes under increasing regulatory and legislative scrutiny, MRA will continue to advocate for an acceptable form of baseline data privacy protection in the U.S. that will protect both the research profession and consumers.

Stay abreast of developments in the "Advocacy" section of the MRA website at www.MarketingResearch.org.

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