CONGRESS EXPECTED TO CONSIDER PRIVACY LEGISLATION THIS YEAR
THAT COULD IMPOSE COMPREHENSIVE REQUIREMENTS
ON A WIDE RANGE OF BUSINESSES

The new Congress that convened in January 2011 is expected to consider a number of comprehensive proposals designed to afford consumers new privacy protections in both online and offline transactions and potentially to affect the obligations of financial institutions under the Gramm Leach Bliley Act (the “GLBA”). The chairmen and senior members of the key congressional committees with jurisdiction over privacy issues have announced their intention to hold hearings or develop new legislation that would address consumers’ concerns about the use of their personal information. The next such hearing will be held by the Senate Commerce, Science and Transportation Committee on **Wednesday, March 16, at 10 a.m.** In a preliminary step, other members of Congress have introduced privacy legislation to initiate congressional discussions on these issues, and leaders of both parties, including Sens. McCain (R-AZ) and Kerry (D-MA), have announced their intention to collaborate on legislation that will include a “Do-Not-Track” mechanism to restrict online behavioral advertising and give consumers greater protections and choice with respect to the collection, use, and disclosure of their personal and other information.

This Memorandum provides a brief outlook regarding anticipated congressional action on consumer privacy legislation.

**Outlook in the Senate**

The chairman of the **Senate Commerce Committee**, Sen. Rockefeller (D-WV), recently announced a legislative agenda for the committee for 2011 that includes “protecting consumer information and privacy on the Internet.” On Wednesday, March 16, 2011, at 10 a.m., Sen. Rockefeller will convene a hearing on the state of online consumer privacy, focusing on commercial practices that involve collecting, maintaining, using, and disseminating large amounts of consumer information, some of it potentially very sensitive and private in nature. Based on discussions at last year’s Commerce Committee hearings regarding online privacy, we expect privacy legislation to be introduced this year by Sen. Kerry (D-MA), who chairs the committee’s Subcommittee on Communications, Technology and the Internet, and Sen. Pryor (D-AR), who chairs the Subcommittee on Consumer Protection, Product Safety and Insurance. It is unclear at this point whether the two Senators will propose such legislation jointly or separately or whether such legislation will address online privacy exclusively. Any privacy legislation fashioned by these committee leaders would likely require bipartisan support in order to be approved by the full Senate. This support appears to be growing. Senior Republicans on the Commerce Committee—including the committee’s ranking Republican, Sen. Hutchinson (R-TX)—as well as other leading Republicans, such as Sen. McCain (R-AZ), are known to be generally sympathetic to consumer concerns about online privacy and are actively collaborating with their Democratic colleagues on legislation that would, among other things, place new restrictions on the ability of companies to track web visitors’ online behavior.
Separately, the **Senate Judiciary Committee** has established a Subcommittee on Privacy, Technology and the Law chaired by Sen. Franken (D-MN). The new subcommittee’s responsibilities include: oversight of laws and policies governing the collection, protection, use, and dissemination of commercial information by the private sector, including online behavioral advertising; privacy within social networking websites and other online privacy issues; enforcement and implementation of commercial information privacy laws and policies; use of technology by the private sector to protect privacy, enhance transparency, and encourage innovation; privacy standards for the collection, retention, use, and dissemination of personally identifiable commercial information; and the privacy implications of new or emerging technologies. Chairman Franken has publicly stated his intention to use his position to protect privacy rights, but has not yet announced a specific agenda or timetable for subcommittee action this year. Nor is it yet clear how the overlapping jurisdictions of the Commerce and Judiciary Committees will be coordinated with respect to the development of new privacy legislation in the Senate.

**Outlook in the House of Representatives**

Following the November 2010 midterm elections and the resulting change in party control of the House of Representatives, all House committees have new leadership with legislative priorities that differ from those of the leadership in the prior Congress. The **House Energy and Commerce Committee**, with jurisdiction over consumer protection (including privacy matters generally) and the Federal Trade Commission, has been reorganized. Rep. Rush (D-IL), former chairman of the committee’s Subcommittee on Commerce, Trade, and Consumer Protection and sponsor of comprehensive privacy legislation in 2010, has been succeeded by Rep. Mack (R-CA), and Rush’s former subcommittee has been reorganized with the effect that it now shares jurisdiction over privacy issues with another subcommittee of this committee. Rep. Upton (R-MI), the new Energy and Commerce Committee chairman, has stated that he is “keeping an open mind” as to whether Congress should pass legislation to enhance online consumer privacy and that he will make a decision in that regard after the committee holds hearings on privacy issues. Such hearings are not yet scheduled but could occur as early as this spring.

In the meantime, two House members interested in privacy policy have initiated congressional discussion of this issue through the recent introduction of legislation. Rep. Rush has reintroduced the Best Practices Act (H.R. 611), the privacy legislation he first proposed in 2010 that would require a broad range of businesses to provide notice of their privacy practices and implement new mechanisms to allow for enhanced consumer choice, and mandate that such companies formulate reasonable data security policies. This legislation was referred to the House Energy and Commerce Committee.
Rep. Speier (D-CA) has introduced two privacy-related bills. The first, the Financial Information Privacy Act of 2011 (H.R. 653), would amend the GLBA\(^1\) by, among other things, requiring financial institutions to obtain opt-*in* consent from consumers prior to disclosing their nonpublic personal information to nonaffiliated third parties. This measure was referred to the House Financial Services Committee, which has no current plans to consider the bill. Rep. Speier’s second bill, the Do Not Track Me Online Act (H.R. 654), would establish a “Do-Not-Track” mechanism and require broader disclosure of online information collection and use practices.\(^2\) H.R. 654 was referred to the House Energy and Commerce Committee.

Each bill, if enacted, would have major implications for a wide range of businesses, including those (notably financial institutions) that already have existing and substantial privacy notice and protection mechanisms in place. However, legislation in the House of Representatives is customarily initiated by committee or subcommittee chairs. Therefore, all three measures will most likely be deferred to await any proposals developed or endorsed by the respective leadership of the Committees on Energy and Commerce or Financial Services.

Further Willkie data privacy Memoranda will be issued as developments warrant.

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We believe that both houses of Congress, spearheaded by leaders on both sides of the aisle, will press for data privacy legislation this year. While the focus of this legislation will be on online behavioral advertising, it is likely that other areas will also be addressed in the mix, including data breach notification, data security protections, and possibly expansion of existing data privacy laws such as the GLBA. Passage of a new data privacy law will still not be easy due to the divided Congress and anti-regulation reservations by certain Republicans. However, given the potential far-reaching implications adoption of any such law could have on a wide range of U.S. businesses, companies should actively monitor the upcoming Senate and House hearings on these issues (including the one by the Senate Commerce, Science and Transportation Committee **scheduled for Wednesday, March 16, at 10 a.m.**) and consider participating in this process, to ensure that any new law that is enacted (and/or any set of FTC or other agency requirements or guidelines that is adopted) is appropriately and reasonably measured and reflective of industry and practical concerns.

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1 Pub. L. 106-102, Tit. V, 113 Stat. 1338, 1436; 15 U.S.C. §§ 6801-6809. In general, the GLBA requires each financial institution to (1) notify its individual consumers and customers about the financial institution’s information-sharing practices with respect to the nonpublic personal information (“NPI”) collected from such consumers and customers and (2) afford consumers/customers the ability to opt out of certain sharing of their NPI by the financial institution with nonaffiliated third parties, unless an exception applies.

2 Detailed summaries of the Rush and Speier bills prepared by Willkie Farr & Gallagher LLP may be found here.
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