

**DATA PRIVACY UPDATE: INSIGHT INTO THE VIEWS OF THE
NEXT PRESIDENT ON KEY ISSUES**

On October 17, 2008, Orson Swindle, former FTC Commissioner, representing the McCain campaign, and Peter Swire, former Privacy Counsel for the Clinton Administration, representing the Obama campaign, met to discuss the candidates' positions on data privacy and data security issues. The discussion was moderated by Thomas Lenard of the Technology Policy Institute. Both candidates' representatives emphasized that privacy issues will continue to be of great concern in the next administration, regardless of who wins the election. In general, McCain favors an approach that relies primarily on competition and market forces, improved technology, and "effective self-regulation" to protect the privacy interests of consumers. While neither candidate has advocated the adoption of comprehensive privacy legislation, Obama believes that if it becomes clear in specific areas that market forces have failed to adequately protect the privacy interests of consumers, government intervention, including legislative action, might be necessary to strengthen privacy protections. Below is a summary of each candidate's position on a variety of privacy-related issues.

Most Pressing Data Privacy Issues for the Next Administration

- **Obama:** Although Obama has not made specific statements about his stance on most privacy issues, he has advocated the following: (1) greater government accountability and transparency in relation to surveillance laws; (2) the development of cost-effective electronic health records that maintain patient privacy; (3) greater protection for children online; (4) increased privacy protections on social networking sites; and (5) harnessing the power of technology to provide citizens with enhanced privacy protection.
- **McCain:** McCain advocates a flexible approach to privacy because today's most pressing privacy issues will likely be very different from tomorrow's concerns. Accordingly, he does not support the development of a comprehensive privacy bill, believing that a self-regulatory approach will allow greater flexibility and agility in addressing new privacy issues as they arise.

Online Behavioral Advertising

- **Obama:** Obama has not taken a public position on "online behavioral advertising" (defined by the FTC as "the tracking of a consumer's activities online -- including the searches the consumer has conducted, the Web pages visited, and the content viewed -- in order to deliver advertising targeted to the individual consumer's interests"). However, Swire opined that Obama's approach would be similar to his general approach on economic issues, *i.e.*, a belief that while free markets drive the economy, sometimes markets fail and those failures need to be scrutinized, and, if necessary, addressed by the government. Similarly, if it appears that the market is not addressing evolving privacy issues such as behavioral advertising, the government must give those issues a "hard

look” and consider whether legislative action or regulatory intervention is required. In addition, Obama believes that it is important to be forward-looking when evaluating emerging privacy issues.

- **McCain:** McCain supports the FTC’s efforts to encourage a self-regulatory approach to this issue. Swindle compared the current concern with respect to online behavioral advertising to the concerns raised with respect to the use of cookies in the early 2000s, noting that, as with cookies, the use of behavioral advertising technology offers many benefits to consumers. McCain believes that if self-regulation is ineffective and consumers are harmed by online behavioral advertising, the FTC can and should intervene and hold the responsible party accountable.

ID Theft / Data Breach

- **Obama:** Obama would increase the FTC’s enforcement budget to strengthen its ability to address threats to the privacy/identity of American consumers. He also has emphasized that the U.S. needs to increase its enforcement efforts against overseas threats such as SPAM from organized crime rings. Obama advocates strong FTC oversight in this area and believes that the U.S. government should work closely with foreign governments to address such threats.
- **McCain:** McCain believes that technology companies have strong incentives to make consumers feel more secure online, and therefore to develop enhanced protections against ID theft and data breaches. Swindle further indicated that while McCain believes that customers should be properly notified in the event of a data breach, any notification requirement should take into account the extent to which there has been or is likely to be actual harm to consumers.

Government Organization

- **Obama:** Obama has proposed that there be a Chief Technology Officer (CTO) in the White House. In response to a question, Swire suggested that the proposed CTO’s role would include undertaking coordination of privacy activities at various executive branch agencies and advising the president on privacy issues. He noted that there is no existing organization designated to handle cross-agency coordination in this area. Swire emphasized that because the FTC is an independent regulatory agency, its role in addressing privacy-related issues would not be diminished by the creation of such a position.
- **McCain:** Swindle indicated that McCain would similarly appoint one person or a group of persons in the White House to track privacy developments for him. McCain’s approach would be to reach out to individuals with different views on both sides of the aisle to identify the best means of addressing emerging privacy issues. Swindle also believes that having a privacy advisor or group within the White House will not diminish the role of the FTC.

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The new FTC Chairman, William E. Kovacic, has listed data protection, identify theft prevention, and scrutiny of online behavioral advertising among his top priorities (*see, e.g.*, <http://www.ftc.gov/speeches/kovacic/2008kovacicintrvwc.pdf>), and various members in Congress will likely push for broad data privacy legislation next year. The foregoing summary indicates that data privacy and data security issues will also garner focused attention in the next administration, regardless of who wins the election, although McCain and Obama would likely approach these issues somewhat differently.

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This memorandum was prepared by Francis M. Buono, John L. McGrew, and Melissa A. Troiano. If you have any questions about this memorandum, please contact any of the members of the WF&G New Administration/Congress Task Force listed below or the attorney with whom you regularly work. The New Administration/Congress Task Force has been formed to provide information and targeted advice, and to respond to questions from clients in connection with the legislative, regulatory, and enforcement and compliance initiatives, and potential litigation, that will result from the new U.S. presidential administration and Congress to be elected on November 4, 2008.

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