EVOLVING PRIVACY POLICY AND DISCLOSURE STANDARDS

Standards for online and mobile privacy policies and privacy-related disclosures continue to evolve. New guidance from the Federal Trade Commission (FTC), the Department of Commerce and other data protection authorities has raised the bar for disclosures. The FTC has been critical of the current state of privacy policies and has called for companies to do better. The agency's recent actions and resulting settlements have also highlighted the need for companies to "clearly and prominently" disclose their information practices. The importance of this type of clear communication is also apparent in new state laws that require certain disclosures, such as data breach notifications, be written in "plain language."

What follows is a brief guide to the current enforcement climate regarding privacy policies and disclosures.

THE FTC

As noted above, the FTC has been highly critical of many privacy policies. In its 2012 report, "Protecting Consumer Privacy in an Era of Rapid Change," the agency made recommendations for businesses and policymakers and called on companies to implement best practices to protect consumers' private information.

In particular, the FTC said existing policies are too long and difficult for the average consumer to read or understand: "Privacy notices should be clearer, shorter, and more standardized, to enable better comprehension and comparison of privacy practices." Currently, "most privacy practices are generally ineffective for informing consumers about a company's data practices because they are too long, are difficult to comprehend, and lack uniformity."

- The FTC continues to signal that it will closely review and interpret actual privacy policy wording, particularly what companies tell consumers about information use/sharing and how changes to policies will be implemented. (One indication of this focus can be found on the agency's Bureau of Consumer Protection website, with its link to privacy disclosure enforcement actions: "Think your company doesn’t make any privacy claims? Think again — and reread your privacy policy to make sure you’re honoring the promises you’ve pledged. Consumers care about the privacy of their personal information and savvy businesses understand the importance of being clear about what you do with their data.")

- The FTC is also focused on mobile data collection and disclosures. Although it recognizes the difficulties of making disclosures in the mobile environment, the agency views these challenges as only increasing the urgency for companies to provide clear disclosures. In its recently released staff report regarding apps, "Mobile Apps for Kids: Current Privacy Disclosures are Disappointing," the FTC criticized the lack of privacy disclosures in the mobile app environment. After the report was released, the agency also indicated that enforcement actions will be forthcoming when companies do not heed the warning and best practices described in the document.

- Careful attention to clear and prominent disclosures is critical in light of the long list of companies that have entered into settlements with compliance and reporting requirements lasting 20 years — due in part to representations made in their privacy policies. In one recent action, the FTC charged that a company used deceptive tactics and violated its own privacy promises to consumers when it launched its social network. In the resulting settlement and others like it, the FTC has stressed the importance of clear privacy policy disclosures and continues to find non-adherence to be a deceptive trade practice, in violation of federal law.
Given these developments, your company is well advised to take the following steps:

1. Revisit your privacy disclosures for readability, whether online, within a mobile app or in direct communications with consumers about changes to their information practices.

2. Ensure that your business is obtaining genuinely informed consent to collect consumer information.

3. Find new ways to clearly communicate with consumers about privacy matters.

**PARTNERS IN YOUR CORNER**

Holland & Knight, a global law firm and one of the largest in the United States, and Kinsella Media, LLC, a leading Washington, D.C.-based advertising and legal notification firm, are experienced in helping companies develop best practices for complying with evolving privacy policy standards.

**HOLLAND & KNIGHT: ON THE CUTTING-EDGE OF PRIVACY LAW**

Holland & Knight works with the class action and plain language notice professionals at Kinsella Media to provide answers to client concerns about disclosures. Whether the issue is data collection (via any information-gathering or tracking technology), data transfer or sharing or selling data, those seeking to attack a company typically claim that its disclosures were inadequate, or worse, misleading. Drawing on a wealth of experience and a current understanding of policy debates on notice, Holland & Knight’s Data Privacy and Security Team drafts and reviews privacy disclosures for substantive compliance with applicable laws and best practices.

**KINSELLA MEDIA: PLAIN LANGUAGE NOTICE EXPERTS**

Kinsella Media augments Holland & Knight’s legal review with proven expertise in effective communication. In national class actions, including matters of privacy and data security, Kinsella Media’s experts have been approved time and again by courts to design legal notices and communications programs and ensure that the included materials are in plain, easily understood language. In addition, Dr. Shannon Wheatman, a Kinsella Media vice president, helped write and design the Federal Judicial Center’s model forms of notice for meeting the plain language requirements for class action notices. Given new FTC mandates for “clear and prominent” notice of information practices, it makes sense for companies to supplement legal analysis with tested and approved communications advice.

**CONTACT US**

Whether you are drafting website or mobile privacy policies or are otherwise communicating with your customers about your privacy practices, Holland & Knight and Kinsella Media are ready to assist. Please contact us for more information.

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