



Ep. 24: Spotlight on Privacy Legislation

January 8, 2020

Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Privacy used to mean keeping one's shades drawn. Today, it is a market-shaping issue that, in various ways, is having a tremendous impact on consumers, children, employees, businesses and government, and legislators at the state and federal levels are actively engaged in defining it and finding ways of safeguarding it even as retail associations and others argue that access to data is critical for good customer service and a better customer experience.

In today's episode, Akin Gump public law and policy partner Ed Pagano and senior policy advisor Galen Roehl will discuss privacy legislation currently being proposed by both parties on Capitol Hill.

Ed and Galen bring years of experience working with legislative matters to this conversation. Ed served in the Obama administration as Senate Liaison and Deputy Assistant to the President for Legislative Affairs, and, previously, for nearly two decades as Chief of Staff for Sen. Patrick Leahy. Galen is a Capitol Hill veteran who, as senior vice president for government affairs for USTelecom, represented the nation's leading broadband providers in front of members of both houses of Congress and their key staff.

They'll be reviewing the privacy legislation being considered by Congress, how it complements or conflicts with state-level legislation and its potential impact on businesses and consumers.

Welcome to the podcast.

Ed, Galen, thank you both for appearing on the show today. Let's start with a little background for listeners. What exactly do you think is motivating the current Hill effort to draft privacy-related legislation? Galen, if you would, please.

Galen Roehl:

There have been privacy proposals floating around on the Hill for a number of years, but I think what's really changed, what's really caught Congress' attention is that the marketplace has changed. Everything is connected; we're in the age of the Internet of Things: Your home is smart, your appliances are smart. Everyone who has an iPhone or an Android device is basically walking around with a data collector in their pockets or in their purse, and people are really starting to recognize just how much information about them is out there and the need to protect it in a world where hackers and people are

trying to steal this information for identity theft or financial fraud, things like that. I think people are really starting to notice this.

Ed Pagano: Excellent point, Galen, I would also add that it's really become politically popular. Consumers and voters are demanding protection of their personal privacy. Like any other political issue, lawmakers are responding to that and are really looking at how they can protect consumers' personal privacy while also allowing innovation in businesses and allowing the customization of services and products that consumers are demanding in this 21st century.

Galen Roehl: One thing I will also add to that, too, that's motivating Congress, I think: Because Congress hasn't acted up to this point, we're starting to see states get involved. California passed the California Consumer [Privacy] Act. It goes into effect January 1; enforcement will start in July. But the Internet doesn't respect state boundaries. There really needs to be a federal law that protects everyone. They can't go state by state.

Ed Pagano: That patchwork of 50 states really will be almost impossible to implement for most businesses. Maybe very, very large corporations will be able to comply, but, otherwise, it's really going to hurt small business, and I think Congress is beginning to understand that.

Jose Garriga: Terrific. Thank you. I think we'll circle back to the concept of state versus federal legislation, a little bit later. Let's talk, then, about some of these efforts at the federal level and what it is that the Hill's considering. What are the leading privacy bills being considered? To what extent do they enjoy bipartisan support? Galen.

Galen Roehl: Several key members on the Hill—let's start with the Senate—Senate Commerce Committee Chairman Roger Wicker and ranking member Maria Cantwell have been in negotiations for the better part of this stuff this year, really. They haven't yet achieved a bipartisan agreement. Each member, Wicker and Cantwell, has released their own separate proposals that I would take each as a first offer. I think they both understand that they got to meet somewhere in the middle; otherwise, it's just not getting done. Also, Commerce Committee members Jerry Moran from Kansas and Richard Blumenthal from Connecticut have been negotiating; they've been making good progress. There's still some points of disagreement, but they're working, making, I think, a really good faith effort on getting a bipartisan agreement. Over on the House side, Reps. [Anna] Eshoo and [Zoe] Lofgren introduced a bill that's currently sitting before the House Energy and Commerce and the House Judiciary committees, and Rep. [Jan] Schakowsky just announced that she is expecting to release a draft perhaps as soon as next week.

Ed Pagano: I would add, I think, what this shows is really bipartisan support for doing something. There's not a consensus yet; that, I think, will develop over time. Privacy is very complicated, and the sharing of consumer data across many different business lines, with the consumers, with non-consumers, I think, it's going to take time to get it right, and that's really what, in the end, we want Congress to do.

Galen Roehl: But I will say, I do think these bipartisan negotiations that are ongoing have really been in good faith. I give much credit to the outstanding staff up there. I think they're really making a concerted effort to get something done. They recognize the importance of this issue.

Jose Garriga: Thank you. Let's drill down a little bit because there's a phrase or concept that keeps surfacing in discussions of the bills being considered, being drafted, and that's "private right of action." Can you describe what that means in this context, and why it may prove to be a stumbling block? Ed, please.

Ed Pagano: Sure. This is really about enforcing new consumer rights on their data. For example, in the California privacy statute going into effect next month, there are new consumer rights

to review your data that is held by a company, to delete that data, to correct that data. How are those rights enforced? They can be done certainly with the state attorneys general, which is envisioned to a degree in California, but California's law also allows a partial private right of action, so a consumer, an everyday person, can, either in a lawsuit individually or collectively in a class action, go to the court to enforce those new consumer rights, and that's really what that private right action is all about. There are various ways to craft it. The business community is concerned about too much litigation that can be very costly and potentially abused. So how do we target enforcement, and is there potential to have some private right of action?

For a lot of Democratic lawmakers—we just heard yesterday from Sen. Blumenthal of Connecticut—they have a concern that if there is a national standard that preempts state laws as part of that compromise on a national standard, there should be a way for consumers to enforce that national standard in court. Federal court, perhaps, state court, but some private right of action, and that is the give and take going on right now, the Republican and Democratic sides on Capitol Hill.

Galen Roehl:

Yeah. Enforcement has been one of the areas where it's been a little harder to get agreement. I think there's general consensus between both Democrats and Republicans that the FTC should be given authority to enforce a federal statute. State attorneys general should be allowed to enforce the statute should the FTC decide not to take action, but it's the private right where there's a little bit of a disagreement. But you are seeing even Chairman Wicker indicated just recently that he might be open to some type of private right of action, but it all depends on how it's drafted. Devil's in the details at the end of the day, right?

Jose Garriga:

Can this be said to confer standing, then, on individuals in a way that they might not have otherwise have had?

Ed Pagano:

Correct. With those new rights would be new standing to enforce those rights.

Jose Garriga:

Okay. Thank you. A reminder, listeners, we're here today with Akin Gump public law and policy partner Ed Pagano and senior policy advisor Galen Roehl discussing privacy legislation being considered in the U.S. Congress.

We've talked now, you've mentioned the California Consumer Privacy Act, I know that New York has its SHIELD [*Stop Hacks and Improve Electronic Data*] Act. To what extent is federal legislation looking to mesh with these state privacy laws? Let's drill down a bit on that topic. Ed, if you would, please.

Ed Pagano:

Sure. That is an area where Republicans and Democrats are trying to work out the details. There's not a consensus yet. Most Republicans and the business community, they would like a full preemption of state laws and one national standard that would certainly be easier to comply with. For House Members and Senators, their concern is that, if their home state has already enacted a privacy law, one, it's very political to preempt or override your home state law, and, two, there is, in other areas of consumer rights, a framework that allows for federal law and also state law. So, sometimes the federal law can be the floor versus the ceiling, and states are allowed to enact a stronger legislation.

Because we're dealing so much with consumer privacy related to Internet communications and sales, that framework may not work, and that's what lawmakers are wrestling over right now. We have over 50 members of the House of Representatives, a body of 435, from the state of California. Two Democratic Senators—Sen. [*Dianne*] Feinstein is the ranking member of the Senate Judiciary Committee, a committee that will have key jurisdiction over some of the enforcement issues in any privacy bill. All

politics is local, and they're dealing with their local politics and also the same time, how do we mesh that together for a national standard?

Galen Roehl: In order to preempt states, like California and others, the national standard is going to have to be a strong privacy law. But I think most of the business community is okay with having a strong federal law. They would prefer that over having 50 different state laws that just creates a compliance nightmare. I think everyone agrees that the federal law has to be a strong one if we're going to get preemption.

Ed Pagano: Those details of a national standard are what the lawmakers and their staffs are working in good faith right now on. A bill has been introduced, which is really the good step. It's been, first, hearings the last year, and now the last couple of months, a flurry of activity on legislation being introduced. And now the debate has really gone to the next stage about drilling down the exact wording, getting feedback from the business community, from consumer groups, from other interested stakeholders on how to refine that legislative language.

Jose Garriga: As a follow-up, given the strength and size of California's economy, do you find that it's basically moving the window for consideration of federal law more towards consumer protection and consumer rights than otherwise might've been?

Ed Pagano: Yes. California really has become a leader in so many areas. Congress, in some areas, has been stalemated to a degree, and California has really stepped into that vacuum, particularly on privacy legislation—they're the first state to enact their comprehensive bill. They have a population of about 40 million, I think it's the fifth-biggest economy in the world, so they are driving the train in this, and Congress sees the date for enforcement of California's law, which is July 1, as a potential deadline for trying to enact some federal legislation.

Jose Garriga: Thank you. Let's talk a little bit more, then, about where things stand at the federal level and let's turn our gaze to the executive. What's the likelihood that President Trump will sign either of the main bills that you've discussed as being under consideration? Are there any executive branch priorities, particularly in this run-up to the election year, that are going to need to be factored into any draft? Galen, if you would.

Galen Roehl: If Wicker and Cantwell or Moran and Blumenthal, if there is a bipartisan bill that has broad support, I think the administration will absolutely be supportive. The previous administration under Democratic FCC Chairman, Tom Wheeler, the FCC passed consumer privacy rules that only applied to the ISP industry. Congress then repealed that rule using the Congressional Review Act, and the President was supportive. I think what the administration wants to see out of this would be a federal privacy law that treats all parts of the Internet ecosystem the same. Telecom companies and tech companies are all treated equally, same rules. That way, consumers have an expectation of privacy that they understand, and they know wherever they are online, the rules are the same.

Ed Pagano: I would add that we are, really, at the beginning of the detailed debate in Congress now, with legislative proposals being introduced, and usually the administration will weigh in at the committee stage, committee consideration called a markup, or when a bill will be in the House or Senate floor. So, a little early for detailed feedback on the administration's positions, but we do expect that to be forthcoming as the legislation moves forward.

Jose Garriga: Thank you. Just to close, what takeaways would you offer listeners, particularly in the business community, regarding the potential impact of all these various pieces of legislation that you all have mentioned? Galen, please.

Galen Roehl: I think, for the business community, a couple of areas that they're going to be most interested in is what happens with the private right of action—that could end up being a dealbreaker for some—and also, what happens with preemption. Like I said, they want

one standard nationwide, and a lot in the business community would see no point in passing, or maybe I shouldn't say "no point," but be less interested in passing a federal law if it meant all these state laws could still stand.

Ed Pagano:

I would add really now is the time to get engaged. The data of your customers and of consumers is so valuable these days, and how it's going to be collected, how it's going to be regulated, those issues are now going to be front and center in Congress in 2020. Given the value of data, now is the time for the business community, if you're not already involved, time to get involved.

Jose Garriga:

Thank you. Listeners. You've been listening to Akin Gump public law and policy partner Ed Pagano and senior policy advisor Galen Roehl. Thank you both for appearing on the show today and shedding light on the background, status and the forecast for legislation on this vital topic for business and consumers.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, SoundCloud and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, public policy, look for public law and policy on the Experience or Insights & News sections on akingump.com, and take a moment to read Ed and Galen's bios on akingump.com.

Until next time.

OnAir with Akin Gump is presented by Akin Gump and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of competent counsel. Prior results do not guarantee a similar outcome. The content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast, and all rights are reserved.