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WEBINAR

Cybersecurity and Privacy: A Year in Review of 2019 and a Look Ahead to 2020

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Speakers: Kirk J. Nahra, Arianna Evers and Lydia Lichlyter

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- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
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WEBINAR

Speakers



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Intro

- Our goal today is to cover some of the top privacy and security developments for 2019 and to look ahead to developments for 2020—and to answer your questions
- An enormous period of change, evolution and revolution for the privacy and security ecosystem
- GDPR was a massive development in 2018
- CCPA dominated 2019
- Obviously lots more to follow in 2020



Intro

- Privacy and Security is now affecting virtually every company, of any size, in any industry, all over the world
- This area of law and compliance has moved from a specialized niche for particular categories of companies (mainly in health care and financial services) to now being a top tier compliance obligation everywhere
- Also becoming so pervasive that it is impacting a broad range of critical issues beyond compliance—even to top level corporate strategy and overall board management



Intro

- We are not planning on covering everything today—certainly not possible in a webinar of almost any length
- Our goal is to provide our thoughts on some of the key areas to be paying attention to across this area of law
- Critical to be thinking about what has happened in the past—particularly in terms of enforcement, litigation and broad publicity



Intro

- Even more important to be planning ahead—to think about how law is changing, along with the areas of legislative and regulatory attention and public discourse
- Many companies are finding that media exposure and consumer expectations may be even more important than enforcement activity
- Managing privacy compliance needs to be a first tier area of attention for most companies



2019



2019 – CCPA Amendments

By industry:

- AB 25 – Employee exemption (1-year sunset) **PASSED**
- AB 1355 – Business-to-business exemption (1-year sunset) **PASSED**
- SB 753 – Online advertising **FAILED**

By advocates:

- AB 1760 – Private right of action **FAILED**
- SB 561 – Private right of action **FAILED**



2019 – Draft CCPA Regulations

Process:

- Seven public forums; 300 written comments submitted during preliminary period
- Draft regulations published October 11
- Four public hearings held December 2–5
- 45-day comment period ended December 6



2019 – Draft CCPA Regulations

New requirements:

- Additional disclosures for businesses that collect PI from more than four million consumers
- Opt-in consent for undisclosed uses
- Acknowledgement of consumer requests within 10 days
- Compliance with Do Not Sell requests within 15 days; notification to third parties within 90 days
- Two tiers of access requests
- Risk-based verification process
- Unverified deletion requests treated as opt-out requests
- If a business begins selling, treat all consumers as opted-out



2019 – Legislative Developments in Other States

- Washington Privacy Act – omnibus bill **FAILED**
- CCPA copycats in at least 11 other states **FAILED**
- Nevada SB 220 – limited opt-out of sale **PASSED**



2019 – FTC: Newly Energized

- Five member bipartisan commission
- Candid in dissents and on the speaking circuit
- Large civil penalties for order violations
- *Hearings on Competition and Consumer Protection in the 21st Century*
- Technology Enforcement Division



2019 – FTC: Enforcement Priorities

- Continued focus on consumer privacy and data security
- Children’s Online Privacy Protection Act
- Privacy Shield
- Fintech
- Internet Broadband Providers



2019 – FTC: More Specificity in Data Security Orders

- *LabMD v. FTC*, No. 16-16270 (11th Cir. 2018)
- Seven data security orders in 2019
- Changes generally fall into three categories:
 - Requiring technical and process “best practices”
 - Increased third-party assessor accountability
 - Board/C-Suite level engagement



2019 – State Attorneys General

- Large, coordinated efforts
- Increased attention to privacy issues, not just data breaches
- Collaboration with the FTC
- Equifax settlement
- Health care data breaches



2020



What's Ahead for 2020: CCPA Regulations

- Current expectation is that regulations will be finalized in **March** or **April**
- They (along with the statute) will be enforceable **July 1**
- Becerra: No major changes expected



What's Ahead for 2020: CPRA Ballot Initiative

- Will be on the November 2020 ballot
 - As of now, seems **likely to pass** (but we'll see)
- Effective **January 1, 2023**
 - Applies to information collected in 2022
- “Business” threshold raised from 50,000 consumers to 100,000
- “Sell” → “Share”
- “Sensitive information:” SSNs, health, financial, communications contents, precise geolocation, racial/ethnic origin, religion
 - Separate opt-out link (limit to necessary uses)
- New enforcement agency: **California Privacy Protection Agency**
- Limitations on future amendments
 - “Consistent with and further the purposes of this Act”



What's Ahead for 2020: Developments in Other States

- Washington Privacy Act – omnibus bill
 - Senate version has passed first committee
 - Six weeks to pass
 - GDPR-based: Rights to access, correct, delete, port, opt-out of processing
- Omnibus privacy bills introduced in IL, NE, NH, NJ, NY, PA, TX, VA
 - Hearing scheduled in NH



What's Ahead for 2020: Other Issues We're Watching

- COPPA, Gramm-Leach Bliley Act rulemaking
- More specific data security requirements
- FTC equitable monetary relief
- Biometric litigation
- Artificial Intelligence
- Telephone Consumer Protection Act
- Web scraping
- Internet of Things



Parting Thoughts on What's to Come

- GDPR Enforcement – lots of pressure, potential for big cases
- FTC enforcement – clearly more aggressive both in terms of the volume of their investigations and the aggressiveness of the investigations
- Absolute dollar numbers are enormous—but may not by themselves tell much of the story
- Critical to watch where they are focusing attention and how these issues evolve



Parting Thoughts on What's to Come

- State AGs
- More extensive activity
- More coordinated activity
- Also more willing to go it alone
- Not necessarily as constrained as many other regulatory and enforcement agencies, given general consumer protection authority
- Some ability to enforce some laws (e.g., HIPAA) where they may not have as much experience as primary regulators



Parting Thoughts on What's to Come

- LabMD case may be challenging going forward—longstanding saga got a lot of attention over many years
- Court found resolution inappropriate because of the vagueness of evaluating compliance with the orders
- Then the court found that the FTC's litigation position was not “substantially justified.” What will this mean going forward?
- Will the FTC be able to build a “common law of privacy” like it has over time with data security?



Parting Thoughts on What's to Come

- Health care and HIPAA
- Enormous attention being paid to the role of tech companies in health care
- Part of a much broader debate about “non-HIPAA” health data—the health information that is not regulated by HIPAA because of the limited scope of the HIPAA statute
- At the same time, HHS OCR is exploring HIPAA changes to permit (and maybe require) MORE data sharing of personal health information, for coordinated care and value-based health care (with the opioid crisis driving these thoughts as well)



Parting Thoughts on What's to Come

- National legislative debate
- Obviously enormous attention being paid at the national level
- Coupled with the broad range of state activity on general privacy laws
- Coupled with state activity on specialty areas (e.g., facial recognition)
- What is likely to happen at the federal level?



Parting Thoughts on What's to Come

- Federal debate clearly is influenced by (1) what is going on in Congress generally; (2) 2020 election; and (3) activity at the state level
- While many states will try to imitate California, that may not be as easy as we thought, given the California specifics
- The California specifics also mean that, if other states pass laws, they may not look all that much like California



Parting Thoughts on What's to Come

- Federal law highly unlikely in 2020
- More likely between 2021–2024 (regardless of who is president)
- Major wildcard: If 3–5 “significant” states pass comprehensive privacy laws, it may put pressure on corporate community and Congress to pass legislation sooner



Parting Thoughts on What's to Come

- “Macro” issues to watch on national legislation:
 - Preemption of state law
 - Private right of action
 - Enforcement mechanisms (more resources for the FTC or separate privacy agency?)
 - Scope of individual rights
 - Whose data is protected?
 - Applicability of “other” federal law exemption—watch this carefully



Conclusions

- An enormous amount of activity in an area that is already incredibly complicated
- Stay on top of the major developments
- Understand the weak spots for your company—what are you doing that creates the most potential for concern?
- Pay attention to what is happening to others



Questions

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