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The Board's Interest in Protecting Corporate Privacy

August 22, 2012

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Today's Presenters

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  Partner
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- **Kenneth P. Mortensen**
  Vice President, Assistant General Counsel & Chief Privacy Officer
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Today's Topics

- Why Privacy & Information Security Have Become Board-Level Concerns
- US Issues
- International Issues
- Risk Management and Competitive Advantage via Information Governance

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Privacy & Security Concerns Increase

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Data Security Now A Top Worry for GCs, Directors

- 2012 FTI / Corporate Board Member "Annual Legal Risks on the Radar" survey
  - 11,000 public company directors & 2,000 GCs
  - 55% of general counsel rate data security as a major concern
  - 48% of directors feel likewise
  - In 2008, only 25% of directors and 23% of general counsel noted data security as a high area of concern.

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Risk Issues

- Internal & External Risks
  - Protection of corporate financial data (SOX)
  - Protection of corporate assets
    - Intellectual Property (USTR $250B annually)
    - Trade Secrets (proprietary trading software)
    - Customer Information (consumer data)
- Enforcement
  - HHS, FTC and State AGs have obtained over $100 million in settlements over the last few years
  - Firms spending significantly more to remediate internal operations post-enforcement than on penalties

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Risk Issues

- President of Corporate Board Member, TK Kerstetter, said that the anomaly between the individuals' confidence in their firms' "preparedness" and the lack of formal written plans in some cases was a "cause for concern".
- The European Commission is planning to draft new laws on cyber security that could introduce a requirement for EU businesses to report when their "essential" systems, including the Internet, have been disrupted due to "cyber incidents".

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US Company Perspective

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US Privacy & Security Environment

- Privacy and security rules are highly segmented based on data type and context
  - Health, Financial, Credit Card, Kids Online, Credit and Reputation
  - Catch all "unfair or deceptive acts or practices" FTC Act Section 5
    - Most states have "Little FTC Acts"
    - Massachusetts data security regulation as precursor
- Breach rules
  - Most states & some cities; state insurance regulators
  - HIPAA (health sector) & GLB (financial services)

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Operational Cost of US Environment

- Expensive to develop segmented controls
- Incidents WILL happen
  - Self-reporting has made these previously 'private' events public and potentially very expensive
- Defending against various actors
  - Hackers (highly publicized, smaller percentage of whole)
  - Employees
    - Innocent mistakes
    - Internal theft
  - Competitors

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Metrics for Reporting

- **Enterprise**
  - **PROS**
    - Ensure uniformity
    - Create consistency
    - Simplify reporting
  - **CONS**
    - No "one size fits all"
    - Non-consistent issues
    - Over-simplification
- **Business Line**
  - **PROS**
    - Ops focused
    - Tailored reporting
    - Business Buy-in
  - **CONS**
    - Inconsistent governance
    - Difficult to compare
    - Metric confusion
- **Hybrid Approach**

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What Sort of Reporting

- Reporting will depend on a number of factors
  - Size (How much? of data set, of users/accounts, of affected individuals, of business)
  - Regulatory environment (Why? HIPAA, FCRA, GLBA, FTC Rules)
  - Availability (What and where can you measure?)
  - Cost (What can you afford?)
  - Risk (What can you not afford?)

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International Risks

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International Privacy Environment

- Outside of US some 80+ countries have privacy rules in some form
- Emerging Economies e.g. BRIC countries already adopted and expanding privacy laws to enhance trading prospects and in some cases protect them
- Enforcement increasing
- Collective action among regulators and domino effect e.g. witness Google's fortunes

Local Game, Local Rules

- Trading terms will cover privacy; requiring compliance with laws and tight data security;
- Often uncapped indemnity requested, audit rights to assess, cost impacts on changes
- Procurement assessments increasingly contain data privacy requirements
- Severe detriment to business prospect of "public" data security incidents
- Increasing appetite to enforce

International Data Security Expectations

- Increasing appetite for prescriptive information security (Japan, Germany, Italy, Israel)
- Increasing international breach reporting requirements
  - Patchy; not as extensive as US
  - Not all breaches reportable to individual or regulator. o Massive press interest in data security breach stories
  - Reputation damage can be severe
- Draft EU regulation radically changes the position
  - 24 hr reporting of all breaches
  - Impact US firms with HR or customer data

Europe Represents Increasing Privacy Rigor

- Draft EU Regulation
  - Radical change
  - Fines of up to 2% Company Global Turnover
  - Fines of 0.5% and 1% Company Global Turnover for compliance administration failures
    - E.g. if don't have a subject access procedure (0.5%); if don't respond properly (0.1%)
    - If don't put in place agreements with joint data controllers dealing with individuals rights (0.1%).
- Potential for "class action" as it seems claims can be brought by third parties representing the individuals

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Anticipated Budget & Planning Impact

- Big Admin increase, records, audits, logs, policies, training
  - Appointment of Data Protection Officers (with protected employment rights) if more than 250 employees
  - EU Commission stats on cost impact being challenged by UK and other Governments
- IT, Cloud Outsourcing and Data infrastructure costs
  - Privacy by Design and Privacy by Default – not clear how this will impact legacy systems
- Explicit consent – opt-in will impact marketing

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Information Governance

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The Question

How will a plaintiff's attorney, judge, jury, or regulator view, scrutinize and analyze an organization's privacy/security posture in light of applicable legal requirements?

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What Is Information Governance?

- *Information governance* is the specification of decision rights and an accountability framework to encourage desirable behavior in the valuation, creation, storage, use, archival and deletion of information. It includes the processes, roles, standards and metrics that ensure the effective and efficient use of information in enabling an organization to achieve its goals.

  (Gartner)

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Common Components

- Risk Assessment & Mitigation
- Security Organization (roles/responsibilities)
- Policy & Procedures
- Awareness & Training
- Testing
- Access controls
- "Lifecycle"
- Monitoring, Audit & Review

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Benefits and Costs of Information Governance

- Benefits
  - Understanding information assets
  - How to protect various assets (resource allocation)
  - Enhanced ability to leverage and monetize data
  - Organizational and operational protections
  - Ability to respond quickly WHEN event happens (BC/DR)
  - First line of defense vs litigants and regulators
- Costs
  - Internal resources (people, technology)
  - External resource (depends on level of maturity)

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Questions & Answers

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- 2012 NDI Checkpoint – Final Session
  - **December 5, 2012**
- Save the Date! NDI Executive Exchange
  - **November 14, 2012 —** Chicago, IL — Invitation-only

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