

LEGAL/PRIVACY

New federal privacy bill poses challenges to marketers: DMA

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By RACHEL LAMB



Senators John McCain (R-AZ) and John Kerry (D-MA) introduced

the Commercial Privacy bill of Rights of 2011 on April 12, imposing stiff regulations on behavioral targeting and collection of consumer data online, which could dramatically undercut the way that luxury brands market themselves in every channel.

The bill, which has been set in place in order to maintain citizens' privacy, illustrates that customers can now opt-out of ads and choose whether or not marketers can directly target them. This will make it very difficult for transmission of data to third-party sources, hindering not only digital marketing, but any form of advertising.

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"This bill affects everyone in the ecosystem," said Adam Snukal, senior associate at Reed

Smith LLP, New York. “It affects advertisers because of the clear and concise notice and disclosure requirements, consumers because they can have the opportunity to know about the data intended to be used by the advertisers and regulators because the most important aspect is that it empowers the [Federal Trade Commission] to enforce rules and regulations to flesh out the privacy rules that set forth.

“The bill is not restricted just to digital advertising and transcends all forms of advertising and goes from print to digital,” he said. “Any time there is going to be a collection in use for personal information, the bill could theoretically come into play.”

The basis of the bill is to establish a regulatory framework for the comprehensive protection of personal data for individuals under the aegis of the Federal Trade Commission, and for other purposes, per the bill.

As direct marketing is one of the biggest ways that luxury retailers market to a specific segment, brands remain unsure of the consequences if this bill is passed.

Bill's tab

The need for regulation was first brought up in December in a report released by the Department of Commerce and was enacted because consumers' personal information was allegedly used and distributed without their knowledge ([see story](#)).

The report recommended standards for consumer privacy on the Internet and backed more self-regulatory programs relating to behavioral targeting.

The bill read yesterday by Sen. Kerry noted that toward the close of the 20th century, individuals' personal information was increasingly collected, profiled and shared for commercial purposes.

“Personal information requires greater privacy protection than is currently available today,” an initial draft of the bill says. “Vast amounts of personal information, including sensitive information, about individuals are collected on and off the Internet, often combined, and sold or otherwise transferred to third parties, for purposes unknown to an individual to whom the personally identifiable information pertains.

“Enhancing individual privacy protection in a balanced way that establishes clear, consistent rules, both domestically and internationally, will stimulate commerce by instilling greater consumer confidence at home and greater confidence abroad as more and more entities digitize personally identifiable information, whether collected, stored, or used online or offline,” it says.

If the bill is passed, all data collectors must give notice to consumers that their data is being collected, and why. The collector also must provide to consumers an option to opt-out of any information collection practice.

Furthermore, the collector of information is required to only collect data that is necessary to carry out a particular good or service. That is, collectors cannot just collect information and store it because they think that they might want it in the future.

Also, the bill is directing the FTC to enforce the privacy laws, and with it that the private right of action be taken away from individuals. Consumers cannot bring class-action lawsuits against marketers that do not comply with the laws. Various authorities will be the only ones that can reprimand them.

Neither fish nor fowl

Presently, customers have options available at their disposal in order to halt behavioral targeting.

Browsers have options that show ad networks currently running and consumers have the option to stop them. They can also visit various Web sites such as <http://www.aboutads.info> where consumers can opt-out of all behaviorally targeted ads with just a few clicks.

The DMA's Washington office released a statement opposing the bill.

"The bill tries to be a comprehensive privacy law, so it poses a great deal of challenges to marketers both online and offline," said Linda Woolley, executive vice president of government affairs at the DMA.

"In a lot of ways, it's a strong departure from the way that we've done privacy legislature in the past, which [has been] privacy rules for banking, health, etc," she said. "This puts it all together in a way that doesn't necessarily differentiate between different kinds of data."

The DMA denies any need for this legislation. It argues that a primary reason is that there has not been a cry from the general public for privacy legislation, nor has the general public expressed interest that this kind of law be passed.

This is a bill for the extremely hyper-sensitive consumer, Ms. Woolley said, particularly those who are particularly interested in being completely protected have opt-out tools at their disposal.

On the other hand, some groups do not support the bill because they do not think that it is helpful enough.

For instance, one of the main features that the bill leaves out is a Do-Not-Track button, which was recommended by the FTC during the report in December.

"I am impressed with the way they've raised these issues and focused attention on the way that they do, but we cannot support the bill in its form because it does not provide the protection that is raised in this state that is needed to be solved," said John Simpson, consumer advocate at Consumer Watchdog, Santa Monica, CA.

"I am very concerned that it does not have a Do Not Track option and the FTC called for it," he said. "Any serious privacy legislation needs to [allow] the FTC to mandate Do Not Track options, and this legislation does not."

"This draft is laden with loopholes and could make consumers feel like they are more protected than they are."

Harboring concerns

There are mixed feelings as to whether or not marketers could benefit from the absence of behaviorally-targeted advertising.

Ms. Woolley and the DMA believe that without the ability to directly target consumers, luxury brands will have trouble advertising goods and services to their preferred affluent audience.

Furthermore, brands could waste money sending out ads to people who do not have the desire or the means to buy luxury items.

“It’s going to be very difficult to make transfers of data to third parties, and that is a critical component of direct marketing,” Ms. Woolley said.

On the other hand, some groups do not think that this will have any fundamental effect on marketers.

Jeff Chester, executive director of the Washington-based Center for Digital Democracy, brings up the Safe Harbor section of the legislation, which indicates the allowance of all existing practices to flourish in Web analytics and navigation.

Moreover, the bill sanctions hosts of data collection techniques that sets the stage to ensure greater opt-in for flow of data.

Marketers will be able to use the current self-regulatory program, and it will not really affect how they operate, Mr. Chester said.

Finally, Reed Smith’s Mr. Snukal believes that if the bill is passed, it could even benefit luxury marketers.

“Luxury brands cater to a more educated, sophisticated customer base who will be more aware of privacy rights and privacy discussions we face in our country today,” Mr. Snukal said.

“Therefore, brands will be more aware if they are dealing with a more sensitive consumer base because there is less of an inclination to do something wrong because there’s more on the line,” he said. “There are a lot of inconsistencies that will have to get ironed out, and a lot of question marks with this bill.

“There will have to be a lot of work done to get this into shape and to make it more industry-friendly.”

Final Take

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