A B-to-B Carve-Out in Privacy Legislation

The U.S. Supreme Court doesn't recognize a privacy interest for businesses, as opposed to that enjoyed by individual consumers.

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Concerns about “Big Data” and the implications for consumer privacy have spurred Congress and federal regulatory agencies to seek new legal protections for data privacy. But much of the debate is being conducted on broad, general terms, and often overlooks crucial distinctions between different kinds of data.

The U.S. economy embraces two broad submarkets—the business-to-consumer (B-to-C) market and the business-to-business (B-to-B) market. Although both systems involve the sale of goods and services, and often the same companies and individuals participate in both, many of the underlying transactions and communications within the two systems raise significantly different issues. Nowhere is this more true than with respect to privacy. Legislation will need to be carefully tailored to protect consumer privacy interests without harming valuable business practices.

As the law has long recognized, “privacy” is a concern of individuals, not corporations or business entities. As the Restatement of Torts states simply: “A corporation, partnership or unincorporated association has no personal right of privacy.” Thus, while privacy is a legitimate concern for individual consumers who participate in the B-to-C marketplace, it is a somewhat alien concept in the B-to-B world, where all participants act in their business capacities.

The B-to-B segment of the U.S. market is huge and an essential driver of the nation’s economic growth. At its core it is supported by companies that build, share and use business data. In the past, trade journal publishers dominated the industry data business. Increasingly in the Internet era, many new entrants, such as Google Inc., also gather, classify and sell robust business data on an industry-by-industry basis. Such data collection, transfer and use lies at the heart of the B-to-B marketplace.

Data-privacy legislation has been an objective of consumer privacy advocates for years, but the push took on greater velocity with congressional hearings into online behavioral advertising in late 2008. Initially, a few congressional privacy advocates considered legislation specifically governing behavioral advertising, but in mid-2010, then-U.S. Representative Rick Boucher (D-Va.) proposed omnibus data-privacy legislation that would broadly regulate practically all collection, use and sale of data about individuals, both online and offline.

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Several similarly focused bills followed, and by 2011, nearly a dozen data-privacy bills had been proposed. In the current Congress, representatives Ed Markey (D-Mass.) and Joe Barton (R-Texas), co-chairs of the Bipartisan Congressional Privacy Caucus, are spearheading a number of privacy initiatives, including some addressing data privacy.

Data privacy has also become a major focus of several agencies. In December 2010, the Federal Trade Commission issued a comprehensive study of consumer privacy, Protecting Consumer Privacy in an Era of Rapid Change, that proposed a “privacy by design” framework in which consumer privacy considerations are built into a company’s default mode of operations. The Department of Commerce entered the data-privacy debate in late 2010 with its “Green Paper” report, which generally supported industry self-regulation but also suggested that government could assist in helping industry participants set appropriate standards through a multistakeholder process.

The congressional, agency and White House privacy initiatives are all directed at protecting consumers from unclear, overbroad or potentially deceitful data collection and use practices. For several reasons, removing data collection and use in the B-to-B marketplace from the coverage of these laws and regulations will not undercut their purposes.

First, privacy is inherently a personal concept and typically has not been con-
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B-to-B communications occur both online and offline. Especially as to offline collection of information, the capacity of