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Data protection outlook for 2011: a global discussion

2011 is shaping up to be a decisive year for privacy, as data protection tops most governments' agendas. In this article, lawyers from around the globe have joined forces and shared their hopes and predictions with us. Lisa Sotto and Aaron Simpson, Partners at Hunton & Williams, highlight the crucial data protection issues that they expect will dominate the US in 2011. Martin Colombo and Martin Pesce of Ferrere discuss a number of important developments in Latin America, where compliance has proved a major challenge, while Tanguy Van Overstraeten, Partner and Global Head of Data Protection and Privacy at Linklaters LLP, suggests how data protection legislation can improve in the EU.

United States

2010 was a banner year for privacy law in the United States. On the legislative front, Congressmen Rush and Boucher crafted game-changing legislative proposals that would impose overarching requirements on a vast array of US businesses. As Congress grappled with privacy legislation, The Federal Trade Commission (FTC) and Department of Commerce issued pivotal privacy reports which challenged the adequacy of traditional self-regulatory efforts in the US.

There are a number of key issues that will continue to percolate. These include:

- Online behavioral advertising. This issue was the major impetus for the Rush and Boucher efforts - the FTC's privacy report also focused substantial attention on the subject.
- Data loss prevention. In light of the high-profile data leaks suffered

by governments and businesses around the world, regulators and executives will be paying close attention to their data security protocols.

- Social media. Corporate executives will continue to be challenged by the emerging ubiquity of social media. They will focus on how to leverage social media to most effectively reach customers. On the flip side, we expect that there will be significant efforts by businesses to effectively manage the risks associated with the use of social media by employees.

- Health privacy. Emerging regulations in the US will continue to focus on the appropriate management of health information. Pursuant to the Health Information Technology for Economic and Clinical Health Act, the Department of Health and Human Services (HHS) will be issuing pivotal rules to implement the privacy and security requirements of the Act. Given the spate of security breaches in the health care arena, we anticipate stepped up enforcement activity by the HHS.

- Regulatory enforcement. The FTC has been exceptionally proactive in bringing privacy and data security enforcement actions pursuant to Section 5 of the FTC Act. Based on comments by FTC officials, we expect the Commission to bring more pure-play privacy enforcement actions in 2011.

- Global leadership. The FTC and the Department of Commerce will seek to step up their efforts in the global privacy arena. With its proposal of a new Privacy Policy Office, we expect the Department of Commerce to assert a leadership position in the ongoing dialogue.

This will set the stage for comprehensive US legislation and the potential for global privacy law

convergence. 2011 promises to cast a bright spotlight on privacy and data security.

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Latin America

2010 was a busy year for privacy developments in Latin America. Uruguay received the green light from the EU Article 29 Working Party (WP29) to be considered as a Safe Harbor for data transfers from the EU, while Brazil called for clarifications on privacy and personal data rules - hinting that a new rule may be passed in the near future. Argentina, on the other hand, reached a 10-year milestone as a safe country recognised by the EU Commission.

However, privacy is still not considered a serious concern in Latin America. In our opinion, there are three main reasons to explain why: a lack of culture, poor law enforcement and unclear provisions.

We estimate that less than five per cent of Latin American companies are currently complying with privacy and data protection rules. Such rules, especially those adopted on the basis of the EU model, introduce high standards regulating information technology and heavily affect the process of handling personal data in a company. Compliance with these rules inevitably increases running costs for companies.

It is unacceptable that just a small number of companies pay the costs imposed by the law, while others continuously ignore it. We think it is necessary to send a message of warning to all companies that do not comply - otherwise, Latin America will have great laws but no compliance. Sanctions need not be increased - instead they must be