

PRIVACY CONCERNS AND GLOBAL SOURCING RESTRICTIONS

EXECUTIVE SUMMARY

A new threat to global trade and U.S. consumers is emerging in the guise of guarding against identity theft. In an effort to restrict offshore outsourcing critics have jumped on the privacy bandwagon to propose prohibiting personal information from being sent outside the United States. Successful enactment of such initiatives could cripple financial services and other industries, while raising prices for Americans. If additional safeguards are needed the best approach would be to engage in multilateral negotiations with several countries to adopt a common privacy standard or work with other nations to strengthen their laws.

RECENT LEGISLATIVE ACTIVITY

In 2005, legislators introduced bills in 13 states to restrict sending personal data overseas. In California, a bill became law that prohibits sending voter data collected in referendums or initiatives outside the United States. That is getting close to the type of legislation that would restrict the sending of other forms of data outside the country. U.S. companies agree that it will only take one state to pass legislation to restrict the sending of personal data abroad to throw existing business activity into turmoil.

As both leading consumers and providers of financial services, Americans benefit from keeping information flowing freely across international boundaries. Like other forms of international cooperation, allowing data to move freely lowers prices for consumers and allows American companies to compete effectively in the global market. Forcing U.S. companies to obtain prior consent individually from tens of millions of people before information could be sent outside the United States is considered unduly burdensome from a business perspective. While the European Union requires affirmative consent and such a heavily regulatory structure is problematic, enforcement is limited in Europe on this measure and the trial bar is also far weaker in the EU than in the United States.

At the federal level, the biggest threats will remain amendments to other federal legislation. In this regard, a likely amendment would come from Senator Hillary Clinton (D-NY), who has authored the Safeguarding Americans From Exporting Identification Data Act' or 'SAFE-ID Act' (S. 800). Senator Clinton's bill would prohibit the disclosure of "personally identifiable information regarding a resident of the United States to any foreign branch, affiliate, subcontractor, or unaffiliated third party located in a foreign country unless" a series of standards are met, including allowing consumers to prevent the sending of such data. Senator Bill Nelson (D-FL) proposed a similar measure in 2004.

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In the House, Rep. Markey (D-MA) has a companion measure to S. 800, while Rep. Cliff Stearns (R-FL) has authored H.R. 1263, which would also push for potential restrictions and increased regulation on sending data outside the United States.

The irony of Senator Clinton championing such restrictions is that New York is home to America's leading financial institutions and such legislation would uniquely harm these firms. In addition, Hillary Clinton is co-chair of the India Caucus in the Senate and restricting data that could be sent overseas would seriously damage India's thriving information technology and business processing outsourcing (BPO) sectors.

NO EVIDENCE OF THREAT

No evidence exists that sending information outside the United States presents great dangers. An executive with a transcription firm notes that in India their firm maintains a secure office environment that prevents, among other things, copying data from company servers. In contrast, transcribers and call operators in the United States may work at home on the same computer used by their husband and other family members.

None of this means countries like India or the Philippines are immune to bad actors anymore than is the United States. There have been cases of data misused and criminal prosecution in India. As part of an effort to address this, Indian high tech companies have pooled together to create an employee database that can be used to screen out individuals with questionable backgrounds. There does not appear to be a comparable effort to date in the United States, though U.S. firms have adopted a number of measures aimed at improving data security and privacy.

MARKET INCENTIVES

The market provides an incentive for a foreign company to take great care in protecting private consumer information, since failure to do so would likely end that firm's chance of gaining any future contracts, jeopardizing the company's very existence. Legal experts say the Federal Trade Commission warns American companies that liability remains when data goes overseas – those who send it there are responsible for its security and the overseas custodian is essentially an agent of the U.S. company.

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Existing federal laws, including the Fair Credit Reporting Act, the Health Insurance Portability and Accountability Act, and the Gramm-Leach-Bliley Act, already address the treatment of certain consumer information and permit the sharing of consumer information among affiliated entities overseas, while providing mechanisms for recourse against U.S. corporations for failing to take appropriate measures to guard consumer information.

If additional safeguards are needed the best approach would be to engage in multilateral negotiations with several countries to adopt a common privacy standard or work with other nations to strengthen their laws. Either tactic would be better than adopting a unilateral approach designed to erect trade barriers, not protect consumers.

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Started in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Va. The focus of the research is on trade, immigration, and other issues of national importance. NFAP Executive Director Stuart Anderson served as Staff Director of the Senate Immigration Subcommittee, working for Senators Spencer Abraham and Sam Brownback, and as head of policy and counselor to the Commissioner of the Immigration and Naturalization Service. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Rep. Guy Vander Jagt (ret.) and other prominent individuals.