

NetChoice Concerns on Federal Privacy Bills



	<u>Best Practices Act (HR 5777)</u>	<u>Boucher/Stearns Discussion Draft</u>	<u>NetChoice Concerns</u>
Is there a small business exception?	“Covered information” includes: any unique persistent identifier about users (customer #s, aliases) The legislation would not apply to entities that collect information from fewer than 15,000 people.	“Covered information” includes: any unique persistent identifier about users (customer #s, aliases) or devices associated w/ users. The legislation would not apply to entities that collect information from fewer than 5,000 people in a year.	Both proposals would regulate small websites that don’t even collect PII. Boucher-Stearns would regulate a tiny online startup that is adding just 100 users a week, even where its users provide only a made-up user name and password. As defined, “covered information” would overly restrict the flow of useful information and harm the development of ad-supported content and services.
What about private lawsuits?	Creates a private right of action if “willfully fails to comply”, statutory damages of \$1,000 per violation, and punitive damages. Also FTC and State AG enforcement.	No private right of action, but authorizes FTC and State AG enforcement.	Safe harbor? Hardly! A company could be <i>torpedoed with lawsuits</i> from enterprising trial lawyers just for sending marketing emails that were later found to be outside of the safe harbor, up to \$1,000 per violation and uncapped punitive damages.
Are there exceptions for desired uses of information?	“Operational purpose” exception to express consent for customer service, security, business functions, IP rights, safety and law enforcement.	“Operational purpose” exception to express consent for improving service & product, detecting fraud, employment relationship, common ownership entities.	Marketing and advertising have legitimate operational purposes. Additional consent <i>should not be required</i> when a business uses covered information to do follow-up marketing to customers with whom it has already established a business relationship. Congress has recognized this consumer expectation in past legislation, which is why it built important exceptions in the CAN-SPAM Act for “relationship messages” to contact customers in an existing business relationship.
What is the role of the Federal Trade Commission?	A safe harbor “choice program” run by the FTC. APA rulemaking authority. Enforcement against unfair or deceptive practices.	APA rulemaking authority. Enforcement against unfair or deceptive practices.	The FTC should enforce laws against unfair or deceptive practices, not micromanage self-regulatory efforts. As the overseer of the safe harbor program, the FTC will have broad powers to dictate the details of self-regulatory programs, effectively <i>transforming the FTC into the port authority of the Internet.</i>