



TECHNOLOGY

Locke Lord's Looking Ahead 2011

e-Discovery Readiness & Response

As court decisions in the e-discovery area continue to grow in number, the law of e-discovery will continue to develop.

We expect that this development and growth will become more than just addressing the parties' rights in particular factual situations, but a real focus on the continued development of what we refer to as the core doctrines in the area of e-discovery: (1) document retention policies; (2) preservation duties; (3) mandatory Rule 26 disclosure requirements; (4) discovery obligations; (5) breaches of the foregoing; (6) measuring the prejudice of such breaches, and (7) addressing remedies that are targeted at both the injustice to the parties and the systemic problems and abuses which exist in the production of e-discovery. As a result, parties obligations will become more clear, and the risk of failed compliance will become greater and more discernable.

FTC's Red Flags Rule

On December 18, 2010, President Obama signed into law the Red Flag Program Clarification Act of 2010, effectively narrowing the definition of the term "creditor" as used in the FTC's Red Flags Rule. The Rule requires covered businesses to establish and maintain written identity theft prevention programs. Generally, the practical effect of the amendment in the 2010 Clarification Act is to exempt from the Rule's scope businesses that do not regularly and in the ordinary course of business obtain consumer reports or furnish information to consumer reporting agencies as part of credit transactions, or advance funds to or on behalf of others, other than for expenses incidental to the services performed by the business for its customers. One of the goals of the amendment in the 2010 Clarification Act is to exempt doctors, lawyers, and other professionals from the Rule's scope. As of press time for this update, the FTC has not extended the December 31, 2010 Red Flags Rule compliance deadline. Unless the FTC extends the compliance date, the Rule, as amended by the 2010 Clarification Act, should now be presumed to be the final rule that will be enforced by the FTC, effective December 31, 2010.

Electronic Signatures and e-Delivery

Momentum for companies implementing effective e-contracting and e-delivery processes will continue to grow in 2011. Companies are realizing not just the cost savings and ease of doing business benefits for e-contracting and e-delivery, but also are realizing how effective e-signature and e-delivery processes can reduce compliance and litigation risks.

Security Audits – SAS 70 Reports

The AICPA has renamed the audits many companies have commissioned or required several of their suppliers to commission to audit the controls of the company for which the reports are prepared. Companies who have obligated their suppliers or trading partners to obtain SAS 70 Reports should revisit this topic in early 2011, as the details of the new report (to be called Services Auditor Report rather than SAS 70 audit), emerge in 2011.

Social Media

The ease of opportunity for information disclosure through popular social media sites and their pervasiveness and ubiquity has created fertile ground for a wide array of legal issues. For example, the National Labor Relations Board recently ruled that companies cannot prohibit employees from discussing working conditions on social media sites. 2011 is likely to see further developments in this quickly expanding realm.

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