

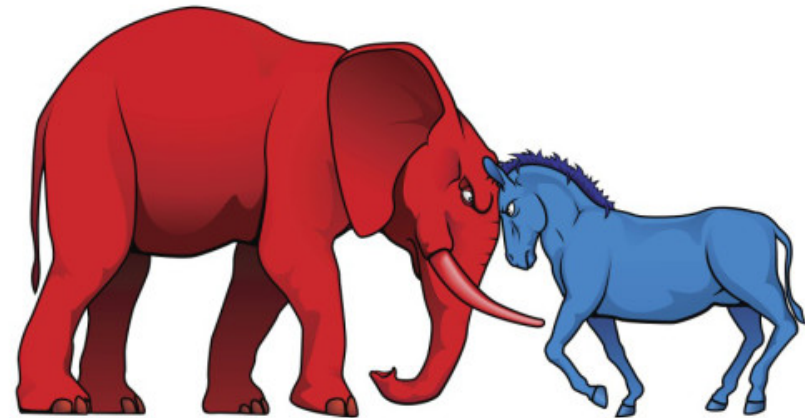


# **The Latest from Washington and the States**

Dan Jaffe  
Group EVP, Gov't  
Relations  
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# Three Weeks Till the Midterms

- Unanswered questions:
  - Will the Democrats take the House?
  - Will the GOP keep the Senate?
  - What will the “Kavanaugh effect” be, if any?
- If 2016 taught us anything, it’s that the only predictable thing is unpredictability



# Flipping the House

- 37 Republicans retiring or running for higher office vs. 18 Democrats
- Democrats need 23 seats to reclaim majority
  - UVA Center for Politics (Larry Sabato):
    - 18 GOP seats likely/lean Democrat & 28 toss-ups
  - Cook Political Report (Charlie Cook):
    - 15 GOP seats likely/lean Democrat & 31 toss-ups
  - Real Clear Politics:
    - 13 GOP seats likely/lean Democrat & 31 toss-ups

# Close Senate Races

- 26 Democrats up vs. 9 Republicans – this is the most exposure one party has had in a midterm since 1970
- Close races to watch:
  - Democratic incumbents and open seats in Trump states
    - FL: Nelson (D) (inc.) vs. Scott (R)
    - IN: Donnelly (D) (inc.) vs. Braun (R)
    - MO: McCaskill (D) (inc.) vs. Hawley (R)
    - MT: Tester (D) (inc.) vs. Rosendale (R)
    - ND: Heitkamp (D) (inc.) vs. Cramer (R)
    - WV: Manchin (D) (inc.) vs. Morrissey (R)
    - AZ: McSally (R) vs. Sinema (D) (open)
    - TN: Blackburn (R) vs. Bredesen (D) (open)
  - Republican incumbent in Hillary state
    - NV: Heller (R) (inc.) vs. Rosen (D)
  - New Jersey Senator Bob Menendez (D) is also considered to be in a close race

# The Weird Election

- Only three times post-World War II have the Senate and House gone in opposite directions in a midterm
  - 1962 (Kennedy midterm): Democrats lost 6 House seats, gained 4 Senate seats
  - 1970 (Nixon midterm): Republicans lost 10 House seats, gained 1 Senate seat
  - 1982 (Reagan midterm): Republicans lost 27 House seats, gained 1 Senate seat
- Will the 2018 Trump midterm join them?

# The Ad Impact

- If Democrats retake House (and/or Senate), ad issues that have been dormant will pop back up
  - DTC
  - Food advertising
  - Children's advertising



# Mandatory Disclosure Muddle

- Impact of Supreme Court's *NIFLA* decision
  - Berkeley cell phone case sent back to 9th Circuit
  - 9th Circuit on its own asked for supplemental briefs in the San Francisco soft drink ordinance - the case was reargued on 9/25 and is awaiting a decision
  - Potential for mandatory graphic cigarette ads
  - Required disclosure of drug prices in DTC ads

# The Next Major Court Battle?

- Sherwin-Williams, ConAgra, and NL Industries found liable in California for creating a public nuisance through the use of lead paint from the early 20<sup>th</sup> century to 1951
  - Facing up to \$750 million in liability
  - Justification: Sherwin-Williams and other companies advertised lead paint and contributed to trade group that advocated use of lead paint creating a “nuisance” in millions of California homes
- ANA filed an amicus brief
- Cert petition denied by SCOTUS





# Dangerous Precedent

- Liability for long-ago advertising for a legal product at the time later to be found harmful
- Potential massive penalties
- Expansion of “public nuisance” to inside private homes
- No requirement to demonstrate nexus between the advertising and any injury
- The advertising itself is the harm

# CCPA Bill

- Broadest privacy bill ever passed in the U.S.
- Covers any company doing business in California that:
  - Has annual gross revenues in excess of \$25,000,000
  - Alone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices.
  - Derives 50 percent or more of its annual revenues from selling consumers' personal information

# CCPA and Data Breach

- CCPA allows for private right of action for data breaches in California
- Personal information under the bill is defined extraordinarily broadly to include:

# CCPA Definition of Personal Information

“Personal information” means information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household:

- (A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers.
- (B) Any categories of personal information described in subdivision (e) of Section 1798.80.
- (C) Characteristics of protected classifications under California or federal law.
- (D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.

# CCPA Definition of Personal Information (con't.)

(E) Biometric information.

(F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an Internet Web site, application, or advertisement.

(G) Geolocation data.

(H) Audio, electronic, visual, thermal, olfactory, or similar information.

(I) Professional or employment-related information.

(J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g, 34 C.F.R. Part 99).

(K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

# Does Bill Endanger Consumers?

- Requires companies to pull info across all subsidiaries – online and offline data – and provide the information upon a consumer's request within 45 days
- Third parties can be deputized to collect info

# A Troubling Example

- Facebook hack exposed 50 million users
- At \$750 per consumer per incident = \$37.5 billion
- Attorney General can go up to \$7,500 for intentional violations



# CCPA: The Latest

- SB1121 – the “clean up” bill:
  - Delayed enforcement until either 6 months after Attorney General publishes final regulations OR by July 1, 2020, whichever is earlier
  - Private right of action ONLY applies to data breaches – not every violation
  - Made clarifications in regard to carve-outs for GLB and HIPAA claims



# Numerous CCPA Issues Remain

- ANA in conjunction with the Chamber of Commerce provided key California legislators 20 pages of proposed amendments
- No clarity over what bill means for loyalty programs



# A Federal Solution?

- The Senate Commerce Committee recently held two hearings on privacy and data security
- “The question is no longer whether we need a federal law to protect consumer privacy. The question is only what shape that law should take.”

Sen. John Thune (R-SD)  
Chairman, Senate Commerce,  
Science, and Transportation  
Committee



# New Privacy Paradigm

- ANA developing a “new paradigm” for privacy
- Emphasize both value of data-driven advertising and where consumers may need additional protection
- We will be seeking the input of ANA’s Legal Affairs Committee

# Drug Advertising Victory

- Durbin amendment in Labor-HHS spending bill: require disclosure of price information in all DTC ads passed the Senate
- We defeated it in the House and in conference



Senate Minority Whip  
Dick Durbin (D-IL)

# The Administration Weighs In

- PhRMA announcement: DTC ads will direct patients to information about costs
- HHS Secretary Alex Azar: “The drug industry remains resistant to providing real transparency around their prices, including the sky-high list prices that many patients pay. So while the pharmaceutical industry’s action today is a small step in the right direction, we will go further and continue to implement the President’s blueprint to deliver new transparency and put American patients first.”



Secretary of Health and  
Human Services  
Alex Azar

# DTC Ad Danger Looming

- If Democrats regain control in Congress, there could be another push to regulate DTC ads

Rep. Anna  
Eshoo  
(D-CA)



Rep. Rosa  
DeLauro  
(D-CT)



Rep. Frank  
Pallone  
(D-NJ)



# Right of Publicity

- ANA helped defeat bill in NY state that would have greatly expanded right of publicity after death
  - No requirement for decedent to be domiciled in NY
  - 40 year period to claim ROP
- Working with SAG-AFTRA & Reed Smith to revamp the bill





# Unprecedented Turnover at the FTC

- All members are new in 2018



Chair Joseph  
Simons



Comm. Noah  
Phillips



Comm. Rebecca  
Slaughter



Comm. Rohit  
Chopra



Comm. Christine  
Wilson





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