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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

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## Facebook Data-Sharing Policy May Raise Regulators' Eyebrows

By **Allison Grande**

Law360, New York (November 26, 2012, 9:41 PM ET) -- Facebook Inc. proposed several changes to its privacy and governance policies last week, including the expansion of the site's ability to share user data with its affiliates, a move experts say is likely to invite scrutiny from U.S. and European Union regulators that want users to have more control over how their information is used.

In a notice Wednesday, the social networking site unveiled several proposed changes as part of an update of its data use policy and its statement of rights and responsibilities. The changes include greater freedom for the site to share user data with affiliates like Instagram Inc. or companies that are partners of its advertisers for behavioral advertising purposes and the elimination of a voting system used to gather feedback when the company has plans to alter its policies.

Experts predicted that the change to the user voting system was unlikely to gain much traction in a regulatory review because the site still plans to give users the ability to weigh in on proposed changes through a seven-day comment period. But the proposed data use revisions could grab the attention of regulators in the U.S., where the Federal Trade Commission has the heightened ability to police the company's privacy practices under a recently finalized consent decree, and the EU, where the Irish data protection regulator recently concluded an audit of the site's privacy policies.

"The policy revision does not appear to require the user's consent, nor does it appear to provide an opt-out option for users who do not want their information shared between Facebook and its affiliates," Shook Hardy & Bacon LLP data security and privacy group co-chair Al Saikali told Law360 on Monday. "We could see regulatory authorities seek clarification from Facebook as to how or whether it intends to obtain consent from, or provide an opt-out option to, Facebook users regarding the information Facebook will now share with its affiliates."

Saikali and other attorneys noted that this change also potentially could trip up the company because of its potential to affect information users had provided to the company under its old policy.

"Under current U.S. law, a company can prospectively change its privacy policies so long as it does not use previously collected data in a materially different way than was promised under the policy at the time of the data collection," Edwards Wildman Palmer LLP partner Alan Friel said. "That means the company needs either express consent from the user to the new usage, or it needs to only apply the new usage to data collected after the effective date of the new policy."

Michelman & Robinson LLP senior counsel Torin Dorros added that allowing the proposed access to affiliates and partners also could attract regulatory scrutiny because these entities "may not necessarily be providing the same services or products that the users 'liked,' which is often what first authorized the data sharing."

The Office of the Irish Data Protection Commissioner, which has jurisdiction over Facebook's activities in the EU because the site's international headquarters are in Ireland, already has confirmed that it is looking into the latest policy changes and is in "close consultation" with the company in relation to the tweaks, which came on the heels of the regulator's September release of a largely positive follow-up audit of the company's privacy practices.

"We have sought and received clarifications on a number of aspects and have outlined our position in relation to what consent will be required for aspects of the policy," Deputy Data Protection Commissioner Gary Davis said in a Monday statement. "Facebook Ireland has understood this position, and we expect the proposed data use policy to be modified to take account of these issues."

Facebook spokesman Andrew Noyes confirmed to Law360 that the company is in "regular conduct" with the Irish regulator "to ensure that we maintain high standards of transparency in respect of our policies and practices."

While the Federal Trade Commission declined to comment on Facebook's proposal Monday, attorneys suspected that the U.S. regulator also would take a careful look at the changes, especially given the terms of the parties' recent consent decree requiring Facebook to give consumers clear and prominent notice and obtain their express consent before sharing their information beyond their chosen privacy settings.

"Facebook is under stricter scrutiny than most companies since it's under the consent decree with the FTC that requires it to get explicit permission from users before making changes," Snell & Wilmer LLP attorney Ryan Ricks said. "That most likely means that they are going to be compelled to have users opt into the system."

The Center for Digital Democracy and the Electronic Privacy Information Center cited this agreement in a letter they sent to Facebook on Monday urging it to withdraw the proposed "Thanksgiving surprise" changes, which the groups said "raise privacy risks for users, may be contrary to law, and violate [Facebook's] previous commitments to users and site governance."

Facebook users also have struck back at the proposed revisions, lodging more than 17,000 comments on the tweaks by Monday night and posting privacy disclaimers in an attempt to protect their postings, although Ricks noted that this notice was "legally irrelevant" because users grant Facebook a limited license to their content when they agree to the site's terms of use, which cannot be revoked with such a notice.

Besides the changes to the site's data-sharing abilities, users also are protesting the proposed elimination of a voting system that allows Facebook users to weigh in on changes such as the ones proposed Wednesday.

The site's current voting policy says if more than 7,000 users post a "substantive" comment on a particular proposed change, users will get the opportunity to vote for alternatives. The vote would be binding on the site if more than 30 percent of all active registered users, which currently totals more than 1 billion, vote.

The company said this system incentivizes the quantity of comments over their quality and that it wants to create a process that leads to more "meaningful" feedback and engagement.

"This form of digital democracy is very unusual for private enterprise, particularly a public company," Friel said. "Even though the likelihood of 30 percent of a billion-plus users ever actually voting is probably unlikely, it is a system that burdens the for-profit company in a way its competitors are not [burdened]."

But despite uproar over the change, experts noted that regulators are unlikely to focus on the elimination of this voting mechanism.

"This doesn't grab people by the lapels as much as a change like automatically tagging people's faces," said Jonathan Rick, the president of digital communications firm The Jonathan Rick Group. "This proposal doesn't foreclose feedback mechanisms, but instead channels feedback through different mechanisms."

Under the proposed changes, users still would be allowed to comment on proposed changes for seven days and submit questions and comments to the company through new instruments such as its Ask the Chief Privacy Officer feature, according to Facebook.

"I would hope that, to the extent Facebook receives significant negative commentary, it would take that into account and consider making further modifications to its proposals before adopting them," Dorros said, although he noted that as a public company, its obligations are ultimately to its shareholders. "If [users] truly want voting rights on certain corporate matters, it is as simple as buying stock in Facebook."

However the regulators decide to tackle these latest policy changes, attorneys noted that other companies should use this example to ensure that their policies and any subsequent changes comply with data protection regulations.

"The takeaway from these changes is that companies need to be clear with their users," Ricks said. "A user of a service should be able to find out with minimal effort how much information is being collected, how it's being used, and the mechanisms by which they will be notified of any future changes. These were best practices before this controversy, and they will be best practices after them."

--Additional reporting by Juan Carlos Rodriguez. Editing by Elizabeth Bowen and Richard McVay.

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