

# CONSUMER DATA IS EVERYWHERE: PRACTICAL CONSIDERATIONS TO MAXIMIZE VALUE IN TRANSACTIONS WITH CONSUMER PRIVACY OMBUDSMEN



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## Introduction

Trustees charged with maximizing the value of a bankruptcy estate can no longer ignore Big Data. Data analytics is undergoing rapid growth as a distinct market—projected to climb to more than \$500 billion globally over the next decade. *See Data Science and Analytics: Industry Overview and Insights*, Houlihan Lokey, Inc. (July 2024), <http://cdn.hl.com/pdf/2024/july-2024-data-science-analytics-industry-overview.pdf>. Trustees also must be cognizant of its ubiquity as an asset. Consumer data is no longer limited to shopping rewards programs; it is collected and monetized in nearly every industry. *See, e.g., James E. Short & Steve Todd, What's Your Data Worth?*, 58 Mass. Inst. Tech. Sloan Mgmt. Rev. 17 (2017).

But, trustees face a ballooning web of federal and state laws govern data privacy. And privacy policies unique to a particular debtor add their own case-specific challenges. ...continued on next page



Transactions involving consumer data may mandate the retention of a consumer privacy ombudsman (“CPO”) to address these issues. The CPO role as codified is not without criticism—qualifications are unclear, deadlines are tight, and recommendations are formulaic. But, trustees can realize significant benefits in complex transactions through early engagement with CPOs and appreciating the scope and limitations of the role. This article addresses the circumstances the appointment of a CPO, the duties of the CPO, and practical considerations for trustees facing the potential sale of consumer data.

### Procedure and Grounds to Appoint a Consumer Privacy Ombudsman

BAPCPA resulted in the codification of §§ 332 and 363(b)(1) governing the appointment of a CPO. *See* Pub. L. 109-8, 119 Stat. 23 § 232 (Apr. 20, 2005). However, Congress offered little exposition on qualifications: a CPO is simply a single “disinterested person” appointed in a bankruptcy case by the U.S. Trustee once ordered by the bankruptcy court. 11 U.S.C. § 332(a); *see also* Fed. R. Bankr. P. 6004(g)(2). The absence of “baseline criteria” has resulted in a range of appointments—from some “repeat player” CPOs that serve in multiple cases to some with

“privacy specialist designations”—and drawn criticism. *See* Laura N. Coordes, *Unmasking the Consumer Privacy Ombudsman*, 82 Mont. L. Rev. 1, 18-27 (2021).

The predicates for ordering appointment of a CPO are clearer and far narrower. Section 363(b)(1) prohibits the non-ordinary course use, sale or lease of personally identifiable information of a non-debtor (“PII”) if the debtor had a policy prohibiting the transfer of PII in effect on the petition date. 11 U.S.C. § 363(b)(1). The only exceptions to this prohibition are if: (1) the transaction is consistent with the PII policy; or (2) the bankruptcy court approves the transaction following the appointment of a CPO. *Id.* The bankruptcy court has no discretion under the second scenario—the bankruptcy court *must* appoint a CPO where a proposed transaction of PII is inconsistent with a debtor’s PII policy. 11 U.S.C. § 332(a).

A trustee must include a request directing the U.S. Trustee to appoint a CPO in any sale motion proposing the sale of PII inconsistent with a PII policy. Fed. R. Bankr. P. 6004(g)(1). Additionally, the U.S. Trustee Guidelines obligate a trustee to provide the U.S. Trustee notice of any motion to sell PII *before filing the motion*. *Handbook for Chapter 7 Trustees*, U.S. Dep’t of Just., 4-18 (Oct. 1, 2012). In the advance notice to the U.S. Trustee, the trustee must explain whether and why the § 363(b)(1) exceptions do or do not apply the proposed transaction. *Id.*

Where a transaction requires the appointment of a CPO, the bankruptcy court must order the U.S. Trustee to appoint a CPO at least 7 days before the hearing on the motion to approve the transaction. 11 U.S.C. § 332(a).

### The Consumer Privacy Ombudsman’s Role in Transactions

The codification of CPO provisions resulted from a failed sale of PII in the bankruptcy case of online toy retailer, Toysmart.com, LLC. *In re Toysmart.com, LLC*, Case No. 00-13995 (Bankr. E.D. Mass.) (“*Toysmart*”). In *Toysmart*, the debtor collected personal customer information including, consumers’ names, addresses, billing information, shopping preferences, and family profile information through its website pre-petition. The debtor’s privacy statement assured consumers that “you can rest assured that your information will never be shared with a third party.” *Id.*, ECF No. 113. Despite this and other transfer prohibitions, the debtor requested authority to sell its customer databases and related information in its subsequent bankruptcy filing. *Id.* The FTC objected and filed a separate civil action in U.S. District Court to enjoin the sale for violating the privacy policy. *Id.*

Without CPO provisions in the Bankruptcy Code, the debtor and FTC were forced to create their own framework for resolving a sale of PII. In short, the parties agreed that a free and clear sale of the PII could occur if the buyer was in the same industry as the debtor and agreed to be bound by the privacy policy for all PII gathered by the debtor. *See id.*

The solution was not well-received. Two FTC commissioners still dissented from the proposed settlement in favor of affirmative consumer opt-ins. *See* Christopher G. Bradley, *Privacy for Sale: The Law of Transactions in Consumer’s Private Data*, 40 Yale J. on Regul. 127, 149 n.131 (2023) (citations omitted). At least 44 attorneys general objected to the sale, adopting the same affirmative opt-in position. *Toysmart.com, LLC*, Case No. 00-13995, ECF No. 180 (Bankr. E.D. Mass. Aug. 3, 2000). The bankruptcy



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The keys to CPO involvement are held by the trustee to some extent. Where a transaction is clearly forthcoming, an early request to the bankruptcy court for the appointment of a CPO may blunt one of the most significant challenges of the current CPO provisions of the Bankruptcy Code: the truncated timeline. A CPO can significantly advantage the trustee in the discharge of statutory duties, particularly where the CPO is offered more time to engage in the process, with legal issues and alternatives, and key stakeholders.

court deferred considering the FTC stipulation until an auction occurred, and, predictably, bidders were deterred by the significant litigation and lack of clarity. *Id.*, ECF No. 313 (Bankr. E.D. Mass. Jan. 10, 2001). The data was ultimately destroyed. *Id.*

The CPO provisions added just four years later with BAPCPA expanded on the flexible approach advocated by the FTC and debtor in *Toysmart*. Like *Toysmart*, § 363(b)(1)(A) does not mandate strict compliance with a PII policy if the transaction is consistent with the policy. However, BAPCPA went further. 11 U.S.C. § 363(b)(1)(A). Section 363(b)(1)(B) permits a PII sale that is not in compliance with a PII policy after the U.S. Trustee appoints a CPO, the bankruptcy court considers “facts, circumstances and conditions” of the proposed transactions and concludes the transaction complies with applicable nonbankruptcy law. 11 U.S.C. § 363(b)(1)(B).

As a matter of statute, the CPO’s role is limited to “assisting” the bankruptcy court in considering the “facts, circumstances and conditions” of the proposed PII transaction. 11 U.S.C. § 332(b). Section 332(b) provides a non-exclusive list of information the CPO may “present” to the bankruptcy court. *Id.*

As a practical matter, the “presentation” often takes the form of a filed report. *See, e.g.*, John G. Louhane, *Are Consumer Privacy Ombudsmen Theatrical Performers?*, XLIII Am. Bankr. Inst. J. 2, 21 (Feb. 2024). The “facts, circumstances and conditions” analysis in the report often bleeds into the ultimate question: whether the transaction applies with applicable nonbankruptcy law. *See* 2 Norton Bankr. L. & Prac. 3d § 44:19 (Oct. 2024) (providing that the CPO should analyze nonbankruptcy law). The reports also include recommendations concerning appropriate limits on the transfer of PII. *See* Louhane, *supra*, at 21.

### Practical Considerations for Trustees in Sales of Consumer Data

Critics of these CPO provisions observe that the Bankruptcy Code missed the mark—limited qualifications and a compressed timeline to review potentially voluminous issues. At least one commentator has gone as far as describing them as establishing “a myth of oversight” that elevates “largely ritualistic” “privacy theater” over substantive protection. Christopher G. Bradley, *Privacy Theater in the Bankruptcy Courts*, 74 Hastings L.J. 607, 607, 612 (2023). As fair as those theoretical criticisms may be, the following practical considerations offer key opportunities for trustees to realize the benefits of CPO involvement in PII transactions:

**Analysis of Complex Legal Issues.** The scope of nonbankruptcy consumer protection laws are significant and complex. Federal regulations include the Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501 *et seq.*; the Gramm-Leach-Bliley Act of 1999, 16 U.S.C. §§ 6801 *et seq.*; and the Health Insurance Portability Act and Accountability Act of 1996, 42 U.S.C. § 1320d & 65 Fed. Reg. 82462. Comprehensive state schemes like the California Consumer Privacy Act, Cal. Civ. Code § 1798.100 *et*

*seq.* & 11 CCR §§ 7000 *et seq.*, and international schemes like the European Union Privacy Directive of 1995, Council Directive 95/46, 1995 O.J., also may require consideration based on the debtor’s jurisdiction. While CPOs are not required to be specialists in these areas, their specific charge to tackle these issues necessarily serves to spot and narrow the potential issues of relevance to the sale in issue.

**Stakeholder Negotiations.** The potential regulatory ire a PII transaction can draw may consume nearly all a trustee’s bandwidth, particularly where regulatory agencies and state attorneys general can become particularly assertive. An early request to appoint a CPO permits the CPO to engage in more fulsome analysis of privacy issues, engage with stakeholders, and shepherd contested sale processes. By way of example, in *RadioShack*, the CPO mediated concerns raised by the FTC and 37 attorneys general over the proposed sale of PII for nearly 37 million customers. *See, e.g., In re Radioshack Corp.*, Case No. 15-10197, ECF No. 2148 (Bankr. D. Del. May 16, 2015); *see also* Louhane, *supra*, at 46 (describing CPO’s involvement facilitating discussions with stakeholders in *In re Vantage Travel, Inc.*, Case No. 23-11060 (D. Mass.)).

**Anticipating CPO Recommendations.** A trustee should look to previous precedent to socialize CPO recommendations with potential bidders early in the transaction process. In an analysis of 141 cases in which CPO reports were filed, one study found 84.4% of CPO reports recommended a *Toysmart* approach: the buyer must be in the debtor’s same industry, must use the PII for the same purpose as the debtor, and must agree to be bound by the debtor’s PII policy. Bradley, *supra*, at 158. Similarly, trustees should prepare bidders for the potential of notice and opt-out recommendations, which appeared in about 68% of the reports in the study. *See id.* at 163. However, trustees and bidders should take comfort that notice is most often permitted electronically and opt-out rates are (for better or worse) exceptionally low. *See id.* at 165-166. Proactive consideration of common recommendations may advance negotiations early rather than threaten to derail fully-baked sale documents on the eve of a hearing.

**Early CPO Appointment.** The keys to CPO involvement are held by the trustee to some extent. Where a transaction is clearly forthcoming, an early request to the bankruptcy court for the appointment of a CPO may blunt one of the most significant challenges of the current CPO provisions of the Bankruptcy Code: the truncated timeline. A CPO can significantly advantage the trustee in the discharge of statutory duties, particularly where the CPO is offered more time to engage in the process, with legal issues and alternatives, and key stakeholders.

While the CPO provisions of the Bankruptcy Code offer room for improvement, Trustees should still be familiar with the framework and prepared to maximize its utility in the increasingly common instance a transaction implicates PII. 🏠