

Privacy

FTC Privacy Goals Could Test Limits Of Agency's Authority, Observers Say

Report Calls for New Privacy 'Framework'

A recent report issued by the FTC calls for a new U.S. privacy framework, with principles such as “privacy by design,” which includes data security, limitations on data collection and retention, and data accuracy. The report also urges increased transparency and “simplified” choice mechanisms. The commission says there are “gaps” in its ability to enforce such principles and has solicited help from Congress.

By [Alexei Alexis](#)

The Federal Trade Commission's recent report on consumer privacy outlines an ambitious set of policy goals that could test the limits of the agency's existing enforcement powers in some cases, observers told BNA in May interviews.

As Congress weighs the need for legislative action, the FTC is expected to continue relying on its authority under Section 5 of the FTC Act, which prohibits “unfair and deceptive” practices, to nudge U.S. businesses toward stronger privacy practices.

While the commission has promised to stay within the confines of the act, some see the potential for overreach, particularly when it comes to the agency's unfairness authority--a murky and controversial area of the law.

“Unfairness is a powerful tool, but it requires real consumer harm,” Howard Beales, a public policy professor at Georgetown University and former FTC official under the George W. Bush administration, told BNA. “The fact that some people think a business practice is creepy is not enough. If the commission tries to stretch the concept of harm, I think they risk doing a great deal of damage to the unfairness doctrine and getting themselves into a lot of trouble.”

'Substantial' Injury Required.

At the request of Congress, the FTC in 1980 issued a policy statement articulating the scope of the agency's unfairness power. Among other factors, the commission said that a practice must cause “substantial” injury to consumers to warrant an unfairness action.

“I would be deeply disturbed if the FTC started bringing these actions for anything that it decided was bad for the internet,” Berin Szoka, president of TechFreedom, a technology policy group based in Washington, told BNA.

In recent testimony before a House Energy and Commerce subcommittee, Szoka urged Congress to order the FTC to prepare another policy statement if the agency's enforcement activity goes too far.

The FTC's two Republican commissioners have also raised concerns about how the unfairness authority will be used in the wake of the commission's privacy report.

Robert Belair, group leader of the privacy practice at Arnall Golden Gregory LLP in Washington, told BNA the FTC will need to use its unfairness authority more aggressively in order to fully achieve the goals in its report.

Other attorneys noted that the tool has been used very cautiously since it came under scrutiny on Capitol Hill more than three decades ago.

Report Calls for New 'Framework.'

In March, the FTC released a final report calling for a new consumer privacy framework in the United States (58 DER A-17, 3/27/12). Though much of the attention surrounding the report has been focused on its application to large internet companies, such as Facebook and Google, the document recommended a framework that is comprehensive in nature, with principles governing the collection, use, and sharing of consumer data across the business community, both online and offline.

“The report offers suggested best practices that apply to all sectors of the economy,” Maneesha Mithal, associate director of the FTC's division of privacy and identity protection, told BNA.

U.S. firms were encouraged to take steps such as implementing programs to promote consumer privacy at every stage of the development of products and services--a concept known as “privacy by design.” An exemption was included for companies that collect only non-sensitive data from fewer than 5,000 consumers a year, provided they do not share the information with third parties.

The framework also does not apply where companies take “reasonable measures” to de-identify information, commit not to re-identify it, and prohibit “downstream recipients” from re-identifying it.

Mithal emphasized that the FTC report was purely intended to provide best practices and does not create new legal requirements.

“Congress has prescribed what our enforcement authority is under Section 5, and nothing in the report changes that,” she said.

Firms Advised to Take Notice.

Still, attorneys interviewed by BNA said that businesses would be unwise to ignore the FTC's new thinking on privacy.

“Whenever the FTC decides that certain practices are good for consumers, I think it will use its enforcement power to push companies in that direction,” Charles Kennedy, a partner in the Washington office of Wilkinson Barker Knauer LLP, told BNA.

The FTC report was based on a preliminary, staff document that was issued in December 2010. Since that time, commission officials have been strongly encouraging the business community in public speeches to adopt privacy by design and other best practices.

There has also been a related enforcement trend, Kennedy said, citing a recent privacy settlement between the commission and MySpace as an example. As part of the settlement, the social networking firm was required to implement a comprehensive privacy program and to undergo independent audits for the next 20 years. Facebook and Google submitted to similar requirements under 2011 privacy settlements with the FTC (238 DER C-1, 12/12/11).

The Facebook and Google agreements were highlighted in the FTC's privacy report. The commission said that companies should view the comprehensive privacy programs mandated in these consent orders "as a roadmap as they implement privacy by design in their own organizations."

Although the FTC has encouraged the adoption of privacy by design, the agency generally lacks the power to mandate it, other than in the data security area, according to Mithal.

"There are gaps in our current authority," she said.

Legislative Action Urged.

Currently, there is no federal law in the United States that provides consumers with general data privacy rights. Instead, there is a patchwork of federal and state privacy regulations, and industry best practices and self-regulatory standards.

By contrast, the European Union has a comprehensive data protection system that was established in the 1990s and is now in the process of being updated (16 DER A-29, 1/26/12).

The FTC, as part of its vision for a new U.S. framework, has joined the White House in calling on Congress to enact general privacy legislation.

"For those companies that are not already taking consumer privacy into account--either because of lack of understanding or lack of concern--legislation should provide clear rules of the road," the FTC said in its report. "It should also provide adequate deterrence through the availability of civil penalties and other remedies."

The commission said it was prepared to work with Congress and other stakeholders to develop such legislation.

In a similar move, the White House issued a report in February that urged Congress to enact a consumer "privacy bill of rights," enforceable by the FTC and state attorneys general (36 DER A-25, 2/24/12).

Several privacy bills are already pending before Congress, including a proposal (S. 799) introduced by Sens. John Kerry (D-Mass.) and John McCain (R-Ariz.) that would require

implementation of privacy by design, among other measures. However, key Republicans have been skeptical about calls for legislative action and are still weighing the need for it (61 DER A-8, 3/30/12).

In the meantime, the commission said in its privacy report that it will continue to go after firms that commit “unfair and deceptive” practices in this area.

The deception prong of Section 5 is often used where a company has allegedly broken a promise, while unfairness allows the FTC to pursue firms that it believes have caused serious injury to consumers, whether or not a commitment was involved, attorneys said.

In the context of online privacy, the FTC has traditionally relied more heavily on its deception authority, holding companies accountable for violations of their own privacy policies. Under a “harm-based” model developed by the commission in the early 2000s, the agency has also traditionally focused on privacy cases involving the potential for tangible consumer injuries, such as identity theft risks stemming from a large-scale breach of sensitive financial data.

Broader Harm Model Proposed.

But recent privacy cases involving unfairness and statements in the FTC's privacy report suggest that the agency may be moving to an enforcement approach using a much broader harm model, according to Szoka.

“[T]he FTC has staked out a bolder position on the scope of harm covered by unfairness than many realize,” he said in testimony prepared for a March hearing before the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade.

In its privacy report, the commission argued that the range of recognized privacy-related harms should be “more expansive than economic or physical harm or unwarranted intrusions and that any privacy framework should recognize additional harms that might arise from unanticipated uses of data.”

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Georgetown University professor

The report cited the Facebook settlement as an example. In that case, the internet giant was charged both with deceiving consumers by breaking privacy promises and with unfairly changing privacy settings on its website in a way that allowed “friend lists” and other information that users may have designated as private to be made public, without their permission.

According to the privacy report, the firm's alleged sharing of users' personal information beyond their privacy settings constituted a harmful practice, because it involved the “unexpected revelation of previously private information.”

The report also suggested in a footnote that the FTC could have brought similar unfairness allegations against Google, although that case focused on deception charges. The commission alleged that Google deceptively incorporated Gmail users' information into the rollout of Google Buzz, a now-defunct social network service, causing email contacts that were intended to be kept private, in some cases, to be made public (62 DER A-32, 3/31/11).

“Although the complaint against Google alleged that the company used deceptive tactics and violated its own privacy promises when it launched Google Buzz, even in the absence of such misrepresentations, revealing previously-private consumer data could cause consumer harm,” the agency said, noting that the firm received thousands of complaints from consumers who were concerned about public disclosure of their email contacts which, in some cases, included ex-spouses, patients, students, employers, and competitors.

Republican Dissents.

The FTC's privacy report was approved 3-1, with Commissioner J. Thomas Rosch, a Republican, dissenting. Among other reasons, he said he opposed the document because of its “insistence” that the unfair--rather than deceptive--prong of the commission's Section 5 authority should govern information-gathering practices.

“Unfairness' is an elastic and elusive concept,” Rosch said in his dissenting statement. “What is 'unfair' is in the eye of the beholder.”

Rosch went on to complain about parts of the report that called for an expansion of what may be recognized as a harmful practice and the impact this could potentially have on the unfairness doctrine. He noted that the FTC has previously represented to Congress that it will not generally enforce Section 5 against alleged intangible injuries, absent deception.

A new Republican commissioner, Maureen Ohlhausen, who joined the agency after the report was issued, raised similar issues during a May 9 privacy hearing before the Senate Commerce, Science and Transportation Committee (90 DER A-27, 5/10/12).

“The FTC's own unfairness statement suggests that the focus should be on monetary as well as health and safety harms, rather than on more subjective types of harm,” she said.

Ohlhausen said she will be consulting with FTC staff, fellow commissioners, and stakeholders to gather their views on what problems and possible solutions they see in the area of consumer privacy. She mentioned plans to examine whether there are current harms that Section 5 cannot reach and how harm should be measured. She also discussed plans to develop her own opinion on whether there is a need for new privacy legislation.

Past Unfairness Troubles Loom Over Agency.

In its 1980 policy statement, the FTC said that its unfairness authority may be invoked where there is an injury to consumers that is “substantial”; not outweighed by any countervailing benefits to consumers or competition; and not reasonably avoidable by consumers.

The commission said it was mainly concerned with monetary harms and unwarranted health and safety risks. “Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair,” the agency said.

In 1983, the FTC issued a similar policy statement on the deception prong of Section 5. Under that policy statement, a deception case can be brought where there is a “representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”

The policy statements cover the full breadth of issues that potentially fall under the FTC’s jurisdiction as a consumer protection agency. They were crafted at the request of Congress, following a series of controversial FTC rulemakings in the 1970s that raised questions about the scope of the commission’s authority.

“There’s a long history on the limits of unfairness,” said Beales, the Georgetown professor and former FTC director of consumer protection. “Before 1980, it was essentially a limitless doctrine.”

Beales said that an unfairness finding is “pretty straightforward” where there are concrete harms involved. “When you start getting into the creepiness factor as a harm, it’s really difficult to see the substantial consumer injury,” he said.

Echoing those comments, Szoka said the unfairness prong can be an effective consumer protection tool, if used appropriately by the commission.

“They need to stick to the basics of the unfairness doctrine they came up with in 1980,” he told BNA. “That’s still a good standard.”

So far, the FTC has been very strategic in testing its expanded harm model, according to Szoka. “Right now, they’re picking fights that they think they can win,” he said. “These are cases that have been settled without litigation.”

Whether the agency’s emerging harm position would survive a court challenge is uncertain, he said.

In addition to the Facebook complaint, unfairness charges involving intangible harm appeared in a recent privacy case brought against FrostWire LLC, a developer of peer-to-peer file-sharing applications (197 DER A-5, 10/12/11). The FrostWire case is particularly groundbreaking, according to Szoka, both because it rests on non-monetary harms and because it applies unfairness in the context of how product design can cause users to share more information than they expect.

Aggressive Steps Coming?

Belair said the FTC will be tempted to use the unfairness prong more aggressively going forward, as the agency seeks to promote its broad vision for a new U.S. consumer privacy framework.

“Deception can only get you so far, although the commission has been very creative in using it as a hook,” he told BNA.

Kennedy said he would not rule out the possibility of more unfairness cases. However, given the potential for controversy, he predicted that the FTC will proceed with caution.

“It would have to be the kind of unfairness case that is fairly egregious in its facts, so that it doesn't raise alarms with Congress,” he said, adding that deception is likely to remain a primary enforcement focus for now.

Reed Freeman, a partner in the Washington office of Morrison & Foerster LLP, offered a similar view.

“I don't think we're going to see big surprises in the near term,” he told BNA. “I believe the pattern of enforcement will continue along the lines of cases that have been brought so far. The FTC doesn't tend to play 'gotcha' in the privacy context.”

Privacy by design is clearly one area where the FTC currently has enforcement challenges, according to Freeman. Even if the agency wanted to take the position, for example, that it can bring an unfairness action against a company for failure to adopt a comprehensive privacy program, that would be a very difficult argument to make, especially while related legislation is still pending before Congress, he said.

However, even if parts of the FTC's privacy report are not currently mandatory, Freeman said the document as a whole should be taken seriously by the business community.

“It's certainly a peek into the future of potential regulatory requirements down the road,” he said. “It would be foolish to not look at it that way.”

By [*Alexei Alexis*](#)

The FTC's privacy report is available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

The 1980 Policy Statement on Unfairness is available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

The 1983 Policy Statement on Deception is available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

Szoka's House testimony is available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/CMT/20120329/HHRG-112-IF17-WState-BSzoka-20120329.pdf>.

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