

TEXAS LITIGATION SOLUTIONS

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CONSUMER PRIVACY: THE NEW FTC PROPOSAL

On December 1, 2010, the Federal Trade Commission (FTC) released a preliminary report proposing a new framework for balancing consumer privacy with commercial innovation. Increasingly, businesses rely on the collection of consumer information to provide new and better products and services. While the FTC's report praises the privacy protections put in place by a range of online and offline companies that collect consumer information, it criticizes the efforts of other companies and proposes its framework as a replacement for current business self-regulation. In addition to guiding and motivating industry toward the development of enhanced consumer protections, the proposal seeks to inform policymakers, including Congress, as they develop new policies and laws governing consumer privacy.

Today's consumer is subject to the collection of various forms of data, including information regarding his or her purchasing behavior, online browsing, or other online and offline activity. For example, a person purchasing a new computer online likely will have his or her personal information collected not only at the point of sale by the company offering the item, but also by other entities that monitor sites visited and content viewed while

the person browses for information regarding computers or any other subject. While some consumers are aware of such data collection and may even view it as serving useful commercial purposes, others lack understanding regarding the potential scope of the information collected. Some consumers fail to realize that

Origins of the New Framework
The FTC's stated objective with regard to privacy has been to protect consumers' personal information and make sure they have the confidence necessary to take advantage of the various benefits offered them in a constantly changing marketplace. In support of this objec-



any of their information is being collected and shared for marketing purposes. The FTC views differences in consumer understanding regarding data collection and the rapid advance of technology as valid reasons to reconsider existing consumer privacy policy.

ive, the FTC has adopted two primary models, the notice-and-choice model and the harm-based model. The notice-and-choice model is focused on encouraging businesses to issue notices regarding their collection and use of information so that consumers can make **(continued page 2)**

RECENT CASE OF INTEREST

Holmes v. Petrovich Dev. Co.
(2011) 191 Cal.App.4th 1047.
A California appeals court recently ruled that the plaintiff, a woman who sued her employer for discrimination, could not claim attorney-client privilege to protect emails sent to her lawyer from her work

email account. The court said the emails did not classify as confidential communications because the employer defendant had issued a warning that employee emails were not confidential and were subject to monitoring. While attorney-client privilege does

not hinge on whether or not communications are electronic, the court considered the plaintiff's emails to her attorney the equivalent of a consultation taking place on the employer's premises because the plaintiff was fully aware of the company policy.

CONSUMER PRIVACY (CONT'D)

informed choices, and the harm-based model seeks to protect consumers from threats to their physical or economic security and intrusions into their daily lives. While perceived as reasonably successful, both models have been criticized and have not kept pace with technological advances that permit more subtle and sophisticated collection of consumer data.

In response to concerns regarding the utility of the above models, the FTC hosted a series of roundtables designed to identify improved methods of protecting consumer privacy that support and encourage beneficial information use and technological innovation. Among the more significant issues raised by participants were the need for greater transparency, simplification of consumers' ability to make choices about the collection and use of their information, certainty that businesses will take measures to protect privacy during system development and implementation, and caution regarding regulation that could damage the considerable benefits made possible through the exchange and use of consumer information. The FTC's new framework for commercial use of consumer information is based not only on roundtable feedback, but also on the existing notice-and-choice and harm-based models, as well as FTC law en-

forcement experience. As the FTC's report states, application of the framework would extend broadly to "online and offline commercial entities that collect, maintain, share or otherwise use consumer data that can be reasonably linked to a specific consumer, computer, or device."

Framework Components

Among the several components of the proposed framework is an emphasis on companies integrating privacy protections into their day-to-day business practices. While the specific protections mentioned are not new concepts and their implementation may be scaled to fit companies that collect and use only small amounts of non-sensitive consumer data, the framework envisions systematic industry implementation. From an administrative standpoint, protections may include the assignment of personnel to supervise privacy matters, training for employees regarding privacy issues, and mandatory privacy reviews as part of products and services development. In addition, the framework endorses protections such as the collection of only data required for a specific business purpose, reasonable security for such data, safe disposal of the data once the business purpose is fulfilled, and development of reasonable procedures that promote data accuracy.

Another component involves

distinguishing between commonly accepted data practices, for which consumer consent would not be required, and practices of greater concern. Under the FTC approach, companies would not need to ask consumer consent to engage in data collection necessary to accomplish product and service fulfillment and certain internal operations. Instead, companies could concentrate on securing consent for other data practices, prominent examples of which include the sale of consumer purchase information to third parties and online behavioral advertising. In situations where consent would be required, the framework proposes providing consumers with clearly described choices and presenting accessible choice mechanisms at times and in contexts in which consumers actually make decisions regarding their data, such as entering personal information in order to make purchases.

In addition, the framework calls for greater transparency regarding data practices. The report mentions a number of specific measures, including improving privacy policies by making them clear, concise, and easy to read and providing consumers reasonable access to the information maintained on them. Because access translates to company expense, the report envisions such access remaining proportionate to the sensitivity of the data and its intended use. Additionally, the report calls for vigorous notice and consent for any material and retroactive data

policy changes.

Commercial Entity Impact

Prior to the FTC's issuance of a final report and any changes to law and policy arising from it, it is difficult to assess potential liability and the basic issue of who may sue or be sued as a result of the new FTC framework. Certainly, the FTC is no stranger to the concept of enforcement, and as Chairman Jon Leibowitz indicated in his remarks on the preliminary report's release,

"...the FTC anticipates a greater number of privacy cases arising in the near future ..."

the FTC anticipates a greater number of privacy cases arising in the near future, especially where children or teenagers are involved. Generally speaking, the FTC believes that current privacy self-regulation does not adequately protect consumers and that legislative remedies will be necessary if companies do not modify their consumer data collection practices to adhere more closely to FTC guidelines. For more information, including the preliminary report, the press release announcing it, and Chairman Leibowitz' remarks, readers should visit <http://www.ftc.gov/opa/2010/12/privacyreport.shtm>.

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