

FTC's Privacy 'Nutrition Label' May Not Fit Complex Data Use

By Allison Grande

Law360, New York (October 24, 2012, 10:31 PM ET) -- The Federal Trade Commission said Tuesday that it was developing a template modeled after nutrition labels that would allow companies to succinctly and uniformly disclose their data collection practices, but industry attorneys are skeptical, saying the complex nature of how companies use and share data would make such a simple solution untenable.

During a panel discussion at the second annual Wired For Change privacy conference in New York, FTC Chairman Jon Leibowitz revealed that the agency's chief technologist, in collaboration with its Bureau of Consumer Protection, was working on identifying the "five essential terms" that should be included in this new type of shortened privacy policy, which would resemble the nutrition labels found on food and beverages.

But attorneys who spoke to Law360 on Wednesday expressed doubt that what companies do with data they collect from their customers could be boiled down to a few general categories.

"We can all agree objectively about how many calories a candy bar has," Morgan Lewis & Bockius LLP partner Gregory Parks said. "But there aren't clear and bright lines in the world of information management that allow you to put things in nice, neat little boxes. The real world of information exchanges is much more complicated than neat little boxes allow."

Companies have faced mounting pressure in recent years to make their sometimes lengthy and legalistic privacy disclosures easier for consumers to digest, a push complicated by companies' tendency to load their policies with details in order to avoid running afoul of Section 5 of the FTC Act, which allows the regulator to bring enforcement actions against companies that make deceptive statements to consumers.

While a nutrition label-style disclosure would address the problem of consumers faced with unwieldy privacy policies, this simplistic solution would not allow for an explanation of the nuances associated with data collection, a shortcoming that would leave consumers no more confident about about how exactly their data is being used, according to attorneys.

"The challenge is how to convey this information in a coherent way that consumers can understand and digest," Jenner & Block LLP privacy and information governance practice group founder and former U.S. Department of Homeland Security Chief Privacy Officer Mary Ellen Callahan said. "There are going to be people that want details, and if we just rely on labels, then that's going to be an element we're missing."

This problem would be amplified by constraining the label to five elements, Callahan added.

“Having only five ingredients seems kind of prescriptive and narrow, because in reality just listing five is not going to really help the consumer,” she said. “I think that the plain language trend and the just-in-time element in terms of notification are very good, but if you only have five elements, I’m not sure that’s going to give consumers any more information than they already know.”

Stressing the need for focus groups and consumer studies to evaluate this new disclosure style, Hunton & Williams LLP global privacy and data security practice head Lisa Sotto agreed that the policies run the risk of becoming a “staccato list of items that may lose some of the important nuances” that consumers need to know about the practices if the agency fails to pick label categories that “provide the appropriate color.”

Replacing these details with graphics also would not necessarily guarantee that consumers would actually pay attention to the policy, attorneys noted.

“Studies show that most consumers are not as concerned about these issues as the FTC thinks and they are perfectly happy to not read privacy policies, but for those that are interested in the policies, they are going to take the time to read them and figure them out,” Parks said. “People who won’t read through a two- to three-page policy probably won’t take the time to figure out a nutrition label either.”

Salazar Jackson LLP partner Luis Salazar pointed out that many consumers don’t even read the nutrition labels on the food products that they purchase, and suggested that the FTC’s efforts might be better spent assessing the industry’s compliance with existing guidelines, such as the guidance that the agency issued in September to mobile application makers about how to comply with privacy principles.

“In its guidance, the FTC laid out best practices such as building privacy in from the start and obtaining consent that mobile application creators should be following, so a nutrition label would just say that they’re complying with everything or they’re not,” Salazar said. “For the FTC to say it’s enforcing those guidelines is infinitely more effective than a nutrition label because a label isn’t going to stop people from going forward and using the website.”

In trying to forecast the “five essential terms” that the FTC would single out for inclusion in the privacy label, attorneys generally agreed that disclosure requirements would feature what types of information a company collects, how it is collected, who may use that information, how it is going to be used and how companies can correct inaccuracies.

A study released by Carnegie Mellon University’s CyLab Usable Privacy and Security Laboratory in 2009, which the FTC has a link to on its website, endorsed the nutrition label concept, and ongoing work by the lab to develop this technology is also likely to influence any proposal by the regulator, Parks added.

The FTC may also look to the model privacy form under the Gramm-Leach-Bliley Act that many financial institutions currently use, a mechanism that White & Case LLP partner Daren Orzechowski pointed to as proof that explaining data collection practices in a more simplified form is possible.

“In terms of people saying that these practices are not capable of being simplified, in the context of the financial services industry, they’ve been doing these somewhat simplified annual privacy notices for a little bit,” he said. “If the FTC does decide to take this approach, then I think that over time, what will happen is that people will get a better sense of what needs to be disclosed and how to draft disclosures in certain ways that are acceptable.”

Orzechowski also rejected the notion that it is hard to distill the different types of data collection practices, noting that “at this point, everyone knows most of the data collection techniques” and that the FTC could lay them out for companies in a possible nutrition label template.

While the idea of a privacy nutrition label is gaining steam at the FTC, attorneys pointed out that the current mechanism being used by many companies — a layered privacy notice, or a “highlights notice,” which Hunton & Williams Centre for Information Policy Leadership first proposed in 2001 — could provide a more workable solution to the problem of long and complicated privacy policies.

“The past several years, layered privacy policies have really caught on, especially in the mobile space because of the screen space constraints,” Callahan said. “They allow companies to have a high-level discussion on certain issues, kind of like what the nutrition label wants to achieve, and then they can drill down on these areas in a longer policy. Ultimately, companies want to ensure that they don't inundate consumers with so much information that they are turned off from reading any notice.”

--Editing by Elizabeth Bowen and Richard McVay.

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