

FTC Stakes Claim To Privacy Authority With 2014 Plan

By **Allison Grande**

Law360, New York (December 03, 2013, 8:31 PM ET) -- The Federal Trade Commission said Monday it will soon hold a series of seminars to probe the privacy implications of issues ranging from mobile device tracking to the security of consumer health data, a move attorneys say advances the commission's hotly contested bid to establish itself as the leading authority on privacy matters.

The two-hour discussion sessions scheduled to be held between February and April will bring together businesses, consumer advocates and academics to examine concerns raised by new developments in so-called big data information collection technologies. The topics chosen by the commission include companies' tracking of consumers using signals from their mobile devices; the use of predictive scoring to determine consumers' access to certain products; and the protections given to information provided by consumers to websites, health apps and devices not covered by federal health privacy law.

By zeroing in on a trio of timely hot-button issues, the commission is not only demonstrating that it has a firm grasp on the privacy area, but also that it intends to use its limited resources to build a knowledge base that will allow it to lay claim to the title of lead privacy regulator in the U.S., according to attorneys.

"The seminars show that the FTC is trying to cement itself as the primary regulator regarding all matters concerning consumer privacy regardless of the medium, technology, venue or subject matter," Davis & Gilbert LLP partner Gary Kibel told Law360. "So that means that if your business model involves any sort of data collection and use, then it's important to think about these issues in advance and observe the FTC's guidance."

While the regulator has been holding workshops and bringing enforcement actions on a variety of privacy issues for over a decade, their ability to wield such authority was only recently called into question when Wyndham Worldwide Corp. and LabMD Inc. became the first two companies to contest rather than settle the commission's data security claims.

In the Wyndham case, which is currently pending in the District of New Jersey, the hotel chain shot back at the commission's June 2012 complaint by contending that the regulator lacks the authority under Section 5 of the FTC Act to regulate private companies' data security practices and deem them "unfair."

LabMD made a similar argument in its own motion to dismiss an administrative complaint filed by the FTC in August, while adding the contention that the Health Insurance Portability and Accountability Act gives the U.S. Department of Health and Human Services the sole authority to set and enforce rules for securing confidential patient medical information.

“The biggest issue for the FTC [moving forward] will be if the courts overturn their authority to regulate data security,” Wiley Rein LLP privacy practice chairman Kirk Nahra said.

But the topics chosen by the commission for further exploration in 2014 — especially the way that health data is handled and secured outside the traditional medical provider context covered by HIPAA — demonstrate that the FTC has no intention of letting the challenges to its authority deter it from examining emerging technologies that have the potential to compromise consumers' privacy, attorneys noted.

“It is interesting that the FTC appears to be signaling that it believes the misuse of these types of data may amount to an 'unfair' practice on the theory that the misuse of this data can cause a substantial injury to a consumer,” Covington & Burling LLP privacy attorney Stephen Satterfield said. “This could mean that even as the FTC's 'unfairness' authority is being challenged in the Wyndham case, the FTC is looking for new opportunities to use that authority against companies that misuse certain types of consumer data.”

The seminar on consumer-generated and controlled health data, which is the final of the three scheduled meetings and is expected to be held in April, will likely draw the most questions over the scope of the regulator's authority, according to attorneys.

“There is going to be a continuing discussion — or, alternatively, an ongoing tug-of-war — about the overlapping roles of the FTC and the HHS' Office of Civil Rights and about who is responsible for regulating consumers' protected health information,” Fox Rothschild LLP partner Scott Vernick said.

Besides the protection of health data, the FTC is also making a play for being able to regulate the use of sensitive data to track mobile phone users' location and to make eligibility decisions, a pair of issues that the retail and credit reporting industries have been working to control on their own, attorneys noted.

At the mobile device tracking workshop, which will be held on Feb. 19, the commission intends to look into recent reports that brick-and-mortar retailers and other businesses have begun to track consumers' in-store movements through signals in their mobile devices, even though a group of smartphone location technology companies announced in October that they had adopted a first-of-its-kind privacy code of conduct for tracking retail customers' location data.

The seminar on alternative scoring products, which is slated to be held March 19, will take a more granular look at the world of data brokers, an industry which is the subject of an upcoming FTC report and has been actively working to respond to Commissioner Julie Brill's call for more transparency.

Morgan Lewis & Bockius LLP partner Gregory Parks characterized the commission's decision to tackle the mobile device tracking issue as “really surprising” given that the fervor over the data collection seems to have died down and that the few bills introduced at the state level to regulate the practice didn't gain any traction.

But despite the apparent success of the industry to calm prior concerns, retailers should still be wary of the commission, given its willingness to go after practices that it perceives to have any sort of potential to harm consumers, Parks added.

“Retailers should watch what the FTC has to say very closely, since this may be the next instance in which the FTC oversteps its bounds in privacy law enforcement and takes some sort of enforcement action even though they don't have a specific mandate and there is no specific law that says that the practice is illegal,” he said.

With the seminars, the commission is also showcasing its willingness to find creative ways to use its decreasing budget to delve deeper into pressing privacy issues, attorneys noted. While the topics chosen by the commission build on issues raised during the commission's November workshop on the Internet of Things, the format for the 2014 discussions is markedly different than the intensive all-day workshops that it has previously held, attorneys noted.

“The seminars are a novel and interesting way for the commission to show its commitment to staying on top of privacy issues while using its resources in an efficient way to accomplish this objective,” Morrison & Foerster LLP partner D. Reed Freeman said.

While an abridged discussion may result in a less complete record on the issue, Freeman noted that the process allows for interested stakeholders to add to the discussion by submitting public comments after the workshop and providing feedback once a commission report is issued.

“If something turns out because the record was thin to be impractical for companies to implement, then stakeholders can go back to the commission and suggest an alternate approach,” Freeman said. “It's a long-term give-and-take with the commission, and if the commission gets it wrong, then it's up to the industry to speak up.”

--Editing by John Quinn and Philip Shea.

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