Protecting Consumer Privacy in an Era of Rapid Change

RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS

FTC REPORT

FEDERAL TRADE COMMISSION | MARCH 2012

Protecting Consumer Privacy in an Era of Rapid Change

RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS

FTC REPORT
MARCH 2012

CONTENTS

EXECUTIVE SUMMARY

In today's world of smart phones, smart grids, and smart cars, companies are collecting, storing, and sharing more information about consumers than ever before. Although companies use this information to innovate and deliver better products and services to consumers, they should not do so at the expense of consumer privacy.

With this Report, the Commission calls on companies to act now to implement best practices to protect consumers' private information. These best practices include making privacy the "default setting" for commercial data practices and giving consumers greater control over the collection and use of their personal data through simplified choices and increased transparency. Implementing these best practices will enhance trust and stimulate commerce.

This Report follows a preliminary staff report that the Federal Trade Commission ("FTC" or "Commission") issued in December 2010. The preliminary report proposed a framework for protecting consumer privacy in the 21st Century. Like this Report, the framework urged companies to adopt the following practices, consistent with the Fair Information Practice Principles first articulated almost 40 years ago:

- **Privacy by Design:** Build in privacy at every stage of product development;
- **Simplified Choice for Businesses and Consumers:** Give consumers the ability to make decisions about their data at a relevant time and context, including through a Do Not Track mechanism, while reducing the burden on businesses of providing unnecessary choices; and
- **Greater Transparency:** Make information collection and use practices transparent.

The Commission received more than 450 public comments in response to the preliminary report from various stakeholders, including businesses, privacy advocates, technologists and individual consumers. A wide range of stakeholders, including industry, supported the principles underlying the framework, and many companies said they were already following them. At the same time, many commenters criticized the slow pace of self-regulation, and argued that it is time for Congress to enact baseline privacy legislation. In this Report, the Commission addresses the comments and sets forth a revised, final privacy framework that adheres to, but also clarifies and fine-tunes, the basic principles laid out in the preliminary report.

Since the Commission issued the preliminary staff report, Congress has introduced both general privacy bills and more focused bills, including ones addressing Do Not Track and the privacy of teens. Industry has made some progress in certain areas, most notably, in responding to the preliminary report's call for Do Not Track. In other areas, however, industry progress has been far slower. Thus, overall, consumers do not yet enjoy the privacy protections proposed in the preliminary staff report.

The Administration and certain Members of Congress have called for enactment of baseline privacy legislation. The Commission now also calls on Congress to consider enacting baseline privacy legislation and reiterates its call for data security legislation. The Commission is prepared to work with Congress and other stakeholders to craft such legislation. At the same time, the Commission urges industry to accelerate the pace of self-regulation.

The remainder of this Executive Summary describes key developments since the issuance of the preliminary report, discusses the most significant revisions to the proposed framework, and lays out several next steps.

DEVELOPMENTS SINCE ISSUANCE OF THE PRELIMINARY REPORT

In the last 40 years, the Commission has taken numerous actions to shape the consumer privacy landscape. For example, the Commission has sued dozens of companies that broke their privacy and security promises, scores of telemarketers that called consumers on the Do Not Call registry, and more than a hundred scammers peddling unwanted spam and spyware. Since it issued the initial staff report, the Commission has redoubled its efforts to protect consumer privacy, including through law enforcement, policy advocacy, and consumer and business education. It has also vigorously promoted self-regulatory efforts.

On the law enforcement front, since December 2010, the Commission:

- Brought enforcement actions against Google and Facebook. The orders obtained in these cases require the companies to obtain consumers' affirmative express consent before materially changing certain of their data practices and to adopt strong, company-wide privacy programs that outside auditors will assess for 20 years. These orders will protect the more than one billion Google and Facebook users worldwide.
- Brought enforcement actions against online advertising networks that failed to honor opt outs. The orders in these cases are designed to ensure that when consumers choose to opt out of tracking by advertisers, their choice is effective.
- Brought enforcement actions against mobile applications that violated the Children's Online Privacy Protection Act as well as applications that set default privacy settings in a way that caused consumers to unwittingly share their personal data.
- Brought enforcement actions against entities that sold consumer lists to marketers in violation of the Fair Credit Reporting Act.
- Brought actions against companies for failure to maintain reasonable data security.

On the policy front, since December 2010, the FTC and staff:

- Hosted two privacy-related workshops, one on child identity theft and one on the privacy implications of facial recognition technology.
- Testified before Congress ten times on privacy and data security issues.
- Consulted with other federal agencies, including the Federal Communications Commission, the Department of Health and Human Services, and the Department of Commerce, on their privacy initiatives. The Commission has supported the Department of Commerce's initiative to convene stakeholders to develop privacy-related codes of conduct for different industry sectors.
- Released a survey of data collection disclosures by mobile applications directed to children.
- Proposed amendments to the Children's Online Privacy Protection Act Rule.

On the education front, since December 2010, the Commission:

- Continued outreach efforts through the FTC's consumer online safety portal, OnGuardOnline.gov, which provides information in a variety of formats – articles, games, quizzes, and videos – to help consumers secure their computers and protect their personal information. It attracts approximately 100,000 unique visitors per month.
- Published new consumer education materials on identity theft, Wi-Fi hot spots, cookies, and mobile devices.
- Sent warning letters to marketers of mobile apps that do background checks on individuals, educating them about the requirements of the Fair Credit Reporting Act.

To promote self-regulation, since December 2010, the Commission:

- Continued its call for improved privacy disclosures and choices, particularly in the area of online behavioral tracking. In response to this call, as well as to Congressional interest:
  - A number of Internet browser vendors developed browser-based tools for consumers to request that websites not track their online activities.
  - The World Wide Web Consortium, an Internet standard setting organization, is developing a universal web protocol for Do Not Track.
  - The Digital Advertising Alliance ("DAA"), a coalition of media and marketing organizations, has developed a mechanism, accessed through an icon that consumers can click, to obtain information about and opt out of online behavioral advertising. Additionally, the DAA has committed to preventing the use of consumers' data for secondary purposes like credit and employment and honoring the choices about tracking that consumers make through the settings on their browsers.
- Participated in the development of enforceable cross-border privacy rules for businesses to harmonize and enhance privacy protection of consumer data that moves between member countries of the forum on Asia Pacific Economic Cooperation.

THE FINAL REPORT

Based upon its analysis of the comments filed on the proposed privacy framework, as well as commercial and technological developments, the Commission is issuing this final Report. The final framework is intended to articulate best practices for companies that collect and use consumer data. These best practices can be useful to companies as they develop and maintain processes and systems to operationalize privacy and data security practices within their businesses. The final privacy framework contained in this Report is also intended to assist Congress as it considers privacy legislation. To the extent the framework goes beyond existing legal requirements, the framework is not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC. While retaining the proposed framework's fundamental best practices of privacy by design, simplified choice, and greater transparency, the Commission makes revised recommendations in three key areas in response to the comments.

First, the Commission makes changes to the framework's scope. The preliminary report proposed that the privacy framework apply to all commercial entities that collect or use consumer data that can be reasonably linked to a specific consumer, computer, or other device. To address concerns about undue burdens on small businesses, the final framework does not apply to companies that collect only non-sensitive data from fewer than 5,000 consumers a year, provided they do not share the data with third parties. Commenters also expressed concern that, with improvements in technology and the ubiquity of public information, more and more data could be "reasonably linked" to a consumer, computer or device, and that the proposed framework provided less incentive for a business to try to de-identify the data it maintains. To address this issue, the Report clarifies that data is not "reasonably linkable" to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data.

Second, the Commission revises its approach to how companies should provide consumers with privacy choices. To simplify choice for both consumers and businesses, the proposed framework set forth a list of five categories of "commonly accepted" information collection and use practices for which companies need not provide consumers with choice (product fulfillment, internal operations, fraud prevention, legal compliance and public purpose, and first-party marketing). Several business commenters expressed concern that setting these "commonly accepted practices" in stone would stifle innovation. Other commenters expressed the concern that the "commonly accepted practices" delineated in the proposed framework were too broad and would allow a variety of practices to take place without consumer consent.

In response to these concerns, the Commission sets forth a modified approach that focuses on the context of the consumer's interaction with the business. Under this approach, companies do not need to provide choice before collecting and using consumers' data for practices that are consistent with the context of the transaction, consistent with the company's relationship with the consumer, or as required or specifically authorized by law. Although many of the five "commonly accepted practices" identified in the preliminary report would generally meet this standard, there may be exceptions. The Report provides examples of how this new "context of the interaction" standard would apply in various circumstances.

Third, the Commission recommends that Congress consider enacting targeted legislation to provide greater transparency for, and control over, the practices of information brokers. The proposed framework recommended that companies provide consumers with reasonable access to the data the companies maintain about them, proportionate to the sensitivity of the data and the nature of its use. Several commenters discussed in particular the importance of consumers' ability to access information that information brokers have about them. These commenters noted the lack of transparency about the practices of information brokers, who often buy, compile, and sell a wealth of highly personal information about consumers but never interact directly with them. Consumers are often unaware of the existence of these entities, as well as the purposes for which they collect and use data.

The Commission agrees that consumers should have more control over the practices of information brokers and believes that appropriate legislation could help address this goal. Any such legislation could be

modeled on a bill that the House passed on a bipartisan basis during the 111th Congress, which included a procedure for consumers to access and dispute personal data held by information brokers.

IMPLEMENTATION OF THE PRIVACY FRAMEWORK

While Congress considers privacy legislation, the Commission urges industry to accelerate the pace of its self-regulatory measures to implement the Commission's final privacy framework. Although some companies have excellent privacy and data security practices, industry as a whole must do better. Over the course of the next year, Commission staff will promote the framework's implementation by focusing its policymaking efforts on five main action items, which are highlighted here and discussed further throughout the report.

- **Do Not Track:** As discussed above, industry has made significant progress in implementing Do Not Track. The browser vendors have developed tools that consumers can use to signal that they do not want to be tracked; the Digital Advertising Alliance ("DAA") has developed its own icon-based tool and has committed to honor the browser tools; and the World Wide Web Consortium ("W3C") has made substantial progress in creating an international standard for Do Not Track. However, the work is not done. The Commission will work with these groups to complete implementation of an easy-to use, persistent, and effective Do Not Track system.
- **Mobile:** The Commission calls on companies providing mobile services to work toward improved privacy protections, including the development of short, meaningful disclosures. To this end, FTC staff has initiated a project to update its business guidance about online advertising disclosures. As part of this project, staff will host a workshop on May 30, 2012 and will address, among other issues, mobile privacy disclosures and how these disclosures can be short, effective, and accessible to consumers on small screens. The Commission hopes that the workshop will spur further industry self-regulation in this area.
- **Data Brokers:** To address the invisibility of, and consumers' lack of control over, data brokers' collection and use of consumer information, the Commission supports targeted legislation – similar to that contained in several of the data security bills introduced in the 112th Congress – that would provide consumers with access to information about them held by a data broker. To further increase transparency, the Commission calls on data brokers that compile data for marketing purposes to explore creating a centralized website where data brokers could (1) identify themselves to consumers and describe how they collect and use consumer data and (2) detail the access rights and other choices they provide with respect to the consumer data they maintain.
- **Large Platform Providers:** To the extent that large platforms, such as Internet Service Providers, operating systems, browsers, and social media seek, to comprehensively track consumers' online activities, it raises heightened privacy concerns. To further explore privacy and other issues related to this type of comprehensive tracking, FTC staff intends to host a public workshop in the second half of 2012.

- **Promoting Enforceable Self-Regulatory Codes:** The Department of Commerce, with the support of key industry stakeholders, is undertaking a project to facilitate the development of sector-specific codes of conduct. FTC staff will participate in that project. To the extent that strong privacy codes are developed, the Commission will view adherence to such codes favorably in connection with its law enforcement work. The Commission will also continue to enforce the FTC Act to take action against companies that engage in unfair or deceptive practices, including the failure to abide by self-regulatory programs they join.