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Administration Seeks New U.S. Privacy 'Framework' for Commercial Activities

by Alexei Alexis

Privacy and Security Agenda

The Obama administration is expected this year to finalize the blueprint for a new U.S. privacy model. The White House's Privacy and Internet Policy Subcommittee could release a white paper on the topic by the spring, according to Daniel Weitzner of the National Telecommunications and Information Administration.

As part of the effort, the Commerce Department is seeking comment on questions such as whether omnibus U.S. privacy legislation is needed. The department is also forging ahead with plans to set up a new privacy office within the agency to lead the development of voluntary, enforceable privacy codes of conduct for designated industries.

The department envisions a close working relationship with the Federal Trade Commission, which would be responsible for enforcing such codes. Meanwhile, the FTC is gathering input on its own major privacy report, which calls for "somewhat of a restructuring" in the way that privacy is handled in the United States, according to FTC's David Vladeck.

Administration Seeks New U.S. Privacy 'Framework' for Commercial Activities

The Obama administration is expected this year to finalize the blueprint for a new U.S. privacy "framework" governing business practices that involve the collection, use, and sharing of consumers' personal data online.

The plan is expected to guide federal policymakers as they grapple with the challenge of protecting consumers' privacy in the internet age.

The Commerce Department in December published a preliminary proposal calling for a set of basic principles, or a "privacy bill of rights," to serve as the foundation for commercial data privacy protection in the United States (9 PVL 1721, 12/20/10).

Commerce is now seeking input from the public, including on the question of whether there is a need for federal legislation to enforce such principles.

Comments, which are due Jan. 28, are expected to assist the White House's Privacy and Internet Policy Subcommittee in preparing a final policy document—most likely a white paper—that could be released by the spring, Daniel Weitzner, National Telecommunications and Information Administration associate administrator for policy, told BNA in a recent interview.

A key goal of the project is to ready recommendations for Congress, which is expected to examine privacy this year, according to Weitzner.

“We certainly expect to be engaging with Congress quite a bit,” he said. “That’s kind of a very significant item on our agenda.”

The Federal Trade Commission is also weighing privacy proposals, such as a “do-not-track” mechanism, allowing consumers to avoid having their online activities followed by advertisers.

Legislative Action Possible

The Commerce and FTC initiatives come at a time when key lawmakers are calling for the enactment of comprehensive federal privacy legislation (10 PVLR 94, 1/17/11).

“I think, overall, this could be one of the biggest years for online privacy policy,” David Medine, a partner in the Regulatory and Government Affairs Department at WilmerHale, in Washington, told BNA. “You have so many things coming together.”

The Commerce proposal was prepared by the department's Internet Policy Task Force, following an earlier inquiry. The proposal was outlined in a discussion document, described as a “green paper.”

A similar paper on cybersecurity could be released by early spring, according to Ari Schwartz, a senior policy adviser at Commerce's National Institute of Standards and Technology.

The agency is also expected to issue papers on copyright protection and the global free flow of information.

The privacy paper called for the U.S. government to take certain steps to nudge businesses toward adoption of a full set of “fair information practice” principles, such as clearly articulating why data is being collected; committing to data use limitations, based on specified purposes; and submitting to privacy audits as an accountability measure. Department officials have referred to the principles as a “privacy bill of rights.”

Commerce has proposed the creation a Privacy Policy Office within the agency to help translate the principles into industry best practices. The new office, which is expected to be set up this year, according to Weitzner, will lead the development of voluntary, enforceable codes of conduct for designated industries, working in collaboration with the FTC.

“We’re actively working on the planning of that now,” he said. “We believe the office is necessary, because we don’t believe there is an adequate sense of urgency in developing these codes of conduct.”

Weitzner said the new office will encourage the private sector to develop conduct codes more rapidly by bringing stakeholders together and using “the bully pulpit of the administration.”

Under the Commerce proposal, the FTC would play a part in developing conduct codes and would also be responsible for enforcing them. A company’s voluntary commitment to a code would be enforceable by the commission.

Safe Harbor Proposed

Compliance could serve as a safe harbor for firms facing complaints about their privacy practices.

Linda Woolley, executive vice president of government affairs at the Direct Marketing Association, welcomed Commerce’s discussion paper and the agency’s participation in the privacy debate.

“The department’s report appears to be supportive of industry self-regulation,” Woolley explained in a BNA interview.

However, Jeff Chester, executive director of the Center for Digital Democracy, a Washington-based consumer advocacy group, told BNA the department’s proposal does not go far enough.

“The Commerce Department’s role is to protect business, not consumers,” he said. “We will be telling Commerce that it is not the appropriate agency to be addressing this issue.”

The consumer advocacy community will be looking this year to Congress and the FTC, rather than Commerce, to establish strong consumer privacy policies, according to Chester. While, at this point, Commerce is not recommending an omnibus privacy law, the agency is open to that possibility, Weitzner said.

“We explicitly asked questions about that and are looking for a more detailed rationale about what kind of legislative framework we might need,” he said.

Among other legislative options, the department is considering whether the FTC needs expanded powers. Weitzner said the commission’s ability to enforce codes is currently limited to cases where the company has committed to complying.

The department’s paper does recommend certain narrow legislative measures. Specifically, it calls for nationally consistent, data security-breach notification rules and a review of the Electronic Communications Privacy Act for the “cloud computing” environment.

‘Behavioral Advertising’ a Concern

Currently, there is no single federal law governing the protection of consumer data in the United States. Instead, there is a patchwork of federal and state privacy regulations and industry best practices and self-regulatory standards.

A key area of concern for policymakers has been the emergence of behavioral advertising, the practice of tracking consumers' internet activities in order to deliver targeted ads.

In an effort to avoid federal regulation, leading marketing groups have launched various self-regulatory proposals.

The effort involves the use of a universal symbol to help the industry with making its data-collection practices more transparent to internet users, as well as a central web page allowing consumers to opt out of such practices.

The Council of Better Business Bureaus (CBBB) and DMA are expected this year to begin monitoring compliance. Project organizers have said that violators could be referred to the FTC.

FTC Weighs 'Do-Not-Track' Solution

Meanwhile, the FTC is weighing other solutions. In December, the commission published a preliminary staff report, recommending a "do-not-track" mechanism for the internet, among other measures (9 PVL 1642, 12/6/10). The document is intended to aid policymakers, including Congress, and to inform industry best practices and self-regulatory efforts, according to the commission.

Like the Commerce paper, the FTC report proposed a new U.S. privacy framework, while stopping short of calling for omnibus privacy legislation.

"From my perspective, and speaking only for myself, a legislative solution will surely be needed if industry does not step up to the plate," FTC Chairman Jon Leibowitz said in a statement announcing the report.

While much of the attention has focused on the "do-not-track" proposal, the FTC's report contained several other recommendations that represent a shift from the commission's traditional thinking on privacy, according to David Vladeck, director of the FTC's Bureau of Consumer Protection.

"I think the report really calls for, in some ways, somewhat of a restructuring in the way that privacy is handled," he told BNA in a recent interview.

Under the commission's proposed framework, companies would need to improve their privacy policies and provide choices to consumers "in a simpler, more streamlined" way.

In addition, the proposal calls for firms to build privacy protections into their "everyday" business practices—a "privacy by design" approach.

“I view this aspect of the FTC’s report as being much more significant than the commission’s do-not-track proposal in that the privacy-by-design mandate affects every business in every industry sector,” Lisa Sotto, head of the Privacy and Information Management Practice at Hunton & Williams, in New York City, told BNA.

The commission has asked for public comments by Jan. 31. A final report is expected from the agency later this year.

‘Notice and Choice’ Not Working?

Both agency reports are groundbreaking in that they attempt to develop a new model for privacy in the United States, based on an expanded set of fair information practice principles, according to Medine.

The current U.S. model relies heavily on a “notice and choice” approach. The FTC and Commerce have proposed adding other principles, such as limiting data collection to specified business purposes.

“The FTC couched it as privacy by design, and Commerce called it a privacy bill of rights, but I think they’re both looking at the same thing,” Medine said.

While the FTC has long been active in the privacy arena, the Commerce Department had been dormant on the issue for years, according Sotto.

“The department has clearly made a decision to be proactive on this issue—not just domestically, but globally,” she said. “That now means that there are two agencies that will be focused on privacy.”

Sotto said there is room for both agencies to have a privacy role, since they come to the issue from different perspectives. The FTC is an enforcement body that focuses on domestic consumer protection, while Commerce is a facilitator of U.S. business interests globally, she said.

As Commerce has increased its focus on privacy, the agency has worked very closely with the FTC, according to Weitzner.

“This framework that we’ve articulated will only work with close collaboration between the FTC and our Privacy Office,” he said.

APEC Initiative on Commerce Agenda

Meanwhile, on the international front, a key goal for the department this year will be pushing a privacy initiative launched by members of the Asia Pacific Economic Cooperation, according to Weitzner.

APEC members, including the United States, have been working on a framework to facilitate cross-border data flows (9 PVL 614, 4/26/10).

APEC is an organization of 21 “member economies” that border the Pacific Ocean. Members include the United States, Russia, China, South Korea, Japan, Taiwan, Hong Kong, Australia, Canada, and Mexico.

“This is the United State’s year to host APEC, so we’ll certainly be giving real attention to the APEC Privacy Framework and how we can move that forward,” Weitzner said.