FTC and privacy in the spotlight at White House

The White House’s new push for a voluntary code of conduct to implement its “privacy bill of rights,” giving consumers more control over their personal data, puts the FTC front and center as the federal government’s eyes and ears on whether companies are toeing the line.

While the codes of conduct would be voluntary, once companies agree to follow them, the FTC would be charged with enforcing them and ensuring companies adhere to their commitments through the agency’s authority to prohibit unfair or deceptive acts or practices.

On the same day the White House proposal was released on Feb. 23, major online tech giants, including Google, announced they would include a “Do Not Track” option to be embedded in their Web browsers by the end of the year that would allow consumers to opt out of having some companies, but not all, keep data on their online activities. Specifically, it would prevent an individual’s browsing history from being used to tailor ads, according to the Google statement.

The FTC has been pushing for a Do Not Track mechanism since 2010, to be accomplished either through legislation or “robust, enforceable” self-regulation that would allow consumers to choose what information is collected about them online and how it is used. Under the agency’s plan, a setting similar to a persistent cookie would be placed on a consumer’s browser that would communicate the consumer’s choices about being tracked and whether he or she wishes to receive targeted ads. A final report is expected soon, FTC Chairman Jon Leibowitz said at the White House briefing.

“The FTC will be watching closely to make sure everyone voluntarily adopting the code is, in fact, really doing what they said they would do,” said Thomas Cohn of LeClairRyan, who previously served as counsel to the director of the FTC’s Bureau of Consumer Protection, in an interview with FTC:WATCH.
“It’s ‘say what you do and do what you say,’ and any disconnect between the two will certainly expose a company to possible FTC investigation and enforcement action charging deceptive privacy practices.”

At the White House gathering Leibowitz also praised work by the online advertising industry to limit behavioral advertising—targeted ads based on browsing history—and efforts by Web browsing companies like Microsoft to give consumers choice about how they are tracked online.

As a result, Leibowitz said, “consumers will be able to opt out of tracking, through either the icon on advertisements they see or through their browser settings, and America will move further down the road to protecting consumer privacy.”

Under the White House plan, the Commerce Department’s National Telecommunications and Information Administration would convene a forum for stakeholders—including consumer groups, privacy advocates, businesses, international organizations, state attorneys general, law enforcement authorities and academics—to adopt sector-specific codes of conduct based on the White House principles.

Down the line, the White House plan calls for legislation to enact a Consumer Bill of Rights that would permit the FTC and state attorneys general to enforce the rights directly. Under the proposed legislation, the FTC would have explicit authority to review the sector-specific codes of conduct to see if they adhere to the Consumer Bill of Rights within 180 days after they are submitted for review. The agency would be required to consider public comments on a code and its review authority would be limited to approving or rejecting a code that “reflects the consensus of all participants in the process.” It also recommends the FTC authority grant a “safe harbor” to companies that follow a code of conduct that the FTC has reviewed and approved.

Some privacy groups criticized the White House for not going straight for legislation. While calling the new principles an “important development to protect consumers in the digital age,” the Center for Digital Democracy said it “would have preferred the White House to introduce new legislation that clearly protected consumers online.”

That said, virtually no one expects legislation in this area to make it through the bitterly divided Congress during this election year.

The voluntary aspect of the current new policy is getting a skeptical greeting among some in Congress. Sen. John Kerry (D-Mass.) couldn’t resist a little sarcasm when he commented to Politico that: “It’s terrific that the advertising industry plans voluntarily to strictly and honestly comply with Americans’ wishes not to be tracked.” Kerry has drafted a privacy bill of rights with across-the-aisle support from John McCain (R-Ariz.) requiring the FTC to issue rules for companies collecting personal information. “Voluntary compliance does not replace the need for a new law,” Kerry added. “Until Congress gets its act together and does its job, Americans won’t have the guaranteed protection of industrywide compliance.”

In a recent communication on the policy, Gibson Dunn noted that the White House policy is very much a work in progress. “Detailed guidance is required to aid in the implementation of the principles set out in the Bill of Rights across a wide range of industries,” it said.

The administration is also looking overseas, noting in its report that “it is critical to the continued growth of the digital economy that [governments] strive to create interoperability between privacy regimes.” Such a move is “part of becoming more of a world presence in the privacy space,” Bart Lazar, a privacy attorney with Seyfarth Shaw, told FTC:WATCH.

Lazar said that the Obama-proposed policy would bring the U.S. more in line with privacy practices in Europe. In Europe, Article 27 of the European Union Directive 95/46/EC encourages companies to develop codes of conduct applicable to transfers of personal data.

“The Obama administration is seeing the future and saying ‘Hey, this is an opportunity for us if we can develop our own codes of conduct,’” said Lazar. “If codes of conduct have the impact of eliminating disparities in state, federal and international laws and reducing the regulatory morass the companies have to deal with, that would really relieve the compliance burden on American and multinational corporations.”

—Jacqueline L. Salmon

REFERENCE:

FTC:WATCH Issue 780
http://www.ftc.gov/speeches/leibowitz/120223whitehouse-privacy.pdf

CFPB, FTC border skirmish

The prediction that the CFPB and FTC would end up butting heads appears to be coming true.

About two weeks ago, the CFPB announced, amid great fanfare, that it plans to begin supervising debt collection and credit-reporting agencies. In a news release
officials on consumer financial issues and banking products. The agency is opening the nomination process to the public, and inviting people with financial service, consumer protection, fair lending, civil rights and community development backgrounds to apply for spots. “We want your help,” said Richard Cordray, in a videotaped interview on the CFPB website, urging consumers to spread the word via the web and facebook to reach as many people as possible.

The CFPB is hoping to create a stronger board than the much-maligned Consumer Advisory Council operated by the Federal Reserve from 1976 to last year, when it was disbanded. Activists and analysts said that board, comprised overwhelmingly of financial industry officials, had been notably ineffective. In March 2010, 18 former or current members of the Fed’s Consumer Advisory Council, told Congress that the council’s advice had been ignored by the Federal Reserve, although members had repeatedly warned Fed governors that a foreclosure crisis was looming. The Financial Crisis Inquiry Commission came to a similar conclusion, citing numerous disregarded warnings issued by members of the Consumer Advisory Council.

CFPB officials are clearly hoping this board will perform more credibly.

REFERENCE:
http://www.consumerfinance.gov/blog/were-taking-nominations-for-our-consumer-advisory-board/

INTERNATIONAL BRIEFS

Canada

It’s going to be easier to track merger activity in Canada soon.

The Canadian Competition Bureau has announced it will begin to publish information about concluded transactions subject to pre-merger notification or where a request was made for an advance ruling certificate.

This will be a major change for Canada: Competition agencies have historically operated under confidentiality restrictions that limited the amount of information that the agencies make public about their actions.

But Canadian officials have decided to begin publishing the information to increase the transparency of government actions. They will publish the names of the parties involved, the affected industry and the decision reached by the agency. The reports will be published at the beginning of each month for the prior month’s activities.

REFERENCE:
http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03118.html

PEOPLE

Thomas A. Cohn, a 17-year veteran of the FTC, has joined the law firm of LeClairRyan as a partner on the firm’s Antitrust, Corporate, Consumer Financial Services and Compliance, Investigations and White Collar Practice Area Teams. He will practice out of the firm’s Washington, D.C., office.

Cohn had served as director of the Northeast Region. He began his FTC career in its Division of Marketing Practices, where he litigated fraud and rule violation cases, and later served as counsel to the director of the FTC’s Bureau of Consumer Protection.

Cohn is a graduate of Boston University School of Law and got his undergraduate’s degree at Yale College.

Appreciation: George W. Douglas, 1938-2012

When asked to reflect on the work of the late FTC Commissioner George W. Douglas, who died on February 10 at 73, Jim Miller, a former FTC chairman, didn’t hesitate in describing his former colleague as “cerebral.” He said Douglas, an economist, was “a thinker, who looked at issues, thought about them, reflected on them and did research.” In other words, Douglas was no rigid ideologue who could be neatly pigeonholed.

Douglas, who was nominated to the FTC by President Reagan and served from 1982 to 1985, knew the limits of both the market and of government regulatory action, Miller added. “He recognized that the market doesn’t always function perfectly, but neither does government. The question is how to choose the outcome that is best for consumers.”

Douglas’s path to the FTC came after he spent time in academia and in running a consulting firm, Southwest Econometrics Inc., in Austin. He was born in Arlington, Texas, grew up in Stillwater, Oklahoma, and came to the northeast to attend Yale University, where he earned his undergraduate, masters and PhD degrees. After those years in New Haven, Ct., Douglas went south to Chapel Hill, where he was a professor of economics at the University of North Carolina from 1965 to 1976. His expertise in transportation and antitrust issues led to his appointment as a Brookings Institute Public Policy Fellow in 1968, where he served in the Department of Transportation.

Douglas and Miller co-authored a book on airline deregulation, “Economic Regulation of Domestic Air