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FTC ANNOUNCES PROPOSED FRAMEWORK FOR REGULATING CONSUMER PRIVACY

Today, the Federal Trade Commission released its long-awaited report on consumer privacy. This report follows the series of privacy roundtables that the FTC held over the past year. The FTC has invited comment on its proposals, which are due **January 31, 2011**. Based on comments received, the FTC has indicated that it will refine its proposal, issue a final report, and make legislative recommendations to Congress in 2011.

In remarks introducing the report earlier today, Consumer Protection Bureau Director David Vladeck emphasized the FTC's view that "self-regulation has not kept pace with technology." Today's report signals an effort to address that concern — and the perceived weaknesses in the FTC's historic approaches to privacy regulation — by providing a normative framework for how companies should protect consumers' privacy. It also reflects the agency's expectation that companies will do more immediately to protect privacy, including by enhancing their privacy disclosures and implementing more rigorous internal policies concerning data management.

Proposed Scope & Enforceability

Applies to:

- commercial entities
- involved in collection *or* use
- data that can be reasonably linked to an individual, regardless of whether the data is "personally identifiable"

The report endorses a privacy "framework" that is not limited to online practices or the collection of personally identifiable information. The framework would apply to all commercial entities --- whether operating online or offline and regardless of whether the entities have a direct relationship with consumers — that collect or use any data that "can be reasonably linked to a specific consumer, computer, or other device." The FTC seeks comment on the scope of its framework.

The FTC has not addressed directly the enforceability of the report's recommendations, but it is reasonable to anticipate that the FTC may enforce those aspects of the final report that it concludes are within its authority under Section 5 of the FTC Act or other statutes. FTC Chairman Jon Leibowitz indicated in a prepared statement that the agency would use its new framework to inform enforcement actions under its existing legal authority, "especially when children and teens are involved."

Proposed Principles

Three Core Principles	The FTC's proposed regulatory framework is based three core principles: privacy by design, choice, and transparency.
Privacy By Design • privacy at every level of the organization • incorporate privacy into product development • adopt comprehensive data management procedures	In the report, the FTC finds that privacy should be an integral part of a company's processes for developing products, a concept that the FTC calls "privacy by design." For example, the report encourages companies to adopt and enforce practices to limit data collection, protect data that is collected, implement reasonable data retention periods, and ensure that consumer data is accurate. The framework also urges companies to adopt privacy principles throughout their organizations, including through training and by appointing personnel with responsibility for overseeing ongoing privacy compliance reviews. The FTC seeks comment on the specifics regarding these proposed requirements.
Choice • provide "just-in-time" disclosure and choice at the time of collection or use • choice not required for "commonly accepted" practices — e.g., fulfillment, legal, product improvement • first-party marketing deemed "commonly accepted" but not third-party marketing	The FTC's approach would require companies to offer consumers choices for data practices that do not constitute "commonly accepted practices" as defined by the FTC. Specifically, the FTC would not require companies to provide choices to consumers about the collection and use of consumer data for product and service fulfillment, internal operations such as product improvement, fraud prevention, legal compliance, and first-party marketing. One focal point for comments on the report is likely to be whether this proposed list of "commonly accepted practices" is too narrow or too broad and how these practices, including most specifically first-party marketing, will be defined. For all other data practices, the report calls on businesses to offer consumers clear and prominently disclosed choices. The FTC envisions that companies will offer these choices at the time and in the context in which the consumer is making a decision about his or her data. For example, the FTC suggests that an online retailer will provide a clear and conspicuous disclosure and control mechanism on the page on which a consumer types in his or her personal information. The FTC indicates that choices within "long" privacy policies and "pre-checked boxes" are ineffective. The report does not express a preference for "opt in" versus "opt out" consent but seeks comment on the appropriate form of consent, including whether the method should vary by context. The report does suggest, however, that enhanced protections — in the form of affirmative express consent — are appropriate for sensitive data, which the FTC defines as including information about children, financial and medical information, and precise geolocation data.

Choice *(continued)*

- browser-based "do not track" endorsed
- browser would notify site not to track or use collected data for targeting
- asks whether more granular controls should be offered
- FTC seeks enhanced enforcement authority

For online behavioral advertising, the report endorses the development of a "do-not-track" framework as a key option for implementing a robust consumer choice framework. The report suggests that uniform choice might be implemented through a persistent browser setting that would inform websites not to track a user or use behavioral information about the user for targeting purposes. The FTC acknowledges that its do-not-track approach cannot be effective unless sites have an enforceable obligation to honor user preferences. But the FTC nonetheless believes that this approach is preferable to current cookie-based approaches, which consumer groups have criticized as under-inclusive and vulnerable to manipulation, and to "registry-based" approaches like the federal Do Not Call program, which it believes would not be technically feasible and could raise new privacy issues.

The FTC has invited comment on how a universal choice mechanism could work in practice and whether consumers should be given more granular choices regarding tracking and targeting. The report also acknowledges that the FTC does not have the authority to impose a "do-not-track" mandate today, but Director Vladeck indicated today that the agency may attempt to "coax and cajole" implementation even as it seeks comment on whether to request broader enforcement authority from Congress.

Transparency

- existing privacy policies not enough
- standardization of disclosures
- reasonable data access
- prominent notice and consent for material, retroactive changes
- consumer education

The report also calls for privacy policies that are shorter, clearer, and more standardized. The FTC seeks comment on how to best ensure the usability and comprehension of privacy notices, requesting specific comment on the feasibility of standardizing the format and terminology across industries. By encouraging more consistent privacy policies and "at a glance comparisons," the FTC hopes to encourage companies to compete on the basis of their privacy practices.

The FTC's framework also pushes for increased consumer access to information held about them by data aggregators and other entities with which they do not do business directly. Further, the FTC calls for all stakeholders to expand their efforts to provide consumer education about commercial data privacy practices.

Consistent with the existing FTC approach, the report also makes clear that before making material changes to a privacy policy, a company should make prominent disclosures that clearly describe such changes and obtain consumers' affirmative consent.

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The FTC's proposed privacy framework, if adopted, would require companies to modify their online and offline privacy practices in significant ways. We encourage companies to closely review the FTC's report, available at http://www.ftc.gov/os/2010/12/101201privacyreport.pdf, and the list of questions posed by the FTC, which is attached below.

If you have questions regarding the FTC report or its impact on your business, or if you are interested in submitting comments, please contact the following members of our privacy and data security practice group:

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