

# Remedies for Privacy Violations

APEC ECSG

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The views expressed herein are the views of Markus Heyder. They do not necessarily reflect the views of the Federal Trade Commission or any Commissioner

- Available Options for Remedies for Privacy Violations?
- United States – Federal Trade Commission perspective

# Background on FTC



- Jurisdiction over competition and consumer protection
- In consumer protection area, we protect consumers from “unfair or deceptive practices” through
  - Enforcement
  - Promotion of self-regulation
  - Education
- We’re also charged with enforcing other consumer-related statutes, including privacy statutes.

# APEC PRIVACY FRAMEWORK

- Recognizes that privacy protections must:
  - prevent harm (Principle No. 1)
  - protect the free-flow of information

# FTC Framework for analyzing privacy issues

- An information-based economy benefits consumers
- Information collected and shared in an information-based economy may be misused and cause harm

# Main objective of FTC privacy agenda:

- Stop information practices that harm consumers without restricting the free-flow of information that benefits consumers

# U.S. approach to privacy

- Sector- and issue specific legislation with aggressive enforcement
- Self-regulation
- Consumer and business education

# Privacy Legislation and Enforcement

- Financial privacy legislation (FTC)
- Legislation governing credit reporting agencies (FTC)
- Medical privacy legislation
- Children's privacy legislation (FTC)
- General legislation applicable to privacy (FTC)



# Types of Remedies

- public enforcement
  - civil remedies:
    - Injunctions
    - consumer redress
    - Disgorgement
    - fines
  - criminal remedies:
    - fines
    - imprisonment
- private actions
- alternative dispute resolution (e.g., mediation)

# Financial Privacy and Information Security: The Gramm-Leach Bliley Act (GLB)

- Basic rules
  - (1) Notice and opt-out
  - (1) Appropriate physical, technical, and procedural safeguards to protect the security and integrity of customer information

# Standard for Safeguards

- Financial institutions must develop, implement and maintain a comprehensive written information security program
- The program must contain administrative, technical and physical safeguards that are appropriate to:
  - the size and complexity of the financial institution;
  - the nature and scope of its activities; and
  - the sensitivity its customer information.

# Remedies for Violations of Privacy and Safeguards Rules

- Injunctive relief
- Consumer redress
- Disgorgement

# Safeguards Rule Cases

- Sunbelt Lending Services
- Nationwide Mortgage Group, Inc.
- Remedies:
  - injunction against future violations
  - biannual audits to certify security program

# Financial Privacy – Pretexting

- Financial privacy protections prohibit “pretexting” – fraudulent access to financial information by false pretenses
- Remedies:
  - Administrative enforcement by FTC (and other agencies) (injunction, redress, disgorgement; civil penalties (\$))
  - Criminal enforcement (fines/imprisonment)

# New Developments

- Proposed legislation that would expand information safeguard rules to data brokers that are not financial institutions and not credit reporting agencies subject to the Fair Credit Reporting act.
- Proposals include requirement to notify consumers if their personal information was improperly obtained by unauthorized persons.

# Fair Credit Reporting Act - Privacy of Credit Reports

- Credit transactions are extremely common in the U.S.
- CRAs collect public record info, credit info, both positive and negative
- The information is sensitive and subject to strict privacy protections under the FCRA



# Credit Reports: Fair Credit Reporting Act (FCRA)

- Allows sharing of consumer information by credit reporting agency only if such sharing serves a **permissible purpose**.
- Permissible purpose generally
  - Credit transaction
  - Insurance
  - Employment (with consent)
  - Other uses with written consent of consumer

# FCRA: Reasonable procedures

- CRAs must employ “reasonable procedures” to ensure that they supply consumer reports only to those with a permissible purpose.
- Enforcement in mid-90s resulted in CRA agreement to employ additional verification procedures:
  - verifying the identities and business of current and prospective subscribers,
  - conducting periodic, unannounced audits of subscribers,
  - obtaining written certifications from subscribers as to permissible purposes for which they seek to obtain consumer reports.

# FCRA amendments: new privacy protections

- Recent amendments enhance privacy protections under FCRA
  - disposal of consumer information
  - tools to prevent and combat id theft
  - truncation of credit card numbers and social security numbers
  - limiting use of medical information in consumer reports

# FCRA Enforcement

- Remedies
  - Private rights of action for willful and negligent noncompliance
    - actual or statutory damages
  - Criminal sanctions for obtaining information under false pretenses and for knowing and willful unauthorized disclosures of information
    - Fines and/or imprisonment
  - Public enforcement by FTC under FTC Act (injunctions; redress; disgorgement; civil remedies)
  - (Public enforcement by other federal agencies and states)

# Children's Privacy: Children's Online Privacy Protection Act (COPPA)

- Prohibits websites from collecting information from children under 13 without verifiable parental consent.
- Enforcement
  - FTC and State authorities
- Remedies in FTC enforcement actions
  - injunction
  - civil penalties (\$)
  - other equitable relief (e.g., consumer education)

# General: FTC Act

- Prohibits unfair or deceptive practices
- It is a deceptive practice to make a promise about privacy and then breach that promise.
- Examples
  - In the Matter of Tower Records
  - Petco Animal Supplies
- Remedies in Tower Records and Petco: injunctions and period audits

# General: FTC ACT (cont.)

- Use of “unfairness” authority to remedy privacy violations
- Practice unfair if it causes or is likely to cause consumers substantial injury that is neither reasonably avoidable by consumers nor offset by countervailing benefits to consumers or competition.
- Example:
  - Vision Properties/Cart Manager
- Remedies in Vision Properties/Cart Manager:
  - injunction
  - proper disclosures
  - disgorgement

# Criminal Statutes That Protect Privacy (DOJ)

**Privacy is also protected through a range of criminal statutes in various subject matter areas**

- Identity Theft (Criminal Procedure Law – 18 USC §1028), includes:
  - Knowingly transferring, possessing, or using a means of ID of another person, or a false identification, with the intent to commit a crime
  - Punishment – anywhere from 1 year to 15 years (20 if in furtherance of drug trafficking, crime of violence, etc. – 30 if to facilitate an act of terrorism)
  
- Aggravated Identity Theft (Criminal Procedure Law – 18 USC §1028A):
  - If a person knowingly transfers, possess, or uses a means of ID of another, in the commission of a felony crime
    - that person receives an additional 2 year sentence
    - that person cannot be placed on probation
    - Some of the crimes listed in the statute include obtaining customer information by false pretense, fraud, falsities in relation to passports, etc.



# Criminal Statutes That Protect Privacy (DOJ)

- Intercepting the Content of Communications in Real Time (18 USC 2511)
  - It is unlawful to intercept, try to intercept or ask someone else to intercept a communication
    - this applies to interception of voice or E-mail communication, listening in on phone calls without consent, etc.
    - includes the use of electronic devices such as electronic sniffers
- Computer Hacking Statute - Securing Information by Gaining Unauthorized Access to a Computer (18 USC 1030)
  - It is unlawful to gain unauthorized access to a computer and view information in that computer
    - includes viewing of information contained in a financial record of a financial institution, a card issuer or a CRA
    - maximum penalty is 1 to 5 years where theft is committed for purposes of fraud or another crime

# Availability of Criminal Remedies

(DOJ)

- In order to enforce criminal statutes, law enforcement must be able to establish its case “beyond a reasonable doubt”
- This in turn requires access to evidence through mechanisms such as:
  - Search warrants, Interception of Content, and Access to Stored Electronic Communications
  - Each of these mechanisms has its own privacy protections built into the mechanism
  - For example, to intercept the content of a communication:
    - must get stringent court approval, must minimize privacy infringement, criminal penalties for misuse, etc.
- This also requires the ability to exchange criminal evidence and investigative information internationally (information which could contain PI of others)
  - in a globally connected world, crimes transcend national boundaries
  - criminals rely upon antiquated info sharing mechanisms and information sharing restrictions to stymie investigations – need to avoid this problem

# Self-regulation by industry

- Codes of conduct
  - BBB
    - BBB Online Privacy Seal
  - TRUSTe
    - Privacy seal programs
- Dispute resolution mechanisms for consumers

# Consumer and business education

- Consumer and Business Education
  - Examples:
    - advice concerning privacy laws and consumer rights
    - advice on reducing risks to computer systems
    - business education brochure on managing data compromises