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The Trump Federal Trade Commission on Privacy: A Dirty Dozen Guesses/Predictions/Thoughts

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How will a Federal Trade Commission controlled by Republicans and with a Chairman selected by President Trump approach privacy issues? As of this writing, we do not know who Trump will nominate as new Commissioners or even who will be the permanent Chairman. Trump selected sitting Republican Commissioner Maureen Ohlhausen as acting Chairman only.

So with Yogi Berra's famous comment firmly in mind–"It's tough to make predictions, especially about the future"–I offer these guesses and predictions.

1. Deception cases only. The Trump FTC is likely to bring only privacy cases involving deception. Going after deceptive activity is easier because you only have to show that a company said one thing but did another, but one deception case pretty much like the next. No one learns much from these cases, except that companies write even more obscure privacy notices to try to evade deception, making things even worse for consumers. Even under Democrats, the Commission was reluctant to bring many privacy cases using its authority to challenge unfair trade practices. The unfairness authority is much more powerful because an unfairness case can effectively establish new general standards of conduct.

2. Harm standard. The Trump FTC will toughen the standard needed to show consumer harm. This is not a prediction. We already know this from statements of acting Chairman Maureen Ohlhausen. Even though there is evidence (mixed, to be sure) that the courts may be loosening the degree and type of showings of consumer harm necessary to sustain a privacy lawsuit, the FTC will go the other way. A worst case scenario will formalize an economic equivalent to a "blood in the streets" standard, where the Commission will insist on an unattainable degree of major, uncontroverted harm before acting. The Bureau of Economics, which has been a drag on privacy at the Commission for years, will play a role in minimizing conclusions that consumer harm exists. The Commission will, however, retain its traditional interest in aggressive privacy protection in data breach and security cases that end up on the front pages of many newspapers. The new Commission, like past Commissions, will be a press hound. But it will still run away from establishing security standards, mostly because it lacks the authority and the will to act.

3. Fish-in-a-barrel cases. The Trump FTC will bring fewer privacy cases, and the cases it does bring will be the legal equivalent of shooting fish in a barrel. The cases will highlight only the most egregious conduct, with a focus on smaller players rather than Google or Facebook or other large companies whose privacy policies affect the most consumers.

4. More sucking up to business. Even the Obama FTC went out of its way to cater to business interests. If you watched closely, you saw the Commission working intently in Europe to support American business seeking to maintain the ability to export personal data from E.U. member

states. The old U.S.-E.U. Safe Harbor agreement was mostly a fraud on the world (e.g., weak standards, no effective rights for consumers, non-compliance by business), but the E.U. and our Department of Commerce looked the other way until the Snowden revelations. That kerfuffle incensed Europe and resulted in a renegotiated Privacy Shield, with much attention from the FTC (and all those unfortunate trips to Europe at taxpayer expense). The most important thing to remember here is that every activity that the Commission took in support of either Safe Harbor or Privacy Shield drew resources away from protecting American consumers. If you think that Commission's interest in E.U. privacy was the result of concerns about European consumers and not because American business interests were at stake, I have a bridge in Brussels to sell you.

5. Fake self-regulation. Like a moth and a flame, the Commission has danced around the idea of privacy self-regulation for a long time. A constant message to business was do a better job of self-regulation or else. But there was and is no *else*. With no real possibility of Commission privacy regulations, the best the Commission could do was to ask Congress to act. We won't see any recommendation for privacy legislation, no matter how attenuated, from the Trump FTC, unless the Commission recommends federal preemption of state laws that provide consumers meaningful privacy protection. With nothing else to do, the Commission will stick with promoting self-regulation, declaring it successful and arguing that there is no need for any federal consumer privacy legislation. With the FTC effectively withdrawn from a pro-consumer privacy role and with self-regulation likely to be less and less effective for lack of any legislative or regulatory threat, privacy self-regulation will wither even while the Commission declares it to be a success. (See the 2011 report I wrote with Pam Dixon for some history on the subject: *Many Failures: A Brief History of Privacy Self-Regulation*, https://www.worldprivacyforum.org/2011/10/report-many-failures-a-brief-history-of-privacy-self-regulation/). Executives in privacy self-regulatory organization should take the hint and find new jobs before dues paying members leave in droves rather than pay for fake self-regulation that is unnecessary, even to serve as a cover story.

6. Notice-and-choice forever. Because the Commission has no teeth, it has for years supported directly and indirectly the idea that notice-and-choice is a suitable response to consumer privacy concerns. Just about everyone else in the privacy world (advocates, regulators, and even business) understands that notice-and-choice leaves out important privacy principles and protects data processors rather than consumers. We will continue to see the Commission unwilling to move far away from notice-and-choice.

7. Consumer help from elsewhere. If there is any hope for consumer privacy, it must come from someone other than the FTC. State attorneys general may step into the vacancy left by the Commission, and activities in the E.U. may benefit American consumers indirectly. The courts are slowly becoming more receptive to privacy lawsuits, and the costs of security breaches will continue to motivate companies to do a better job on security. At the same time, however, both privacy and security are likely to be hard to find anywhere in the Internet of Things. The FTC may hold workshops, issue reports, and call yet again for self-regulation, but it will do nothing substantive.

8. Assessments and consent decrees. In most privacy and security cases that settle with consent decrees, the Commission typically extracts a facially impressive order that requires settling

companies to agree to a 20-year reporting process that includes an independent assessment. However, as Chris Hoofnagle discusses in his excellent recent book–*Federal Trade Commission Privacy Law and Policy*, https://hoofnagle.berkeley.edu/ftcprivacy/–the consent decrees sound impressive but do little. They call for "assessments" rather than audits. An assessment is a largely meaningless activity that allows the assessor to rely on statements from the company rather than undertaking independent review. The Commission pays little attention to the assessments, not even getting copies of them in all cases.

I expect the Commission to drop the requirement for 20 years worth of assessments from future consent decrees. If so, then I suspect that companies subject to current consent decrees may ask the Commission to agree to modify the obligations. Because the reporting is mostly meaningless and just creates paperwork that the Commission doesn't use effectively, the Commission may just agree. The truth is that little would be lost, except by the consulting, accounting, and law firms paid to produce useless reports that the FTC rarely saw, read, or acted on.

9. FTC staff. Core FTC staffers are likely to continue to push on the privacy front, but they just won't get far. Privacy cases will be harder to bring, and staffers who try will quickly lose heart. Anyone who can't find a different job will just hunker down for the duration. The staff will be allowed to conduct somewhat useful but mostly showy workshops and to issue mild-mannered staff reports. The problems at the Commission are not with the staff but with the structure, powers, and culture of the agency. The FTC continues to be scared of its own shadow and of the Congress. With Republicans in charge, the interest in actually protecting consumers on the privacy front will diminish from a mild interest to as little as possible. Another staffing prediction: if the Chairman appoints a new chief technologist, it will be someone from industry rather than academia.

10. FCC. For several years, the telecommunications industry pushed to move its privacy regulation from the Federal Communications Commission to the FTC on the grounds that there should be a single set of privacy standards. The big lie behind this effort is that there are actually any FTC privacy standards. The telecomm industry just wanted to move from aggressive enforcement at the FCC to the mealy-mouthed, standardless, non-regulation at the FTC. Have you ever heard of any industry that wants to change from a weak regulator to a strong one? Me neither.

Of course, the industry argument for a single set of privacy standards is a dodge. If presented with a broadly applicable privacy bill setting uniform standards, industry would run immediately for the exit. It would revert to its traditional argument that the US's sectoral approach, with different rules for different data controllers, is the right way to go. This is the heads-we-win-tails-you-lose positioning on privacy from most (but not all–there are some reasonable business players) of the business community.

My prediction is that the effort to move privacy regulatory authority from the FCC to the FTC will fail. The movement of authority crosses too many substantive, jurisdictional, and political lines. The Trump FCC doesn't care about privacy now, so why should industry "pay" to get a new weak regulator when it gets its current weak regulator for free? In any event, industry should now want to stay with the FCC because Congress's killing of the FCC's broadband privacy rules

through Congressional Review Act appears to prevent any new privacy rule from the FCC anyhow.

11. LabMD. What will happen now with the FTC's LabMD case presently in litigation? I prudently decline to make a prediction here, but I quietly observe that the case was something of a wreck from the start. The best hope is that the case can be resolved somehow without the FTC losing any vital parts in the process.

12. Caveats. None of these predictions addresses FTC consumer protection activities other than privacy. On the consumer protection side, there are always plenty of companies that overtly cheat consumers or that have completely fraudulent business models. The Commission will likely ignore much of the fraud, as it has in the past, selecting a few cases against little guys to look active. To make a balancing comment–something admittedly mostly absent from this post–I recognize that the Commission is always resource bound, something not likely to change. Indeed, it could get worse.

I have a grim view of the future of privacy protection at the FTC. My best hope is that I will be wrong, but it's a thin hope at best.

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