In the matter of Google Inc.

US FTC File No. 102 3136, 30 March 2011

The US Federal Trade Commission held that Google had violated its own consumer privacy policy and, as such, was required to prevent future misrepresentations by implementing a comprehensive privacy policy and undertaking privacy audits.

California's US Congresswoman Anna Eshoo recently made a profound statement in the wake of the Federal Trade Commission's (FTC) announced settlement of claims that Google breached consumer privacy in rolling out its 'Buzz' social network last year.

Rep. Eshoo commented that 'Google's agreement to obtain consumer consent before sharing new information with third parties should apply to all companies that collect or use personal data'.

This is actually great advice that ought to be considered by companies looking to establish and/or maintain compliance measures addressing consumer privacy issues and much more. Many businesses fail to realize that the FTC offers extensive guidance for companies that endeavor to comply with the law.

The FTC routinely publishes on its website all significant settlements and final orders arising from administrative and civil enforcement actions that are brought by the agency. These enforcement action orders offer a wealth of knowledge for companies that want to understand how the FTC interprets the laws it enforces and what it expects companies to do to comply with those laws.

The Google settlement background

The proposed Google settlement presents an excellent example of how companies can improve their own compliance programs by tracking FTC enforcement actions.

The compaint

In February 2010, Google launched a social networking service called 'Google Buzz' through its Gmail email service. Buzz offered users the opportunity to share updates, comments, photos, videos and other information through posts or 'buzzes'. The FTC's complaint alleged that Google led consumers to believe that they would be able to control who would be able to see their posts.

Among the claims made by the FTC were that:

- Without prior notice to or consent from consumers, Buzz created publicly displayed lists of 'followers' of Gmail users, using personal information, including names and email addresses of the people with whom they regularly exchanged emails, provided when the users created their Gmail accounts.
- When Buzz was first announced to Gmail users, consumers were given the impression that they would be able to choose whether they wanted to participate and which, if any, of their friends would be included in their network. However, even if a consumer declined to participate in the network, the FTC alleged that the user's information would still be shared with other users.
- The complaint alleged that consumers were led to believe that they could 'turn off Buzz' by clicking a link that was provided at the bottom of the Gmail homepage. However, although clicking on the link would cause the Buzz tab to be removed from the user's Gmail page, the user's name allegedly continued to be shown as a follower on the profiles and Buzz pages of others along with a 'follow' link that continued offered the opportunity for others to follow the user that had expressed a desire to opt out of the network.
- The complaint alleged that Buzz failed to adequately communicate that certain user information that had previously been private would be shared publicly by default, and that the controls that could allow users to change the defaults and regulate how and to whom their information was disclosed were confusing and difficult to find.
- Google allegedly failed to disclose that even if a consumer declined to enroll in Buzz, if the user later clicked on the Buzz tab, a list of the user's followers and those people the user was set up to follow could appear on the user's public profile, publicly exposing the names of people with whom a user chatted or emailed most often. Moreover, although the Buzz application offered the opportunity to prevent the lists of people users followed and of those who followed them from being displayed publicly, the edit feature was allegedly difficult for users to find.
- The complaint alleged that the default setting for items posted on Buzz was 'public', and that the user's posts were shared with all of the user's followers unless the user selected 'private' from a drop-down menu, allowing the user to post to a more limited group. Public buzzes were allegedly added to the user's public Google profile, which was searchable on the internet and could be indexed by search engines.
- The Buzz social network allegedly shared certain personal information of Gmail users without consumers' permission. In some cases, Gmail users who had previously blocked certain email contacts from viewing other information about them on Google Chat or Google Reader did not have their preferences carried over to Buzz.
- Users allegedly were unable to block or determine the identity of followers who did not have a public Google profile or who failed to provide a first or last name when they set up their Google account.

Google allegedly received thousands of complaints from consumers about the automatic generation of lists of followers and people to follow from the user's email contact lists. In some cases, private contact information was allegedly exposed to individuals against whom the users had obtained restraining orders: abusive ex-spouses, clients of mental health professionals, clients of attorneys, children and recruiters that had received emails from users seeking job leads.

In addition, the FTC alleged that consumers were often confused about what information was made public through Buzz, and they complained about the potential disclosure of their private email addresses.

The FTC alleged that the Buzz social network unfair and deceptive and violated Section 5(a) of the Federal Trade Commission Act[1]. The agency also raised the unprecedented claim that the Buzz network breached Google's self-certification representations that were made under the US Safe Harbor Privacy Principles of Notice and Choice for the purpose of complying with the US-EU Safe Harbor Framework.

The content of the proposed settlement

The proposed settlement bars Google from misrepresenting the privacy or confidentiality of individuals' information or misrepresenting compliance with the US-EU Safe Harbor or other privacy, security or compliance programs. The settlement requires the company to obtain users' permission before sharing their information with any third parties in the event that Google changes its products or services in a way that results in information sharing that is contrary to any privacy promises made when the user's information was originally collected.

The settlement further requires Google to establish and maintain a comprehensive privacy program, and it requires that for the next 20 years, the company submits to audits conducted by independent third parties every two years to assess its privacy and data protection practices.

Guidance provided by the proposed Google consent order: a 'comprehensive privacy program'

As Rep. Eshoo suggested, the proposed Google consent order provides valuable guidance for companies that collect personal information from consumers[2].

Among other things, the consent order defines the 'Covered Information' that should be protected, including consumers' names, home and other physical addresses, email addresses or screen names, IP addresses, telephone and cell numbers, contact lists and physical locations (which are becoming more important in the age of GPS technology).

The consent order prohibits the company from making any misrepresentations regarding the extent of its efforts to maintain and protect the privacy and confidentiality of Covered Information as well as the extent the company participates in or complies with any privacy, security or other compliance program.

The consent order provides that before the company shares a user's information with a third party, it must 'clearly and prominently' disclose to the user the fact that the information will be shared, the identity of the third party with whom the information will be shared and the purpose of the sharing. Besides making these disclosures, the company must also obtain the user's 'express affirmative consent' for the sharing.

Finally, the consent order provides an excellent outline for implementing a 'comprehensive privacy program' that addresses privacy risks, and protects the privacy and confidentiality of Covered Information. It suggests that privacy programs should include measures that:

- designate an employee or employees to coordinate and be responsible for the program;
- perform a privacy risk assessment that identifies risks associated with the unauthorized collection, use, or disclosure of Covered Information;
- design and implement reasonable privacy controls and procedures to address the risks identified through the privacy risk assessment, and conduct regular testing or monitoring of the effectiveness of those privacy controls and procedures;
- develop and use reasonable steps to select and retain service providers to protect the privacy of Covered Information obtained from the company and to confirm service providers' obligations to maintain appropriate privacy protections of their own; and
- evaluate and adjust the company's privacy program in light of the results of the required testing and monitoring, any material changes to the company's operations or business arrangements, or any other circumstances that may have a material impact on the effectiveness of the privacy program.

Conclusion

As companies seek to avoid potential civil and regulatory liability, they should begin by reviewing information provided by the regulators that will ultimately evaluate their conduct. The proposed Google consent order provides an excellent example of how companies can develop their own compliance procedures using guidance obtained from prior enforcement actions.

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1. Section 5 (a) reads:
'§ 45. Unfair methods of competition unlawful; prevention by Commission
(Sec. 5) (a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade
(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--
(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--
(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or
(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and
(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.
If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.
(4)(A) For purposes of subsection (a) of this section, the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--
(i) cause or are likely to cause reasonably foreseeable injury within the United States; or
(ii) involve material conduct occurring within the United States.
(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.'
2. The Google Agreement containing the consent order is available on the FTC website at www.ftc.gov/os/caselist/1023136/110330googlebuzzagreeorder.pdf