Podcast Transcript

2022 DSIR Report Deeper Dive: FTC

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Kattman: Ransomware, MFA, extortion, fraudulent fund transfer schemes, these topics and many others make up the key finding section of the eighth annual Data Security Incident Response report, informally known as the DSIR report. Each year, the incident response attorneys within the Digital Assets and Data Management Group, or DADM, provide statistics and analytics around the incidents they encountered the previous year in a report that is eagerly received by clients, vendors, media outlets, and frankly anyone interested in or tasked with their company's digital asset and risk. I'm Amy Kattman, and you're listening to BakerHosts.

In our fourth episode in the series exploring the 2022 DSIR report, we discuss the recent changes in the FTC and what we can expect for privacy going forward. Our guest today is Daniel Kaufman, former acting director of the FTC's Bureau of Consumer Protection and current partner in our Advertising, Marketing, and Digital Media Group. Welcome to the show, Daniel.

Kaufman: Hey, it is great to be here, thanks.

Kattman: To begin, can you tell us about the recent changes to the makeup of the FTC?

Kaufman: Sure. So interesting developments at the FTC. For many months the FTC has been sort of at two-two, there have been two democrats and two republicans. So in order to get anything done they had to have some discussion and dialogue and compromise. As of mid-May of 2022, Alvaro Bedoya, who is a well-known privacy policy expert, was confirmed to be the fifth commissioner. So as of mid-

May, there is a three-two democratic majority at the commission and you know, it'll be interesting to see how this plays out.

Some people may recall when Chair Khan first took over the Federal Trade Commission, you know, there were three democrats then and two republicans for a few months until Commissioner Chopra left to head the Consumer Financial Protection Bureau. But during that period of time, there was a lot of highly partisan activity that was going on at the FTC. A lot of three-two votes, a lot of sort of policy changes that were implemented over very strong republican objections. So it is really an open question as to whether we're going to see a return to that highly partisan activity from mid-2021, or whether there will be more of a focus on sort of developing, you know, joint policy issues and creating more of a bipartisan approach, which is more traditionally how the FTC has operated.

Now it has been, you know, maybe five or six weeks since Commissioner Bedoya joined. There hasn't been sort of a deluge of three-two matters being voted out. There seems to be this perception that there was a log jam of matters at the FTC that were just waiting for the fifth vote, and that certainly does not seem to be the case. I'm sure in the next few months there will be a few matters that are voted out along party lines and probably some significant matters. But so far, it seems sort of relatively calm and stable and it'll be interesting to see how things change now that the democrats do have a three-two majority at the commission.

Kattman: A few weeks ago, a discussion draft emerged of bipartisan, bicameral federal privacy legislation, the American Data Privacy and Protection Act. What kind of changes would that bring to the FTC and its continued role in privacy issues?

Kaufman: So the legislation is really a big deal. You know, it is very unclear whether this legislation is going to reach it to the end goal. But the fact that it is bipartisan, it is bicameral, you know this is probably the closest we've come to sort of seeing federal privacy legislation move forward in quite a long time. Now, there is a lot of back and forth going on with what is being called the three corners privacy bill. So I don't want to talk to much about the substance because it seems to be evolving on a daily basis. But what I think is really significant about it, as someone who has spent many, many years of my life at the FTC, is that the FTC is front and center in this legislation. And there have been periods of times in the last few years where there have been discussions on the hill as to whether the FTC should maintain its role as the nation's primary privacy enforcer and this legislation really puts the FTC, it makes it very clear that the FTC is indeed going to be that authority in this country.

Now the states are of course doing incredibly important work on privacy but having the FTC as the lead on this legislation is really significant and when you look at the draft, you know, there is a lot of rulemaking that is delegated to the Federal Trade Commission. There is a lot of guidance that the FTC has to do. There are studies the FTC has to do, and also of course, enforcement authority goes to the FTC and to the states as well, and that is all a really big deal. You know, the FTC is required to establish a Bureau of Privacy and for those who don't know, the FTC currently has three bureaus. The Bureau of Competition, Bureau of Economics, and the Bureau of Consumer Protection and all the privacy work is generally done within the Bureau of Consumer Protection. So elevating this fourth bureau, a Bureau of Privacy is again, very significant for the agency.

And on the substance side, you know, what is really interesting is that most of the FTC's work has been done pursuant to the FTC act, which is generally a 90-year-old statute that prohibits unfair or deceptive acts or practices. And with that language, the FTC has developed sort of this leading privacy program, and the three corners privacy bill or some form of it would vastly change, modify, and strengthen the FTC's legal authority and the tools that it can use on privacy and security issues. So really significant legislation, no idea if it is going to sort of become law, but it is really very significant how the FTC is front and center in the legislation.

Kattman: You bring up a really interesting point, Daniel. What if the legislation doesn't materialize? Will there be more FTC activity?

Kaufman: So there will definitely be more FTC activity and one area where we may see FTC activity is on rulemaking. Just a few weeks ago, the FTC did an updated filing with OMB, which talks about sort of the rulemaking that they're planning on initiating. And one indication there was that they're going to do a rulemaking on what they call commercial surveillance, how information and data is collected for purposes of targeting advertising to consumers. So they've put out there that there is an interest by FTC leadership in doing this kind of rulemaking. They want to focus on issues such as security practices, concerns raised about the quote they used is privacy abuses, and also whether algorithmic decision making is resulting in unlawful discrimination.

So pretty broad look is what the FTC has indicated they want to do. However, there is two really big caveats to consider if we sort of think about whether the FTC is going to do some sort of privacy rulemaking. And the first is, at the end of June there was a very significant Supreme Court decision that came out dealing with the issue of the Environmental Protection Agency and whether it had authority to do a rulemaking that it had issued. And based upon that Supreme Court decision, which would of course affect agencies such as the FTC, there are real questions as to whether courts would find that the FTC has adequate authority to do this kind of privacy rulemaking. So the Supreme Court decision does raise a lot of questions about, you know, whether the FTC can as a matter of law, proceed with something like this. But my guess is that if federal legislation fails, the FTC will still proceed with it. But you know, lots of questions there.

The second caveat is that even if the FTC does proceed, the FTC will be using what is called Mag-Moss Rulemaking and it is a pretty cumbersome, very time consuming and complex rulemaking process that the FTC has to use for this kind of issue. So basically, and the rulemaking has to be premise on unfairness and deception. So there are lots of questions about whether, even if the FTC has the authority to do such rulemaking, whether the Mag-Moss procedures would allow the FTC to truly conduct this kind of complex rulemaking on such difficult issues.

So between the Supreme Court decision, the complicated Mag-Moss rulemaking procedures, there are lots of real questions about even if the FTC decides to do this rulemaking, whether it can do it in a way that is effective, that addresses the issues they want to raise. And to be clear, the FTC does initiate this rulemaking, we are talking several years at a minimum before they're at the end of the rulemaking process and then, of course, there would be court challenges based a lot on this recent Supreme Court decision. So we will be watching that closely.

Kattman: So, in addition to the rulemaking and policy work, what other types of cases can we expect to continue to see?

Kaufman: So we will definitely see a lot more privacy and data security cases at the FTC, they care about the issues deeply. You know, I think in terms of specifically, you know, the FTC given the Supreme Court's decision in the AMG case, which undercut the FTC's ability to get monetary relief in many instances in federal court, you know, the FTC is looking at other areas where they have the ability to get money. So a couple of them that come to mind, the Children's Online Privacy Protection Act allows the FTC to get civil penalties, so I think we'll continue to see more COPPA cases. Similarly, the Fair Credit Reporting Act also allows the FTC to get money back to consumers and penalties, so I think we'll see some FCRA activity.

I think certainly we'll see data security cases, we'll see privacy cases involving platforms, they are particularly interested in platforms. And I would say you know, last year the FTC amended the Gramm-Leach-Bliley safeguards rule, parts of it have come into effect, other parts of it come into effect I think it is in early 2023. So you know, any time an agency changes a rule, amends it, you can be pretty confident that they're looking for cases to use to sort of put their mark on that authority. So I'm sure we'll see some safeguard rules cases as well in the next year or so.

The other, actually, one additional thing I should point out. There was an interesting blog that the FTC put out the other day, or the other, a few weeks ago, by the chief technology officer that talked about the fact that there is a quote defacto breach authority, a breach notification requirement in the FTC act. So I think we may see a case or something on that theory. You know, is there really a defacto breach requirement under the FTC act? They've said it in a blog, and I think it will be interesting to see if, if we see a case develop with that principle.

Kattman: Absolutely. Now I understand privacy isn't the only area of concern. What can you tell us about the FTC's focus on the convergence of privacy and competition?

Kaufman: Well, an issue we've heard about quite frequently from, certainly from Chair Khan and from Commissioner Slaughter, is sort of the convergence of privacy and competition issues and there seems to be this philosophy that there is a significant overlap between privacy and competition, and it is an area that they want to look at more closely. Has, you know, the consolidation and conduct of some of the large tech companies, have they used that power to increase their ability to collect and use consumer data? So that is an area where I do think there is a partisan split, but certainly the democrats care deeply about sort of, how competition issues relate to privacy issues, and I do think we'll see more about that. There was a 2021 report to Congress where the democratic commissioners made that point, certainly over the objections of some of the republican colleagues.

Kattman: This is all really fascinating information. Daniel, to wrap up our discussion today, could you tell us what you believe are the most important takeaways for someone watching the FTC?

Kaufman: So, you know, I would say three things. First, you know, the Mag-Moss Rulemaking that the FTC will initiate on privacy, you know, it is complex, it is, the FTC procedures are not well suited to address it. So just keep that in mind, when that rolls out there is going to be a lot of focus on it. But this is a process that will take years and years, as opposed to legislation which can theoretically happen much more quickly. So that is one point. You know, no matter what happens with the legislation, expect to see a lot more continued FTC activity on privacy and data security. It is an important focus, and we'll see more there. And the third thing, I would say is when we start looking at FTC privacy and security cases coming out, I think we're going to see some changes and sort of remedies that the FTC is seeking. They really want to sharpen the remedies they're getting in privacy cases. In recent cases, we've required, we've seen the FTC require companies to delete algorithms that were purportedly developed through illegally obtained data. So that is one issue that is come up. Second issue is sort of requiring notice in privacy cases. That is become a bigger issue at the FTC, and it will be interesting to see if there are other, different remedies that the agency starts requiring in their orders going forward.

Kattman: Thanks for joining us today, Daniel.

Kaufman: Well thank you, it's been really great to talk to you today.

Kattman: If you have any questions for Daniel, his contact information is in the show notes. As always, thanks for listening to BakerHosts. Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with a lawyer directly. The opinions expressed on BakerHosts are those of the participants appearing on the program, and do not necessarily reflect those of the firm. For more information about our practices and experience, please visit bakerlaw.com.