

# Enforcement Options for a Federal Privacy Law

January 30, 2020



Stacey Gray  
*FPF*



Nick Jackson  
*ZwillGen*

# FPF Privacy Legislation Series



- **Goal:** Providing independent resources to legislative staff and policy experts working on legislation, in support of a baseline, comprehensive privacy law in the United States
- **FPF's Mission:** Bridging the policymaker-industry-academic gaps in privacy public policy; developing privacy protections, ethical norms, & responsible business practices.

## Previous Sessions:

- Covered Data
- Research
- Federal Preemption
- Child Privacy
- ... send us your ideas!

[www.fpf.org/legislative-resources](http://www.fpf.org/legislative-resources)



# Introduction



Nick Jackson  
*ZwillGen*

- represents clients in complex litigation, including the defense of class action lawsuits
- has represented clients in matters involving federal privacy statutes, constitutional privacy rights, consumer protection laws, intellectual property, laws affecting online gaming, contractual disputes, and federal and state securities laws
- assists clients in responding to formal investigations and informal inquiries from federal and state regulators
- Advises service providers facing demands for user data from law enforcement and private litigants

# Introduction

## Private Right of Action (PRA)

Access to justice

Access to information  
(discovery)

Strong compliance incentive

Judicial review

(EU adequacy?)



## Federal Agency (FTC)

Legal Uniformity

Legal Certainty

Agency Expertise

Policy Adaptability

“Anti PRA” arguments  
(litigation costs, incentives  
to settle meritless cases)



# Webinar Agenda: Enforcement

|   |          |
|---|----------|
| 1. <b>Government Enforcers</b>                                    | Stacey   |
| 2. <b>Non-Government Enforcers</b>                                | Stacey   |
| 3. <b>Nature of Enforceable Violations</b>                        | Nick     |
| 4. <b>Judicial Remedies and Other Forms of Individual Redress</b> | Nick     |
| 5. <i>Discussion and Q&amp;A</i>                                  | (15 min) |



# 1. Government Enforcers

# Federal Trade Commission (FTC)

- Civil law enforcement agency
- “Common law” of privacy and security - § 5 of the FTC Act
- Investigative tools:
  - “civil investigative demands” (“CIDs”); 6(b) authority; ability to conduct wide-ranging studies
- May initiate an enforcement action using either an **administrative** or **judicial** process;
  - If a company violates a final order, it is liable for a civil penalty for each violation.
  - Can refer to U.S. Dep’t of Justice for criminal penalties
- Rulemaking authority (some)



<https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>



# Considerations for FTC as an Enforcer

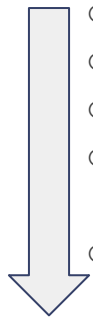
- Consider: FTC as the locus of enforcement vs. FTC's **Section 5** enforcement
- Keep existing “unfair” and “deceptive” standards?
  - Act/practice “unfair” if it “causes or is likely to cause **substantial injury** to consumers which is not **reasonably avoidable** by consumers themselves & not **outweighed** by countervailing benefits to consumers or to competition.” 15 USC 45(n)
- Addition of:
  - State Attorneys General (or other local entities) as additional enforcers who can bring actions as *parens patriae*?
  - Civil penalties or other consumer redress in the first instance of a violation?
  - Mandatory complaint resolution?
  - Broad or targeted rulemaking?
  - Funding and staff





# State Attorneys General

- Notable recent enforcement by State Attorneys General (“AGs”) under e.g. the Children’s Online Privacy Protection Act (“COPPA”)
- Local enforcers could include: city attorneys, state consumer protection officers, etc.
- Interaction between state/local enforcers and FTC:
  - Notice period to the FTC;
  - Consolidation of complaints by several State AGs;
  - Intervention (by Right);
  - Prohibiting AGs from instituting actions during the pendency of an ongoing FTC action against the same defendants;
  - Requiring AGs to explicitly seek approval from the FTC to bring civil actions



## 2. Non-Government Enforcers

# Individuals, Classes, and Nonprofits

- **Individuals:** a federal privacy law may permit individuals to sue on behalf of themselves or others (parent/guardian relationships).
- **Class certification** is available under Rule 23 of the Federal Rules of Civil Procedure (unless otherwise modified in the law).
- **Organizations & nonprofits** are in some cases able to sue, for example on behalf of their members, if they can meet Standing requirements.
- *A federal law could:*
  - default to existing rules for organizational standing;
  - establish a framework for nonprofits to challenge violations of the law - either by creating standards or processes for qualification, or creating an open-ended authorization (allowing any 501(c)3 nonprofit to sue); or
  - defer this process to the FTC or State AGs, or require them to appoint nonprofits.



# Standing

- Anyone challenging a violation of the law in federal court **must meet the Constitution's minimum standing requirements**, demonstrating that they have:
  - **(1)** suffered a specific injury; that is
  - **(2)** traceable to the defendant; and
  - **(3)** that will likely be redressed by a favorable decision.
- Unsettled area of law for privacy violations (**Spokeo v. Robins**)
  - A “bare violation” will likely not suffice
  - However, specific injury might include violations of core legally protected interests (e.g. trespass), or unfair profit. (See: Amicus Brief by Restitution Scholars in *Spokeo*)



# 3. Nature of Enforceable Violations

# Harm Standard

Options:

- All violations are actionable
  - *Subject to constitutional minimum*
- Heightened “harm” standard - a plaintiff must demonstrate that the law has been violated and that they have experienced some “harm”
  - *Could meet or exceed the constitutional minimum*
  - For example: physical or financial harm; unfair discrimination; emotional injury; violations of core rights



# Intent Standards

A new privacy law could tie enforcement (or remedies) to various heightened standards of intentionality by companies regarding violations of the law: e.g. mere negligent violations, willful or intentional violations, or violations evincing recklessness or knowing disregard.

## Statutory Models

- **Driver’s Privacy Protection Act (“DPPA”)**: permits civil actions against entities that “knowingly” obtain, disclose, or use personal information from a motor vehicle record in violation of the law, from any individual to whom the information pertains.
- **Privacy Act of 1974**: violations that are “willful or intentional” can give rise to compensatory damages, while violations that do not meet this standard can only provide a basis for injunctive relief.
- **Fair Credit Reporting Act (“FCRA”)**: permits actual damages within a set range when a company “willfully fails to comply with any requirement” of the law, while higher penalties exist for “obtaining a consumer report under false pretenses or knowingly without a permissible purpose.”



# 4. Judicial Remedies (and Other Forms of Individual Redress)



# Judicial Relief

- **Equitable Relief**
  - **Injunctions:** stop the disputed activity
  - **Specific Performance:** perform a specific action
- **Statutory Penalties**
  - **Treble damages** for greater intent standards
- **Actual Damages:** monetary compensation tied to harm
- **Punitive Damages**
- **Restitution or Disgorgement**
- **Judicial discretion** - for example to increase where heightened intent standards are met



# Considerations for Individual Redress

1. **Immunities, Complete Defenses, and Safe Harbors**
2. **Grace Periods (Notice & Cure)**
  - a. e.g. with internal appeals or regulatory reporting requirements
3. **Heightened Pleading Standards / Early Dismissal**
4. **Preferred or Mandatory Venue**
  - a. Good for legal certainty and building a body of expertise in a particular circuit; challenging for consumers
5. **Mandatory Complaint Resolution (or, Exhaustion of Agency Remedies)**



# Questions?

**info@fpf.org**

**www.fpf.org**

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