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Privacy issues are becoming increasingly important during this time of rapid technological advance. This article addresses the important question of how the FTC might balance the consumer protection concerns arising in the context of privacy with competition issues. It will first examine the basic principles of consumer protection and competition law, the two core missions of the FTC, and then take a look at some cases and other actions by the FTC outside the privacy realm that illustrate the different modes of interaction between the two areas of law. The agency's careful balance of its two core missions becomes clear through this exercise. Next, the article will describe the most recent evolution of privacy law at the agency, and the FTC's preliminary staff report on privacy. Included in the discussion will be a review of some of the latest privacy protection proposals from industry members. Finally, the article will discuss the interplay of some core consumer protection and competition principles in analyzing the privacy protection proposals.

*Commissioner, U.S. Federal Trade Commission. The views expressed in this article are my own and do not necessarily reflect the views of the Commission or the other Commissioners. I am grateful to my attorney advisor, Holly Vedova, for her invaluable assistance in preparing this article.

I. Introduction

The last five years have seen tremendous change in the on-line world. Technological advances have allowed on-line companies to develop new means to rapidly collect and share consumer information for use by behavioral advertisers and others. These changes can benefit consumers: Behavioral advertisers use the information to create ads more closely targeted to consumers' interests, increasing revenue to content providers, thereby funding much of the free content on the internet. But the changes also raise significant consumer privacy issues. Consumers may be unaware of the extent to which their on-line habits are bought and sold or, if they are aware, some consumers may curtail economic or other activity out of fear of the consequences.

> Thus privacy joins a number of other issues at the Federal Trade Commission involving both consumer protection and competition claims.

For the most part, the privacy issues that arise in this context are based on consumer protection law. The FTC's recently released preliminary staff report on privacy is primarily focused on consumer protection issues.[1] However, some of the issues that arise in the privacy realm could also present competition concerns. Thus privacy joins a number of other issues at the Federal Trade Commission involving both consumer protection and competition claims. The intersection of these two areas of law is of growing significance to the business community, consumers, and practitioners, as well as to regulators. Sometimes the principles at the heart of these two areas of law point to conflicting results, while at other times they work in harmony. As in other areas of the law, the consumer protection concerns arising in the context of privacy will need to be balanced with competition issues.

To help shed light on how the FTC might undertake this task, this article will first examine the basic principles of consumer protection and competition law, the two core missions of the FTC, and then take a look at some cases and other actions by the FTC outside the privacy realm that illustrate the different modes of interaction between the two areas of law. The agency's careful balance of its two core missions becomes clear through this exercise. Next, the article will describe the most recent evolution of privacy law at the agency, and the FTC's preliminary staff report on privacy. Included in the discussion will be a review of some of the latest privacy protection proposals from industry members. Finally, the article will discuss the interplay of some core consumer protection and competition principles in analyzing these proposals.

II. Consumer Protection and Competition Laws Both Address Distortions in the Marketplace

Consumer protection and competition law share at least one core concept: protecting consumers by removing distortions in the marketplace. Often the under-

lying conduct prohibited by these two areas of law impacts consumers in different ways. Conduct prohibited by consumer protection law usually involves individual businesses acting in a way that has a direct impact on consumers, for example, by deceiving or misleading them through false or deceptive advertising. A prime example in the privacy area is the FTC's recent complaint and settlement against EchoMetrix, where the company sold software to enable parents to monitor their children on-line, but failed to adequately disclose that the software also collected information about the kids' on-line activities and then sold that information to third-party marketers.[2]

Conduct prohibited by competition law also affects consumers, but the impact may not be as direct as on the consumer protection side because the prohibited practices in the first instance affect competition between businesses which then impacts consumers, for example, in the form of higher prices. An example involving privacy could be a situation where an on-line platform provider with a dominant share of the market introduces a privacy protection program that severely disadvantages a competitor.

Notwithstanding this difference in consumer impact, as former FTC Commissioner Tom Leary has noted, it takes only a few more moments of thinking about consumer protection and competition law to understand that these two areas of law share the common goal of addressing distortions in the marketplace that are designed to increase, or have the effect of increasing, the sales and profitability of a business or an industry in a manner detrimental to consumers.[3] Consumer protection law addresses distortions that take place on the demand side of the transaction: Consumers' choices in the marketplace are negatively impacted, for example, by deceptive advertising that gives consumers the false impression that a product or service is worth more than it really is. Competition law addresses distortions that take place on the supply side: Anticompetitive practices, for example, exclude competitors or restrict supply among competitors, thereby elevating prices.[4]

CONSUMER PROTECTION LAW ADDRESSES DISTORTIONS THAT TAKE PLACE ON THE DEMAND SIDE OF THE TRANSACTION: COMPETITION LAW ADDRESSES DISTORTIONS THAT TAKE PLACE ON THE SUPPLY SIDE.

However, as with most things in the real world, the distinction is not always so neat. Occasionally competition law addresses distortions that take place on the demand side; for example, when challenging anticompetitive practices that increase consumer switching costs. On these occasions competition law is even more closely aligned with consumer protection law because the competition law focuses on demand side conduct that decreases consumer choice or autonomy. It is easy to see how this could come into play in the privacy area. As on-line firms develop new privacy protections, one result could be increased consumer switching costs, something disfavored by competition law principles in certain situations. Similarly, consumer protection law occasionally addresses conduct aimed at competitors—for example, deceptive practices tar-

geting the perceived performance of competitor products—which, in turn, harms consumers. This conduct could arise in the privacy arena where, for example, a vertically integrated platform provider discriminates in the privacy protections it offers based on whether a competitor's website is implicated. Such action could raise concerns about misrepresentation and deception.

The analysis becomes even more interesting when the conduct-distorting commerce implicates *both* consumer protection and competition principles. In those situations, the analysis is not as simple as in the above examples. As discussed below, tensions between the principles promoted by each area of law can arise; however, there are also instances when the two areas of law work in harmony.

III. Tension Between Competition and Consumer Protection Laws

Sometimes the principles promoted by competition law have the potential to trump consumer protection concerns. The *California Dental* case is an interesting example of the circumstances under which competition concerns can override facially legitimate consumer protection concerns.[5] There, the FTC challenged a dental association's ethical code that governed competing dentists' advertisements of the price, quality, and availability of their services. The association's ethical code prohibited its dentist members from making claims of across-the-board discounts off the dentists' regular prices for certain groups of patients, such as senior citizens.[6]

The dental association claimed that the restrictions were needed because, even though some of the ads truthfully described the dentists' fees, the association was concerned that the ads could not adequately disclose all the variables related to the fees, rendering the ads potentially misleading. Officials of the association testified that, in determining whether a particular ad was in violation of the code, they would attempt to determine whether the ad in its entirety would be misleading to a prudent person.[7]

Superficially, the prohibitions seemed consistent with consumer protection objectives. But the Commission concluded that, as enforced, the code was anticompetitive because it effectively prohibited even accurate advertising of prices and quality and restricted broad categories of advertising claims, without distinguishing between those that were deceptive and those that were not.[8] As such, the code impaired dentists' ability to engage in price competition. Thus, the Commission viewed its enforcement action as ensuring that practices aimed at promoting consumer protection objectives did not violate antitrust principles.

The Ninth Circuit essentially upheld the Commission's opinion,[9] but the Supreme Court concluded that the Ninth Circuit used a standard for analyzing the advertising restrictions—a "quick look" rule of reason analysis—that was too

abbreviated under the circumstances, and remanded the case for further proceedings.[10] The Court did not say the restrictions had to be examined under a full-blown rule of reason (which would require the FTC to define a market and demonstrate that the association had market power). Rather, the Court simply said that the justifications for the restraints were sufficiently substantive that "[f]or now, at least, a less quick look was required."[11] The Court based its ruling on a belief that the advertising restrictions could have had a net pro-competitive effect on competition, or no effect at all, and that the restrictions were, on their face, designed to avoid false and deceptive advertising, something particularly important in a market characterized by disparities in the information available as between dentists and their patients.[12]

AT A MINIMUM, BEFORE COMPETITION PRINCIPLES CAN TRUMP CONSUMER PROTECTION CONCERNS, ANY LEGITIMATE CONSUMER PROTECTION ISSUES MUST BE IDENTIFIED AND BALANCED AGAINST THE COMPETITIVE HARM.

An important lesson to be drawn from the *California Dental* case is that it is not always easy to strike the right balance between competition and consumer protection concerns. A reasonable interpretation of the Supreme Court's ruling would be that the Commission's analysis of the association's activities did not strike the appropriate balance between competition and consumer protection interests. While misuse of consumer protection objectives can clearly lead to liability under the competition laws, the Commission was not adequately sensitive to the consumer protection aspects of the underlying conduct. This raises the obvious question of what the appropriate level of legal scrutiny should be in matters where consumer protection is asserted as a justification for conduct that encroaches on competition concerns. At a minimum, before competition principles can trump consumer protection concerns, any legitimate consumer protection issues must be identified and balanced against the competitive harm.

IV. Industry Self-Regulation

The fact that the *California Dental* case involved a self-regulatory body is an important aspect of the competitive analysis and judicial decision. The California Dental Association is a very large professional association composed of competing members engaging in self-regulation.[13] Industry self-regulation can be a very good thing, as it may be the most efficient way for an industry to police itself by combating fraud and protecting consumers. In most circumstances, industry self-regulation should be encouraged. For instance, in the privacy context, behavioral advertisers' ubiquitous collection of consumer data without consumers' knowledge prompted the FTC in 2009 to urge the on-line industry to develop a self-regulatory response.[14] Of course, industry self-regulation may be too slow to develop, or inadequate in its provisions or reach, to effectively address consumer harms. The industry's response at the time of the FTC's 2009

call for self regulation of the privacy issues surrounding behavioral advertising was slow and inadequate.[15]

In addition, industry self-regulation may heighten concerns about harm to competition among members of the profession or trade. When competitors form a trade association to self-regulate, and collectively have a dominant position in the marketplace, the risk of competitive concerns grows, and the conduct must be closely examined. In *California Dental*, the fact that the association's members accounted for 75 percent of practicing dentists in California bolstered the Commission's competition concerns.[16]

Industry self-regulation also may further entrench some competitors' positions. Notably, the Commission recently brought several cases involving professional licensing boards that issued rules under the auspices of consumer protection, but which the Commission alleged harmed competition and consumers by reducing competitive alternatives. For example, in 2007 the Commission settled a case against the South Carolina Board of Dentistry involving the board's newly imposed requirement that a dentist examine every child before a dental hygienist could provide preventive care, such as cleanings, in schools.[17] The rule prohibited the previously common practice of using dental hygienists as an alternative to dentists in certain settings such as schools. The Commission found that the rule led to fewer children receiving preventive dental care. The rule was particularly egregious in the Commission's view because it largely affected economically disadvantaged children.[18] In a more recent case, the Commission filed an adjudicative complaint against the North Carolina Dental Board for taking actions to block non-dentists from providing teeth whitening services.[19]

In both of these cases, the dental boards argued that their rules were needed to prevent physical harm to consumers from non-dentists; an objective ostensibly grounded in consumer protection concerns. But the Commission's pursuit of both cases struck a different balance between consumer protection and competition concerns. In both cases, the Commission believed that the boards were using a consumer protection rationale as a pretext for their desire to limit competition from non-dentists.

V. Consumer Protection Requirements May Outweigh Concerns about Entry Barriers

In a variety of other important matters, consumer protection principles often take precedence over competition principles. For example, consumer protection principles may have the effect of limiting entry into markets by new firms and products, even though entry traditionally plays an important role in addressing competition concerns. This phenomenon can be seen, for example, with respect to advertising substantiation in the food industry. New food products introduced

in a market usually are heavily advertised to gain consumer awareness. But new entrants can get into trouble if, for example, their advertising contains health claims that are not substantiated. The Commission imposes a fairly rigorous substantiation standard for health or safety claims in food products. These claims must be supported by competent and reliable scientific evidence.[20]

Complying with substantiation requirements may place a greater burden on new entrants because performing the scientific studies necessary to substantiate some claims may require significant resources. Some potential entrants might therefore find substantiation requirements to be significant entry barriers. However, in the context of advertising health claims about food, entry through unsubstantiated claims should not be considered legitimate entry. Thus, the need to comply with substantiation requirements should trump the competition objective of reducing barriers to entry.

The Commission's Endorsements and Testimonials Guides might be said to pose entry barriers as well.[21] The Guides set forth important principles of truth-in-advertising. For example, an advertisement featuring a consumer claiming or implying that her experience with a product is "typical," when that is not the case, should clearly and conspicuously disclose the typical consumer experience.[22] Similarly, the Guides state that ads featuring statements by endorsers who have been paid to sing the praises of a product should disclose the payment.[23]

The principles underlying the Endorsements and Testimonials Guides could constrain the very type of advertising required for new market entrants to gain market share. Indeed, the Guides apply to advertising through bloggers and other social media, among the lowest cost forms of advertising available to new market entrants. The Guides therefore arguably make it harder for new entrants to gain market share through creative on-line advertising. Yet once again consumer protection principles supporting full disclosure about testimonials and endorsements should trump these potential competition concerns about entry.

In *California Dental*, for example, the potential for harm to competition was strong, but the consumer protection concerns were also strong.

The balance between consumer protection and competition concerns seems fairly easy in these examples. Unsubstantiated health claims and false testimonials have obvious harmful effects on consumers. But in other situations, it can be more difficult to make the right call. In *California Dental*, for example, the potential for harm to competition was strong, but the consumer protection concerns were also strong. The fact that the Supreme Court was more influenced by the consumer protection aspects of the conduct than both the Commission and the Ninth Circuit shows that in some matters where the two principles pull in opposite directions, finding the right balance can be challenging.

VI. Where Consumer Protection and Competition Concerns Harmonize Towards the Same Result

In other matters, consumer protection and competition principles converge and mutually support each other in the analysis of conduct harmful to consumers. One area that has received close attention for possible anticompetitive conduct involves high-tech markets where firms appear to be attaining dominance. In this area, consumer protection problems can be intermixed with exclusionary conduct. The FTC's recent *Intel* case is a good example.[24]

INTEL

In August 2010, the Commission settled its administrative adjudication against Intel, a case that alleged both competition and consumer protection law violations. The Commission alleged that, since 1999, Intel had unlawfully maintained a monopoly in the market for central processing units ("CPUs"), and sought to acquire a second monopoly in graphics processing units ("GPUs"), using a variety of practices that violated antitrust laws as well as the competition and consumer protection prongs of Section 5 of the FTC Act.[25]

The Complaint alleged that, in 1999 and again in 2003, Intel's competitors started to release products that were superior to Intel products in performance and quality, threatening Intel's monopoly. In response, Intel engaged in several practices that the Commission believed were designed to block or slow down the adoption of competitive products and allow Intel to maintain its monopoly, all to the detriment of consumers.

> The combined competition and consumer protection violations in Intel were enforced in a harmonious manner to protect consumers.

The practices that raised consumer protection aspects of the case involved Intel's compiler.[26] Beginning in 2003, Intel introduced a new version of its compiler shortly before its competitor, AMD, released its technologically superior CPU. Intel's new compiler slowed the performance of software on AMD's CPU. The Commission believed that Intel failed to adequately disclose that the changes it had made to its compilers beginning in 2003 were the cause of the slower performance of AMD's CPU.[27] The Commission also believed that Intel intentionally misrepresented the cause of and potential solutions to the performance differences, in an effort to portray its competitor's product as inferior.[28]

The Commission's Consent Order puts Intel under important restrictions that will improve the competitive landscape for the CPU and GPU markets. The Order also contains equally important requirements traditionally employed in a consumer protection context, including requiring Intel to engage in corrective

advertising about its compilers, and to reimburse software developers and vendors harmed by Intel's allegedly deceptive conduct.[29]

The combined competition and consumer protection violations in *Intel* were enforced in a harmonious manner to protect consumers. The Commission's ability to protect competition and consumer protection simultaneously in this case was facilitated by the fact that Intel aimed its allegedly anticompetitive conduct and its allegedly deceptive conduct at the same target on the supply side of the equation: its competitors.

VII. The Commission's Preliminary Privacy Report and Industry's Response

As noted at the outset, recent developments in on-line and off-line data collection have prompted substantial activity at the FTC in the last few years centered on privacy concerns. Some of the meatiest privacy concerns raise issues that fall squarely at the intersection of consumer protection and competition law, implicating many of the different modes of interaction between the two areas of law discussed above.

Privacy is a central element of the Commission's consumer protection mission. In recent years, advances in technology have made it possible for detailed information about consumers to be stored, sold, shared, aggregated, and used more easily and cheaply than ever, in ways not feasible, or even conceivable, before. These advances in technology have, among other things, allowed on-line companies to engage in behavioral, or targeted, advertising. As noted above, targeted advertising has many important benefits. Consumers receive information about products and services in which they are more likely to be interested. Businesses can better target their advertising dollars to reach the right audience. Perhaps most importantly, this type of advertising supports a great deal of the internet's free access to rich sources of information.

THE DRAMATIC CHANGES IN TECHNOLOGY HAVE CHALLENGED THE VITALITY OF THE COMMISSION'S TRADITIONAL PRIVACY MODELS.

Yet serious privacy concerns arise when companies can easily collect, combine, and use so much information from and about consumers. The dramatic changes in technology have challenged the vitality of the Commission's traditional privacy models. As the report notes, it is hardly a surprise to discover that there are significant gaps in older privacy protection models. In the mid-1990s, the fair information practices model was prevalent, with its call for businesses to provide consumers with notice and choice about how their personally identifiable information is used.[30] Then in the early 2000s, the Commission and others shifted to a harm-based model, under which the regulatory framework focused on data security, data breaches, and identity theft.[31]

There are significant problems with each of these frameworks. The "notice and choice" model, as it is being used today, places too great a burden on consumers. Many notices are written in "legalese" and are therefore difficult for consumers to read. And delivery of notices on mobile devices with their smaller screens compounds these problems.

THE "NOTICE AND CHOICE" MODEL, AS IT IS BEING USED TODAY, PLACES TOO GREAT A BURDEN ON CONSUMERS.

On the other hand, a harm-based model may not sufficiently address the myriad of harms that can result from insufficient privacy protections surrounding information about medical conditions, children, and sexual orientation, to name a few salient examples. The "harm" model is also fundamentally reactive: it addresses and corrects privacy and data security breaches after they have been discovered, rather than focusing on creating a climate in which privacy is part of the fundamental design of products and services being offered. [32]

And both models focus on "personally identifiable" information, a concept which may be out of touch with technological advances that allow previously non-identifiable data to be "re-identified" with a consumer.[33]

After grappling with these issues over the past year and a half, FTC staff issued a preliminary report for policymakers like Congress, as well as for industry, that proposes a framework for rethinking their approach to privacy. [34] The proposed framework urges both policymakers and the industry toward a more dynamic approach to addressing privacy in today's technologically advanced landscape.

The main elements of the framework in the preliminary staff report include the following:

1. Companies should adopt a "privacy by design"[35] approach that involves building privacy protections into their everyday business practices, such as providing reasonable security for consumer data, collecting only the data needed for a specific business purpose, retaining data only as long as necessary to fulfill that purpose, safely disposing of data no longer in use, and implementing reasonable procedures to promote data accuracy.

2. Companies should improve the transparency of their data practices, including improving their privacy notices so that consumer groups, regulators, and others can compare data practices and choices across companies.

3. Companies should provide information to consumers about their data practices through simpler, more streamlined choices than have been used in the past. Choices should be clearly and concisely described, and offered at a time and in a context in which the consumer is making a decision about his or her data. The FTC took no position on

opt-in or opt-out in the report, but rather focused on whether the notice and choice mechanism offered is robust.

There are several different mechanisms that can be employed to provide more meaningful choices to consumers. The 2010 Report discusses a "Do Not Track" choice as one means of allowing consumers to exercise choice about collection and use of information about their on-line activity.[36]

To implement Do Not Track, the 2010 Report indicates that the most practical method of providing consumer choice may be a browser-based approach.[37] This approach allows consumers to make persistent choices that travel with them through cyberspace, communicating their tracking preferences to every website they visit, giving consumers meaningful control over the information they share and the sort of targeted ads they receive. The staff report indicates that other proposals besides a browser-based approach can work as well[38] and seeks input from commenters about other proposals.[39]

The 2010 Report's recommendation of a Do Not Track mechanism has ignited a hearty response.

The 2010 Report's recommendation of a Do Not Track mechanism has ignited a hearty response. Several proposals have been put forward by major industry players. Some are browser-based,[40] and others employ use of icons and cookies for consumers to express their tracking preferences.[41] These proposals, and others, are rapidly developing.

To determine how successful any particular mechanism is in reaching the consumer protection goal of providing simplified choice, the Commission and others should examine the mechanism based on the following criteria, among others:

(i) Is the mechanism easy to use? Or will the mechanism lead to multiple systems that can lead to consumer confusion?

(ii) Is it universal? That is, is there participation by the vast majority of advertisers, ad networks, service providers and other relevant industry players?

(iii) Does it provide for opt-out of collection of information, in addition to opt-out of use of the information for particular purposes, such as targeted advertising?

(iv) Does the mechanism allow for consumer choice that is persistent?

(v) Is the mechanism effective and enforceable?[42]

Each of the Do Not Track mechanisms proposed by industry to date satisfies a different bundle of these criteria, and is therefore capable of fulfilling the consumer protection goals of a simplified choice mechanism to a greater or lesser extent than other mechanisms. As many of these proposals are still in

their early stages, it is as of this writing still too early to definitively opine about which of them will ultimately be the most successful in fulfilling the consumer protection mandate.

VIII. Competition and Consumer Protection with Respect to Privacy

Recently, several commentators have urged firms to compete based on how they collect, use, store, and dispose of consumers' information—that is, to engage in competition based on privacy.[43] This form of competition is clearly in its gestational stage. Some of the positive developments with respect to competition as it concerns privacy include companies' efforts to improve baseline data security standards for cloud computing services and to improve use of encryption by default for email service;[44] major on-line search engines' efforts to shorten retention periods for search data; [45] and development of new tools, including the Do Not Track mechanisms described above, that allow consumers to control their receipt of targeted advertisements and to see and correct the information companies collect about them for targeted advertising.[46]

Any new framework for privacy should promote both competition and consumer protection principles. Encouraging "privacy by design" and other new ways of thinking about privacy may present firms with greater incentives to compete on privacy, thereby increasing consumer choice and opportunities in this area. In this way, both areas of law could be aligned to address demand side distortions of the marketplace.

ENCOURAGING "PRIVACY BY DESIGN" AND OTHER NEW WAYS OF THINKING ABOUT PRIVACY MAY PRESENT FIRMS WITH GREATER INCENTIVES TO COMPETE ON PRIVACY, THEREBY INCREASING CONSUMER CHOICE AND OPPORTUNITIES IN THIS AREA.

Yet it is worthwhile to consider the precise contours of the alignment between competition and consumer protection concerns with respect to privacy. The 2010 Report's proposed new privacy framework arguably could raise concerns about the ability of new firms to enter a market. Some observers may ask: Can new firms design the kinds of dynamic, just-in-time notices that should now be provided? Can they adequately address concerns about personally identifiable information, secondary uses of information, and use of so-called "legacy" data collected under prior privacy regimes? Or will these new recommendations create a barrier to entry in markets that have been the hallmark of dynamism in our economy?

Rather than viewing the proposed new privacy framework as imposing potential barriers to market entry for new firms, the new framework might instead present market entrants with an *advantage*, by providing them with a guidepost for

creating business models that address privacy concerns from the outset, rather than as an afterthought. Indeed, some more established data brokers and other information firms believe it is much easier for their newer competitors to design privacy protections into their new business models and new forms of consumer communications than it is to retrofit old systems to meet the realities of today's privacy concerns. New firms may well have a "leg up" on existing players, if they implement these recommendations at the start of their business endeavors.

In addition, with respect to both new and existing firms, the proposed new framework's principles may move regulators and businesses away from a reactive model that focuses on privacy concerns after harm is done and towards a model where companies are encouraged to entice consumers to use their products and services based, in part, on their privacy practices.

THE VARIOUS DO NOT TRACK PROPOSALS, PARTICULARLY SINCE THEY ARISE IN A SELF-REGULATORY CONTEXT, ALSO RAISE SOME INTERESTING ISSUES WITH RESPECT TO THE ALIGNMENT OF CONSUMER PROTECTION AND COMPETITION PRINCIPLES.

The various Do Not Track proposals, particularly since they arise in a self-regulatory context, also raise some interesting issues with respect to the alignment of consumer protection and competition principles. First, there could be competition concerns if a particular proposal disadvantages competitors of the platform offering the proposal, especially if the platform operator has a dominant market share and is vertically integrated. Depending on the circumstances, the proposal could result in an exclusionary practice similar to those addressed by the Commission in the *Intel* matter if competitors are blocked, or entry barriers are otherwise significantly raised.

Second, to the extent a proposal is offered by a group of competitors (for example, a trade association), there could be concerns if the competitors act in ways that favor their own economic interests to the detriment of other competitors and consumers. This is especially a problem if the trade association developing the proposal has a dominant share of the market, as in the *California Dental* and professional licensing board cases discussed above. As we have seen, oftentimes competitors can favor their own economic interests in the context of industry self-regulation undertaken in the name of "consumer protection," to the detriment of competition and consumers because the self-regulation reduces competitive alternatives.

In cases where industry implements a Do Not Track mechanism and other aspects of the new proposed privacy framework under the auspices of self-regulation, the Commission will need to watch developments closely, to ensure that such requirements, ostensibly aimed at protecting privacy, are not simply a means to keep out new entrants. As noted earlier, in other Commission actions involving self-regulatory regimes, there may be a tipping point at which self-regulation turns anticompetitive, particularly in cases where the mechanisms are developed by a trade association or industry players that have a dominant market position.

At the same time, the Commission and other policy makers must keep an eye on the consumer protection objectives for a Do Not Track mechanism. Unless a proposal is put forth by a firm with a significant presence in the market, or is adopted by a group of firms that together have a significant presence, there may be too many different proposals, creating consumer confusion. And with respect to proposals offered by an industry group that require adherence by industry members, unless all or the vast majority of industry members agree to abide by the proposal, it may fail to meet the universality criteria. Tensions like these, between consumer protection goals and competition issues, may arise, and will have to be carefully balanced as various industry and regulatory proposals are fleshed out.

IX. Conclusion

The latest developments in the fast-changing world of data collection and use raise many questions at the intersection of consumer protection and competition law. Some have easy answers, others do not. This article has covered some issues worth considering in this area and suggested some ways to analyze the issues. There will undoubtedly be further developments in the very near future as this dynamic industry continues to evolve, so policymakers and practitioners should keep a close watch on this space. It is undoubtedly the case that the Commission, with its unique focus on both consumer protection and competition law, will continue to take a strong interest in developments in privacy protection and the challenges these developments will present at the intersection of these areas of the law in the future. ◀

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2 *FTC v. Echometrix, Inc.*, No. CV10-5516 (E.D.N.Y. Nov. 30, 2010) (consent order).

3 *See* Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 Antitrust L.J. 1147, 1147-48 (2005).

4 *Id*.

5 California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

6 California Dental Ass'n, 121 F.T.C. 190, 192-94 (1996), *aff'd sub nom.* California Dental Ass'n v. FTC, 128 F.3d 720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

7 *Id.* at 347-48 (Azcuenaga, Comm'r, dissenting).

8 *Id.* at 300-03, 307.

9 *See* California Dental Ass'n v. FTC, 128 F.3d 720, 726-30 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

10 *See California Dental*, 526 U.S. at 769-81.

11 *Id.* at 781.

12 *Id.* at 771-72; *see also id.* at 774-76, 778.

13 *Id.* at 759-62.

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15 Julie Brill, *Keynote Address to International Association of Privacy Professionals, The FTC and Consumer Privacy Protection* (December 7, 2010), *available at* http://www.ftc.gov/speeches/brill/101207iapp.pdf.

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18 Opinion and Order of the Commission at 1-3, South Carolina State Bd. of Dentistry, Dkt. No. 9311 (F.T.C. July 30, 2004), *available at* http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf.

19 Press Release, Fed. Trade Comm'n, Federal Trade Commission Complaint Charges Conspiracy to Thwart Competition in Teeth-Whitening Services (June 17, 2010), *available at* http://www.ftc.gov/opa/2010/06/ncdental.shtm; *see also* Complaint, North Carolina Bd. of Dental Examiners, Dkt. No. 9343 (F.T.C. filed June 17, 2010), *available at* http://www.ftc.gov/os/adjpro/d9343/100617dentalexamcmpt.pdf. Note that the North Carolina Board of Dentistry matter is currently in litigation; the author did not participate in voting out the complaint due to her previous position at the North Carolina Attorney General's office.

20 *See, e.g.*, Order to Show Cause & Order Modifying Order, Kellogg Co., Dkt. No. C-4262 (F.T.C. May 28, 2010) (requiring "competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true," and defining "competent and reliable scientific evidence" to mean "tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results"), *available at* http://www.ftc.gov/os/caselist/0823145/100602kelloggorder.pdf; Decision & Order, Indoor Tanning Ass'n, Dkt. No. C-4290 (F.T.C. May 13, 2010) (same), *available at* http://www.ftc.gov/os/caselist/0823159/100519tanningdo.pdf.

21 Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2010).

22 16 C.F.R. § 255.2(b) (2010).

23 16 C.F.R. § 255.5 (2010).

24 Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), *available at* http://www.ftc.gov/opa/2010/08/intel.shtm; Decision & Order, Intel Corp., Dkt. No. 9341 (F.T.C. Oct. 29, 2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf.

25 Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The first part of

the statutory language (unfair methods of competition) covers competition violations, and the second part (unfair or deceptive acts or practices) covers consumer protection violations.

26 Decision & Order, Intel Corp., Dkt. No. 9341 (F.T.C. Oct. 29, 2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf, ¶9. A compiler is a tool used by developers to write software. The compiler translates the "source code" of programs into "object code" that can be run as software on consumers' computers. *Id.* ¶57.

27 *Id.* ¶¶58-59.

28 *Id.* ¶60.

29 *Id.* at 14-17.

30 For example, Title V, Subtitle A, of the Gramm-Leach-Bliley (GLB) Act, 15 U.S.C. §§ 6801-6809, requires, among other things, that financial institutions provide their customers with annual notices explaining their privacy practices and their customers' rights to limit some sharing of the customers' information. For more detail, *see* Federal Trade Comm'n, Bureau of Consumer Protection Bus. Ctr., *In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act, available at* http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act.

31 The FTC's Safeguards Rule, for example, sets forth standards that certain financial institutions must use in developing, implementing, and maintaining reasonable safeguards to protect the security, confidentiality, and integrity of any nonpublic personal information pertaining to their customers. *See* 16 C.F.R. pt. 314 (2010) (implementing GLB Act §§ 501(b), 505(b)(2), 15 U.S.C. §§ 6801(b), 6805(b)(2)). In addition, numerous states have enacted breach notification laws. *See, e.g.,* Samuelson Law, Tech. & Public Pol'y Clinic, Univ. of Cal.-Berkeley Sch. of Law, *Security Breach Notification Laws: Views from Chief Security Officers*, App. A, at 40-46 (Dec. 2007), *available at* http://www.law.berkeley.edu/files/cso_study.pdf.

Both the FTC and the states have brought numerous law enforcement actions in the data security context. *See, e.g.*, Press Release, Fed. Trade Comm'n, Twitter Settles Charges that It Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program (June 24, 2010), *available at* http://www.ftc.gov/opa/2010/06/twitter.shtm; Agreement Containing Consent Order, Twitter, Inc., File No. 092-3093 (F.T.C. June 24, 2010), *available at* http://www.ftc.gov/os/caselist/0923093/100624twitteragree.pdf; Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants LifeLock and Davis, FTC v. LifeLock, Inc., No. 2:10-CV-00530-NVW (D. Ariz. Mar. 15, 2010) (ECF No. 9); Press Release, Office of the Atty. Gen., Cal. Dep't of Justice, Brown Stops LifeLock from Misleading Consumers about Identity Theft Protection Services (Mar. 9, 2010) (announcing settlement entered into jointly with FTC and 34 other states), *available at* http://ag.ca.gov/newsalerts/release.php?id=1869; Assurance of Discontinuance, State v. TJX Cos., No. 46S-6-09 WNCV (Vt. Super. Ct. June 23, 2009) (settlement entered into with 40 states and District of Columbia), *available at* http://www.atg.state.vt.us/assets/files/TJX%20AOD.pdf; Decision & Order, TJX Cos., Dkt. No. C-4227 (F.T.C. July 29, 2008) (consent order), *available at* http://www.ftc.gov/os/caselist/0723055/080801tjxdo.pdf; Press Release, Office of the Atty. Gen., State of Vt., Attorney General Sorrell Reaches Agreement with ChoicePoint (May 31, 2007), *available at* http://www.atg.state.vt.us/news/attorney-general-sorrell-reaches-agreement-with-choicepoint.php; Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction and Other Equitable Relief, United States v. ChoicePoint, Inc., No. 1:06-CV-0198-JTC (N.D. Ga. Feb. 15, 2006) (ECF No. 5); Decision & Order, BJ's Wholesale Club, Inc., Dkt. No. C-4148 (F.T.C. Sept. 20, 2005) (consent order), *available at* http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf; Stipulated Consent Agreement & Final Order, FTC v. Toysmart.com, LLC, No. 00-11341-RGS, 2000 WL 34016434 (D. Mass. July 21, 2000).

32 *See* Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 Hastings L.J. 1227, 1232-46 (2003).

33 The Commission has been concerned about reidentification of previously non-identifiable data. *See* Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy and Identity Prot., FTC, to Reed Freeman, Morrison & Foerster LLP, Counsel for Netflix (Mar. 12, 2010), *available at* http://www.ftc.gov/os/closings/100312netflixletter.pdf (closing letter).

34 *See* 2010 Privacy Report.

35 Privacy By Design is an approach that Ann Cavoukian, Ph.D., Information and Privacy Commissioner of Ontario, has advocated. *See* Ann Cavoukian, Ph.D., Ont. Info. & Privacy Comm'r, *PbD: Privacy by Design*, *available at* http://www.ipc.on.ca/images/Resources/privacybydesign.pdf.

36 *See* 2010 Privacy Report at 63-69 (2010); Center for Democracy and Technology, *What Does "Do Not Track" Mean? A Scoping Proposal By the Center for Democracy and Technology* (January 31, 2011), *available at* http://cdt.org/files/pdfs/CDT-DNT-Report.pdf.

37 *See* 2010 Privacy Report at 66.

38 *See id.* at 63-64.

39 *See id*. at A-4.

40 *See*, e.g., Microsoft's Internet Explorer 9 "Tracking Protection" technology (Press Release, Microsoft, Providing Windows Customers with More Choice and Control of Their Privacy Online with Internet Explorer 9 (Dec. 7, 2010), *available at* http://www.microsoft.com/presspass/features/2010/dec10/12-07ie9privacyqa.mspx); Mozilla and Stanford University Researchers' Firefox browser Version 4 with its Do Not Track header feature (Mozilla Blog, Mozilla Firefox 4 Beta, now including "Do Not Track" capabilities (Feb. 8, 2011), *available at* http://blog.mozilla.com/blog/2011/02/08/mozilla-firefox-4-beta-now-including-do-not-track-capabilities/); and Apple's Do Not Track feature to be included in the next version of its Safari browser (Nick Wingfield, *Apple Adds Do-Not-Track Tool to New Browser,* Wall S. J., April, 14, 2011, *available at* http://online.wsj.com/article/SB10001424052748703551305 76261272308358858.html).

41 *See* the Digital AdvertisingAlliance's proposal described at http://www.aboutads.info. The Digital Advertising Alliance is a coalition of marketing and business groups, including over 300 major ad networks (over 300), as well as the American Association of Advertising Agencies, the Direct Marketing Association, the Better Business Bureau, the Interactive Advertising Bureau, the American Advertising Federation, the Association of National Advertisers, and the Network Advertising Initiative. *See* also Google's free, downloadable add-on for its Chrome browser, which provides a single, persistent opt-out of behavioral advertising by members of the Interactive Advertising Bureau, a self-regulatory group. Google Public Policy Blog, *Keep your opt-outs* (Jan. 24, 2011), *available at* http://google publicpolicy.blogspot.com/2011/01/keep-your-opt-outs.html.

42 Prepared Statement of the Federal Trade Commission on the State of Online Consumer Privacy before the Senate Committee on Commerce, Science and Transportation (March 16, 2011) at page 16, *available at* http://www.ftc.gov/os/testimony/110316consumerprivacysenate.pdf.

43 *See* Emily Gray, *FTC to Boost Competition in Privacy Protection,* Global Competition Rev., Sept. 23, 2010, *available at* http://www.globalcompetitionreview.com/news/article/29065/ftc-boost-competition-privacy-protection-/; Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 Antitrust L. J. 769, 773-75, 792-97 (2010).

44 *See* 2010 Privacy Report at 45, 47-48 & n.122 (2010).

45 *See id.* at 47-48 & n.122.

46 *See id*. at 63 & n.149.