

Regulation From All Sides?--The FCC and FTC Tag-

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The U.S. Federal Trade Commission usually gets much of the glory for policing privacy and data security issues. For example, just a few months ago the FTC achieved a settlement requiring Fandango and Credit Karma to establish comprehensive data security programs and biennial security assessments following charges that the companies misrepresented to consumers the level of security of their mobile apps and failed to secure the transmission of consumers' sensitive personal information. And who could forget the FTC's Google Buzz settlement from 2011?

But recently the FTC has been sharing the privacy and data security spotlight with a different agency—the U.S. Federal Communications Commission. What?

In a post late last year, Jedidiah Bracy wondered if the FCC was becoming envious of the FTC's enforcement role in the privacy arena. He speculated that we'll see more jurisdiction-sharing between these two federal agencies in this area over time.

I think Jedidiah is right.

Exhibit A: Last fall, the FCC announced its very first data security enforcement action. The full text of the FCC notice proposing the fine is linked [here](#). In this case, the FCC proposed a \$10 million fine against two telecommunications companies, TerraCom and YourTel, for alleged violations of provisions of the Communications Act and FCC rules that require companies to protect the privacy of phone customers' personal information. According to an FCC announcement, “[t]he companies allegedly breached the personal data of up to 305,000 consumers through their lax data security practices and exposed those consumers to identity theft and fraud.” The data at issue were the social security numbers, names, addresses, driver's license numbers, and other sensitive information of low-income consumers who provided the data to establish eligibility for Lifeline telephone services. The personal information was allegedly exposed to public view on the Internet (and apparently discovered by investigative reporters) without any password protection. The harm was compounded when the companies allegedly failed to notify all potentially affected customers of the breach.

The Communications Act requires telecommunications carriers to protect the confidentiality of consumer “proprietary information,” and requires telecommunications carriers' practices related to providing communication services to be “just and reasonable.” According to the FCC, TerraCom

and YourTel violated these requirements. Among other things, the companies failed to employ reasonable data security practices to protect consumer proprietary information and misrepresented their data security practices in their privacy policies.

In addition to being the FCC's opening salvo in the data security area, this recent action is the largest proposed privacy fine in the FCC's history.

Exhibit B: Just over a month earlier, the FCC adopted a settlement with Verizon, in which Verizon agreed to pay a \$7.4 million fine to settle an FCC investigation of allegations that Verizon used its customers' personal information when tailoring marketing campaigns without first providing notice and obtaining customer consent (as required by FCC rules implementing the Communications Act).

The good news is these cases don't mean that all companies must add the FCC to the list of potential regulators that may bring privacy and data security enforcement actions against them. For one thing, both the TerraCom/YourTel and Verizon enforcement actions involve telecommunications companies otherwise subject to the jurisdiction of the FCC. Not every business falls within the scope of the Communications Act—not by a long shot.

But what I think these cases illustrate well is that the FCC sees itself as, among other things, a consumer protection agency. It shares this world view with the FTC. These two cases show us that, like the FTC, the FCC is willing to "go big" in the area of consumer privacy and data security for those companies where the FCC has a regulatory hook—that means wired and wireless telecommunications providers as well as cable, satellite, radio, and television companies. The FCC has some privacy and data security muscle that it is apparently ready, willing, and able to flex.