

FTC Nominee Expected To Oppose Broad Privacy Rules

By Bibeka Shrestha

Law360, New York (September 2, 2011) -- If confirmed, Federal Trade Commission nominee Maureen Ohlhausen would likely call for greater transparency about privacy practices but fight comprehensive restrictions on the collection and use of consumer information, according to privacy experts.

Should the Senate greenlight President Barack Obama's pick, Ohlhausen would leave her partner position at Wilkinson Barker Knauer LLP's privacy, data protection and cybersecurity practice to join the FTC's five-member board as its second Republican commissioner for a seven-year term starting Sept. 26. Ohlhausen would replace Republican Commissioner William Kovacic, who has served on the commission since January 2006.

Experts say it would be surprising for the technology policy heavyweight to meekly sign on to FTC Chairman Jon Leibowitz's privacy agenda, which seeks to set a minimum standard of conduct for companies across the board that collect personal information, rather than focusing on specific sectors like the financial industry.

"As a general matter, I do not think that she would not support 'substantive' regulation — restrictions on what companies can collect and disclose or how they can use the information that they collect," said Andrew Smith, a Morrison & Foerster LLP partner who worked closely with Ohlhausen while at the FTC's Bureau of Consumer Protection.

Leibowitz has sought to move past the notice-and-choice mechanism espoused under the George W. Bush administration, arguing that merely requiring companies to notify consumers about their privacy practices and allowing them to opt in or opt out is not a viable strategy, according to Smith. In Leibowitz's view, consumers don't have enough time, energy or know-how to read and understand such notices.

But Ohlhausen would likely support better disclosure about privacy practices to prevent consumers from signing off on lengthy privacy terms without a glance, rather than abandon notice and choice, experts say.

"I would certainly expect with Maureen Ohlhausen as commissioner, that that would still very much be the emphasis: clearer, better disclosure," said Jerry Ferguson, who leads Baker Hostetler's data privacy and information security group. "Although these practices are disclosed in fine print of privacy policies, consumers may not be aware of what's going on."

Mobile and social media as well as online behavioral advertising — which tracks consumers' online activities to provide targeted advertising — will also remain hot issues during the new commissioner's term, according to Andrew Serwin, the founding chair of the privacy, security and information management practice at Foley & Lardner LLP.

How Ohlhausen's appointment to the FTC would impact the commission's enforcement of privacy and data breach violations remains to be seen, but Serwin said he expected the agency to continue stepping up enforcement in the short term.

The public's increased focus on such issues has contributed to a spike in FTC enforcement actions in recent years, as privacy continues to be a front-and-center issue, Serwin said.

And more consumers are expecting basic protection from online companies, including back-end security of information, according to James Grimmelman, associate professor at New York Law School.

"I don't think you could possibly say, 'We don't safeguard your information, it's all at your risk,'" Grimmelman said. "They will not let you get away with that."

Ohlhausen worked at the FTC in a number of leadership roles from 1997 to 2008, spending the last four years at the agency as director of the Office of Policy Planning, principally focusing on e-commerce, advertising and technology issues. While serving as director, the FTC nominee oversaw an inquiry into net neutrality as well as the Broadband Connectivity Competition Policy report.

After leaving the FTC, Ohlhausen served as in-house counsel for the Business Software Alliance, a major international information technology industry group, until she joined Wilkinson Barker.

Ferguson said her move to the Business Software Alliance signals that Ohlhausen could be sensitive to industry concerns as well as consumer rights.

For example, Smith said Ohlhausen is likely to support industry's call for a uniform national standard for data security and security breach notification requirements to replace the current patchwork of laws that make compliance difficult for corporations.

Ohlhausen would have to weigh in on a continuing debate over whether the agency should likewise coordinate international consumer protection standards, Serwin said.

"One thing the FTC has struggled with is how to marry [its] regulatory views with others and vice versa," Serwin said.

Obama's decision to nominate Ohlhausen reflects the government's growing emphasis on the consumer protection side of the FTC's two-pronged mission. Appointees to the commission are more often than not antitrust attorneys, but Ohlhausen brings hefty experience in both competition and privacy law.

"She is one of the few commissioners in my memory who has had a really strong grounding in both aspects of the Federal Trade Commission's mission," Smith said. "With Maureen Ohlhausen, there's no learning curve. She'll be able to hit the ground running."

If she wins the appointment, Ohlhausen could find herself at odds with Commissioner Julie Brill — the Democratic consumer protection expert on the commission — over the best strategies for tackling privacy issues, but the disagreements probably would not impede the FTC's progress, according to Smith.

"It's not going to be like gridlock," Smith said. "She will facilitate a healthy debate about these issues."

Ohlhausen will likely follow in the footsteps of former FTC Commissioner Orson Swindle, for whom she worked as an attorney, according to Smith. Swindle was known for crafting smart and pointed dissents, some of which wound up influencing the commission's later policies, he said.

--Editing by Pamela Wilkinson and John Williams.

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