

Enforcement

Wyndham Settles FTC Enforcement Case Over Hacks of Customer Payment Data

Without admitting any allegations, hotelier Wyndham Hotels & Resorts LLC agreed Dec. 9 to settle Federal Trade Commission charges that lax data security “unfairly exposed” hundreds of thousands of customers’ payment card information (*FTC v. Wyndham Worldwide Corp.*, D.N.J., No. 2:13-cv-01887-ES-JAD, *stipulated order filed*, 12/9/15).

The underlying case involved one of the most anticipated privacy and data security rulings in years regarding the FTC’s authority to bring data security enforcement action under the unfairness prong of Section 5 of the FTC Act.

After fighting back for years in a high profile case alleging the FTC lacked authority to pursue data security enforcement actions without specific data security rules in place the settlement brings its challenge to somewhat muted end.

“This settlement brings to a close one of the two open challenges to the FTC’s core authority on data security,” Kirk J. Nahra, a partner at Wiley Rein LLP in Washington, told Bloomberg BNA. The second open challenge being the ongoing data security enforcement saga regarding LabMD Inc. (228 PRA, 11/27/15).

The settlement with Wyndham will also “continue to embolden the FTC to pursue its agenda on data security” and push a “broader range of companies to make sure that they are building data security programs that are consistent with the FTC’s by-now well established standards,” Nahra, who is a member of the Bloomberg BNA Privacy & Security Law Report advisory board, said.

Peter Karanjia, a partner with Davis Wright Tremaine LLP in Washington, told Bloomberg BNA that the settlement “at the very least, gives an idea of types of approaches that the FTC recommends.” The “unusually detailed” compliance program in the settlement provides a useful place for companies and chief privacy officers to look to “formulate best practices that should exceed the minimum standards the FTC might think as the basic requirements,” he said.

Linn F. Freedman, a partner at Robinson & Cole LLP in Providence, R.I., told Bloomberg BNA that she wasn’t surprised by the settlement. “I get both sides. It looks

like they both came to the table in good faith to come to a practical and sensible order,” she said

Under the terms of the stipulated order for injunction, filed in the U.S. District Court for the District of New Jersey, Wyndham agreed to:

- implement a comprehensive data security program;
- gain a Payment Card Industry Data Security Standard evaluation and engage in yearly assessment of the handling of customer payment card information; and
- 20 years of compliance reporting to the FTC on the settlement agreement requirements.

The settlement, however, doesn’t require Wyndham to pay any monetary penalty.

Twenty-Year Obligation. If Wyndham satisfies the data security auditing requirements it will be deemed to be in compliance with the settlement order, offering it a safe harbor from further enforcement actions, according to Chris Hoofnagle of the University of California, Berkeley, who sits on the Bloomberg BNA Privacy & Security Law Report advisory board.

Freedman said that it may be “disheartening” to some observers because “the FTC hasn’t backed down from the requirement that there be a monitoring for over 20 years. Many people believe it’s too long and unreasonable.”

However, Jessica L. Rich, director of the FTC’s Bureau of Consumer Protection, disagreed. “Twenty years isn’t too long,” she told Bloomberg BNA during a conference call. Companies should be implementing reasonable safeguards to begin with, she said. When asked whether this case was about privacy or data security, Rich said, “you can’t have privacy without data security, but this case is about data security.”

FTC Chairwoman Edith Ramirez said in a statement that the “settlement marks the end of a significant case in the FTC’s efforts to protect consumers from the harm caused by unreasonable data security. Not only will it provide important protection to consumers, but the court rulings in the case have affirmed the vital role the FTC plays in this important area.”

Three Separate Hacks. Wyndham faced three separate hacks over a two-year period, which reportedly compromised more than 600,000 payment cards and led to more than \$10 million in losses. In 2012, the FTC initiated a data security enforcement action against Wyndham in federal court, alleging it engaged in deceptive and unfair practices (123 PRA, 6/27/12).



In April 2014, the district court declined to dismiss the suit, holding that the FTC has authority under the unfairness prong of Section 5 of the FTC Act to bring a data security enforcement action against the company and doesn't have to issue data security rules (68 PRA, 4/9/14).

In August, U.S. Court of Appeals for the Third Circuit affirmed (164 PRA, 8/25/15). The appeals court rejected Wyndham's arguments that what is "unfair" in the con-

text of data security should be subject to a more specific definition by the FTC. The standard doesn't require "unscrupulous or unethical behavior" if there is injury to consumers, nor must the conduct be "not equitable," the appeals court said.

In a Dec. 9 statement, Wyndham said the settlement "sets a standard for what the government considers reasonable data security of payment card information." It added that to date, it hasn't received "any indication that any hotel customers experienced financial loss" as a result of the attacks.

In addition to data security auditing requirements, the proposed order requires that in the event the hotelier suffers a data breach affecting more than 10,000 payment card numbers, it must provide an assessment of the breach to the FTC within 10 days.

The FTC unanimously approved the stipulated order, which is subject to court approval.

Eugene F. Assaf of Kirkland & Ellis LLP in Washington signed the stipulated order for Wyndham. Kevin H. Moriarty, Katherine E. McCarron and James A. Trilling of the FTC in Washington signed the stipulated order on behalf of the commission.

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Full text of the proposed stipulated injunction is available at http://www.bloomberglaw.com/public/document/Federal_Trade_Commission_v_Wyndham_Worldwide_Corporation_et.