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Before the

Senate Committee on Commerce, Science and Transportation

Hearing on “The Need for Privacy Protections:
Perspectives from the Administration and the Federal Trade Commission”

May 9, 2012

Chairman Rockefeller and members of the Committee. I am pleased to join Chairman Leibowitz, who is presenting the FTC's testimony and Cameron Kerry, General Counsel at the Department of Commerce. This is an important topic for American consumers and I commend you for holding this hearing. Let me say at the onset of my comments that the views expressed in this statement are my own and do not necessarily represent the views of the Commission or any other Commissioner.

As you know, my tenure as an FTC Commissioner began on April 4. So while privacy is an issue in which I have tremendous interest and commitment, my views on privacy from the perspective of a Commissioner are just over a month old. While I have read the March 2012 Privacy Report and formed some initial thoughts, I was not at the Commission during its development and release. I am just now in the process of fully educating myself on the specifics of the report and thinking through the implications of its recommendations. So, I am not yet ready to commit myself to specific positions on all aspects of the privacy issues raised in the Report.

I am, however, happy to share some of my preliminary views on the best ways to safeguard consumer privacy as well as my thoughts about where the Commission should deploy its resources. To start, I firmly believe that consumers should have the tools to protect their personal information through transparency and choices. As I said during my confirmation hearing, I support the FTC's strong record of enforcement in the area of privacy. The Commission's written testimony highlights many of our enforcement efforts relating to privacy and data security. The FTC has brought more than a hundred (100) spam and spyware cases and more than thirty (30) data security cases, including cases against ChoicePoint, CVS, and Twitter. We have also charged companies with failing to live up to their privacy promises, as in the highly publicized privacy cases against companies such as Google and Facebook, which together will protect the privacy of more than one billion users worldwide. As a Commissioner, I will urge continuation of this strong enforcement record.

As I also said in my confirmation hearing, I support enactment of data security legislation. The legislation should empower the FTC to promulgate regulations for the protection of personal data from unauthorized access, as do the current bills by Chairman Rockefeller and Chairman Pryor.

As a parent, I am especially concerned about protecting our children's privacy in face of rapid technological advances. I support the Commission's multi-prong approach in this area: enforcement, regulation, policy research, and education. Since the enactment of the Children's Online Privacy Protection Act of 1998, the Commission has brought eighteen (18) COPPA enforcement actions. In the ongoing proceeding to amend the rule, I will carefully consider the record as I formulate my views.

Turning to the Commission's Privacy Report, I would like to commend some important aspects of it. It calls for a policy of "privacy by design" by which companies build privacy

protections into their everyday business practices. This helps minimize the risk of privacy breaches and concerns from the outset and should be considered a best practice by companies as they develop new products and services.

Appropriate use of the “notice and choice” concept is also core to a sound privacy policy, and I support the Privacy Report’s recognition that there is no single best way to offer notice and choice in all circumstances. I also agree with the concept of reducing burdens on consumers and businesses by identifying circumstances for which choice is not necessary because the collection and use of consumer data is consistent with the context of the transaction or with the relationship with the consumer.

As I have noted, Congress has given the Commission the enforcement and policy tools to provide a strong framework with which we can protect American consumers. Some of my colleagues, however, have supported additional privacy legislation that would go beyond Section 5. The exact contours of such legislation are not yet defined, but my colleagues gave general guidance in the privacy report. The privacy report was clear that the recommended legislation would reach practices that would not be challenged under current Section 5, however.

This gives me the opportunity to develop my own opinion on what else in addition to Section 5 may be beneficial to consumers, such as whether additional general privacy legislation is needed. I will consult with FTC staff, my fellow Commissioners, as well as many other stakeholders to gather their views on what problems and possible solutions they see in the area of consumer privacy.

Some of the issues I will examine are:

What harms are occurring now that Section 5 cannot reach and how should harm be measured? As my colleague Commissioner Rosch noted in his dissent to the Privacy Report, the Commission has specifically advised Congress that absent deception, it will not enforce Section 5 against alleged intangible harm, (FTC letter to Ford and Danforth, 1984), and the FTC’s own unfairness statement suggests that the focus should be on monetary as well as health and safety harms, rather than on more subjective types of harm. Although the Commission’s Privacy Report did not reject the fundamental insights of the harm-based approach, it appears to embrace an expansion of the definition of harm to include “reputational harm,” or “the fear of being monitored,” or “other intangible privacy interests” (*see* Report at iii, 20, 31), and, as an initial matter, I have reservations about such an expansion.

Thus, even absent deception, financial and medical information is protected under current law, which likely reflects most consumers’ expectations. In other areas, however, consumers appear to have diverse views about sharing information. Thus, it is important to proceed carefully to avoid impinging on many consumers' preferences. If a consumer is provided with clear notice prior to the collection of information, there is likely no basis for concluding that a consumer cannot make an informed choice.

I would also like to find out more about the progress of the self-regulatory and technology based efforts underway to provide consumers greater transparency and choice about the collection and use of their data.

Finally, new restrictions may also have an effect on competition by favoring entrenched entities that already have consumer information over new entrants who need to obtain such information, or encouraging industry consolidation for purposes of sharing data. As a competition agency, the FTC should be sensitive to these concerns as well.

Clearly, the technology sector is developing at lightning speed and we now face issues unheard of even a few years ago. I wish to proceed cautiously in exploring the need for any additional general privacy legislation, however. I have concerns about the ability of legislative or regulatory efforts to keep up with the innovations and advances of the Internet without also imposing unintended chilling effects on many of the enormous benefits consumers have gained from these advances or without unduly curtailing the development and success of the Internet economy.

Thank you for allowing me to participate in today's hearing. This Committee has shown strong leadership in the area of consumer privacy, and I look forward to working with you to ensure that American consumers' privacy is protected. I am happy to answer any questions.