

Dissenting Statement of Commissioner Joshua D. Wright

Issuance of *The Internet of Things: Privacy and Security in a Connected World* Staff Report
January 27, 2015

I dissent from the Commission's decision to authorize the publication of staff's report on its Internet of Things workshop ("Workshop Report") because the Workshop Report includes a lengthy discussion of industry best practices and recommendations for broad-based privacy legislation without analytical support to establish the likelihood that those practices and recommendations, if adopted, would improve consumer welfare.¹ This approach differs from the normal approach to a workshop report, which is to synthesize the record developed during the proceedings, and not to make broad policy recommendations. An economically sound and evidence-based approach to consumer protection, privacy, and regulation of the Internet of Things would require the Commission to possess and present evidence that its policy recommendations are more likely to foster competition and innovation than to stifle it.

The Commission has a long and well-regarded history of producing public reports that examine novel, emerging or otherwise important issues. These reports are integral to the Commission's role in protecting consumers and competition in the marketplace. The genesis of such reports varies. Congress may ask the Commission to investigate certain subject matter and then to submit a report to them on the findings.² In preparing such Congressional reports, the Commission sometimes will seek information using our authority under Section 6(b) of the Federal Trade Commission Act to compel private parties to submit information for review.³ Commission staff reports often are the result of extensive research, rigorous investigation into certain industry sectors, practices or products, and economic analysis.⁴ Reports taking advantage of the Commission's unique ability to collect and analyze data and to conduct economic analyses to form the basis of its recommendations predictably have had significant impact on public

¹ Although an agency's recommendations regarding industry best practices do not carry the force of law, there is a very real danger that companies may reasonably perceive failure to achieve those practices or to adopt such recommendations as actionable. Where an agency's recommendations regarding best practices are not supported by cost-benefit analysis, firms may respond by adopting practices or engaging in expenditures that make consumers worse off.

² See, e.g., FED. TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2000).

³ See, e.g., FED. TRADE COMM'N, *CIGARETTE REPORT FOR 2011*(2013); FED. TRADE COMM'N, *SMOKELESS TOBACCO REPORT FOR 2011* (2013); FED. TRADE COMM'N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS* (2008); FED. TRADE COMM'N, *CREDIT-BASED INSURANCE SCORES: IMPACT ON CONSUMERS OF AUTOMOBILE INSURANCE* (2007); Press Release, Fed. Trade Comm'n, *FTC Orders Nine Insurers to Submit Information for Study of the Effect of Credit-Based Insurance Scores on Consumers of Homeowners Insurance* (Dec. 23, 2008), <http://www.ftc.gov/news-events/press-releases/2008/12/ftc-orders-nine-insurers-submit-information-study-effect-credit>.

⁴ See, e.g., FED. TRADE COMM'N, *BUREAU OF ECON., IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS* (2007); FED. TRADE COMM'N, *BROADBAND CONNECTIVITY COMPETITION POLICY* (2007); FED. TRADE COMM'N, *EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION* (2009); FED. TRADE COMM'N, *POSSIBLE ANTITRUST COMPETITIVE BARRIERS TO E-COMMERCE: WINE* (2003).

policy debates.⁵ Another category of reports prepared by staff include those that document public workshops conducted by the Commission, as well as the public comment process that usually accompanies such workshops. While these documentary reports rarely reflect independent research or investigation, they can potentially serve a somewhat useful role in synthesizing the discussion at the workshop, the comments placed on the public record, and the Commission's enforcement actions and policy positions relating to the workshop topic.

The Workshop Report falls into neither of these categories and thus raises several concerns.

First, while documentary reports may serve a useful purpose in preserving a record of the workshop proceedings and the accompanying public comment process, one must recognize that merely holding a workshop – without more – should rarely be the sole or even the primary basis for setting forth specific best practices or legislative recommendations. If the purpose of the workshop is to examine dry cleaning methods⁶ or to evaluate appliance labeling,⁷ the limited purpose of the workshop and the ability to get all relevant viewpoints on the public record may indeed allow the Commission a relatively reasonable basis for making narrowly tailored recommendations for a well-defined question or issue. But the Commission must exercise far greater restraint when examining an issue as far ranging as the “Internet of Things” – a nascent concept about which the only apparent consensus is that predicting its technological evolution and ultimate impact upon consumers is difficult. A record that consists of a one-day workshop, its accompanying public comments, and the staff's impressions of those proceedings, however well-intended, is neither likely to result in a representative sample of viewpoints nor to generate information sufficient to support legislative or policy recommendations.

Second, the Commission and our staff must actually engage in a rigorous cost-benefit analysis prior to disseminating best practices or legislative recommendations, given the real world consequences for the consumers we are obligated to protect. Acknowledging in passing, as the Workshop Report does, that various courses of actions related to the Internet of Things may well have some potential costs and benefits does not come close to passing muster as cost-benefit analysis. The Workshop Report does not perform any actual *analysis* whatsoever to ensure that, or even to give a rough sense of the likelihood that the benefits of the staff's various

⁵ See, e.g., FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011) (cited in *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120, 2129 (2014)); FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION (2002) (cited in *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 132 S.Ct. 1670, 1678 (2012)); FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003) (cited in *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S.Ct. 2238, 2252 (2011)); FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003) (cited in *Granholtm v. Heald*, 544 U.S. 460, 466 (2005)).

⁶ Press Release, Fed. Trade Comm'n, FTC to Host Roundtable on Proposed Changes to its Care Labeling Rule for Clothing (Feb. 11, 2014), <http://www.ftc.gov/news-events/press-releases/2014/02/ftc-host-roundtable-proposed-changes-its-care-labeling-rule>.

⁷ Press Release, Fed. Trade Comm'n, Commission Announces Workshop on Effectiveness of the Appliance Labeling Rule (Mar. 31, 2006), <http://www.ftc.gov/news-events/press-releases/2006/03/commission-announces-workshop-effectiveness-appliance-labeling>.

proposals exceed their attendant costs.⁸ Instead, the Workshop Report merely relies upon its own assertions⁹ and various surveys that are not necessarily representative and, in any event, do not shed much light on actual consumer preferences as revealed by conduct in the marketplace. This is simply not good enough; there is too much at stake for consumers as the Digital Revolution begins to transform their homes, vehicles, and other aspects of daily life. Paying lip service to the obvious fact that the various best practices and proposals discussed in the Workshop Report might have both costs and benefits, without in fact performing such an analysis, does nothing to inform the recommendations made in the Workshop Report.

The abbreviated analysis underlying staff's data minimization recommendation illustrates the concerns I have with the Workshop Report's failure to analyze costs and benefits in general. In the Report, without limiting the scope of "data,"¹⁰ staff identifies the benefits of data minimization in terms of eliminating two scenarios: (1) the possibility that larger data stores present a more attractive target for thieves; and (2) retention of large stores of data increase the risk that data will be used in a way that deviates from consumers' reasonable expectations. In considering the costs of data minimization, staff merely acknowledges it would potentially curtail innovative uses of data. Without providing any sense of the magnitude of the costs to consumers of foregoing this innovation or of the benefits to consumers of data minimization, and without providing any evidence demonstrating that the benefits of data minimization will outweigh its costs to consumers, staff nevertheless recommends that businesses "develop policies and practices that impose reasonable limits on the collection and retention of consumer data."¹¹

Third, I remain unconvinced that the proposed framework described in the Workshop Report – a combination of Fair Information Practice Principles as well as other concepts such as "security by design" – is the proper framework to apply to the still-nascent Internet of Things. In

⁸ See generally, FED. TRADE COMM'N, THE INTERNET OF THINGS: PRIVACY AND SECURITY IN A CONNECTED WORLD (hereinafter "Workshop Report") at 31-37 (2015) (recommending the adoption of data minimization without quantifying or analyzing the costs or benefits of this proposal); see also *id.* at 37-44 (recommending the adoption of the notice and choice model without providing any actual estimates of its costs or benefits).

⁹ See, e.g., Workshop Report at 31-32 ("While staff recognizes that companies need flexibility to innovate around new uses of data, staff believes that these interests can and should be balanced with the interests in limiting the privacy and data security risks to consumers. Accordingly, companies should examine their data practices and business needs and develop policies and practices that impose reasonable limits on the collection and retention of consumer data.") (footnotes omitted); see also *id.* at 26 ("Of course, what constitutes reasonable security for a given device will depend upon a number of factors Nonetheless, the specific security best practices companies should consider include the following . . .").

¹⁰ The Report identifies two types of data collection – the direct collection of sensitive information and the "collection of personal information, habits, locations, and physical conditions over time." Workshop Report at 13. The danger, as set forth in the Report, of this latter category of collection is that it "may allow an entity that has not directly collected sensitive data to infer it." *Id.* While the Commission is familiar with the risks associated with the collection and misuse of sensitive data, other than through hypothetical scenarios, the Workshop Report provides no information to quantify the actual extent or true risks attendant to this latter category of data collection. As I noted previously in my responses to the Data Broker Report, I am wary of extending FCRA-like coverage to other uses and categories of information without first performing a more robust balancing of the benefits and costs associated with imposing these requirements. FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 52, n. 88 (2014).

¹¹ Workshop Report, Executive Summary at 4.

contrast, I support the well-established Commission view that companies must maintain reasonable and appropriate security measures; that inquiry necessitates a cost-benefit analysis. The most significant drawback of the concepts of “security by design” and other privacy-related catchphrases is that they do not appear to contain any meaningful analytical content. Relying upon the application of these concepts and the Fair Information Practice Principles to the Internet of Things can instead substitute for the sort of rigorous economic analysis required to understand the tradeoffs facing firms and consumers. An economic and evidence-based approach sensitive to those tradeoffs is much more likely to result in consumer-welfare enhancing consumer protection regulation. To the extent concepts such as security by design or data minimization are endorsed at *any* cost – or without regard to whether the marginal cost of a particular decision exceeds its marginal benefits – then application of these principles will result in greater compliance costs without countervailing benefit. Such costs will be passed on to consumers in the form of higher prices or less useful products, as well as potentially deter competition and innovation among firms participating in the Internet of Things.

Before setting forth industry best practices and recommendations for broad-based privacy legislation relating to the Internet of Things – proposals that could have a profound impact upon consumers – the Commission and its staff should, at a minimum, undertake the necessary work not only to identify the potential costs and benefits of implementing such best practices and recommendations, but also to perform analysis sufficient to establish with reasonable confidence that such benefits are not outweighed by their costs at the margin of policy intervention. At this juncture, I believe the Workshop Report either should set forth that evidence or, in the alternative, request additional empirical evidence upon which to make future recommendations. In the absence of such evidence, the Commission should decline to publish the Workshop Report’s recommendations.