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Federal Trade Commission
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Good afternoon. I want to thank George Mason University Antonin Scalia Law School and the Privacy Forum for sponsoring this event and for inviting me here to speak today. I look forward to discussing with you Acting FTC Chairman Ohlhausen's privacy agenda, focusing in particular on the FTC's Economics of Privacy Initiative.¹

Let me start with providing some key points of reference. Over the past two decades, the FTC has become the federal government's leading agency on consumer privacy. The FTC has been an excellent steward in playing this leading role, drawing on its strengths as an adaptive and flexible agency to protect the public. We do not intend to surrender this leadership role, and we think that consumers and competition will be better off if we do not.

The FTC's fundamental tools for consumer protection are law enforcement, guidance, and research and policy development work. The agency uses these tools in combination and alters its use of them to respond most effectively to consumer protection problems, including those relating to privacy. This approach has been extremely effective in the past and it will continue to be so in the future.

As most of you know, the FTC is primarily a civil law enforcement agency. The agency enforces Section 5 of the FTC Act, which prohibits unfair and deceptive acts and practices. The FTC has used its Section 5 authority to bring law enforcement actions against companies who do not honor the privacy promises they make to consumers, misuse consumers' sensitive data, or

¹ The views I express are my own and do not necessarily represent the views of the Commission or any individual Commissioner.

fail to take reasonable steps to protect the security of consumers' data. In addition, the Commission enforces special statutes relating to privacy, such as the Fair Credit Reporting Act, the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, and their implementing rules.

Over the course of many years, the FTC has brought hundreds of cases to protect consumer privacy. Case-by-case enforcement, paired with general research and policy statements about the thrust of FTC's enforcement actions, is well suited to addressing topics like privacy where markets and technology are so dynamic. Prescriptive rules create high risks of over-regulating and under-regulating, and proceeding case-by-case helps us avoid these types of risks.

It is critical that the FTC maintain an active privacy enforcement program. Obviously, it prevents, redresses, and deters conduct that is harmful to consumers and competition, which is at the core of the FTC's mission. Moreover, maintaining an active privacy enforcement program has some ancillary benefits for industry. By taking action against deceptive privacy promises, we can ensure that companies compete on the basis of truthful, non-misleading claims. With our visible enforcement program, we can help build consumer trust in the marketplace for new and innovative products and services. And, on a more specific level, FTC privacy enforcement is crucial to the Privacy Shield framework that industry sorely needs to ensure that information can flow from the European Union to the United States.² From my perspective, the FTC can and must remain actively involved in privacy law enforcement.

² Federal Trade Commission, Protecting Privacy in Transatlantic Data Flows: The EU–U.S. Privacy Shield (April 13 2017), available at <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/protecting-privacy-transatlantic-data-flows-eu-us-privacy>.

The FTC's research, policy development, and advocacy activities relating to privacy informs our privacy enforcement work so we can protect consumers effectively without imposing unnecessary or undue burdens on industry. I want to discuss briefly three types of research and policy development work involving privacy that may have a substantial impact on future FTC privacy enforcement.

First, the FTC rather than the Federal Communications Commission should have the authority to address broadband ISP privacy issues. The FTC has comparative expertise relative to the FCC on privacy issues. The FTC addressing privacy issues for broadband ISP providers along with privacy issues for other actors in the Internet ecosystem would allow for the development of a more coherent and consistent approach to privacy in that ecosystem. The FCC recently issued a Notice of Proposed Rulemaking proposing to reclassify broadband ISP service as an information service rather than an a common carrier service, which would have the effect of returning authority to the FTC to address broadband ISP privacy issues.³ The FCC's rulemaking proceeding provides the FTC with an opportunity to file a comment advocating for such a return, and the FTC may well file such a comment.

Second, the FTC will continue to study novel and specific privacy topics so that we can make the best enforcement decisions possible. For example, last month the FTC hosted a conference to learn more about developments in identity theft and how best to protect consumers from it.⁴ In addition, later this month the National Highway Traffic Safety Administration and the FTC will be hosting a workshop to examine privacy, data security, and safety issues arising

³ Federal Communications Commission, Restoring Internet Freedom Notice of Proposed Rulemaking (May 5, 2017), available at <https://www.fcc.gov/document/restoring-internet-freedom-notice-proposed-rulemaking>.

⁴ Federal Trade Commission, Identity Theft: Planning for the Future, available at <https://www.ftc.gov/news-events/events-calendar/2017/05/planning-future-conference-about-identity-theft>.

from cars being connected to the Internet.⁵ The FTC will continue its long history of engaging in research and policy development work on such specific and novel privacy issues when they arise.

Third, and most importantly, under Acting Chairman Ohlhausen's leadership, the FTC has commenced its Economics of Privacy Initiative.⁶ As noted above, the FTC has brought literally hundreds of privacy cases over the past two decades. The Bureau of Economics has weighed in with its own economic and policy views on each of these cases. So, every case the FTC has brought has reflected economic analysis. This has allowed the FTC generally to strike the right balance between enabling consumers to reap the extraordinary benefits of our information-based economy while providing companies with incentives not to engage in conduct relating to privacy that harms consumers.

However, what the FTC has not done to date is consolidate its case-based analyses and current research into a comprehensive assessment of economic principles to build a solid analytical foundation for the FTC's privacy work. Acting Chairman Ohlhausen commenced the Economics of Privacy Initiative to "deepen the FTC's understanding of the economics of privacy," including "studying consumer preferences and the relationship between access to consumer information and innovation."⁷ This deeper understanding will help ensure that the FTC's privacy work continues to protect consumers and promote innovation in a dynamic marketplace.

⁵ Federal Trade Commission, *Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles*, available at <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>.

⁶ Remarks of Maureen K. Ohlhausen, Acting Chairman of the Federal Trade Commission, before the ABA 2017 Consumer Protection Conference, Atlanta, Georgia (Feb. 2, 2017), at 5.

⁷ *Id.* at 5; *see also* Commissioner Maureen K. Ohlhausen, "Consumer Privacy: Someone May Be Watching You – And That May Not Always Be a Bad Thing," Marketing and Public Policy Conference 2013, Washington, D.C., (May 31, 2013), at 7-9 (emphasizing the need for economics-based research into privacy issues).

I think that there is a striking parallel between the Economics of Privacy Initiative and the FTC's work on unfairness and deception in the early 1980's. At that time, the Commission incorporated decades of case law into the analytical framework set forth in the FTC's Deception, Unfairness, and Advertising Substantiation Policy Statements. Significantly, these Policy Statements reflected sound economic principles. More than three decades later, these Policy Statements continue to provide the analytical foundation for the lion's share of the FTC's consumer protection work. While we have no current plans to issue a comparable privacy statement, economic analysis can help us answer better key questions that arise in applying these Statements in the privacy context. For example, what constitutes "substantial injury" in the area of privacy? How can we develop further evidence on the likelihood of harmful outcomes? What privacy promises are material to consumers?"⁸

The FTC's Bureau of Economics will be leading the Initiative. However, BE will receive significant input from the FTC's Bureau of Consumer Protection and Office of Policy Planning to ensure that their experience and perspectives are reflected in BE's analysis.

The FTC is just at the beginning of the Initiative. What we learn during the Initiative may strengthen the agency's approach to privacy and place it on a more solid analytical foundation. The FTC has not yet identified any specific timetables for the Initiative.

The Initiative to date, for the most part, has consisted of internal FTC planning, analysis, and discussion. Flowing from this initial work, two BE senior managers presented a paper at a recent conference.⁹ The presentation described an approach to privacy and data security

⁸ For a discussion of potential issues to consider arising from the application of economic analysis to FTC privacy issue, see generally James Cooper and Joshua D. Wright, "The Missing Role of Economics in FTC Privacy Policy," George Mason University Law and Economics Research Paper Series 17-01 (publication forthcoming 2017).

⁹ Ginger Jin and Andrew Stivers, "Protecting Consumers in Privacy and Data Security: A Perspective of Information Economics (May 22, 2017).

drawing on the economic literature about information flow and use in the marketplace. It applied that approach to consumer protection concerns as a first step in developing a well-grounded cost-benefit analysis to inform the FTC's future law enforcement and policy decisions.

Yesterday, the FTC took the first major step to involve external stakeholders in the Initiative. As many of you know, in each of the last two years the FTC has sponsored a PrivacyCon, an event intended to foster research into issues at the intersection of privacy and consumer protection. We will be holding our next PrivacyCon in January 2018. As in years past, the FTC is seeking papers on privacy issues from potential presenters with a tech background. This year, however, PrivacyCon's emphasis will be on the economics of privacy. The FTC's announcement sets forth a raft of questions designed to elicit and encourage its submission of responsive research and requests to present at PrivacyCon 2018.¹⁰ For example, the announcement identifies as general topics for analysis and discussion: (1) the nature and evolution of privacy and security risks; (2) quantifying costs and benefits of privacy from a consumer perspective; (3) quantifying costs and benefits from a business perspective; and (4) privacy incentives, market failures, and interventions. These questions focus on the same topics on which many of you have presented or will present research here today. Consequently, many of you could contribute greatly to the success of PrivacyCon 2018 and the Initiative. I wholeheartedly encourage you to share what you know with the FTC and share with us what you think we need to know to establish a firm, economics-based foundation for the FTC's privacy work.

I want to respond directly and clearly to a concern that I have often heard about the Economics of Privacy Initiative, namely, that the commencement of the Initiative indicates or

¹⁰ Federal Trade Commission, Privacy Con 2018: Call for Presentations (June 7, 2018), available at <https://www.ftc.gov/hode/1223293>.

foreshadows a retreat from active FTC privacy enforcement. It does not. Our efforts during the Initiative to develop a sound analytical framework for our privacy work based on economic principles will not prevent or distract us from using law enforcement to fulfill our core consumer protection mission.

Thank you and I look forward to answering any questions you may have.