

# Protecting Consumers and Competition at the New FTC

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Thank you, Randy, for your kind and generous introduction. I am honored that the Free State Foundation has invited me to speak at this important seminar, centered primarily on FCC policy. I will address my remarks to certain developments at the Federal Trade Commission (“FTC”), an agency that promotes the interests of American consumers through its competition and consumer protection missions – a governmental role which complements the FCC’s efforts to promote a vibrant, competitive, and innovative American communications marketplace. First, I will briefly describe the institutional role of the FTC and its Office of General Counsel. I will then focus on two topics of direct relevance to consumer interactions with the Internet – the FTC’s enforcement activities related to internet service providers’ (ISP) network management practices, and to data security and privacy. I will close by highlighting a major set of policy hearings the FTC will convene on “the new economy.”

My remarks today are my own. They do not necessarily represent the views of the Federal Trade Commission or any Federal Trade Commissioner.

#### I. Overview of the FTC and its Office of General Counsel

Let me begin with an overview of the FTC and its mission. The FTC is a small but highly effective independent agency that has three bureaus: the Bureau of Consumer Protection (“BCP”), the Bureau of Competition (“BC”), and the

Bureau of Economics (“BE”), which supports both BCP and BC. The FTC is the only federal agency with a broad mission to both protect consumers and maintain competition in most sectors of the economy. Its jurisdiction ranges from privacy and data security, to anti-fraud enforcement, to mergers and acquisitions, to anticompetitive tactics by pharmaceutical companies, to high-technology and emerging industries. This is an historic time at the Commission – four new Commissioners joined the agency in May, including Chairman Joseph Simons, Commissioner Noah Phillips, Commissioner Rohit Chopra, and Commissioner Rebecca Slaughter.

The FTC has eight regional offices around the country that handle various enforcement actions and liaise with state and local officials. The Commission also has various functional offices, dealing with such topics as management, policy planning, EEO, public affairs, congressional relations, international affairs, and, last but not least, legal matters – my office, the Office of General Counsel (“OGC”).

Put briefly, OGC provides “in-house” legal advice and litigation services for the Commission. Notably, the FTC by statute has independent litigating authority, which means that it represents itself in both trial courts and appeals courts, without having to seek the assistance of the Justice Department (“DOJ”). Our litigators have had a great deal of success in trial and appellate courts, and, indeed, in the

Supreme Court. Although we do not always win in court – no agency does – our track record is excellent. Most of our federal district court cases involve suits to enforce our orders or to obtain equitable injunctive relief under Section 13(b) of the FTC Act . Our visits to the appeals courts and to the Supreme Court often involve review of final Commission administrative decisions, as well as appeals from federal district courts.

Although we do not rely on DOJ to do out litigating, we do work with them closely to coordinate whenever possible on legal policy matters. In particular, we have an active *amicus curiae* program under which we file third party briefs that seek to promote sound antitrust and consumer protection policy, often (though not always) in conjunction with the DOJ. For example, since I arrived at the FTC in early April, we joined the DOJ as “friends of the court” in two high profile antitrust matters. We supported a grant of certiorari in the *Apple v. Pepper* case,<sup>1</sup> involving the applicability of the *Illinois Brick* indirect purchaser rule, and filed before the Federal Circuit in *Intellectual Ventures v. Capital One*,<sup>2</sup> involving the scope of the *Noerr-Pennington* antitrust exemption for petitioning the government.

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<sup>1</sup> Apple Inc. v. Robert Pepper, et al. (U.S., No. 17-204, May 8, 2018), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2018/05/apple-inc-v-robert-pepper-et-al>.

<sup>2</sup> Intellectual Ventures I LLC et al. v. Capital One Financial Corp. et al. (Fed. Cir., No. 18-1367, May 11, 2018), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2018/05/intellectual-ventures-i-llc-et-al-v-capital-one-financial-corp>.

I am pleased to note that on June 18, the U.S. Supreme Court agreed to hear *Apple v. Pepper* in its October 2018 term.<sup>3</sup>

## II. Internet Service Providers' Network Transmission Practices

Let me briefly address the FTC's enforcement role regarding ISPs' internet transmission practices. FTC's competition and consumer protection powers can help address concerns that consumer welfare is being harmed by ISP network practices.

First, our authority to combat unfair methods of competition allows us to take action if we find that ISPs are using contract provisions to undermine the competitive process.

Second, our deception authority bans companies from offering consumers one product or service but providing them something different. And if ISPs promise to adhere to net neutrality principles, the FTC can hold them to those promises. Our deception authority also requires companies to disclose material information – for example, blocking or throttling practices – if not disclosing it would mislead a reasonable consumer.

Third, the FTC's unfairness authority prohibits practices where the actual or likely consumer injury is substantial, unavoidable, and not outweighed by benefits

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<sup>3</sup> See [https://www.supremecourt.gov/orders/courtorders/061818zor\\_m6io.pdf](https://www.supremecourt.gov/orders/courtorders/061818zor_m6io.pdf).

to consumers or competition. The FTC has used this authority to sue companies that unilaterally violated their past promises to consumers.

For example, in 2015 TracFone, the largest prepaid mobile provider in the U.S., agreed to pay \$40 million to the Federal Trade Commission to settle charges that it deceived millions of consumers with hollow promises of “unlimited” data service.<sup>4</sup> Despite emphasizing unlimited data in its advertisements, TracFone drastically slowed or cut off consumers’ mobile data after they used more than certain fixed limits in a 30-day period. Consumers who had a TracFone unlimited plan before January 2015 and whose service was slowed or cut off were able to apply to the FTC to receive a refund.

Currently, with respect to ISP abuses, the FTC is challenging as unfair and deceptive AT&T Mobility’s alleged practice of throttling wireless data plans, which they advertised as unlimited. In February 2018, in an en banc decision, the Ninth Circuit Court of Appeals ruled that the FTC could continue this suit.<sup>5</sup> It held that the statutory bar on the FTC’s assertion of jurisdiction over common carriers only applied to the extent that such companies engage in common-carriage activity. By extension, this interpretation means that the FTC may regulate

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<sup>4</sup> See Press Release, Prepaid Mobile Provider TracFone to Pay \$40 Million to Settle FTC Charges It Deceived Consumers About ‘Unlimited’ Data Plans, Jan. 28, 2015, <https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc>.

<sup>5</sup> See Leslie Fair, En banc Court of Appeals rules in FTC’s favor on common carrier issue (Feb. 28, 2018), <https://www.ftc.gov/news-events/blogs/business-blog/2018/02/en-banc-court-appeals-rules-ftcs-favor-common-carrier-issue>.

common carriers' non-common-carriage activities, such as the throttling activity alleged in this case.

In sum, anticompetitive conduct by ISPs, and ISPs' deceptive or unfair acts that harm consumers, clearly are fair game for FTC enforcement. The FTC will not hesitate to investigate and take action where appropriate to address these problems.

### III. Data Security and Privacy

The FTC has unparalleled experience in consumer privacy enforcement. The Commission has used its core enforcement authority – Section 5 of the FTC Act<sup>6</sup> – to take action against companies engaged in unfair or deceptive practices involving the privacy and security of consumers' information. The FTC also enforces sector-specific statutes that protect certain health, credit, financial, and children's information.

Some of the FTC's privacy enforcement priorities include financial privacy, children's privacy, health privacy, the Internet of Things, and data security. Ongoing work includes investigations of Facebook's privacy practices<sup>7</sup> and the

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<sup>6</sup> 15 U.S.C. § 45(a).

<sup>7</sup> Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices (Mar. 26, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

Equifax data breach. Let me cite a few examples that are illustrative of the FTC's recent work in this area.

Financial privacy has long been an area of particular emphasis for the FTC. For example, the FTC alleged that online tax preparation service TaxSlayer violated the Gramm-Leach-Bliley Act's Safeguards Rule by, among other things, failing to implement adequate risk-based authentication measures and failing to require consumers to choose strong passwords.<sup>8</sup> The FTC alleged that malicious hackers were able to gain full access to nearly 9,000 TaxSlayer accounts between October 2015 and December 2015 and use that information to engage in tax identity theft, which allowed them to obtain tax refunds by filing fraudulent tax returns.

The Commission also takes seriously its commitment to protect children's privacy, which continues to be a focus of the FTC's enforcement efforts. In the Commission's first children's privacy case involving Internet-connected toys, the FTC announced a settlement with electronic toy manufacturer VTech Electronics for violations of the Children's Online Privacy Protection Rule, including a civil penalty of \$650,000.<sup>9</sup> The FTC alleged that the company collected children's

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<sup>8</sup> TaxSlayer, LLC, No. C-4626 (Nov. 8, 2017), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer>.

<sup>9</sup> U.S. v. VTech Electronics Ltd. et al., No. 1:18-cv-00114 (N.D. Ill. Jan. 8, 2018), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3032/vtech-electronics-limited>. See also U.S. v. Prime Sites, Inc. also d/b/a Explore Talent, No. 2:18-cv-00199 (D. Nev. Feb. 12, 2018), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3218/prime-sites-inc-explore-talent>.

personal information online without first obtaining parental consent, and failed to take reasonable steps to secure the data it collected.<sup>10</sup>

The FTC has also continued to focus on privacy and data security involving the Internet of Things. For example, last year Vizio, one of the world's largest manufacturers and sellers of Internet-connected smart televisions, agreed to pay \$2.2 million to settle charges that it installed software on its televisions to collect the viewing data of 11 million consumers without the consumers' knowledge or consent.<sup>11</sup> Additionally, the FTC co-hosted with the National Highway Traffic Safety Administration a workshop on privacy and security issues posed by automated and connected motor vehicles.<sup>12</sup>

Data security continues to be a crucial part of the FTC's privacy work. To date, the Commission has brought more than 60 cases alleging that companies failed to implement reasonable safeguards for the consumer data they maintain. For example, the Commission recently announced an expanded settlement with ride-sharing platform company Uber Technologies related to allegations that the company failed to reasonably secure sensitive consumer data stored in the cloud.<sup>13</sup>

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<sup>10</sup> In addition to law enforcement, the FTC also undertakes policy initiatives, such as its recent workshop co-hosted with the Department of Education on educational technology and student privacy. See Student Privacy and Ed Tech (Dec. 1, 2017), available at <https://www.ftc.gov/news-events/events-calendar/2017/12/student-privacy-ed-tech>.

<sup>11</sup> VIZIO, INC. and VIZIO Inscape Services, LLC, No. 2:17-cv-00758 (D.N.J. Feb. 6, 2018), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3024/vizio-inc-vizio-inscape-services-llc>.

<sup>12</sup> FTC Workshop, Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles (June 28, 2017), available at <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>.

<sup>13</sup> Uber Technologies, Inc., Matter No. 1523054 (Apr. 11, 2018), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3054/uber-technologies-inc>. Following the announcement

As a result, an intruder accessed personal information about Uber customers and drivers, including more than 25 million names and email addresses, 22 million names and mobile phone numbers, and 600,000 names and driver's license numbers. The FTC also reached a settlement with one of the world's largest computer manufacturers, Lenovo, related to allegations that the company pre-loaded software onto some of its laptops that compromised security protections in order to deliver ads to consumers.<sup>14</sup>

As the United States' leading privacy enforcement agency, the Commission is committed to the success of the EU-U.S. Privacy Shield framework, a critical tool for protecting privacy and enabling cross-border data flows. We have brought enforcement actions to enforce it<sup>15</sup> and will continue to do so when participants fail to meet their legal obligations. The Commission will continue to work with other agencies in the U.S. government and with our partners in Europe to ensure businesses and consumers can continue to benefit from the Privacy Shield.

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of last year's original proposed settlement, the Commission learned that Uber had failed to disclose a significant breach of consumer data that occurred in 2016 – in the midst of the FTC's investigation that led to the August 2017 settlement announcement. Due to Uber's misconduct related to the 2016 breach, Uber will be subject to additional requirements. Among other things, the revised settlement could subject Uber to civil penalties if it fails to notify the FTC of certain future incidents involving unauthorized access of consumer information.

<sup>14</sup> Lenovo, Inc., No. C-4636 (Jan. 2, 2018), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3134/lenovo-inc>.

<sup>15</sup> See Press Release, Statement of Acting FTC Chairman Maureen K. Ohlhausen on First Annual Review of EU-U.S.-Privacy Shield, Oct. 18, 2017, <https://www.ftc.gov/news-events/press-releases/2017/10/statement-acting-ftc-chairman-maureen-k-ohlhausen-first-annual>.

The Commission is aware that Congress has long considered whether to adopt comprehensive data security legislation. The agency stands ready, willing and able to work with Congress on that issue.

Finally, the Commission supports its vital enforcement work with privacy and security research. For example, in February 2018, the FTC held its third annual PrivacyCon, a conference examining cutting-edge research and trends in protecting consumer privacy and security.<sup>16</sup> The FTC also held a conference to examine how identity theft has evolved over the last decade and what we can do to address the challenges it poses.<sup>17</sup> And in December 2017, the Commission held a workshop to examine consumer injury in the context of privacy and data security.<sup>18</sup>

In short, the FTC is and will remain extremely active on the privacy and data security fronts, particularly with regard to the Internet economy.

#### IV. FTC Hearings on Changes in the Economy, and Conclusion

Let me close by spotlighting a policy development priority of Chairman Joe Simons', featuring a "big picture" look at changes in our economic system that will affect the American economy – and the way the FTC carries out its competition

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<sup>16</sup> This year's event focused on the economics of privacy including how to quantify the harms that result from companies' failure to secure consumer information, and how to balance the costs and benefits of privacy-protective technologies and practices. FTC Workshop, PrivacyCon 2018 (Feb. 28, 2018), available at <https://www.ftc.gov/news-events/events-calendar/2018/02/privacycon-2018>.

<sup>17</sup> FTC Workshop, Identity Theft: Planning for the Future (May 24, 2017), available at <https://www.ftc.gov/news-events/events-calendar/2017/05/planning-future-conference-about-identity-theft>.

<sup>18</sup> FTC Workshop, Informational Injury (Dec. 12, 2017), available at <https://www.ftc.gov/news-events/events-calendar/2017/12/informational-injury-workshop>.

and consumer protection mandates. Beginning in September 2018, the FTC will hold a series of multi-day, multi-part public hearings (“hearings”) to consider whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. The hearings pay tribute to, and are modeled after, the FTC’s 1995 Global Competition and Innovation Hearings under the leadership of then-Chairman Robert Pitofsky.

The progress of the Federal Trade Commission in its modern era has built heavily upon the willingness of its people to assess their work critically and explore possibilities for improvement. The hearings and associated public comment process will provide opportunities for FTC staff and leadership to obtain input from a broad and diverse range of interested stakeholders and experts, and will stimulate thoughtful internal and external evaluation of the FTC’s near- and long-term law enforcement and policy agenda. The hearings may identify areas for additional study, enforcement, advocacy, and policy guidance, including improvements to the agency’s investigation and law enforcement processes.

Through August 20, 2018, the Commission will accept public comment on the topics identified in the June 20 announcement of the hearings, which is available on the FTC’s website, [ftc.gov](http://ftc.gov). We would be happy to hear your thoughts.

Thank you very much for your kind attention.