



United States of America
Federal Trade Commission

The Procrustean Problem with Prescriptive Regulation

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**Sixth Annual Telecom Policy Conference
Free State Foundation
Washington, DC**

March 18, 2014

I. Introduction

Thank you to the Free State Foundation for inviting me to speak today. I am honored to participate in today's thoughtful discussion on the future of communications regulation.

At the Federal Trade Commission ("FTC"), protecting consumers and competition on the Internet is a substantial and growing part of our work, and I have some specific ideas on the FTC's future role. After introducing the work of the FTC, I will make three points today. First, to protect consumers effectively while promoting innovation, regulators must embrace regulatory humility and focus on consumer harm. Next, the recent *Verizon* decision is an example of the difficulties of using prescriptive *ex ante* rulemaking to regulate a dynamic industry.² The Greek myth of Procrustes and his iron bed is instructive here, as I will explain. Finally, reformers

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

² *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. Jan. 14, 2014).

should look to the FTC's successful, evolving approach to Internet-related issues, including its *ex post* enforcement of basic competition and consumer protection rules.

II. Background on the FTC

First, a little background on the Federal Trade Commission. The FTC's mission is to, quote, "prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions without unduly burdening legitimate business activity."³ For a century, the FTC has pursued this mission under Section 5 of the FTC Act, which authorizes the Commission to prevent unfair methods of competition and unfair or deceptive acts or practices.⁴ These dual competition and consumer protection mandates are intentional. Competition and consumer protection laws are complementary tools. Both help promote vibrant markets that benefit consumers.

Congress charged the FTC with carrying out this competition and consumer protection mandate across nearly all segments of the economy, including the vast majority of commercial activity on the Internet. The FTC also enforces several issue- or sector-specific laws such as the Children's Online Privacy Protection Act⁵ and the Fair Credit Reporting Act.⁶ This broad jurisdiction means that the FTC and the Federal Communications Commission ("FCC") share jurisdiction over much of the Internet ecosystem, with one significant exception that I will discuss later.

³ See About the FTC: Our Mission, <http://www.ftc.gov/about-ftc> (last visited Mar. 17, 2014).

⁴ 15 U.S.C. § 45(a)(1).

⁵ Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506.

⁶ Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*

III. Two Key Principles for Regulators

Whether at the FTC or the FCC, all regulators of technology should embrace two fundamental principles: One, regulatory humility. Two, a focus on evaluating consumer harm. Unless regulators follow these two principles, even agencies with the best-designed statutory and regulatory structure will be less effective and possibly make consumers worse off. On the other hand, regulators who embrace these principles can help limit the harms caused by the flaws that exist in all regulatory approaches. Practicing these principles is particularly important when the area to be regulated is rapidly changing and difficult to predict.

a. Principle 1: Regulatory Humility

It is exceedingly difficult to predict the path of technology and its effects on society. The massive benefits of the Internet in large part have been a result of entrepreneurs' freedom to experiment with different business models. The best of these experiments have survived and thrived, even in the face of initial unfamiliarity and unease about the impact on consumers and competitors. For example, you may remember the early widespread skepticism directed toward online shopping. Today, let me just ask: how many of you bought something online this month? Early skepticism does not predict potential consumer harm. Conversely, as the failures of thousands of dotcoms show, early enthusiasm does not predict consumer benefit.

Because it is so difficult to predict the future of technology, government officials, like myself, must approach new technologies and new business models with a significant dose of regulatory humility. This means we must work hard to educate ourselves and others about new developments. We must research the effects on consumers and the marketplace. We must

identify benefits and any likely harm. If harms do arise, we must ask if existing laws and regulations are sufficient to address them, rather than assuming that new rules are required.

And we must remain conscious of our limits. The success of the information economy means that we regulators can now gather so much data. But data isn't knowledge or wisdom. "Data-driven" decisions can be wrong. Even worse, data-driven decisions can *seem* right while being wrong. Political polling expert Nate Silver notes that "[o]ne of the pervasive risks that we face in the information age ... is that even if the amount of knowledge in the world is increasing, the gap between *what we know* and what *we think* we know may be widening."⁷ Regulatory humility can help narrow that gap.

b. Principle 2: A Focus on Evaluating Consumer Harm

Equally important, we ought to focus on evaluating consumer harm. Before intervening, regulators must understand how new technologies and business models affect consumers, both positively and negatively. This requires careful factual and economic analysis. It also serves as another check on action for the sake of action. As noted in the FTC at 100 Report, "[T]he improvement of consumer welfare is the proper objective of the agency's competition and consumer protection work."⁸ Our consumer protection laws encourage us to focus on consumer harm, whether the cause of the harm is deception or unfairness. In analyzing a potentially deceptive practice or omission, the FTC asks if the deception is material; that is, absent the deception, would the consumer have made a different choice? As explained in our *Deception Statement*, "If different choices are likely, the [deceptive] claim is material, and injury is likely as

⁷ NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL - BUT SOME DON'T 46 (Sept. 2012).

⁸ William E. Kovacic, TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES at iii (Jan. 2009), available at <http://www.ftc.gov/reports/federal-trade-commission-100-our-second-century>.

well. Thus, injury and materiality are different names for the same concept.”⁹ The Commission’s unfairness analysis relies even more explicitly on harm. It deems a practice unfair if it causes substantial harm, which is not outweighed by any offsetting consumer or competitive benefits, and the consumer could not have reasonably avoided the harm.¹⁰ The FTC’s *Unfairness Statement* specifically identifies financial, health, and safety as varieties of harm that the Commission should consider substantial and further states that emotional impact and more subjective types of harm will not make a practice unfair.¹¹ I believe these clear statements as to what constitutes consumer harm have focused the FTC and made it more effective than it would be, for example, under a less specific public interest standard.

When the FTC exercises its competition authority, it also carefully evaluates consumer welfare (or, its corollary, consumer harm). The core mission of antitrust law is to improve consumer welfare by protecting vigorous competition and economic efficiency. The FTC has expressly acknowledged that its dual consumer protection and competition mandates are bound together by this single objective of improving of consumer welfare.¹² This is in part why I have said that consumer welfare must be among the guiding lights for the FTC to apply its Section 5 authority to cases outside the reach of traditional antitrust laws.¹³ In such cases, I have argued

⁹ FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION (1983), available at <http://www.ftc.gov/ftc-policy-statement-on-deception>.

¹⁰ FED. TRADE COMM’N, FTC POLICY STATEMENT ON UNFAIRNESS at 3 (1980), available at <http://www.ftc.gov/ftc-policy-statement-on-unfairness>.

¹¹ *Id.*

¹² See generally, “About the FTC: What We Do,” available at <http://www.ftc.gov/about-ftc/what-we-do>. (last visited Mar. 18, 2014).

¹³ See, e.g., Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 4-5 & n.22, *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), available at <http://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0> (objecting to use of Section 5 in case lacking evidence of substantial consumer harm, as opposed to perceived harm to particular competitors). See generally, Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n, *Section 5: Principles of Navigation*, Remarks before the U.S. Chamber of Commerce (July 25, 2013), available at <http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf>; Maureen K. Ohlhausen, *Section 5 of the FTC Act:*

that, before taking action, the FTC ought to establish substantial harm to competition or the competitive process, and thus to consumers, relying on robust economic evidence that the challenged conduct is anticompetitive and reduces consumer welfare.¹⁴

By focusing on practices that are actually likely to harm consumers, the FTC has limited its forays into speculative harms, thereby preserving its resources for clear violations. I believe this self-restraint has been important to the FTC's success in tackling a wide range of disparate problems without disrupting innovation. I think this is a model worth replicating.

IV. The Prescriptive Approach and Its Procrustean Problem

Regulatory humility and a focus on evaluating consumer harm are both necessary to successfully protecting online consumers and competition. However, regulators also need the proper tools for the job. Although the FTC and the FCC share jurisdiction over the Internet, the tools they use are very different.

The FCC has traditionally regulated the communications industry using prescriptive *ex ante* regulation. The Communications Act and subsequent legislation established a system of classifications for various telecommunications providers or services.¹⁵ Within that silo structure, the FCC has generally conducted Administrative Procedure Act rulemakings that classify entities as falling within a specific silo and then detail the procedures these various types of entities must follow. Friedrich Hayek, who spent a lot of time exploring the interaction between laws and

Principles of Navigation, J. ANTITRUST ENFORCEMENT (2013), available at <http://www.ftc.gov/public-statements/2013/10/section-5-ftc-act-principles-navigation-0> (“SECTION 5 NAVIGATION”).

¹⁴ See SECTION 5 NAVIGATION at 8 (“We must tie our UMC enforcement back to our core mission of promoting and protecting consumer welfare. In my view, then, our UMC authority should be used solely to address harm to competition or the competitive process, and thus to consumer”); *id.* at 13 (“[A]ny effort to expand UMC beyond the antitrust laws should be grounded in robust economic evidence that the challenged practice is anticompetitive and reduces consumer welfare.”).

¹⁵ Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151 *et seq.*

liberty, would call these types of rules “commands” or “rules of organizations,” as distinct from “rules of spontaneous orders” such as common law that arose organically and evolve over time.¹⁶

I believe the prescriptive *ex ante* approach is not well suited to regulating the rapidly evolving Internet. Prescriptive *ex ante* regulation faces at least three significant knowledge-gathering challenges. First, a regulator must acquire knowledge about the present state and future trends of the industry being regulated. The more prescriptive the regulation, and the more complex the industry, the more detailed the knowledge the regulator must collect. Second, collecting such information is very time consuming, if it is even possible, because such knowledge is generally distributed throughout the industry and may even be latent. Third, as a regulated industry continues to evolve, collected knowledge can quickly become stale. This is a particular concern for fast-changing technological fields like telecommunications.

These knowledge problems can lead to negative consequences. First, because statutory, procedural, and resource constraints make it impossible for the regulator to continually update the rules, it is difficult for *ex ante* regulation to keep up with technological change. These problems may not be as acute if the regulated industry is slowly evolving over decades. But in the Internet ecosystem, which is rapidly innovating and evolving, a prescriptive *ex ante* approach has resulted in significant mismatches between the rules and reality. Second, because *ex ante* regulations are an attempt at the almost impossible task of predicting the future, some harms will occur that were unanticipated. Simultaneously, regulations may prevent harmless or even beneficial practices. Third, prescriptive *ex ante* regulations can hinder innovation. For example, if an innovative new project or service doesn’t easily fit within a particular statutory or regulatory classification, the innovator may be uncertain about how to comply with the law.

¹⁶ See FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY, 48-51 (1973).

Such legal uncertainty exacerbates the already risky effort to develop something new, which discourages innovation.

In short, prescriptive regulation, particularly of fast-changing industries, risks becoming procrustean. Let me explain. In Greek mythology Procrustes was a rogue blacksmith, a son of the sea god Poseidon, who offered weary travelers a bed for the night. He even built an iron bed especially for his guests. But there was a catch: if the visitor was too small for the bed, Procrustes would forcefully stretch the guest's limbs until they fit. If the visitor was too big for the bed, Procrustes would amputate limbs as necessary to fit them to the bed. Eventually, Procrustes met his demise at the hand of Greek hero Theseus, who fit Procrustes to his own bed by cutting off his head.

The general lesson of Procrustes is a warning against the tendency to squeeze complicated things into simple boxes, to take complicated ideas, technologies, or people, and force them to fit our preconceived models. As Nassim Taleb points out in "The Bed of Procrustes," his book of aphorisms, we often do not recognize this backward fitting approach or are even oddly proud of our cleverness in reducing something complicated to something simple.¹⁷ Regulatory humility counsels embracing the lesson of Procrustes. Regulators should resist the urge to simplify, make every effort to tolerate complexity, and develop institutions that are robust in the face of complex and rapidly changing phenomena.

Unfortunately, due to the limits of knowledge, regulation too often is a procrustean bed for the regulated industry. When the regulated industry is rapidly evolving, yesterday's comfortable regulatory bed can quickly become a torture rack for tomorrow's technologies. In particular, the history of telecommunications regulation is largely a story of regulatory attempts

¹⁷ NASSIM N. TALIB, THE BED OF PROCRUSTES, xii (2010).

to fit new technologies into an out-of-date regulatory model. From the 1913 Kingsbury Commitment to the 1996 Telecommunications Act and its subsequent implementation, Congress and the FCC have constructed a bed of regulation that makes distinctions based on physical platform, business model, and geographic characteristics that are increasingly irrelevant. Consequently, when considering the converging technologies and overlapping business models of an IP-based world, the FCC has struggled to deploy its prescriptive *ex ante* regulation tool in a legally sustainable manner. The procrustean Title II bed simply doesn't allow the FCC much flexibility.

The *Verizon v. FCC* decision¹⁸ and the underlying Open Internet Order¹⁹ together provide a fascinating example of the inflexibility of the *ex ante* approach. In a 2002 declaratory ruling and several subsequent decisions, the FCC determined that broadband internet service was an information service and therefore was not subject to Title II common carrier regulation.²⁰ In other words, the FCC decided not to subject broadband internet service to the procrustean bed of Title II regulation because it just didn't fit well. Fast forward to 2010, where, in the Open Internet Order the FCC established three requirements on broadband service providers: anti-discrimination, anti-blocking, and transparency.²¹ As you all know, in *Verizon v. FCC*, the D.C. Circuit struck down these rules in part. The court found that by imposing anti-discrimination and anti-blocking rules the FCC was impermissibly treating broadband service like a common carrier service. Returning to our gruesome Greek metaphor, it was as if the FCC had said, "broadband

¹⁸ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir., Jan. 14, 2014).

¹⁹ Preserving the Open Internet, Report and Order, 25 FCC Rcd 17905 (FCC 2010) ("Open Internet Order").

²⁰ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd* *NCTA v. Brand X*, 545 U.S. 967 (2005). *See also* Preserving the Open Internet, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13074 ¶¶ 29 nn.35-39 (2009) (describing the orders classifying various broadband services).

²¹ Open Internet Order, 25 FCC Rcd at 17906.

providers, we're not going to force you into the Title II regulatory bed, but we are going to trim some of your limbs, and never mind that these are some of the same restrictions we would impose if we were going to force you into Title II.” The upshot of the court’s decision is that to impose anti-blocking and anti-discrimination rules, the FCC would have to reclassify broadband access as a Title II common carrier service – that is, force it into the Title II bed, no matter how badly it fit.

Net neutrality is not the only Internet issue where technological change is exposing flaws in the *ex ante* approach. Voice over IP technology is another good example. VoIP is a broadband-based voice telephone service. To the consumer, VoIP looks nearly identical to the traditional voice service that the FCC has regulated as a common carrier since its earliest days. Yet, although the FCC has imposed certain regulations on VoIP, the FCC does not regulate VoIP as a common carrier service. The FCC has not acted on a long-pending rulemaking proceeding posing the question of whether VoIP is a Title II common carrier service.²² I do not raise this to encourage the FCC to regulate VoIP under Title II, but rather to emphasize that the ongoing IP transition will continue to push difficult issues like this to the fore.

V. **The FTC’s Approach**

Given that the prescriptive *ex ante* regulatory approach faces such difficulties, what is the alternative? For consumer protection and competition issues, I have a significant amount of experience operating within the model we use at the Federal Trade Commission.

The FTC model is quite different from the FCC’s. Instead of a siloed statute, Section 5 of the FTC Act charges the FTC to prevent and punish “unfair methods of competition,” and

²² See IP-Enabled Services, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

“unfair and deceptive acts.”²³ The Act applies across all industries with a few exceptions. And where the FCC’s regulations generally set the boundaries of what certain types of entities can do, the FTC’s statute fences off deceptive or unfair practices for all entities, but generally permits everything else. The FTC’s process is enforcement-centric rather than rulemaking-centric. As such, it is *ex post* rather than *ex ante* and case-by-case rather than one-size-fits-all. And because an enforcement action requires a complaint and a case to move ahead, the FTC’s method typically focuses on actual, or at least specifically alleged, harms rather than having to predict future harms more generally.

Because of these structural differences, the FTC’s enforcement process is less affected by the systemic knowledge problems of the FCC’s prescriptive *ex ante* rulemaking approach. First, rather than having to collect detailed knowledge about an entire industry, the FTC need only gather enough information about the specific parties to the dispute and their behaviors in the relevant market. The FTC has significant investigatory authority to gather such information. Second, collecting such information is much simpler because the vast majority of the necessary information will be in the hands of the parties to the case. Third, even in rapidly changing industries, the FTC’s decision on a case will bind only those parties to the specific case. The case will have precedential value, but when the FTC weighs that precedent in future cases, it can then consider any changes in the underlying facts.

Thus, the FTC’s approach facilitates what Adam Thierer calls “permissionless innovation,” or the “anti-precautionary principle” better than a prescriptive rulemaking approach.²⁴ The proof, as they say, is in the pudding. As the Internet has become an

²³ 15 U.S.C. § 45(a)(1).

²⁴ See Adam Thierer, *Who Really Believes in “Permissionless Innovation”?*, <http://techliberation.com/2013/03/04/who-really-believes-in-permissionless-innovation/> (last visited Mar. 18, 2014).

increasingly integral part of society, the FTC's enforcement-centric approach has enabled it to serve an increasingly large role in protecting consumers and competition online even while the industry has continued to innovate. In fact, the FTC is already addressing major Internet-centric concerns, including new issues in privacy, fraud, advertising and other consumer protection issues, along with competition issues.

Perhaps the most significant Internet issue the FTC has tackled is privacy. The FTC leads the federal effort to protect the privacy of consumers online. Online privacy is a very wide-ranging topic, covering spam email, data collection and security, safety of children, and online advertising. Hot new topics include the Internet of Things and big data. The FTC has been active in all of these areas, using a full range of tools, including enforcement, consumer and business education, policy research, and convening stakeholders for discussion.

For example, the FTC has brought a wide range of enforcement cases addressing consumer harms related to the Internet, including more than 100 spam and spyware cases and 50 data security cases. The FTC has brought these cases against a wide range of defendants, including an international hotel chain, a major data broker, a national drugstore chain, and the social media site, Twitter. We also hold companies to the promises made in their privacy policies and have brought actions against companies such as Google and Facebook for violating those promises. Additionally, we have brought over 20 cases to enforce the Children's Online Privacy Protection Act and have collected more than \$7 million in civil penalties.²⁵ I believe this strong enforcement record reflects the FTC's readiness and capability to protect consumer privacy online in the face of technological change.

²⁵ See generally, Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Forum for EU-U.S. Legal- Economic Affairs*, Remarks at The FTC's Privacy Agenda for the 2014 Horizon (September 14, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-privacy-agenda-2014-horizon-forum-eu-u.s.legal-economic-affairs/130914berlinprivacyin2014.pdf.

Enforcement is the cornerstone of our activity to protect consumers online. But it is supported by a wide range of other complementary tools that the FTC uses to promote consumer welfare and competition online, including consumer and business education and policy R&D efforts.

In some respects, the Commission's consumer and business education efforts affect a greater percentage of American consumers than anything else we do. For example, the information available on our webpages to help consumers avoid becoming victims of identity theft and to mitigate the damage of identity theft have had millions of hits and has been distributed widely in hardcopy. We also educate consumers on how to avoid falling victim to online scams, how to deal with spam email, how to protect their computers, phones, and home networks, and how to keep children safe online, among many other topics. For businesses we offer a wide range of legal resources, guidance, and handbooks on topics including online advertising, privacy laws, and best practices across the Internet, including websites, mobile apps, and general data security.

The FTC also has a strong policy research and development capability that it uses to stay abreast of new technologies and emerging issues. For example, the Commission has been closely studying the related issues of big data and the Internet of Things. The FTC has hosted successful workshops on these topics and others, including disclosures of online marketing and advertising practices, children's online privacy and new technology, and mobile device tracking. Future FTC workshops will cover topics such as consumer behavioral prediction and analysis and consumer generated health data. These workshops are particularly valuable because not only do they educate consumers and businesses, they also help the Commission stay informed about the ongoing technological developments and the benefits and risks of such new technologies.

VI. The Impact of the *Verizon* Decision on the FTC Approach

Returning to the *Verizon* ruling for a moment: although the decision does not explicitly affect the FTC's important role in protecting Internet consumers, it may have two indirect effects. First, the D.C. Circuit did uphold one provision of the Open Internet Order that could assist the FTC's consumer protection efforts. Specifically, the court upheld the Order's requirement that broadband service providers be transparent about what they offer.²⁶ This transparency requirement could provide useful information to consumers. The FTC can monitor the information provided by broadband service providers to ensure it is accurate and consistent with their actual practices. To the extent that we find statements inconsistent with reality, our deception authority empowers us to take action to protect consumers.

Second, the D.C. Circuit, while striking down parts of the Open Internet Order, did accept the FCC's assertion that it has independent authority under Section 706 of the Communications Act.²⁷ The partial dissent in *Verizon* raises significant and legitimate concerns regarding the majority's interpretation of the FCC's 706 authority. On its face, the scope of this authority would appear to be bounded only by the FCC's creativity in connecting its proposed regulatory action to the promotion of broadband deployment. There is a lot of uncertainty about the extent of the FCC's 706 authority, but it does appear that a particularly aggressive FCC could assert overlapping jurisdiction with the FTC on Internet consumer protection issues. For the reasons discussed above, I believe the FTC's enforcement-driven, case-by-case approach is much better suited to the fast-changing Internet world, and therefore I counsel caution in adopting other prescriptive rules in this area.

²⁶ *Verizon v. FCC*, 740 F.3d at 659 (finding that the disclosure requirements are permissible and severable from the Order).

²⁷ *Id.* at 635 (“[W]e start and end our analysis with section 706 of the 1996 Telecommunications Act, which, as we shall explain, furnishes the Commission with the requisite affirmative authority to adopt the regulations.”).

With our array of enforcement, education, and research tools, the FTC is well equipped to advance its competition and consumer protection mission online, even in the face of constant change. This is not to say the FTC is perfectly equipped. There is one significant change that should be included in any update to the communications laws: common carriers should no longer be exempt from FTC oversight. Although the FTC and the FCC share jurisdiction over much of the Internet marketplace, common carriers are exempt from FTC jurisdiction. In the prior era of separate regulatory silos of communication channels, this may have made sense. But today common carriers and non-common carriers compete directly in a number of markets. The common carrier exemption to our jurisdiction means that these competing technologies face disparate regulatory regimes through an accident of history. This exemption also frustrates effective enforcement with respect to a wide variety of activities—including privacy, data security, and billing practices—and should be removed.

VII. Conclusion

Thank you for your attention today. I know a lot of energy will be spent over the next several years looking at how we can reshape our communications laws. I hope that during this process legislators and regulators will embrace regulatory humility and focus on evaluating and addressing consumer harm. Furthermore, I urge all of you to reflect on the demonstrated challenges of using *ex ante* approaches to regulate a fast-evolving technology like the Internet. I believe the FTC's successful *ex post* enforcement of competition and consumer protection rules provides a useful template for protecting Internet consumers. I look forward to working with all of you and with Congress to update our laws to better serve consumers. Thank you.