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**REGULATORY HUMILITY IN PRACTICE: REMARKS BY
FTC COMMISSIONER MAUREEN K. OHLHAUSEN**

**INTRODUCTION AND CONVERSATION:
JEFFREY EISENACH, AEI**

**SPEAKER:
MAUREEN K. OHLHAUSEN, FEDERAL TRADE
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JEFFREY EISENACH: Well, welcome everyone. It's a couple of minutes after noon, so why don't we get started. My name is Jeff Eisenach. I am the director of AEI's Center for Internet Communications and Technology Policy. And we have a special treat today in terms of our speaker, who I'll introduce in just a second. Just a couple of notes before I do so.

The first is – if I can get everyone's attention, Brian – the first is that we have had an event scheduled on April 16 with Kathleen Bradley from the CityBridge Foundation, with Jim Glassman as part of our Disrupters series. It turned out we had a conflict on that date and so we're rescheduling that event and we'll let everyone know. We'll be posting and sending out invitations presently to let people know when that event is taking place. But if you've got that on your calendar, you should take it off.

Secondly, with respect to this event, so the title of today's event – I should tell you, our speaker is Maureen Ohlhausen. I'll say in just a second a couple of words about Commissioner Ohlhausen in just a second. Our speaker is Commissioner Maureen Ohlhausen, and our topic is regulatory humility. And I guess I want to say we have had a very difficult time promoting this event because every time we told someone we were doing a session on the topic of humility in Washington on April 1, they assumed that was a joke. (Laughter.) So I appreciate all of you making it through the humor of the situation and actually showing up today. We are actually here and it is a serious topic if one that is not entirely fashionable, I suppose, in modern-day Washington.

It is a topic that Commissioner Ohlhausen has been advancing for some time. And we'll talk about that a little bit both during her remarks and during my comments – and in my comments in a few minutes, as we have a discussion in a few minutes here.

Commissioner Ohlhausen has been a member of the Federal Trade Commission since 2012. Before then, she served many years as a member of the staff and among her important roles there, served as the director of the Office of Policy Planning and led the FTC's Internet Access Task Force. She has been a part of the FTC General Counsel's Office. She's served as a clerk at the U.S. Court of Appeals for the D.C. Circuit. She attended both George Mason University Law School, where she managed to get in and out before I arrived, and so she missed my class there. And she also attended the University of Virginia, where she graduated in 1984. And we actually overlapped, but as she was an English major, she missed my economics classes there. But despite that, somehow, she's turned out to be a heck of an economist, as well as a wonderful attorney and one of the best FTC Commissioners we've had in many years.

So, Commissioner Maureen Ohlhausen, thank you for being with us today. We look forward to your remarks. (Applause.)

MAUREEN OHLHAUSEN: Well, Jeff, I owe all my economic skills to Ken Elzinga, who was my economics professor, even though I was an English major, as you mentioned. Thank you so much for having me today. I'm delighted to be here. I always enjoy participating in the AEI events and I'm looking forward to the upcoming

discussion with you, Jeff, on the principle of regulatory humility and how to implement that as a policymaker at the Federal Trade Commission.

As background for that discussion, let me briefly share how I think about regulatory humility and the ideas that it draws upon and some of the key practical implications of that concept. Then Jeff and I can dig deeper on any aspects that he or you, audience members, would like to explore. But first, let me note that my views are my own and not necessarily those of the Federal Trade Commission.

Now, some of you may have already heard me talk about the procrustean problem with prescriptive regulation. Let me give you a little background on that. In Greek mythology, Procrustes was a rogue blacksmith and the son of the sea god Poseidon. He offered weary travelers a bed for the night. He even specially built an iron one just for his guests. But there was a catch. If the visitor was too small for the bed, Procrustes would stretch him to fit into it. If the visitor was too big, Procrustes would amputate limbs as necessary. Eventually, Procrustes met his own demise at the hands of the Greek hero Theseus, who fit Procrustes to his own bed by cutting off his head.

The story of Procrustes warns us against the very human tendency to squeeze complicated things into simple boxes, to take complicated ideas or technologies or people and fit them into our preconceived models. As Nassim Taleb points out in “The Bed of Procrustes,” which is his book of aphorisms, we often use this backward-fitting approach without recognizing that we’re doing it. Even worse, sometimes we’re proud of our cleverness in reducing something complicated to something simple.

The lesson of Procrustes for regulators and policymakers is that we should resist the urge to oversimplify. We need to make every effort to tolerate complex phenomena and to develop institutions that are robust in the face of rapid innovation. Now, there are many ways to apply the lesson of Procrustes, but today I’ll focus on three principles that I apply in my work.

First, approach issues with regulatory humility, recognizing the fundamental limits of regulation. Second, prioritize action to resolve areas of real consumer harm. Third, use the appropriate tools. I believe these principles apply to regulation generally, but that they are particularly critical for technology or other fast-moving industries. So my comments will draw upon examples from those fields, particularly where the FTC’s played a role.

So now, I’d like to talk about each of these principles a little more fully. Principle one is practice regulatory humility. Regulatory humility is my name for recognizing the inherent limitations of regulation and acting in accordance with those limits. Now, of course, the idea that regulatory action has inherent limits is much older than my use of the term. One of the most fundamental limits of regulation was explained by Friedrich Hayek in his 1945 paper, “The Use of Knowledge in Society.”

Hayek spent much of his illustrious career demonstrating the limits of centralized planning, as compared to the decentralized market and social structures. And his insights apply equally to regulation by the administrative state. For me Hayek's key insight in his paper was his recognition that regulators face a fundamental knowledge problem. And this problem limits the effective reach of regulation. 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 knowledge the regulator must collect. But Hayek argues regulators simply cannot gather all the information relevant to every problem.

But what limits the ability of the regulators to collect such information? First, collecting and analyzing such information is very time consuming because such knowledge is generally distributed throughout the industry in what Hayek calls the "dispersed bits of incomplete and frequently contradictory knowledge." Second, in most cases, critical information lies latent in the minds of the individuals or the institutional structures of the industry involved. So even those directly involved in the industry itself, cannot themselves fully explain how things get done.

James C. Scott, in his book, "Seeing Like a State," uses the Greek term *Metis* to describe this practical knowledge or the wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment. These are the types of skills that can really only be learned by doing. Think, for example, of riding a bike or speaking a language or conducting an effective board meeting. Much of human knowledge falls into this category. Regulation cannot effectively capture much of this practical knowledge.

A third aspect of the knowledge problem is that even when a regulator manages to collect information, that information quickly becomes out of date as the regulated industry continues to evolve. Obsolete data is or should be a particular concern for regulators of fast-changing technological fields. This knowledge problem means that centralized problem-solving cannot make full use of the available knowledge about a problem and therefore, in many cases, offers worse solutions than letting the market or private arrangements, like contracts, work.

Hayek's insight is actually not very controversial today. At the time he wrote his paper, centralized planning was the en vogue solution for just about every social ill. Today, there is a consensus that markets and other private mechanisms are better at solving most economic problems. And even the most interventionist regulators often talk about preferring market mechanisms and light touch regulation.

Yet, despite the lip service paid, regulators still too often instinctually react to apparent problems by proposing top-down solutions. This instinct is the opposite of regulatory humility. And to be more effective regulators, we must suppress it.

So principle one is to recognize the limits of regulation and embrace regulatory humility. Having done so, then what? Congress has given the FTC a variety of jobs

and some of them are quite important. So how can a policymaker act with regulatory humility and still carry out its mission? My next two principles address this practical problem.

My second principle and a key way to practice regulatory humility is to focus on identifying and addressing real consumer harm that the market and private arrangements cannot address well on their own. At the FTC, this is actually part of our statute. Congress charged us in Section 5 with preventing unfair and deceptive acts or practices. Deceptive acts violate Section 5 only if they are material, which our deception statement equates with harm. Practices are only unfair if there is a substantial harm that consumers cannot avoid and that outweighs any benefits to competition or to the consumers themselves. In both cases, the law concerns itself with addressing actual consumer harms.

Likewise, the FTC carefully evaluates consumer welfare or its corollary, consumer harm, when it exercises its antitrust authority. So not only does the law require the FTC to focus on consumer harm, such a focus is also good policy. Agencies have limited resources and we should generally spend those resources to stop existing or extremely likely harms rather than trying to prevent speculative or unsubstantial harms.

When we analyze harms and benefits, both in our enforcement efforts and in policymaking more generally, we ought to follow the advice of Frédéric Bastiat. In his famous 1850 essay, “That Which Is Seen and That Which Is Not Seen,” Bastiat argues that he could tell the difference between a good and a bad economist, based on a single methodological habit. A bad economist, he said, judges a policy or action based only on the seen first-order effects of that action. In contrast, a good economist takes account both of the effects which are seen and also of those which it is necessary to foresee.

Bastiat explained that the bad economist’s myopic analysis might lead him to prevent a small present harm, yet trigger a much bigger harm overall. In contrast, the good economist’s thorough analysis will lead her to be more tolerant of the risk of a small present harm if it will avoid a much larger harm later.

I think regulators face the same challenge and should therefore engage in diligent cost-benefit analysis. Now, the appropriate depth of such analysis might vary, depending on the situation. In clear cases of a fraud by a single party, where there are no consumer benefits, the costs and benefits need not necessarily be detailed exhaustively. However, for cases where there are both costs and benefits and the decision could affect a wide range of parties, regulators are to carefully assess consumer harms and benefits. This will help keep agency resources focused on where they can do the most good.

By focusing on practices that are actually harming or likely to harm consumers and which the consumers cannot reasonably avoid, the FTC has generally limited forays into speculative harms, thereby preserving its resources for clear violations. I think this self-restraint has been important to the FTC’s success in alleviating a wide range of

disparate consumer harms without disrupting innovation. And I think this is a model worth replicating.

My final principle is this: use the appropriate tools. The tools an agency uses can make a big difference in the agency's effectiveness. For fast changing technologies, agencies need tools that are nimble, transparent, and incremental. A good example of a nimble, transparent, and incremental tool is the FTC's case-by-case enforcement process. Now, often, we equate regulation with large APA-style rulemakings and such ex ante rulemakings set out rules often industry wide in scope to prevent future harms. For the reasons discussed above, including the knowledge problem, regulators struggle to construct effective ex ante rules and to update such rules in a timely manner. And such prescriptive ex ante regulations can hinder innovation.

We've seen many new technologies and business models grow across and around the boundaries of statutes and regulations. Trying to stuff them into the old boxes exacerbates the already risky effort to develop something new. So although the FTC does have rulemaking authority, the vast majority of our actions are ex post case-by-case enforcement.

This incrementalist approach, which we've been using for 100 years, has significant benefits. Consistent with Hayek's thesis about the knowledge problem, addressing only a specific case at hand requires far less information than, for example, an industry-wide rulemaking to address similar issues. This makes the knowledge problem more manageable. Furthermore, this case-by-case enforcement requires specific facts on the ground and a specifically alleged harm which allows the agency's understanding of evolving industry practices and their impacts on consumers and competition to also evolve and improve.

Finally, the outcome generally only directly applies to the party to the enforcement action. Thus, an incrementalist approach both constrains agencies to actual, rather than hypothetical harms, and better limits the potential unintended consequences of agency action. The incremental approach is particularly well suited to dealing with fast developing areas of technology, where even small distortions in such fast moving industries can quickly divert the industry from its previous trajectory.

So to conclude, I believe that officials who follow these principles – regulatory humility, a focus on identifying and addressing significant consumer harm, and use of the proper tools – will be able to carry out their missions to protect the public while minimizing negative effects on innovation. Applying these principles can help us avoid the procrustean problem and thereby ensure that the comfortable regulatory bed we design today doesn't become a torture rack for tomorrow's technologies.

Thank you again to AEI for having me and I look forward to the discussion.
(Applause.)

MR. EISENACH: Well, I think that couldn't be a better setup for what everyone here will not have a hard time guessing will be my first set of questions. So, recently, another regulatory agency across town from the FTC engaged in some ex ante rulemaking, which seems on the face of it might not comport perfectly with your recipe for regulatory humility. And I've got a couple of specific questions, but I just wanted to toss it out and get your overall reaction to the Title II designation at the Federal Trade Commission – Federal Communications Commission and preface that by saying that, you know, in 2007, you were the head of the FTC's Internet Task Force, the lead author – I think it's fair to say – of a report that echoed really the words that you've just spoken today urging specifically proceeding with caution before enacting broad ex ante restrictions in an unsettled dynamic environment. So big picture question, you know, what's – has anything changed that you think justifies the FCC's actions?

MS. OHLHAUSEN: The main thing that I have focused on in talking about the FCC's action is its reclassification to Title II of broadband service and the impact that may have on the FTC's ability to bring case-by-case enforcement in the privacy – particularly privacy and data security area, where we've been such an active protector of consumer interests, starting back in the '90s with some of the earliest action. We actually brought the first online privacy case against Geocities, back when I worked for Commissioner Swindle and Dan Caprio was with me at that time. He remembers that well.

One of my concerns is that consumers may be made worse off. A broader concern that I have is the idea, and we looked at this in the 2007 report, that in a market where you are trying to get more competition, the regulatory structure, the oversight structure that you choose matters. You should keep in mind whether this is going to freeze things in place how they are now or whether this is going to bring more competition into the market.

One of the concerns that I have is with the FCC's approach and I do believe they have genuine concerns; I believe there can be problems. I'm an antitrust enforcer. I have seen problems arise in the market, but the question is what are the right tools to bring to bear? Is it an extensive regulatory structure that's trying to foresee all the problems and come up with all the solutions or is it a case-by-case enforcement approach where we see that there is a bottleneck and that someone is acting in a way that hurts competition overall, not a particular competitor?

I think one of the other concerns that I have with the order is it's very broad. It's taking on, because it's using the Title II approach, a very broad set of tasks. I was on a panel recently with Travis LeBlanc, the head of their enforcement bureau, who basically said, here's a handset, everything that runs over it, we look at and we're going to do a rulemaking to see how Section 222 applies. That's a big job and that's a big job that seems sort of unrelated to net neutrality concerns in my opinion. So I would say, just to start off, those are my main concerns with the order.

MR. EISENACH: Well, so let's dig in deeper on two things. First, Chairwoman Ramirez, I think, has called – again, echoing a theme that's been part of the FCC's

authorization fights over the year, called for the repeal of the Common Carrier Exemption. If the Common Carrier Exemption were repealed and we had then what Chairman Wheeler colorfully called a one-two punch, would a one-two punch comprised of FCC Title II authority plus FTC regulation comprise a good regulatory framework as far as you're concerned? Would that solve the problem?

MS. OHLHAUSEN: I think it would at least reduce the problem of taking an agency that has been active and flexible and innovative in how it has viewed these new phenomena, rather than taking the old regulatory structure created for the telephone monopoly and applying it on top of all the new technologies. So I think keeping the FTC in the picture is important, but I think there would be some hard thinking about how one would come up with a rational regulatory scheme to have the FTC and the FCC in this space. I think that would be more difficult.

But with that being said, the FTC does work in areas where a lot of other agencies also have authority – the FDA, CFPB, I mean the list sort of goes on and on. So it's not unusual that we or industry have to work in the area where there are more than one regulatory agency playing a role.

MR. EISENACH: I guess the question is then, coming back to the Section 222, I, you know, I obviously am not a supporter of the Title II designation, net neutrality rules. One of its promises was that by designating broadband services as a Title II service, we kind of get through all this litigation stuff and have regulatory certainty. One of the many kind of apparent exceptions to that claim is the 222 issue, which is the consumer proprietary network information rules that apply, have always applied to telephone companies and now will apply in some unknown way to broadband companies.

If the FCC is going to issue ex ante regulations detailing the means by which consumer information is handled by broadband providers, doesn't that effectively eliminate the playing field for the – what is there for the FTC to do if the FCC is enforcing detailed ex ante regulations over privacy and broadband?

MS. OHLHAUSEN: The idea that having one regulator is better and it doesn't matter who that regulator is, it's kind of like Procrustes guests. They had a lot of certainty they were going to fit in that bed, but maybe that wasn't the best outcome for them. And I think that's one thing to consider. Certainty is an important value. It's not the only value that one would want to make sure that innovation continues, right? That's what we should be looking for here. What's the best consumer welfare outcome? How will innovation continue?

I think that when you look back to the old telephone monopoly, it had a lot of certainty. It did not have a lot of innovation in it. I think that the breakup that was brought about by antitrust actually unleashed a whole lot of innovation in that space and I wish people would keep that in mind when they're trying to go back and say, well, isn't it better just to have one big overarching regulatory structure, with one regulator who decides everything for us in advance.

You know, AT&T decided we had black telephones and that was about it. And I'm not sure that's where everyone wants to go back to.

MR. EISENACH: So let me press just a little bit. If – let's assume that that happens. Let's see – let's assume the FCC goes forward, issues kind of detailed regulations. As a practical matter and something I've seriously been wrestling with, where is the opportunity? Where is the playing field? Where is the blue sky left for the FTC to come in and be engaged and to apply its expertise once ex ante regulation is in place? Doesn't it, in effect, take the FTC off the playing field, Common Carrier Exemption aside?

MS. OHLHAUSEN: I'm not sure we can put the Common Carrier Exemption aside. I mean, were the Common Carrier Exemption to be rescinded, right? Because I want everyone to know there's actually a Ninth Circuit district court decision in the FTC's case against AT&T for their throttling of wireless broadband service where they had promised unlimited service. And the court actually said that the FTC does continue to have jurisdiction and that it is an activity-based, not a status-based exemption.

But putting that aside, I would hope that at this point it might be appropriate for Congress to step in and to decide where those lines should be drawn. And I think that it takes some serious thinking and some serious forecasting to figure out what's the best approach. But think about how the FTC has worked with online behavioral advertising, for example. We rolled out guidelines in 2009 that talked about how's the information being collected and do you give people notice. Trying to apply the CPNI rules to that is very unsettling, I think. And I would pity the person who has to figure out how you continue to do online behavioral advertising when you're looking at CPNI rules that were basically designed to cover information about a phone call and then also have sharing requirements.

MR. EISENACH: Well, speaking of Congress –

MS. OHLHAUSEN: Yes.

MR. EISENACH: – the FTC staff, in January, issued that report on the Internet of Things and you supported the report in general terms. But the staff also came back to a place where it's been recently, which is recommending broad-based privacy regulation from Congress. And you, in your statement on the report, suggested that wasn't such a good idea. I'll give you a chance to talk about why.

MS. OHLHAUSEN: I thought the report did a lot of things well. And one of the main things that it did is that it did not recommend that we need Internet-specific regulation now and expressed concerns about stepping in with regulation in a fast moving technology whose benefits are really just starting to be discovered. I thought that was a real benefit of the report.

My concern was that by going back to its 2012 recommendation for broad baseline privacy legislation, is that the report was stepping away from some of the other things that we've learned since then, which is that the Fair Information Practice Principles' approach – notice, choice, access, security, I assume people are familiar with that. It's focused on limiting collection and getting rid of data, data minimization. It's not going to work very well in a big data, Internet of Things world. It was telling companies to get rid of information now because of speculative future harms and sort of minimizing speculative future benefits. So that was one of my big concerns.

I'm also concerned that even the President's own baseline privacy, the Privacy Bill of Rights legislation, is kind of in tension with the White House's own report on big data. Both the White House report and the PCAST report say focusing on collection is ultimately not going to be a way that you protect consumers very well or be very scalable. So I share those same concerns.

MR. EISENACH: As opposed to focusing on use.

MS. OHLHAUSEN: As opposed to focusing on use, which is, in my mind, also, really focusing on harms.

MR. EISENACH: Exactly. Well, let me come to another topic. We're going to hit all the high points here. Another topic that's been –

MS. OHLHAUSEN: Get all the hard ones out of the way first.

MR. EISENACH: – been in the news. That's right. So for some reason, I guess because you all replied to a Freedom of Information Act request and some staff musings about Google's conduct in the context of its antitrust investigation you all conducted a couple of years ago, came on on the front page of the paper. That's all been now very newsworthy recently. What I think – I'm not sure many people remember is that the Commission, in fact, did enter into a consent with Google. The consent applied to its data scraping and some other aspects, not the search neutrality per se. But you actually felt that even the consent that the commission did enter into and went too far – that rather than letting Google off the hook, that the Commission did more than it should have. I wanted to give you a chance to talk about that for a second and where all that stands.

MS. OHLHAUSEN: So for those of you who haven't noticed in the past week or so, there was an inadvertent disclosure of every other page of one staff recommendation in the Google search matter. And from that, people have reported much more broadly to say the FTC staff found harm and then the FTC Commissioners didn't take action. But what that memo really said was that on the main issue, which was search, that staff – this was the Bureau of Competition's staff – did not recommend that the FTC bring an enforcement action because we did not find that on balance that made consumers worse off.

The test for antitrust is whether it hurts consumers, not whether one competitor likes it or another doesn't. It's whether it hurts consumers.

We had the same recommendation from the Bureau of Economics and from the Office of the General Counsel, so the commission voted to close the search investigation. Now, some staff mentioned in that memo did raise concerns about some of Google's other practices. We ultimately actually closed the investigation on that after Google offered up some voluntary commitments. So we didn't actually enter a settlement with Google.

Also people have overlooked the fact that we did actually sue Google for an antitrust violation relating to its assertion of fair, reasonable, and nondiscriminatory or FRAND-encumbered Standards Essential Patents on the same day. Somehow that has gotten left out of the stories. Putting that all together, my concern at the time was that I was looking at where the market was going. And where was the market going for how people conducted search? If you look at it today, the trends that staff, including the economic staff, identified back then and I found important are really playing out. Traditional desktop search has really been eaten into by search from other platforms, including social media and through apps. So that has changed a lot. The question was, did these behaviors actually hurt competition in the long term or is it just something that some competitors didn't like?

Now, Google did offer up these voluntary compliances and they have adhered to them in that time period.

MR. EISENACH: Let me ask a question I hadn't intended to ask, but I wanted to hear a little bit. Since you mentioned apps and you mentioned the way people behave online, so, you know, 10 years ago, we had a monopoly over TLDs. Every – the way one navigated the Internet is you typed in to the menu bar at the top – you typed in the name of the website that you wanted to visit, www.aei.org, for example or techpolicydaily.com or –

MS. OHLHAUSEN: www.regulatoryhumility.com.

MR. EISENACH: There we go, very good.

MS. OHLHAUSEN: It's not a website yet, but somebody owns the domain.

MR. EISENACH: I wonder who that would be. (Laughter.) Market power. I worry about market power then. But I worry less because, in fact, search, navigation conduct on the Internet has changed and now the dominant form I think is still Google. I think typically one would go to a search engine and type in regulatory humility and Ohlhausen and – rather than [regulatoryhumility.com](http://www.regulatoryhumility.com). And as you mentioned, now there is a third way that the – now that Internet use has navigated to our mobile devices, we tend to use apps because they're easier to work with with our thumbs. So what does that tell

us? Does that tell us something about market power in these markets, I guess, you concluded it did in the Google case?

MS. OHLHAUSEN: Well, certainly, I think in antitrust analysis, we've had to get used to new business models that have been enabled by new technologies. And there's some question about how competition works in these markets. So the idea that you have 10 equal sized competitors and that creates the most efficient market, which I never really believe, given the economies of scale and things like that. But to say you have a platform. And then, there's going to be competition to be the next platform. And you're having more platform-by-platform competition. So maybe the desktop versus the handset screen versus whatever may come next, social media or what have you.

I think what we're seeing – and this is one of the fundamental issues about why the Common Carrier Exemption no longer makes sense – is because all these formerly siloed regulatory industries. You had the phone company. You had the cable company. You may have had the desktop company. They're all competing with each other now. So we have convergence. Everybody is offering some wider suite of options, of services and products, and we have to have our antitrust tools be able to account for that. That is, again, why I like the case-by-case antitrust approach, because I think it allows us to learn about changes in technology and also to adjust our analysis where it's gone wrong.

We've certainly seen that in antitrust. There's been a sea change, going back to the early '80s, when we brought economic analysis into antitrust. And our analysis has improved greatly. I think that's important that a case-by-case analysis lets you do that, where regulation is much more static.

MR. EISENACH: Well, let me – I think that I couldn't agree more and I think the fact that you're trying to bring that into the FTC and its deliberations is so important. Let me move to one where a case-by-case approach has gotten some criticism or raised some concerns, and that is the FTC's approach to data security cases. So probably the most well known of those cases is the Wyndham case, which is at bar in the courts. And going both to the question of the FTC's authority to enforce data protection regulation, if you will, and then also to what the standards ought to be, whether the FTC has effectively established data security expectations that companies can adhere to with some expectation of the outcome in terms of enforcement conduct.

So some would argue that the FTC's intervention in cases like the Wyndham case and other cases is the antithesis of regulatory humility – agency going where it arguably doesn't have a lot of expertise – arguing the other side's case here – where it arguably doesn't have a lot of expertise and it certainly hasn't established clear expectations about what it expects from companies.

So how do you respond – I know you have been a supporter of the Wyndham case and some of the other cases, so the question is how do you respond to those concerns?

MS. OHLHAUSEN: Taking it outside of the context of the Wyndham case, which is an active litigation, the FTC has established the principle that companies are required to take reasonable precautions to protect the sensitive consumer data that they have in their care. This is a principle that we've developed under our Section 5 authority across administrations, both Democrat and Republican. It's actually had unanimous support across a number of years, but it's based on deception, we also have unfairness. So if a company makes a promise to safeguard your data – and they don't, that's a fairly straightforward kind of analysis.

A lot of our work has been done under unfairness, where there is not a requirement of a promise, but it's based on substantial harm. So there has to be a substantial harm to a consumer and substantial harm is defined as – under our unfairness statement – financial, medical, things that could affect health and safety, so we've often included information about real-time location and information about children and, actually, quiet enjoyment of the home. That was sort of the basis for the Do Not Call Rule.

So we look at the harm, but then we say, OK, was the consumer reasonably able to avoid that harm. And in the case of data security, the answer is generally, no, they can't. They're unaware that the company is not taking these precautions. And then do the benefits of that practice outweigh the harms to competition or consumers? And so we've used unfairness.

Developing that, we've looked at the types of data that companies are holding about consumers' medical information, financial information, I mean the drumbeat of data breaches, I think we've all seen and heard and have concerns about. Consumers are not really able to take steps to protect themselves from these things happening. So we've required companies to take reasonable precautions. The kinds of precautions we required them to take are things like having a firewall, not having your password be "password." Even in the offline space, if you have medical or prescription information, don't throw it out into the dumpster. Don't take people's applications for mortgages and throw it out into the dumpster.

That is, I think one of the challenges about saying everyone should have this level of security. It's a very fast changing area. The threats and the precautions are sort of in a race. So I don't think it would be good for companies really if the FTC chose some level of security. It would be out of date before the ink was dry. It's much more a process-based approach. Has a company taken the appropriate precautions that, one in the industry of this size, having this sensitivity level of data would normally take?

So that's a long answer as a justification for it.

MR. EISENACH: That's a good answer. And I want to ask one follow up and in the meantime, everyone, please get ready with your questions because as soon as – I'll ask one more question, then we'll come around with questions. When I do come around with questions, I think we have a microphone someplace here and I see Berin's already got his hand up. So when we do go to questions, we'll ask you to get the microphone and then also state who you are and where you're from.

So following up on that, and not to press the point at all, but to go to a kind of a different level, so the concern, I think, or the complaint is that the effect of FTC enforcement, at least beyond a certain point, can sort of feel like punishing the victim, right? So Wyndham says, wait a second, I may or may not have had perfect – let me not use Wyndham. Company X, hypothetical company X says I may or may not have had perfect security, but look around, pick up the paper, everybody's getting hacked today. Nobody seems to have perfect security. And in the meantime, what does the United States government that, you know, I pay lots of tax money to to protect me from bank robbers and other bad guys, what is the United States government doing to stop Russians, Chinese, Iranians, Americans, North Koreans from coming in and disrupting, stealing from – in the case of Sony arguably nearly destroying – American businesses? So maybe this is not an FTC issue, but as you've looked to these issues, is it your sense that the U.S. is doing as much as it could or should be doing about the larger problem?

MS. OHLHAUSEN: Well, first of all, we don't require companies to have perfect security. They have to take reasonable precautions and we do close a lot more investigations than we bring suits on. So you should know that. We will take a look. If you took reasonable precautions, you have steps in place, you trained people, you didn't have gigantic oversights in your data security program. The FTC is not going to bring enforcement action against you. But by comparison if you say you were someone who owned – and I don't mean to make this parallel to Wyndham, but say you were someone who owned a hotel. And you had rooms. And you knew your rooms could easily be opened – jimmed open with a credit card. But you said, well, yeah we knew that, but it's the criminals who come in and break into the rooms, it's not us. I'm not sure that consumers would be very happy with that answer. I think that there's some obligation when you've taken sensitive information about consumers to take reasonable precautions to safeguard it.

Now, on the issue of the wider threats, I think that private security needs to play a role in the bigger picture. So certainly it's outside the FTC's area of expertise, but we do work with other parts of the government. This needs to be a broader approach. There are these threats. We need to be aware of them. Companies need to take, again, reasonable precautions. And the way I look at those is to train your staff to make sure you have the kind of password protection that others in your industry have and that you have a firewall. Because some of our cases, I don't think we've really gotten close to the line. You have people having tapes with sensitive medical data that they leave in their car all weekend. If that was my data, I wouldn't be so happy about that.

MR. EISENACH: OK, well, we're open for questions. Berin was the first one to raise his hand, so we'll go back here.

Q: So just to drill down on the FCC a little deeper. So you expressed the concern that they might issue regulations. They could do that. It's not really clear what they're going to do. What we know thus far is that they're not going to apply the existing CPNI rules directly. They're having a workshop at the end of April to explore what their approach should be, but it seems likely to me that what they're really going to do is to do case-by-case enforcement in the most perverse way.

They, last year, in their enforcement action against TeraCom, they discovered for the first time that the Section 222 or the basis for the CPNI rules are not actually the only basis for the FCC to regulate privacy. That 222(a) is a general authority for the FCC to do anything, including requiring reasonable data security. And also that 201(b), which covers just and reasonable practices, allows the FCC to regulate privacy and data security. And then in the order, they announced that Section 706 is the basis for regulating privacy and data security.

So it looks like they're planning to do case-by-case enforcement that might in some ways resemble what the FTC does, except not based on deception or unfairness with any of those limiting principles, just basically whether it's just reasonable, whether it promotes broadband. So what do you think about that approach as a different paradigm that's not strict regulation? It's not the kind of case-by-case that the FTC does. It's open ended. The agency isn't likely to issue any limiting principles. They're likely to just – as the chairman said when he was asked about the general conduct standard, he said, well, I don't really know how it's going to apply. We just seem to be a referee on the field, so we can throw the flag. Is that a good model for regulation to you and what lessons would you point the FCC to based on the FTC's experience?

MS. OHLHAUSEN: Well, certainly that model raises some concerns, as I have my three principles that I set out, it raises some concerns over those. I do think that focusing on substantial harm is important, making sure it's light touch, that you aren't too regulatory so you allow innovation.

But one of the other concerns I actually have about the difference between the FTC and the FCC is – what is the outcome? What are we trying to get? The FTC actually can get redress for consumers. So if there's been a violation that causes monetary harm to consumers, we can put the money back in consumers' hands. And we can also cover a several year period. The FCC has a fining authority and I think it can only go back a year.

When we're looking for the right tools, I would be concerned about those tools and even the ability for those tools to carry out some of the kinds of functions the FTC currently can do.

MR. EISENACH: More questions? Mike?

Q: Mike Nelson with CloudFlare. This is sort of an unfair question for two reasons. First, it's not your agency and second, it's about news that just happened in the last hour. (Laughter.) The president just put out an executive order on going after hackers and taking much more aggressive action to confiscate any assets they might have in the United States if we see that hackers are attacking our infrastructure. Have you had a chance to see even the headlines about this and do you think this is going to be helpful and how might the FTC be involved?

MS. OHLHAUSEN: All I saw was a tweet about it, so I'm hesitant to weigh in with 140 characters worth of knowledge on that. (Laughs.)

MR. EISENACH: Now, that's regulatory humility.

MS. OHLHAUSEN: I'm sorry. I do try to practice what I preach.

MR. EISENACH: All right. We'll come over here.

Q: Hi, Commissioner. I'm Carry Devorah from the Center for Copyright Integrity. You've got a tough job, but I think it's important to explain to people your use of the word "enforcement." You don't mean law enforcement. You don't put people in jail for what they do to consumers. And I'm trying to point people towards Title 18 of the Criminal Code. Now, announcing regulatoryhumility.com has just made you a target for ICANN and people who use the ICANN system of TLDs to clone your identity there. You'll probably have dot sucks within the hour, triple porn. It goes on. What steps are you doing to shut down ICANN, which is root core, ground zero for all of the other whack-a-moles that your agency is overburdened with?

MS. OHLHAUSEN: So the FTC does do law enforcement. It's civil law enforcement. We're not allowed to do criminal law enforcement because of our agency structure. We certainly try to pay attention to any forms of where scams and problems can come up and we do liaise with other agencies and with private civil organizations like ICANN.

MR. EISENACH: Next question, here we go.

Q: Thanks for your presentation. I just wonder just about almost every agency is not doing their job. And just about every consumer has a problem, nobody's going to help them. And you say FTC and it seems you can cover everything, but now you say you cannot really enforce anything actually. And we are talking about business. We are talking monopoly and we are saying – maybe say economy of large scale that that will be cheaper, but it's not – totally the opposite. Once the monopoly power, they raise everything higher. So like Internet, everything it's the same, especially they have a power to hacking people's account and hacking people's – not just Internet account. They can even terminate the account, but also the financial, everything, everything.

MR. EISENACH: Do you have a question?

Q: Yeah, my question is how are you going to help the law enforcement or pressure them to really prosecute those criminals to be to jail?

MS. OHLHAUSEN: In our antitrust enforcement, we do try to pay attention to market power issues. On the consumer protection side, if a company's made a promise and doesn't adhere to it or if they've used consumer information or harmed them in a way that caused a substantial injury, we can bring enforcement action. But I also want to mention we do have tools for consumers and consumer education to try to allow consumers to help themselves or if they've been victims of identity theft, how they go about taking steps to remedy the harms that have happened.

MR. EISENACH: Right here. Paul? Is it Paul?

Q: Yeah. Hi, thanks, Paul (Schroeder ?), American Foundation for the Blind. So I want to explore a market segment that doesn't really have much power, typically people with disabilities. Your colleagues over at the FCC – I'll say something nice about them, and we all have today – have been wrestling with implementing a law to require accessibility for advanced communications in televisions and similar devices and have, I think, done a reasonably good job of trying to balance industry and disability needs in the process. I want to give you just an example to, I don't know, maybe give me some free consultation advice on how one might handle this.

In the – the FCC has a limit, of course, on the areas in which you can regulate. One of the areas that's not touched is something, let's say, software used in the employment settings – customer relations, management database, you know, big software stuff. The way the Americans with Disabilities Act handles that, of course, is on a case by case basis, much like you've described. It's a reasonable accommodation between the individual and the employer that can either be solved or can't. That doesn't really allow for a solution to get to the developer of the software, the huge companies that actually make the product. It means that the burden falls on the employer to try to solve a problem that it can't because it can't really remake the code or on the person with disability who doesn't get the job because they can't do the job not out of their inability to do the job, but simply out of the software's inability to allow for accessibility.

So can you help me work through how a case-by-case solution works for this market segment that doesn't really have power and typically doesn't have a different place to go, maybe use that employment example as one to help me understand what a better answer might be?

MS. OHLHAUSEN: The FTC can only exercise the powers that it's been given by Congress. Our authority's over unfair and deceptive acts or practices. It would have to meet one of those requirements, or unfair methods of competition, which is basically a Sherman Act kind of antitrust violation. It sounds to me like your issue is that you have a segment of the population that's not being

served by industry. The FTC can help groups of the population who are being targeted for certain types of frauds and we do have special materials for people who have special challenges. But it's not something that I've actually seen for your segment of the population.

So I would be happy to have you come in and talk to our staff, but it's not immediately apparent to me what tools Congress has given us that we can bring to bear to your issue.

Q: I don't have the mic, but I was just saying, I was looking for you to go a little bit outside of your FTC roles and – (inaudible) – other people that are in FTC. Just to give a sense of what is the right answer to this issue of a group that doesn't (have it?) regardless of what agency it's that you're talking about. What is the correct policy prescription that balances the needs of that segment with the needs of industry and – (inaudible).

MS. OHLHAUSEN: Well, I do think one of the things that we've seen in the great explosion of innovation is that there are new tools that can reach different groups with different preferences a lot better. We all used to have sort of a one-size-fits-all in so many different ways. And so I would hope that perhaps innovation and new choices might be available to be more finely tuned.

I certainly have sympathy for your concerns because my own mother actually has a severe eye disability. And some of the technological changes that I've seen over time that have been able to serve her, I'm very excited about. So when I go to the Consumer Electronics Show and they show me the TVs that you can do voice activation I think, oh, that would be great for my mother. And I would love to see the day we get to cars that are self-driving for those kinds of reasons.

I don't have a solution to say we can do this for you through the FTC tools tomorrow, but I hope that keeping in mind that allowing innovations to develop can help to serve populations who have some needs that aren't shared by everyone in the community.

MR. EISENACH: So we're just about out of time. I'm going to take the mic back and ask the last question here. And a month or so ago – actually two months ago now, you and I were on a panel at a think tank across town and the topic of that panel was the Obama administration's antitrust policy kind of looking back. And the interesting thing about the substance of that discussion is that at the end of the day the Obama administration's antitrust policy has taken a more moderate course than one would have thought on day one, very much in contrast to what we've seen at the FCC in terms of the policy outcome. And also that the tone – particularly we were talking about the federal FTC – you and Josh have been on that panel – that the tone has been different from what seems to have happened at the FCC, which is really tremendous kind of contentiousness and even acrimony in the way the business is done.

And so I wanted to give you a chance to close by talking about an agency you and I both have spent some time at and have some respect for. How does it work at the FTC that even in areas where there is potential disagreement, A, we tend to find a reasonably moderate course, and B, we do so in a way that is mutually respectful of the people we work with?

MS. OHLHAUSEN: I think there's a couple of factors that go into that, and I've been a real student of the FTC structure and authority. And having done numerous reports leading up to the FTC's 100th anniversary, I've thought deeply about this. I think it is the clarity that our statute is supposed to reach consumer harm. We don't have a public interest standard. We don't have these confounding factors that one person may say it's in the public interest to do this and someone else may say to do that. And particularly in antitrust, where it's become such a field that's very much focused on economics and consumer welfare, not one competitor over another competitor. So I think that's helped a lot.

The FTC was also created with these special tools to do policy R&D. So a lot of our work over time, in these particular new areas, we try to lay down a basis – a baseline of knowledge. When I talk more fully about regulatory humility – I say it's really up to us to find out about new markets, new technology, and to understand them deeply. And we use this policy function to do that.

You talked about the net neutrality report I did in 2007. There's a host of reports like that. From those reports we begin to build a consensus on antitrust law and consumer protection law. For example, I was proud to have been a part of the State Action Task Force in the antitrust area. We did a report in 2003, from which we developed cases. It led us to win two cases in the Supreme Court recently – Phoebe Putney and North Carolina Dental – that drew the line of what was private action and what was state action in a way that I think is going to benefit competition and consumers a lot. But that took 14 years.

Having an agency like the FTC, where you've got a bipartisan agency, but that also has a research mission to build that consensus to pass the baton from administration to administration, Democrat and Republican, to get to that kind of outcome. I think that's something that has allowed the FTC to try to reach consensus and try to get to positions that over time can move the law in a way that's better for consumers.

MR. EISENACH: That's a great last word and we're going to leave it there. Please join me in thanking Commissioner Maureen Ohlhausen for being with us. (Applause.)

MS. OHLHAUSEN: Thank you, Jeff.

(END)