**Commissioner Julie Brill's Statement**
**About the Federal Trade Commission's Written Testimony**
**on "Reforming the Electronic Communications Privacy Act"**
**Submitted to Senate Judiciary Committee**
**September 16, 2015**

I write separately to describe my views regarding Part II.C of the Commission's written statement for the Senate Judiciary Committee's hearing on ECPA reform legislation.

In this section, the Commission asks Congress to create a "judicial mechanism" through which the Commission and other civil law enforcement agencies could obtain the contents of online accounts from ECPA-covered entities in the course of their investigations. The testimony frames this recommendation as an alternative to legislation that would require a criminal warrant to obtain content from ECPA-covered providers. I am not convinced that this authority is necessary to maintain the Commission's effectiveness as a law enforcement agency now or in cases that we can presently foresee. On the other hand, I am concerned that a judicial mechanism for civil law enforcement agencies to obtain content from ECPA providers could entrench authority that has the potential to lead to invasions of individuals' privacy and, under some circumstances, may be unconstitutional in practice.

As the Commission's testimony states, the FTC currently has some authority under ECPA to obtain content from ECPA-covered entities. Although this authority exists on paper, the Commission rarely if ever uses it. One reason for our forbearance from seeking content through ECPA is that situations in which this authority is useful are exceedingly rare. The Commission is highly effective in uncovering the identities and finding the locations of fraudsters and other targets by seeking basic identifying information under other provisions of ECPA. We are also very often successful in tracing the flow of ill-gotten money and locating assets that may be used for consumer redress through authority that is entirely separate from ECPA. In addition, we routinely acquire the contents of relevant documents, including nonpublic emails and other messages, either directly from targets or from third parties who are not subject to ECPA.

Moreover, for the past five years, a major, additional factor in the Commission's forbearance from obtaining content under ECPA is the Sixth Circuit's decision in *United States v. Warshak*, which held that obtaining the content of email through a court order, rather than a warrant, violated the Fourth Amendment.

In the meantime, the Commission has built an extremely impressive record of shutting down a wide range frauds and recovering hundreds of millions of dollars for consumers. In our investigations and in our efforts to enforce judgments, we encounter many obstacles – wasted assets and offshore defendants, for example – but an inability to obtain content from ECPA providers generally is not one of them.

The costs – in terms of privacy protections for consumers – of solidifying the

Commission's authority to obtain content through ECPA is real. Fundamentally, I believe that individuals' privacy interests extend to what they store and send online. I simply am not convinced that a judicial mechanism enabling civil law enforcement agencies to order ECPA-covered providers to turn over content will provide the safeguards against government intrusion to which individuals are entitled.

At the same time, I am not today endorsing proposals that would only allow law enforcement authorities to obtain ECPA-related content through a criminal warrant. I believe that the issues raised in today's hearing will benefit from further discussion and debate within the Commission and with Congress and all stakeholders.