

## **Oral Statement of Commissioner Christine S. Wilson, FTC**

As Prepared for Delivery

Before the  
U.S. Senate Committee on Commerce, Science and Transportation

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### **Introduction**

Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, I am pleased to appear before you today (albeit remotely).

I would like to highlight two areas where I respectfully believe that Congress could assist the Federal Trade Commission in fulfilling its mission to protect consumers and competition: first, by enacting federal privacy legislation; and second, by maintaining the focus on consumer welfare and economics-driven enforcement in antitrust.

### **Privacy Legislation**

With respect to privacy legislation, I agree with Chairman Simons' opening statement on this topic. Federal privacy legislation is necessary for several reasons. First, businesses need predictability in the face of a growing patchwork of state and international privacy regimes. Federal privacy legislation would provide needed certainty to businesses in the form of guardrails governing information collection, use, and dissemination. Second, consumers need clarity regarding how their data is collected, used, and shared so they can make informed decisions about which goods and services to use. Currently, there are significant information asymmetries with regard to consumers' knowledge of the privacy characteristics of various products, leaving consumers ill-equipped to evaluate the quality and value of those products. Third, there are growing gaps in the sectoral coverage of our existing privacy laws. For example,

the Health Insurance Portability and Accountability Act (HIPAA)<sup>1</sup> covers the privacy of sensitive health data collected by a doctor or pharmacist, but not by apps or wearables.

The need for federal privacy legislation is even more urgent now, given the spread of Covid-19, which is driving data usage in ways not previously contemplated by consumers. For tens of millions of Americans, work, school, entertainment, and social interactions have moved online. Businesses, researchers, and government entities have deployed consumer data to monitor compliance with quarantines and to implement contact tracing. And many view technology, including both contact tracing and widespread health monitoring, as key to safely easing quarantines and resuming normal life. But these tools are fueled by sensitive data regarding people's movements and their health. These initiatives have raised new and complex issues regarding consumer privacy, and have laid bare both the lack of clear guidance for businesses and the absence of comprehensive privacy protections for consumers.

Proposed contact tracing initiatives have also exposed the dearth of digital trust in this country. For disease containment initiatives to be effective, consumers must trust that government entities and businesses will be careful stewards of their data. But among those who use smartphones and can download contract tracing apps, a *Washington Post* poll found that more than half do not trust tech companies to ensure that people who report a coronavirus diagnosis using an app would remain anonymous.<sup>2</sup> Privacy legislation would help build digital trust around data collection and use, which is necessary to foster continued innovation and investment in the tech arena.

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<sup>1</sup> The Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Stat. 1936 (1996).

<sup>2</sup> Craig Timberg, Drew Harwell and Alauna Safarpour, *Most Americans are not willing or are able to use an app tracking coronavirus infections. That's a problem for Big Tech's plan to slow the pandemic*, WASHINGTON POST (Apr. 29, 2020), <https://www.washingtonpost.com/technology/2020/04/29/most-americans-are-not-willing-or-able-use-an-app-tracking-coronavirus-infections-thats-problem-big-techs-plan-slow-pandemic/>

An additional imperative for federal privacy legislation is protection of our rights under the Fourth Amendment. In applying the Fourth Amendment, courts employ a “reasonable expectation of privacy” analysis.<sup>3</sup> Consumers have grown accustomed to surrendering extensive data through their daily use of phones, computers, digital assistants, and other connected devices. If citizens know and accept that nothing is private, then they have no reasonable expectation of privacy, and protections under the Fourth Amendment are eviscerated.

While privacy is important, so is competition. Federal privacy legislation must be crafted carefully to maintain competition and foster innovation. The General Data Protection Regulation in the EU (“GDPR”) may have lessons to teach us in this regard. Preliminary research indicates that GDPR may have created unintended consequences, including a decrease in venture capital investment and entrenchment of dominant players in the digital advertising market.<sup>4</sup> Reports also indicate that compliance with GDPR is costly and difficult for small businesses and new entrants. U.S. legislation should seek to avoid these negative consequences. The FTC, with its dual mission in competition and consumer protection, is uniquely situated to provide technical assistance to Congress as it seeks to protect privacy while maintaining competition.

There are four other elements that I believe should be included in federal privacy legislation:

- First, the FTC should be the enforcing agency. We have decades of experience in bringing privacy cases, and we have the requisite expertise to tackle any new law effectively.

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<sup>3</sup> Katz v. U.S., 389 U.S. 347 (1967).

<sup>4</sup> See Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment* (Nat’l Bureau of Econ. Research, Working Paper 25248, 2018), <https://www.nber.org/papers/w25248.pdf>; *GDPR - What happened?*, WHOTRACKSME BLOG (2018), <https://whotracks.me/blog/gdpr-what-happened.html>.

- Second, any legislation should include civil monetary penalties, which Congress has included in other statutes enforced by the FTC, including the Children’s Online Privacy Protection Act.<sup>5</sup>
- Third, the FTC should be given jurisdiction over non-profits and common carriers, which collect significant volumes of sensitive information.
- Fourth, any law should include narrow and targeted APA rulemaking authority, which will enable the FTC to promulgate guidance and address technological developments.

Finally, on a related note, I encourage Congress to enact data security and data breach notification legislation.

### **Consumer Welfare and Economics in Antitrust**

Let me turn now to the FTC’s second mission, preserving competition. The consumer welfare standard in antitrust – in which competition in the markets for goods and services is measured by how well it serves consumers – has attracted criticism in recent years. Critics often over-simplify the standard by asserting that it is solely concerned with low prices. In fact, the consumer welfare standard encompasses other factors that consumers value, including quality and innovation; if people wanted only the cheapest product, we would still be using flip-phones instead of smartphones. But price does matter. As antitrust scholar Herbert Hovenkamp recently wrote, attacking “low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most.”<sup>6</sup> Many of us are fortunate enough today to be able to

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<sup>5</sup> Children’s Online Privacy Protection Act of 1998, 15 U.S.C. 6501-05; *see also* Children’s Online Privacy Protection Act Rule, 16 C.F.R. Part 312, available at: <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule>.

<sup>6</sup> Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* 45 J. CORP. L. 101, 130 (2019) (“The neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most. ... As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.”).

buy a higher quality, name-brand product – but most of us also can remember those early days when we were thankful for the availability of a no-frills, value-priced version.

Some conduct, like price fixing and market allocation, clearly drives up prices without any redeeming increase in quality or innovation. But most of the business practices and mergers that come before the antitrust agencies are more ambiguous in their effects. Enforcers determine whether a business practice is legal based not on its label, but rather by examining its empirical effects. For that reason, we need economic analysis to help us determine whether any harm to competition is outweighed by benefits to consumers. Fortunately, the FTC has a Bureau of Economics that provides the expertise and experience needed for such analysis, as well as for studies including merger retrospectives that help to inform our enforcement. We also can hire outside economists to testify at trial.

In the absence of economic analysis, antitrust at best would be a series of per se rules. This system would result in business decisions that prioritize form over function, creating market distortions and inefficiencies. The U.S. experienced this phenomenon during the decades when many vertical restraints that had similar welfare effects could be either per se illegal or per se legal, and when merger decisions were, as Justice Potter Stewart put it, a “counting-of-heads game” that ignored the actual competitive dynamics in the relevant market. At worst, antitrust untethered from economic analysis would be subjective and vulnerable to political manipulation. Companies would devote themselves to seeking the favor of legislators and regulators, instead of courting consumers.

## **Conclusion**

In closing, the FTC would welcome the opportunity to provide technical assistance to Congress on these issues. Thank you for your assistance in strengthening the FTC's ability to fulfill its mission.

I am happy to answer any questions you may have.