Interview with FTC Commissioner Maureen Ohlhausen

Editor’s Note: In this interview with The Antitrust Source, Commissioner Maureen Ohlhausen discusses the importance of transparency in Commission decision making, her consumer protection and privacy priorities, the role of industry self-regulation, the state action doctrine, enforcement in technology markets, and relations with other agencies.

Commissioner Ohlhausen, a Republican, was sworn in as a Commissioner of the Federal Trade Commission on April 4, 2012, to a term that expires in September 2018. She joined the Commission from Wilkinson Barker Knauer, LLP, where she served as a partner focusing on privacy, data protection, and cybersecurity issues.

Prior to joining Wilkinson Barker, Commissioner Ohlhausen served in a variety of roles at the FTC, including Director and Deputy Director of the Office of Policy Planning, an attorney advisor for former Commissioner Orson Swindle, and a staff attorney in the Office of General Counsel. Before her time at the FTC, Commissioner Ohlhausen spent five years at the U.S. Court of Appeals for the D.C. Circuit, serving as a law clerk for Judge David B. Sentelle and as a staff attorney.

Editors Randy Shaheen and Kristin McPartland from The Antitrust Source conducted this interview on September 25, 2012.

ANTITRUST SOURCE: Let’s start with a couple of background questions. Before becoming a Commissioner, you held a variety of roles at the Commission, including in the Office of Policy Planning, the Office of General Counsel, and a Commissioner’s office. How have those experiences shaped your thinking as a Commissioner?

OHLHAUSEN: These experiences have shaped my thinking in several ways. One of the ways was the ability to see how the different parts of the agency are meant to work together, how we get the best outcomes, and how important it is to use all the tools at our disposal.

The FTC is primarily a law enforcement agency; that is our main business. At the same time, it is important for us to use other tools, such as our economic research, industry-level research, or outreach to business and consumer groups. Using our non-enforcement tools allows us to both inform and explain our enforcement perspectives to our various constituencies, including consumers, the American Bar Association, Congress, and other stakeholders. I was fortunate in that all the different jobs that I had at the agency involved both enforcement and non-enforcement functions.

Secondly, I was exposed to the different strengths that we can bring from the different parts of the agency. For example, we have a Bureau of Economics to inform all the work that we do here in our enforcement and policy efforts. Of course it is very natural for economics to inform the competition side of the agency; however, economics ought to play an important role on the consumer protection side as well.

There is also the interaction between the Bureau of Consumer Protection and Bureau of Competition. The antitrust and consumer protection missions should really work hand in hand; they should complement each other. Sometimes, however, they tend to fall into separate silos.

I have never had a job at this agency that was particularly “siloed.” That was something that helped me to prepare to be a Commissioner because Commissioners, of course, are responsible for overseeing all activities at the agency on both the competition and consumer protection sides.
ANTITRUST SOURCE: In one of your prior roles at the agency you were involved in the “FTC at 100” project,¹ and you referenced that report in your swearing-in ceremony. What do you consider to be the key recommendations from that report, and do you anticipate advocating for those as a Commissioner?

OLHAESEN: My involvement in the “FTC at 100” report was a culmination of the different roles that I had played at the agency, including my work on the agency’s reports under the Government Performance and Results Act (GPRA) and my oversight of the agency’s 2006–2011 strategic plan. That work led up to me heading the “FTC at 100” project for then-Chairman Kovacic.

The goal of the FTC at 100 endeavor was not to say, “We are on the right track on healthcare cases, or we are on the wrong track on merger cases,” or something along those lines. It was focused more on the question of, if the agency were issued a report card, what subjects should be included on that report card? That is, rather than give us a particular grade in any particular subject, what should those subjects be?

There were several important principles that came out of the FTC at 100 effort that I will try to emphasize in my tenure as a Commissioner. One is that the FTC has to be very clear about what its mission is, and it has to articulate that mission clearly to others. It is important that our stakeholders, including the parties we sue, as well as Congress, consumer groups, and the business community, all understand what we’re doing and why we’re doing it.

Those stakeholders don’t all necessarily have to agree on what we’re doing in a particular case. That’s not the expectation. The expectation is that they have an understanding that this is the FTC’s mission and this is how we are going to carry it out.

Another important principle is, as I have already mentioned, the use of all of our tools. That includes offering guidance when we do seek enforcement, such as a clear and informative analysis to aid public comment. Alternatively, if we decide not to enforce, we have in certain cases issued a closing statement that provides guidance on why we don’t think it’s appropriate to move forward on a particular matter.

Also among those tools are policy R&D, with which we make sure our work, as much as possible, is supported by economic research and taking us in the right policy direction, and our outreach efforts, including consumer and business education.

Another important principle coming out of the FTC at 100 effort is the notion of paying very close attention to outcomes. Success should not be measured solely by activity. Bringing more cases doesn’t necessarily mean better outcomes for consumers than bringing a fewer number of cases that focus more on where the most consumer harm is occurring.

We need to focus on improving consumer welfare, and not just rely on the easy measurements, which ask how many cases you brought, how many reports you issued, and how many times you filed advocacy letters. Those numbers are interesting and we need to look at them, but we need to understand more about the effects of our efforts.

Finally, and I’ve already touched on this, it is crucial to maintain support for the agency’s mission through outreach. A big role of a Commissioner is to go out and be the public face of the agency, to talk to groups in the U.S. and internationally, and, frankly, to give interviews, such as this one.

**ANTITRUST SOURCE:** You also said at your swearing in ceremony that “the Commission [should] pay close attention to outcomes and to examine whether agency activity is actually improving consumer welfare and whether it can be done more effectively.”\(^2\) Were you referring to retrospective studies, and do you think more needs to be done in this area?

**OHLHAUSEN:** Retrospective studies are a very good tool, both to see whether we’ve made the right decisions and to see whether what we predicted would happen has actually happened. They are also a good tool, for example, when we haven’t been successful in a certain enforcement program to convince others that, notwithstanding our lack of success, our predictions were correct. Our hospital merger retrospective from the early 2000s is a very good example of that.

I think retrospectives can be very useful to look back at our predictions. For example, suppose we said that we were going to challenge a merger because we saw the market going in a certain direction. Did the market really go in that direction? Perhaps the merging parties were saying, “No, you’re missing the point: we’re moving to a completely different market structure or distribution model.” We should ask whether we got it right. Were we correct? If we weren’t correct, let’s get a better understanding of why we weren’t correct and factor that into our analysis in the future.

**ANTITRUST SOURCE:** In between your current role as a Commissioner and your prior roles at the FTC you spent several years at a law firm. Did representing companies before the FTC give you a different perspective on the agency?

**OHLHAUSEN:** Private practice was a very valuable part of my experience. I was at Wilkinson Barker Knauer, a telecommunications boutique law firm, and I headed up the firm’s FTC practice. I worked mainly on the consumer protection side, but I did some antitrust counseling as well.

My experience at the firm was very useful to see from the outside the effects of the FTC’s pronouncements and enforcement efforts on businesses. It also gave me some perspective on the burdens imposed on companies receiving information requests from the agency. We may say, “Give us this information,” but may not realize the burden that the request imposes on a company to provide that information. So it was very useful to me to have seen the world from both sides.

**ANTITRUST SOURCE:** What advice do you have for parties that are meeting with Commissioners to persuade them not to follow an adverse enforcement recommendation from agency staff?

**OHLHAUSEN:** Personally, I like to read things first. So if I can get papers or a white paper—of course, it doesn’t have to be a treatise—in advance of the meeting, that’s very helpful to me.

I would also recommend having a specific goal in mind. Come into the meeting and tell me why the market is changing, why these efficiencies really will happen, why the market should be defined differently, or something along those lines. Come in and say, “Here are the three things I want to tell you.”

Commissioners, of course, cooperate a lot with staff. They’re on the ground providing the Commission information. If a party has a new theory or idea or fact it wants to introduce into the dialogue, it’s helpful for the party to run that by the staff first. That’s not a hard and fast rule

because, if there is a development at the last minute, I certainly want to hear about it. But, it's not an effective technique to come in to a meeting with a Commissioner with a totally new theory or data that hasn’t already been provided to staff.

Also, good advice for everybody is not to overreach in your facts or legal arguments. You may have a legitimate point, but if it’s exaggerated, it tends to undercut your credibility.

**ANTITRUST SOURCE:** Many federal agencies permit respondents to deny liability or to “neither admit nor deny” liability in settlement agreements. Recently, some judges have pushed back against that practice. Do you have a view on the appropriateness of permitting a respondent to expressly deny liability when entering into an FTC consent agreement?

**OHLHAUSEN:** I do. At the FTC, our role is to stop harm that’s occurring in the market and to get the best result for consumers. We are not an agency that has authority to punish parties. With that goal in mind, I think whatever preserves the most flexibility for staff to be able to stop the conduct as soon as possible and get the best redress for consumers should be our priority.

Requiring defendants to admit liability would be a problem, as most well-counseled defendants would not settle on those terms and it’s not fair to impose this only on the less well-counseled defendants, who may not be any more guilty than the well-counseled. If we were to go to a standard under which parties had to admit liability, that would make it extremely difficult to reach settlements, which often are very efficient options to stop the bad conduct and get redress for consumers.

Even the courts, in the *Circa Direct* case for example, said they don’t want semantics—what's really the difference between “neither admit nor deny” and a denial of liability? And so even if we make a change, I’m not sure how much that’s going to satisfy the courts.

I believe this issue is merely a skirmish that should not impel us to expend resources to change our practice, which is currently consistent with that of DOJ and other agencies. Our proper focus is on stopping bad practices and obtaining redress for consumers, which is best achieved by preserving some bargaining leverage for staff on the wording in settlements.

**ANTITRUST SOURCE:** We’d like to turn now to some consumer protection questions. What is your view on what the Commission’s consumer protection priorities should be going forward?

**OHLHAUSEN:** One of the top priorities of the FTC should always be fraud and, particularly in this kind of economy, last dollar fraud that preys upon financially depressed consumers. Fraud of any kind is a big problem for consumers.

It’s also a problem for the market overall and for legitimate competitors who may be disadvantaged because consumers are choosing the fraudulent provider, based on erroneous information. In addition to the loss of business, the legitimate competitor often has to spend more in marketing and advertising to overcome consumers’ mistrust after they’ve been defrauded.

The FTC has had a very active fraud enforcement program for a long time. It’s a big part of our work, and I think it’s something we should definitely continue to make a priority.

**ANTITRUST SOURCE:** Are there other areas for which the Commission should be issuing guides or providing other forms of guidance?

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OHLHAUSEN: The Commission just released the revised Green Guides, which I think are a good example of how the FTC can play a beneficial role in the regulatory arena. I remember when they were revised in 1998, and this is an area of marketing that continues to grow. In connection with the revised Guides, the FTC did research about what messages consumers were taking away from environmental claims, which showed that they are confused about some of them. The FTC provided common sense guidance based on the research that we did, which asked: what do consumers understand, what do they take away, where are they confused?

The revisions continue to push the guidance in the right direction. For example, the new Guides include additional qualifications for the use of broad, unqualified claims like “environmentally friendly” or “eco-friendly,” which will help consumer understanding of such claims. Thus, the Guides will help ensure that the information conveyed is truthful and clear. I am also pleased that the revised Guides provided real-world examples of claims that do and don’t qualify as deceptive.

ANTITRUST SOURCE: Privacy is another important area. What do you view as the most pressing privacy issues that the Commission needs to address?

OHLHAUSEN: As I stated during my confirmation hearing and again in congressional testimony that I gave in May before the Senate Commerce Committee, the FTC has done a very good job in choosing its enforcement targets in the privacy area, focusing on traditional areas of deception and unfairness in addressing types of harm that have been well recognized under FTC precedent as being appropriate areas, such as financial and medical harm.

There's actually a recent case I want to mention, which involves rent-to-own stores that rented laptops to people, as well as the software company that helped design monitoring programs for the stores. At the request of the stores, but unbeknownst to consumers, the software company collected information from those laptops, including consumers' financial and medical information. The software could also activate the computer's webcam and take pictures of people, including pictures of them in the privacy of their bedrooms. The FTC brought the case against the software design company, not just the rent-to-own stores, because it played an active role in collecting the sensitive information and sent a deceptive software registration form to collect additional information. I think this case is a very good example of the kind of deception and unfairness enforcement that the FTC should continue to pursue.

I have concerns when we start to broaden the kind of harms that are deemed unfair. In deception, that's a different case. The harm in deception is not as big an issue because we are basically enforcing promises that the business chose to make.

If I'm a particularly privacy-sensitive consumer and I visit a site that promises, “I'm going to protect the information that your hair is brown and you're five foot two,” they need to keep that promise. Even though anybody who sees me would know those two facts, if a site commits to protecting that information, that promise should be enforced.

In the unfairness area—where the business hasn't made an overt promise—the types of harm that we traditionally consider unfair involve finances, health and safety, and information about children. I'm concerned about some of the statements the Commission made in the Privacy Report

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to expand unfairness to cover intangible or reputational harms.6 Once you depart from the traditional areas of harm, consumer preferences about sharing such information start to vary widely, however, and we need to be careful about recognizing those variations.

ANTITRUST SOURCE: You just anticipated our next question. In your May 2012 statement, you indicated some concern about harm occurring now that might not be reached under Section 5 and how to study those harms. Have you developed your thoughts further on how the Commission might look at these issues?

OHLHAUSEN: One of the questions that I’ve been asking is what harms are occurring that we can’t currently reach? For example, when you have a case like the one that I described in my previous answer, those are some pretty obvious harms. It was intrusive behavior, but we were able to stop it under our traditional unfairness and deception principles.

Before we jump in and say there should be “do not track” legislation, what I meant by my testimony in May was that I wanted to see what harms are occurring that Section 5 could not reach. So far, it appears that we can protect the kinds of information that most people and Congress agree should be private. Thus, I do not believe we need to expand the types of harm we should consider unfair. With that said, we should use our deception authority when companies break their promises to keep any type of information private.

ANTITRUST SOURCE: The FTC’s privacy report called for a “do not track” option in Internet browsers, which several major browsers are now working to implement. Do you agree with that recommendation and do you see a need for or expect legislation in this area?

OHLHAUSEN: I think that self-regulation generally can play a very useful role in protecting consumers, and there are many self-regulatory organizations that have been quite effective over the years. There’s a lot of self-regulatory activity going on both in the browser space and with advertisers, and those efforts should be allowed to play out. Before we jump in and say there should be “do not track” legislation, I think it’s important for the self-regulatory process to continue because it may be the best way to give consumers the tools to express their preferences.

The bottom line is giving consumers meaningful choice. If a consumer has concerns about being tracked, can self-regulation produce an option that allows them to express their preference and not be tracked? I think the self-regulatory process holds a lot of promise for those issues to be worked out in a more flexible way than legislation.

ANTITRUST SOURCE: One area that is generating a lot of discussion is disclosures on mobile devices. How much leeway do you think the Commission should give advertisers when they are working with platforms with some inherent limitations?

OHLHAUSEN: We had a workshop in May on disclosures and mobile devices.7 Mobile devices may take disclosures or wording that was developed for a desktop monitor and push it down to a small

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screen on the handset, and that’s a challenge. But, technology is moving to meet consumer demands, so industry must develop appropriate new models that will provide the information consumers need. The FTC’s role is using our outreach and other tools to help meet this challenge. I think this workshop was a good way to get the key stakeholders in the room and talking to each other.

Consumers need to have an understandable disclosure that can be viewed on the small screen, which is clear about what information is being collected and how it’s being used. There may be a variety of ways that that can be achieved, perhaps through an icon system like the Care Labeling Rule tag on your clothes or some other way to condense that information and convey it to consumers on their handsets.

It’s interesting to see some of the developments that are actually happening at the handset level, where Apple and Android are making significant progress in notifications. There’s not just one way to do it.

**ANTITRUST SOURCE:** You’ve spoken before about having a layered approach where consumers can see the high points and allow those who care more to read further. It sounds like you’re already seeing that, or will the Commission need to get more involved to move industry towards that approach?

**OHLHAUSEN:** I do think that’s the case. In the Privacy Report, which came out in March, the FTC did recommend as a best practice that companies consider using a layered approach. When I was in private practice talking to my clients, they were definitely interested in moving to that.

You want to give consumers the information that they need, but you don’t want to give them too much information such that it becomes a useless morass. It’s necessary to strike a balance. But again, we need to have a dialogue about it, and the mobile disclosure workshop was a good way to hear the views of many interested people.

**ANTITRUST SOURCE:** We’d like to turn now to some antitrust-related questions. You have described the importance of transparency in Commission decision making. Do you think the Commission and the Bureau of Competition issue enough closing statements and, if not, are there other things the Commission might do to improve transparency in competition matters?

**OHLHAUSEN:** I think the Bureau does a pretty good job of identifying cases in which they think there should be a closing statement. Occasionally I’ll ask staff whether there should be a closing statement in a given matter. But overall, in my tenure here, I think they’ve gotten it right.

**ANTITRUST SOURCE:** The Commission recently decided to withdraw its 2003 Disgorgement Statement, a decision from which you dissented. Even though you give the Commission a pretty good grade overall on transparency, was that a step in the wrong direction?

**OHLHAUSEN:** I think so. We had the 2003 Disgorgement Statement, which was a bipartisan state-

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ment. It was endorsed by the Antitrust Modernization Commission.\textsuperscript{10} When initially adopting the statement, the Commission put it out for public comment. I was troubled that we didn’t follow a similar process in rescinding it, or even in deciding whether it should be revised. I was also troubled that, in withdrawing the statement, we simply stated that case law provides sufficient guidance as to how we might use our disgorgement authority going forward. If you take that approach too far, that’s a reason not to give guidance on anything. For example, you can always be concerned that, if we give guidance during the merger review process, such as through the Horizontal Merger Guidelines, a court could decide that the Guidelines say one thing but the Commission is trying to do something different.

In terms of the process, the idea, of course, is to give interested parties an opportunity to weigh in on a proposed change in Commission policy. Perhaps they would have told us something that we don’t know—either in favor of or against rescinding the statement.

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\textbf{ANTITRUST SOURCE:} You just mentioned the Horizontal Merger Guidelines, which were revised about two years ago.\textsuperscript{11} Do you see a need to update or issue any other competition enforcement guidelines, such as with regard to vertical mergers?
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\textbf{OHLHAUSEN:} So far, in my limited experience as a Commissioner, I have not seen a reason to revise the guidelines on vertical mergers. It may be something to consider if we see considerably more vertical mergers, but I just haven’t seen that many yet.
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\textbf{ANTITRUST SOURCE:} Some have argued that the antitrust agencies and antitrust law generally are not well suited for evaluating transactions and conduct that occur in rapidly changing markets, such as technology markets. What are your thoughts on this?
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\textbf{OHLHAUSEN:} First of all, I would be curious for people who raise that to say what would be better. To paraphrase Winston Churchill, it’s the worst system except for all the rest. But I do think antitrust is sufficiently well suited to the task. Obviously, technology markets move quickly and often. As a result, the agency needs to stay informed about what’s going on, and that’s one of the benefits of our policy function. When I was the head of the Office of Policy Planning—and I think this continues today—one of its roles was to ask what is over the horizon, what do we need to know about so that the Commission is sufficiently informed to be able to address problems when they arise in a given technology market.

I think it is very important for the Commission to dedicate resources for studying market dynamics, technology changes, and the accompanying legal and economic issues. Having a chief technologist on staff now is a very good resource for doing that.

But I think we’ve actually done a pretty good job of enforcement in technology markets and recognizing the competitive importance of changes in technologies or market dynamics. Of course, a change can occur even while we’re looking at a transaction, as evidenced in the closing of the

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Google/Admob investigation in 2010. So, we need to be sensitive to these dynamics, and I think we need to keep our knowledge up to date, but I think antitrust is still a very effective tool.

ANTITRUST SOURCE: You spoke earlier about the need to do retrospective studies to see how prior enforcement decisions played out. Do you think the technology sector would be a good place for those types of studies?

OHLHAUSEN: I do. I think that could be very useful because there may well be opportunities to learn from our efforts in that sector.

One matter that comes to mind is the Blockbuster/Hollywood Video merger, which was ultimately abandoned in the face of FTC opposition. One of the questions there was the expected effect of a transaction that would have resulted in a firm with significantly more brick-and-mortar video stores. But, even then (in 2005), the industry was moving toward streaming, and I don’t know if we as an agency really understood the magnitude of that change in video distribution during the investigation. These are the kinds of things that we need to do in evaluating fast-changing industries—really understand what’s happening in terms of changing business models and consumer preferences.

ANTITRUST SOURCE: There are two pending cases right now that the FTC has involving state action: the North Carolina Dental case before the Fourth Circuit and the Phoebe Putney merger before the U.S. Supreme Court. The state action doctrine is an issue with which you have been long familiar, given your prior role on the FTC’s State Action Task Force. What effect do you think the State Action Report has had, and do you think the courts are doing a better job of applying the state action doctrine as a result of that report?

OHLHAUSEN: I think the report helped focus some thinking on the proper application of the state action doctrine by the courts. There is a certain amount of anticompetitive activity that is being inappropriately sheltered under this doctrine.

And when we issued the report, we didn’t just describe the case law. We also worked to develop cases in this area, including North Carolina Dental, South Carolina Board of Dentistry, and some other cases.

I think we have been making some progress in getting commentators and courts to think more clearly about the proper application of the doctrine. They are asking what is at stake: is it a regulatory scheme enacted by the state that is clearly articulated and actively supervised, or is it really competitors getting together and stepping into the shadow of the state to pursue their own private interests?

ANTITRUST SOURCE: Obviously, the Commission disagreed with the way the Eleventh Circuit

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13 FTC v. Phoebe Putney Health Sys., Inc., No. 11-1160 (U.S.); North Carolina State Bd. of Dental Examiners v. FTC, No. 12-1172 (4th Cir.).


applied the state action doctrine in the *Phoebe Putney* case.\textsuperscript{16} Do you have a wish list in terms of how you would like to see the Supreme Court clarify the state action doctrine in that case?

**OHLHAUSEN:** The question in *Phoebe Putney* is whether a grant of general corporate powers includes the power to restrict competition or effectively give a monopoly to a private healthcare provider. If so, that’s problematic. I think it would be a very good outcome to have the Court say that an authorization of general corporate powers does not constitute a clear articulation to displace competition. About twenty states have joined an amicus brief saying an opposite conclusion would impose a big burden on states and undermine their authority to decide when competition ought to be displaced in a particular area.

I also think it’s important for the Court to decide this way to make a point that exemptions from the antitrust laws should be drawn very narrowly and should be tied back to the reason that they were created in the first place. The state is a sovereign. If it says, “We’re going to set the prices here, and we think that’s in the state’s interest,” that’s generally fine. But if the state is saying, “We’re going to displace competition, but we’re not going to really pay any attention to how it’s done,” the interests of the state’s citizens are not being furthered.

**ANTITRUST SOURCE:** You have also written about the *Noerr-Pennington* doctrine, which is another limitation on the reach of the antitrust laws. Do you see the need for the Commission to bring some cases to help clarify the boundaries of this defense the way it has done in the state action area?

**OHLHAUSEN:** I think that would be a useful thing if you find the right case. We don’t want to bring one that’s not quite right because we could be worse off than if we had not brought it at all. I am particularly interested in the issues surrounding repetitive petitioning and the so-called pattern exception to *Noerr*. There’s a pretty stringent sham litigation standard right now, and I’m not sure if it makes sense to apply such a high standard if there are multiple suits brought by a party alleged to be engaging in sham litigation. There is also the misrepresentation exception. The FTC applied that in its 2004 *Unocal* decision,\textsuperscript{17} and I think that was a very valuable contribution to *Noerr* precedent. So I think that if we could find something similar that could bring that kind of clarity to repetitive petitioning, that would be helpful. But we have to find the right case.

**ANTITRUST SOURCE:** There has been a lot of discussion about making sure that consumers have cost-effective access to the Internet and the latest technologies, whether from their homes or from mobile handsets. As you know, the Commission shares jurisdiction with the FCC in this area. Do you see opportunities for the FTC to help advance the goals of having broader cost-effective access to those technologies?

**OHLHAUSEN:** I certainly am a big supporter of the FTC playing a role, on both the competition and the consumer protection side, in the Internet access area. But ultimately with respect to cost-effectiveness, the market sets the price for Internet access, as with any other product or service. Internet access is an important market, and it raises important antitrust issues. We should therefore pay attention to it. That was certainly our intention when we formed the Internet Access Task


\textsuperscript{17} Union Oil Co. of Cal., 138 F.T.C. 1 (2004).

But it's also a consumer protection issue. Right now we certainly have an interest in ensuring that consumers get the service—whether it's the costs or other features of the plan—that they have signed up for. So our antitrust and consumer protection focus in the Internet access area is largely the same as in more traditional areas of the economy: protecting competition in the marketplace and making sure that promises to consumers are being respected.

\textbf{Antitrust Source:} You are the first Commissioner confirmed after passage of Dodd-Frank and after the birth of the Consumer Financial Protection Bureau.\footnote{Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).} As a Commissioner, how does the presence of the CFPB and your shared jurisdiction with them on a number of issues inform your perspective on consumer protection issues involving financial products?

\textbf{Ohlhausen:} Dodd-Frank preserved the FTC's enforcement authority, although rulemaking in the financial arena was generally transferred to the CFPB.

It makes sense for us to coordinate with the CFPB to share some of our expertise, and the evidence I've seen is that both agencies are committed to doing that. For example, we just filed comments with the CFPB providing them advice on their work on mortgage disclosure statements. The FTC's Bureau of Economics has done studies in this area, and those efforts can significantly benefit the CFPB's work. We have several joint agency working groups and joint investigations underway.

It's common knowledge that the FTC doesn't have—and has never had—jurisdiction over banks. But it makes sense for us to continue to focus on non-bank lenders. For the CFPB to have the authority in areas where the FTC does not makes a lot of sense. The memorandum of understanding between the two agencies spells out the parameters of how the coordination will work.

We want to avoid, for example, conflicts where there are two different standards applied or duplication of effort or double burdens on industry. It will take careful coordination between the CFPB and the FTC to make sure those don't happen, but I think that commitment is there.

\textbf{Antitrust Source:} Your predecessor was a vocal proponent of making sure that the FTC was a five-star, elite agency amongst the various global competition agencies. Do you see particular things that the FTC ought to do to maintain its leadership role on the international stage?

\textbf{Ohlhausen:} Yes, the way the agency got to that status was by investing its resources in engaging with foreign competition authorities and also global organizations such as the ICN and the OECD. We continue to play that leadership role.

I was just in Vietnam for a meeting of ASEAN members to address merger and acquisition regulation. And the thing that really came through to me was how much the members of the Vietnamese delegation appreciated the FTC's commitment, including sending people to do technical assistance in Vietnam. The FTC really has put in the work and the time to help other countries as well.
We’re reaching out more to other key players in growing economies in countries like China and India. In fact, we’re signing a competition-related Memorandum of Understanding with India this week. There are also the international consumer protection efforts that we have undertaken and will continue to pursue. So I think that’s how we got to the point where we are, and that’s certainly how we’ll maintain it.

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“Up To” Advertising Claims: The FTC Weighs In

Joel Winston

You see them all the time—advertisements claiming that a product or service will achieve a benefit of “up to,” “as much as,” or “as low as” a specified figure. Car dealers and finance companies, for example, may promote prices “as low as $16,995,” or rates “as little as 3% APR.” Sellers of energy-savings devices may promise savings of “up to 50%” off your utility bills.¹

It’s not uncommon that there is a disconnect between what messages advertisers intend to convey and the ones consumers perceive. In this case, it seems fair to conclude that what advertisers are trying to say through a phrase such as “up to” is that the results individual consumers will achieve will vary and that the stated figure is a best-case scenario that not everyone, or even most, will obtain. Unfortunately, that may not be the same message that consumers (or the government) understand such language to be conveying, and it is consumer perception—not advertiser intent—that ultimately counts.

Recent actions by the Federal Trade Commission involving window replacement advertisements—including five consent orders, warning letters to fifteen additional advertisers, and a report on the results of a copy test involving claimed energy cost savings—suggest that at least one agency of the government believes consumers read “up to” claims very differently from what most advertisers may have assumed. They also may provide considerable insight into what the FTC believes might be a deceptive practice under Section 5 of the Federal Trade Commission Act.

The FTC is to be commended for its efforts to provide guidance to advertisers on when “up to” claims are permissible, and especially for its reliance on actual evidence of how consumers interpret such claims. Nonetheless, a number of important questions remain about what exactly the FTC’s guidance means, and additional clarity from the FTC would be useful. In the meantime, businesses should exercise caution about using “up to” claims in their advertising.

The Legal Framework

Section 5 of the Federal Trade Commission Act² prohibits unfair or deceptive acts or practices in or affecting commerce. An advertisement is deceptive if it contains a representation that is likely to mislead consumers acting reasonably under the circumstances, and that representation is material.³ Therefore, to determine whether an ad is deceptive, advertisers first need to consider what messages, or representations, the ad communicates to reasonable consumers.⁴

¹ For ease of reference, this article will refer to all claims of this type as “up to” claims.
⁴ FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994).
Advertisements may convey both express and implied claims. Express claims are self-defining—the ad speaks for itself. Conversely, determining whether an ad makes an implied claim requires analysis of the advertisement and the relevant context. For its part, the Commission first views the advertisement on its face to ascertain its “net impression.” If, based on this facial analysis, it is unable to determine with confidence what claims consumers are likely to take from the advertisement, the Commission looks to extrinsic evidence of how consumers actually interpret the ad, often consumer copy tests.

The Five Replacement Window Cases
On February 22, 2012, the FTC released five settlements with manufacturers of replacement windows. In each case, the Commission challenged advertisements claiming energy and cost savings that consumers could achieve by installing the respondent’s windows. In two of the cases, the respondent’s advertisements claimed energy savings and reductions in energy bills of “up to” a certain percentage. The respondent in Winchester Industries ran ads which, among other things, claimed that consumers would achieve “energy savings” of “up to 47%.” In Serious Energy, some of the ads stated that the window “reduces heating & cooling costs by up to 50%” and “cuts your energy bills by up to 40%.” The ads also included energy savings and cost reduction claims that were not qualified by any “up to” language.

In the other three cases, the advertisements quoted in the complaint did not make “up to” claims. In Gorell, the ads “pledged” that consumers would save “40%” or “at least 40%” in energy for both heating and cooling. In Long Fence, the ads included a “guarantee” of “50% savings,” and promised to reimburse consumers for any shortfall. In THV Holdings, the advertisements included a “guarantee” that the consumers’ savings would equal the installation cost within eight years and that “homeowners will typically experience a 35% to 55% reduction in monthly energy bills.”

Despite the differences in the express statements made in the five companies’ ads, the Commission alleged in each of the complaints that the respondent represented that consumers are “likely” to achieve savings of the specified amount or percentage.

6 A copy test is a form of market research in which a sample of consumers is exposed to a stimulus, such as an advertisement, and then asked a series of questions to elicit what messages they perceive in that stimulus. Kraft, 970 F.2d at 318; Thompson Med., 104 F.T.C. at 788–89.
Comment \(^{13}\) issued with the proposed consent orders explain the FTC’s view that, at least in the circumstances of these cases, an “up to” performance claim operated no differently than an unqualified performance claim.\(^ {14}\)

Part I of each order prohibits unsubstantiated energy savings claims for any covered product,\(^ {15}\) and mandates that the respondent must be able to substantiate that, for any “up to” claims, “all or almost all consumers are likely to receive the maximum represented.”\(^ {16}\) On its face, requiring substantiation that “all or almost all are likely” to achieve the outcome connotes a more rigorous standard than showing the outcome is “likely.” And both standards appear to impose a more rigorous test than the FTC has required previously.

**The Copy Test**

The FTC may be signaling its intention to apply its new, tougher standards for “up to” claims broadly through its recent release of a copy test of an advertisement based on one used in the window marketer cases as well as its issuance of a series of warning letters to other window manufacturers.

On June 29, 2012, the FTC published a report summarizing the results of a copy test it had conducted on how consumers interpret “up to” claims and how such claims influence consumers’ beliefs about the product.\(^ {17}\) Among other things, the copy test found that adding “up to” to a performance claim was ineffective in qualifying the claim. The study tested the communication of an advertisement from the *Winchester Industries* case. Using a mall-intercept methodology, 360 consumers in five markets were exposed to one of three mocked-up versions of the ad:

- Ad 1 stated that the window is “PROVEN TO SAVE UP TO 47% ON YOUR HEATING AND COOLING BILLS.”
- Ad 2 was identical to Ad 1, but omitted the words “UP TO.”
- Ad 3 was identical to Ad 1, but with an added disclosure: “The average Bristol Windows owner saves about 25% on heating and cooling bills.”

The testers asked survey respondents a series of open-ended and close-ended questions about the claims they perceived in the ad they had viewed and the beliefs they had formed about the product as a result. The report concluded that both the “up to” qualifier and the disclosure of average results were generally ineffective to change consumer perception about their likelihood of achieving the maximum outcome.

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13 The FTC releases an Analysis to Aid Public Comment when it issues a consent agreement for public comment. The Analysis provides a non-technical summary of the complaint, proposed order and, in some instances, the reasons for entering it.


15 The five orders with the window marketers define the term “Covered Products,” broadly speaking, to include windows or window components and any other product or service for which the respondent makes any claim about energy usage or savings, cost savings, insulating properties, thermal performance, or the like. See, e.g., id.

16 Under this proviso, advertisers that limit the claim to specific circumstances need only have substantiation for the performance of the product under those circumstances. Id.

● About half of the consumers who viewed Ad 1 (with the “up to” qualifier) took the claim to mean that users could expect to receive approximately a 47% savings. 18

● The “up to” language made no difference in consumers’ understanding of the ad—the percentage of consumers to whom the 47% savings claim was communicated was statistically the same for those who viewed Ad 1 and those who viewed Ad 2.

● The disclosure of average results in Ad 3 was also ineffective—the percentage of consumers to whom the 47% savings claim was communicated was statistically the same as for those who viewed Ads 1 and 2.

● Similarly, the persuasiveness of the advertisement was not affected by the “up to” qualifier—there was no statistically significant difference between Ad 1 and Ad 2 in the percentage of consumers who believed that most consumers could expect to save about 47% on their bills. The disclosure in Ad 3, however, did reduce that belief somewhat.

The copy test also measured how consumers interpreted an “up to” claim in terms of the likelihood of achieving the maximum result. Of the participants who perceived the ad to be making a 47% or about 47% savings claim, about 28% interpreted that to mean that “all” or “almost all” consumers would achieve such savings. An additional 14% interpreted the claim to mean that “most” consumers would achieve that result. 19

Although the report contains no enforcement or other recommendations, the FTC issued a press release with the report that included the following statement: “The FTC believes the report will help guide advertisers to avoid the use of misleading ‘up to’ claims. It reinforces the FTC’s view that advertisers using these claims should be able to substantiate that consumers are likely to achieve the maximum results promised under normal circumstances.” 20 It is unusual for the Commission to issue an admonition of this type through something as informal as a press release.

The Warning Letters

On August 29, 2012, the FTC announced that it had issued letters to fifteen additional companies marketing windows or window glass warning them that they might be making unsubstantiated energy savings claims similar to those challenged in the five settled cases. 21 Each of the letters included the following bullet point:

18 An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim. See, e.g., Kraft, 114 F.T.C. at 122; Telebrands Corp., 140 F.T.C. 278, 291 (2005), aff’d, 457 F.2d 354 (4th Cir. 2006).

19 Only those participants who had perceived the ad as claiming savings of 47% or about 47% were asked the question of how many consumers could expect that level of savings. Nearly half of the sample did not perceive the 47% or about 47% claim in the first place. When those participants are factored in, only about 15% of the entire sample took an “all” or “almost all” claim, and an additional 7% took a “most” claim (which the FTC presumably equates with “likely.”) These percentages may be high enough to establish, as a matter of law, that the claims were conveyed See Novartis Corp., 127 F.T.C. 580, 684–85 (1999) (claim is conveyed if it is perceived by a “significant minority” of consumers; 30 to 45 percent is “more than a significant minority”). Nonetheless, in considering how broadly to apply its “likely” or “all or nearly all are likely” standard beyond the specific claims at issue for window replacement products, it is important to keep in mind that, even for these specific claims, fewer than 1 in 6 consumers (15%) took the “all or nearly all” message and fewer than 1 in 4 (15% plus 7%) took the “likely” message.


Avoid Deception When Making “Up-to” Claims. A recent FTC study shows that many consumers interpret claims that windows will save “up to” a specified amount of energy to mean that all or almost all users are likely to get the specified savings. . . . Therefore, to avoid deception, you must clearly convey the results consumers are likely to get. For example, if you say that consumers will save “up to” a specified percentage in savings, your substantiation should prove that all or almost all consumers are likely to get that percentage in savings.

The FTC’s Past Treatment of “Up to” Claims
The FTC has been challenging “up to” claims for many years. In many cases, the Commission has declined to interpret what the “up to” claim implied. In those cases, the representation alleged in the Complaint—i.e., the FTC’s characterization of what message it believes consumers took from the statements in the advertisements—simply repeated the ad language without any attempt to interpret it.22 Other cases, however, have included various interpretations of “up to” language:

- “[A]n appreciable number of consumers” will receive the maximum or close to the maximum result under normal conditions.23
- Consumers will receive “consistently significant” results.24
- The product will “consistently produce results in the range of the stated [maximum].”25
- The product will produce “substantial” results.26


23 E.g., Plaskolite, 101 F.T.C. 344 (1983); Cynex Mfg. Corp., 104 F.T.C. 464, 475 (1984); GCS Electronics, 108 F.T.C. 158 (1986). The FTC has never revealed what it considers to be an “appreciable number,” but the traverse paragraphs (the standard paragraph in FTC complaints that in some cases explains why the Commission believes the representation is unfair or deceptive) in these cases alleged that “few if any consumers” achieved the maximum or close to the maximum result. How many more would comprise “an appreciable number” is unresolved. At least one court has expressed a view on this question, however. In FTC v. Pacific Medical Clinics Management, Inc., 1992-1 Trade Cas. (CCH) ¶ 69,777, the FTC challenged claims that consumers who enrolled in a weight loss clinic would lose “up to thirty pounds in thirty days.” The court found that the claim was deceptive because only 1.07% of consumers achieved this result, holding that this percentage was not “an appreciable number.”

The National Advertising Division of the Council of Better Business Bureaus, the advertising industry’s self-regulatory group, still applies the “appreciable number” test in adjudicating advertising disputes, even though the FTC has not used it in recent years. See CableVision Sys. Corp., NAD Case No. 5412 (1/6/12) (“up to” claims about internet speed “must be supported by evidence demonstrating that the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances typically encountered by consumers.”).

24 Automotive Breakthrough Sci., Inc., 126 F.T.C. 229, 301 (1998) (“The claim, ‘tests show up to 30% reduction,’ in our view, conveyed a message that respondents had and relied on tests that showed consistently significant reductions in stopping distances. In fact, the record is devoid of test results that demonstrate that ABS/Trax consistently reduced stopping distances by any substantial percentage, let alone 30%. To the contrary, the record contains both reliable and probative evidence that respondents’ product did not and could not perform as claimed.”).

25 See Telemarketing Sales Rule, 75 Fed. Reg. 48,458 (Aug. 10, 2010); “Providers should be cautious in purporting to qualify their savings claims to make sure that the qualifications are effectively communicated to consumers. For example, phrases such as ‘up to’ or ‘as much as’ (e.g., ‘up to 60% savings’) are likely to convey to consumers that the product or service will consistently produce results in the range of the stated percentage or amount.” Id. at 48,500 n.578.

The stated maximum is the “typical” or “average” result.\(^{27}\)

**The Commission Has Not Explained the Variations in Its Interpretations.** It is worth noting that the representation alleged in the window manufacturer complaints (whether the ad included the “up to” language or not) was itself a qualified one—that consumers are “likely” to receive the advertised performance. The FTC has typically interpreted unqualified performance claims in an unqualified way, i.e., that the product will achieve that performance.\(^{28}\) The *Gorell*, *Long Fence*, and *THV Holdings* cases represent a departure from that practice, in effect reading unqualified claims to be qualified, i.e., that consumers are “likely” to receive that performance, thereby suggesting that some consumers may not.\(^{29}\) Whether the Commission intended these five cases to signal a new way of interpreting performance claims, or whether it is limiting that interpretation to the facts of these cases, is unclear, but it seems reasonable to think that at least in some cases, depending on the context, consumers may understand that not everyone will receive the result claimed in the ad.\(^{30}\)

In another change from past FTC practice, until this year, the Commission had based its reading of “up to” claims on its own facial analysis of the advertisements employing them. The copy test marks the first time that the Commission has stated publicly that it had empirical evidence of how consumers understand “up to” claims.

**The FTC’s Current Standard**

It is important to note that the FTC has not issued a formal interpretation of “up to” claims, such as might appear in an FTC rulemaking, Guide, Enforcement Policy Statement, or litigated opinion. Rather, advertisers have to try to glean whether the Commission’s formulation of the “likely” or “all or almost all are likely” tests change the prior interpretations by reading the complaints and orders in the five window cases, the survey report and press release,\(^{31}\) and the subsequent warning letters. It is important for advertisers to understand what the FTC’s actions mean and conform their practices to the extent possible, particularly because the press release issued with the Report noted that it was intended to “help guide advertisers to avoid the use of misleading ‘up to’ claims.” Businesses that ignore this guidance may become the targets of FTC cases.

Since the FTC has, even in these recent actions, set out two different formulations for “up to” claims—that advertisers must be able to show that (1) consumers are “likely” to receive the stated maximum result; or (2) that “all or nearly all consumers are likely” to receive that result—adver-

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\(^{27}\) FTC v. Febre, No. 97-1230, 1996 U.S. Dist. LEXIS 9487 at *5 (N.D. Ill. 1996) (“Thus, while it might not be reasonable to believe that everyone who participates in the program would earn the stated amount, it can be presumed that a consumer would reasonably believe that the statements of earnings potential represent typical or average earnings.”)


\(^{29}\) Although a departure from standard practice, this approach is consistent with the one taken by the court in *FTC v. Five-Star Auto Club, Inc.*, which held that an unqualified performance claim implies that the result is “typical,” in other words likely but not necessarily universal. No. 99 Civ. 1695, slip op. at 32 (S.D.N.Y. May 17, 2000), available at http://www.ftc.gov/os/1999/03/fivestardecision.pdf.

\(^{30}\) See, e.g., Initial Decision, California Milk Producers Advisory Board, 94 F.T.C. 429, 546–47 (1979) (claim that “every body needs milk” was not deceptive even though a small percentage of consumers are lactose-intolerant); but see Firestone Tire and Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973) (unqualified claim for “the safe tire” implied absolute safety and that all of the advertised tires were entirely free of defects).

\(^{31}\) Although FTC press releases are ordinarily drafted by the Office of Public Affairs without input or a vote from the full Commission, it would be unlikely for the agency to issue a press release reflecting a significant policy change without at least an informal consensus among the Commissioners.
tisers face confusion as to what level of performance they will need to be able to show in order to make an “up to” claim. It seems clear that the days of “an appreciable number” are over and that the threshold is at least 50 percent. But, is it sufficient that a majority of consumers will receive the maximum? Or must it be virtually everyone? Or is it something in between?

Are There Two Standards or One? In ascertaining what standard the FTC may be seeking to establish, we must first understand why the agency has offered the two different formulations. One possible explanation is that the FTC considers the phrases to be synonymous, and therefore there is only a single standard applicable to all “up to” claims. For example, one passage in the warning letters appears to equate the two formulations:

Therefore, to avoid deception, you must clearly convey the results that consumers are likely to get. For example, if you say that consumers will save “up to” a specified percentage in savings, your substantiation should prove that all or almost all consumers are likely to get that percentage in savings.\(^3\)\(^2\)

If the FTC intended to establish a single standard, however, it is unclear why it would risk confusion by using different formulations. Moreover, at least on their face, the terms do not mean the same thing. The addition of “all or almost all” as a modifier accompanying “likely” must have some significance and presumably indicates a percentage higher than “likely” alone.

A more probable explanation is that the FTC intended to articulate two standards, with the “likely” test applying to “up to” claims generally, while the more rigorous “all or almost all are likely” standard limited to the claims challenged in the five settlements and tested in the consumer copy test—energy savings claims for replacement windows. In its statements, the FTC has taken some pains to say that the “all or almost all are likely” standard does not necessarily apply outside the circumstances that were before it. In the five settlements, the “up to” claim proviso to Part I of the orders, which includes the “all or almost all are likely” standard, only covers energy savings and cost reduction claims for replacement windows.

The Analyses to Aid Public Comment for those cases caution that the complaints and orders should not be interpreted as a general statement of how the FTC might interpret “up to” claims in other contexts, and they describe the proviso as fencing-in relief.\(^3\)\(^3\) Consistent with this explanation, the Commission’s subsequent statement in the press release accompanying the copy test report, which is directed at “advertisers” generally, follows the broader “likely” formulation.

This bifurcated approach is a sensible one. The Commission has empirical evidence in the form of a copy test of a particular ad for a replacement window that indicates that at least some consumers interpreted “up to” in that ad to mean that “all or almost all” consumers will receive the maximum savings. It has no such evidence for “up to” claims for other products or in other circumstances.

What Do the Standards Actually Require? Whether or not they are intended to be different, the question remains what the two formulations—“likely” and “all or almost all are likely”—actually


\(^3\)\(^3\) Fencing-in relief is a remedy that goes beyond what the law requires to ensure that a company that has engaged in the alleged wrongdoing does not continue it in a new guise. See e.g., FTC v. Ruberoid Co., 343 U.S. 473 (1952). It is not uncommon for the FTC to impose stricter standards on companies under order than those to which it holds companies generally. Note, however, that the warning letters sent to companies not under order use the same “all or nearly all” language. Thus, it seems that the order provisions are not fencing-in relief but rather are statements of more general applicability.
mean. Dictionary definitions for “likely” vary; some indicate that it means a simple majority, while others suggest it means more than that.\textsuperscript{34} Whatever “likely” is intended to mean, as discussed above, “all or almost all” would seem to imply a higher degree of probability.

Regardless of what “likely” and “all or almost all” mean, combining the two terms as the FTC has done here creates a further issue. It requires handicapping both how likely the result is and separately what percentage of people will achieve a particular result. One way to understand the concern is to assign quantities to the two terms. For example, we could assume, for purposes of analysis, that “likely” means more than 50 percent and that “all or almost all” means more than 90 percent. Applying the standard, then, would mean that 90 percent (or more) of consumers has a 50 percent (or more) chance of obtaining the maximum result. Doing the math, this means that an “up to” claim would be substantiated so long as 45 percent (.90 x .50) or more of consumers will actually achieve the stated maximum. Assigning different quantities to “likely” and “all or nearly all” would produce different percentage outcomes, of course, but the concept would be the same.

It seems doubtful, however, that the FTC intends the standard to be some sort of combination of two probabilities, particularly because the outcome suggested above would result in a lower threshold for the claim than “likely” alone. Further clarification from the Commission would be helpful in this regard.

**How Broadly Should the FTC’s Approach Apply?** A key question is whether, and the extent to which, the FTC’s requirement that “all or almost all” achieve the result was intended to apply to all “up to” claims. Had it only appeared in the five window settlements, it could be viewed as limited to “fencing-in” relief against violators. But the recent warning letters show the FTC intends to apply it at least to advertisements for replacement windows broadly. How will the Commission determine the breadth of application, and how will businesses know which standard applies to their advertising?

In the Analyses to Aid Public Comment for the five settlements, the FTC seemed to recognize that, in other circumstances involving other products or services, “up to” claims may not convey the “likely” or “all or almost all are likely” messages:

Some promotional materials challenged in the FTC’s complaint include the words “up to” in an apparent attempt to qualify representations that consumers who replace windows with respondent’s windows are likely to achieve specific amounts of residential energy savings or reduction in residential heating and cooling costs. In the context of the specific ads in this case, the words “up to” do not effectively qualify such representations for replacement windows. The FTC’s complaint and the proposed consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words “up to” for other products or services in the future.

In fact, there undoubtedly will be circumstances in which an “up to” claim does not communicate that “all or almost” consumers will achieve the maximum result, or even that consumers are “likely” to achieve it. How consumers interpret a particular claim depends on what else the ad says and depicts, the type of product involved, and consumers’ pre-existing knowledge or beliefs.

\textsuperscript{34} The primary definition in the Merriam Webster Dictionary is “having a high probability of occurring or being true . . . very probable,” suggesting more than 50 percent. \url{http://www.merriam-webster.com/dictionary/likely}. Other dictionaries have definitions more akin to a simple majority. E.g., Dictionary.com (“probably . . . destined to happen”), \url{http://www.macmillandictionary.com/dictionary/british/likely}; MacMillan Dictionary (“probably going to happen”), \url{http://www.macmillandictionary.com/dictionary/british/likely}. The fact that “likely” commonly is modified by terms such as “highly” or “very” would seem to indicate that “likely” by itself means only a majority.
about the product or category.35 For example, viewing a claim that a replacement window will save up to 47 percent in energy costs, individual consumers might reasonably expect results of that magnitude—47 percent seems on its face to be a reasonable savings that consumers could expect to achieve, and there is no obvious reason the savings would vary dramatically from person to person. In other cases, however, consumers might well understand that individual variation may be high and that the stated figure represents a best-case scenario.

To pick an extreme example, an ad stating that consumers can win “up to” $100,000 playing the slots at a casino probably does not convey to consumers that they, themselves, are likely to win that amount.36 Or, an ad stating that users of a weight loss product will lose “up to” 150 pounds almost certainly does not convey that consumers are likely to achieve a 150 pound weight loss, much less that all or almost all will do so. Indeed, most consumers will not want or need to lose that much weight and certainly understand that how much weight they lose will depend in large part on their own behavior.37 Or, when a lender offers open-end credit with a limit “up to” a certain dollar amount, or rates “as low as” a certain percentage, consumers likely understand that many will not qualify for the best terms, for example, if they have a poor credit rating. Moreover, “up to” claims often are used in situations where consumers will know before they purchase whether they will be able to achieve the maximum promised benefit, for example, when a store advertises a sale with savings “up to” a certain amount.

Thus, to extrapolate from a single copy test of a particular ad for a particular product to all advertising would ignore the impact that context can have and how much variation there can be in how consumers interpret advertisements. The FTC certainly understands this and has included some general cautionary language about extending its guidance on “up to” claims too far. But, a clearer acknowledgment that in some cases such claims may not communicate that “all or almost all” consumers will achieve the maximum result—or may not even communicate that consumers are “likely” to achieve the maximum—would be helpful.

The FTC Endorsement and Testimonial Guides
In evaluating the FTC’s new policy on “up to” claims, it is useful to compare it to what the FTC recently did in an analogous context—the use of consumer testimonials in advertising. Many advertisements include testimonials from users of their product describing the results those individuals achieved. In this way, a testimonial is very similar to an “up to” claim; both purport to represent best-case results and not necessarily a typical or average result.


36 This is the very fact scenario that the FTC used when it revised its Guides on Endorsements and Testimonials, discussed below, in acknowledging that not all consumer testimonials convey a typicality claim and that disclosures or other factors could influence how consumers interpret testimonials. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, Notice of Proposed Changes to Guides, Request for Public Comment, 73 Fed. Reg. 72,378 (Nov. 28, 2008). The similarity of testimonials to “up to” claims as advertising techniques also is discussed below.

37 Acknowledging that consumers may not read claims of this sort as applying to them in a literal way, the complaints in a number of FTC weight loss cases interpret “up to” claims and testimonials touting extreme weight loss results as implying that consumers generally will lose a “substantial amount of weight,” or typically are successful in reaching their “weight loss goal,” rather than the specific maximum result portrayed. See, e.g., Consent Decree, FTC v. Medlab, Inc., CV 08 0822 (N.D. Cal. Feb. 6, 2008), available at http://www.ftc.gov/os/caselist/0623068/080208medlabzyladexcmplt.pdf; Consent Order, Nutri/System, Inc., 116 F.T.C. 1408 (1993).
The FTC recently revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising, originally issued in 1980. The original Guides stated that a consumer testimonial would be interpreted as representing that the consumer’s experience was “representative of what consumers will generally achieve,” but provided a safe harbor for advertisers who could not meet that standard if they disclosed (1) what the generally expected performance would be; or (2) the limited applicability of the consumer’s experience. Many advertisers took advantage of the second safe harbor by including testimonials touting best cases, with a fine print disclosure along the lines of “your results may vary” or “results not typical.”

In 2009, the FTC substantially revised the Guides. Based on consumer surveys showing that many consumers ignored the “results may vary”-type disclaimers and interpreted testimonials as reflecting what they themselves would achieve, the second safe harbor disclosure was eliminated. The current Guides thus require that the advertiser either (a) have substantiation that the testimonialist’s results are representative of what consumers will generally achieve, or (b) disclose the generally expected performance. The FTC's view that testimonials convey that they are “representative” of what consumers generally achieve resembles the “likely to achieve” or “all or nearly all are likely to achieve” standards for “up to” claims. It is unclear, however, whether the Commission views the standard to be the same for the two types of claims.

Another possible difference between the two approaches relates to whether the claim can be qualified. As noted, the Guides permit advertisers to qualify testimonials with a disclosure of the average result, while the FTC’s statement regarding “up to” claims mentions no such safe harbor. This is unsurprising given that a disclosure of this kind was ineffective for the ad tested in the FTC copy test. But it raises the question whether any sort of disclosure in any context would be considered adequate to qualify an “up to” claim.

More broadly, the Guides acknowledge that context is important in determining what messages a testimonial might convey and that not all testimonials will imply typicality. In its 2008 request for comment on modifying the Guides, the Commission stated:

[T]he Commission believes that certain advertisements employing testimonials may not convey that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service . . . . The Commission therefore proposes to qualify the currently unequivocal language [of the existing Guides] to state that ‘an advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central

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38 74 Fed. Reg. 53,124 (Oct. 15, 2009), codified at 16 C.F.R. Part 255. FTC Guides are administrative interpretations of the law. As such, they do not have the force and effect of law and are not independently enforceable. The Commission may take action under the FTC Act, however, if a particular use of a testimonial or endorsement is inconsistent with the Guides. In such an enforcement action, the Commission has to prove that the challenged act or practice was unfair or deceptive.


41 16 C.F.R. § 255.2(a).

42 One indication that the FTC might consider the standards to be the same can be found in a case filed after the publication of the FTC “up to” survey. Consent Decree, FTC v. Fitness Brands, Inc., Case No. 12-23065-CIV-ALTONAGA (S.D. Fla. Aug. 27, 2012, entered on the docket Aug. 28, 2012), available at http://www.ftc.gov/os/caselist/1023047/120823abcircledigeststip.pdf. The case challenged weight loss and fitness claims for an exercise device that were made, among other ways, through consumer testimonials. Paragraph 57 of the FTC Complaint alleges that, through these testimonials, the defendants represented that consumers who use the device are “likely” to obtain the benefits depicted in the testimonials.
or key attribute of the product or service will likely be interpreted as representing that the
endorser’s experience is representative of what consumers will generally achieve . . . . 43

The FTC reinforced this qualified approach in promulgating the final revised Guides. Address-
sing a commenter’s argument that consumer perceptions of testimonials will vary depending on
the circumstances, the Commission stated:

The [revised Guide] would recognize that, depending on how a testimonial is crafted and used
in a particular ad, it might not convey a typicality claim . . . . [T]he revision makes the Guides
less restrictive, by allowing for the possibility that a testimonial will not convey a typicality claim,
and thus not require any further qualification. 44

The Commission also was careful in the revised Guides to leave open the possibility that even
a disclaimer of typicality alone might be sufficient to qualify a claim: “[T]he revised Guides would
not prohibit the use of disclaimers of typicality. Although the Commission is, admittedly, skeptical
that most disclaimers of typicality will be effective in preventing deception [the revised Guide]
does not rule out the possibility that a clear, conspicuous, and informative disclaimer would
accomplish this goal.” 45

The FTC’s pronouncements about “up to” claims have not explicitly acknowledged that dis-
claimers might be effective in certain circumstances, although it has said that advertisers can limit
their claims to specific circumstances. Further clarification on this point from the Commission
along the lines of what it said in the Guides would be helpful.

Conclusion
Over this past year, the FTC has made a laudable effort to provide guidance to businesses on the
use of a common advertising technique—“up to” claims. But, questions remain as to exactly what
that guidance means and how far it extends. When it comes to advertising claims, context always
matters; as a result, it is difficult to state a principle of broad application as to how claims will be
interpreted and when they are permissible. And, there is an unavoidable tension between pro-
viding certainty to businesses by stating a principle or rule that applies across the board, and dis-
couraging useful advertising claims that, in a particular context, would not be deceptive. For
example, there is an important policy consideration in clarifying whether and how advertisers can
convey potential benefits that a substantial minority of consumers might realize, even though most
or all will not do so.

Thus, whether or not the FTC has achieved the optimal balance with respect to “up to” claims
remains to be seen, and further clarification of its guidance will always be helpful. In the mean-
time, advertisers should be very cautious about using such claims unless they can substantiate
that a high percentage of consumers will achieve the maximum result, or carefully and clearly
qualify and limit to the claim to the circumstances where that is the case.

43 73 Fed. Reg. at 72,378.
45 Id. Several commenters on the revised Guides noted that calculating the “average” result may be difficult in many cases as advertisers may
not have data on the experiences of all of the consumers who used the product. Thus, if they were not permitted to qualify their claims, they
could never use testimonials.
Third-Party Smart Meter Data Analytics: The FTC’s Next Enforcement Target?

Dana B. Rosenfeld and Sharon Kim Schiavetti

In March 2012, the Federal Trade Commission issued a final report setting forth privacy recommendations and best practices for companies handling consumer data. The report extends to “all commercial entities that collect or use consumer data that can be reasonably linked to a specific consumer, computer, or other device” subject to certain limited exceptions. Given the rapidly increasing deployment of smart meters, the report may ultimately apply to utilities and third parties providing detailed analytics of Consumer Energy Usage Data (CEUD) made available through smart meters. Consequently, companies processing this data with inadequate privacy and data security safeguards may become the FTC’s next enforcement target.

Energy Consumption Data as New PII

The Smart Grid and the Smart Meter. The basic architecture of the smart grid presents “several thorny privacy issues.” The smart grid generally refers to a class of technology (“smart grid technologies”) used to bring utility electric systems into the 21st century. The smart grid relies on an advanced metering infrastructure (AMI), which is a system of smart meters, two-way communications networks, and data management systems that enable metering and other information exchanges between utilities and their customers. Title XIII of the Energy Independent and Security Act of 2007 provided the legislative support for national grid modernization efforts. Subsequent funding through the American Recovery and Reinvestment Act in 2009 of approximately $4.5 billion supported investment grant programs to deploy smart grid technologies.

Dana B. Rosenfeld is a partner and the chair of the Privacy and Information Security practice group at Kelley Drye & Warren LLP and Sharon Kim Schiavetti is an associate with the Advertising and Privacy and Information Security practice groups at Kelley Drye & Warren LLP. Special thanks go to Meg Hardon, Senior Government Relations Advisor.

1. Fed. Trade Comm’n, Protecting Consumer Privacy in an Era of Rapid Change (2012) [hereinafter FTC Privacy Report], available at http://ftc.gov/opa/2012/03/privacyframework.shtm. This report is applicable to “all commercial entities that collect or use consumer data that can be reasonably linked to a specific consumer, computer, or other device, unless the entity collects only non-sensitive data from fewer than 5,000 consumers per year and does not share the data with third parties.” Id. at iv.

2. Id.


smart grid implicates privacy at a fundamental level, as it can best be understood as a “powerful
digital communication network.” Industry members estimate the smart grid network will be “100
or 1,000 times larger than the Internet.” And like any analogous communications network, the
smart grid presents new and problematic threats to privacy in the form of increased data collection,
retention, sharing, and use.

The first widely distributed smart grid application is the smart meter. These are rapidly being
deployed throughout the country to replace analog meters, a component of a century-old power
grid with limited functionality. Analog meters must be physically accessed by meter readers or
read remotely through radio-frequency identification (RFID) to generate monthly electricity bills.
In contrast, smart meters transmit CEUD wirelessly to utilities as frequently as every five-to fifteen-
minutes. The CEUD made available through smart meters contains a more precise level of detail,
or “granularity,” than its analog counterpart. This data may allow utilities to control energy loads
more efficiently and manage overall demand on the electric grid. It may also encourage and facilit-
ate more efficient energy consumption behavior by consumers. However, as the National Institute
of Standards and Technology (NIST) observes, the “major benefit provided by smart meters, i.e.,
the ability to get richer data to and from customer meters and other electric devices, may also be
its Achilles’ heel from a privacy viewpoint.”

The focus for protecting privacy of information stored on computers or exchanged on com-
puting networks is determining whether data is or is not “personally identifiable information,” or
PII. This type of information can locate or identify a person, or it can be used in conjunction with
other information to uniquely identify an individual. Historically, PII includes name, social secu-
ritv number, address, phone number, or date of birth. In the Internet Age, the list of what constitu-
tes PII has grown to include other data, including e-mail addresses, Internet Protocol (IP)
addresses, social networking pages, search engine requests, log records, and passwords. Smart meters, like traditional meters, will be associated with a unique physical address, which
constitutes PII. The CEUD made available through smart meters, when associated with the
meter’s serial number and other consumer profile information, may also constitute PII.

New Privacy Risks. Granular CEUD, when combined with a customer’s profile information, may enable the persistent monitoring of individual electricity usage patterns and appliance use.

Research indicates that analyzing 15-minute intervals of aggregate household energy can alone

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8 EPIC Testimony, supra note 3, at 4.
9 Id.
10 Id. at 3.
13 Id.
14 Id.
15 EPIC Testimony, supra note 3, at 3.
16 Id.
17 Id.
18 Profile information may include a customer’s full name, address, billing history, credit card information, and Social Security number.
19 NISTIR, supra note 11, at 30.
pinpoint the use of most major home appliances.\textsuperscript{20} This may reveal a consumer’s behavioral patterns, habits, and activities taking place inside the home, including activities like sleeping, eating, showering, and watching TV.\textsuperscript{21} Energy use patterns over time may reveal the number of occupants in the household, work schedules, sleeping habits, health, affluence, or other lifestyle details and habits.\textsuperscript{22} While utilities could use this information to assist consumers in energy conservation efforts, numerous—and arguably less benign—uses of this data exist outside of the energy management context. This is often referred to as “secondary” uses of data for purposes other than for the provision of electrical power.\textsuperscript{23}

Marketers could use granular energy data to make targeted advertisements. Insurance companies could use it to determine premiums (for example, by knowing that a medical device is being used), and landlords to verify lease compliance.\textsuperscript{24} Data trackers could trace owners or users of electric vehicles to identify their approximate location and travel history. Criminals could use it to perpetrate fraud, identity theft, or burglary in a confirmed vacant dwelling. Some consumer fear exists that law enforcement could also use the data to identify suspicious or illegal activity and to conduct warrantless surveillance.\textsuperscript{25} In a 2010 smart grid survey conducted by the Ponemon Institute, utility customers were the most worried about how the smart grid’s collection of personal information would threaten their personal safety and reveal personal details about their lifestyle.\textsuperscript{26} According to the Department of Energy (DOE), even if current smart grid technologies cannot yet identify individual appliances and devices in the home in detail, it will certainly be within the capabilities of subsequent generations.\textsuperscript{27}

**New Data Security Risks.** The massive amounts of data produced by smart grid technologies can potentially be misused by a number of parties, including power utilities, authorized third parties such as data analytics firms, and unauthorized third parties such as identity thieves.\textsuperscript{28} These entities may access the CEUD by contract with the utility or through multiple channels independent of the utility.

Utilities in the smart grid are increasingly contracting with third parties (“CEUD management services”) to provide energy services that will enable consumers to monitor and control their energy usage. Analysts estimate that by 2020, 91 million smart meters will be covered by managed service contracts, where a third party other than the utility will operate the AMI system on a day-to-day basis.\textsuperscript{29}

\textsuperscript{20} Id. at 14.

\textsuperscript{21} Id. at 30.

\textsuperscript{22} Id.


\textsuperscript{24} NISTIR, supra note 11, at 30.

\textsuperscript{25} Id.

\textsuperscript{26} See Press Release, Ponemon Institute, New Ponemon Study Points to Need for Smart Grid Education (Dec. 14, 2010), available at \url{http://www ponemon org/news-2/39}.


\textsuperscript{28} See EPIC, supra note 3, at 5. While a discussion of data security solutions for smart meters is outside the scope of this article, companies seeking to deploy management tools and applications of CEUD should be aware of the increased data security risks involved.

\textsuperscript{29} PIKE RESEARCH, 91 Million Smart Meters to be Covered by Managed Service Contracts by 2020 (June 7, 2012), \url{http://www.pikeresearch.com/newsroom/91-million-smart-meters-to-be-covered-by-managed-services-contracts-by-2020}.
Outside of a contract, a third party can access energy data from no fewer than three channels independent of the utility: (1) a Home Area Network-enabled (HAN) device, which obtains wireless output signal data from the smart meter; (2) the customer, who obtains CEUD from the utility or from the smart meter (e.g., Green Button data, discussed in the next section); or (3) an Internet connection with the utility, referred to as the “backhaul.” A third party receives data via the backhaul when the utility, after hauling the data back from the smart meter to its server, then processes the data and provides it to the third party—typically without customer input or choice. Some state public utility commissions (PUC) have adopted measures to protect CEUD accessed by HAN-enabled devices or through the backhaul connection. The California PUC is one notable example.

The use of wireless communications to transmit CEUD is particularly problematic from a data security standpoint. Wireless sensors and networks are generally susceptible to security breaches unless properly secured, and breaches of wireless technology could expose users’ personal data. Further, signals from wireless devices are easily detectable by bad actors, making sensitive data on systems using wireless technology vulnerable to theft. According to EPIC, the faith placed in the capacity of the Smart Grid to safeguard sensitive personal information is unfounded. “An attacker with $500 of equipment and materials and a background in electronics and software engineering could take command and control of the [AMI] allowing for the en masse manipulation of service to homes and businesses.” Therefore, it is possible that “just as identities, credit and debit card numbers, and other financial information are routinely harvested and put up for sale on the Internet, so can Smart Grid identifiers and related information.”

New Third-Party Entrants to the Market. In addition to new entry points for third-party access, the proliferation of “smart” appliances, utility devices, and third-party products will increase the number of devices that may generate CEUD. This is in large part due to the recent initiatives in personal energy conservation by the federal government and industry members. Two notable programs are the “Green Button” initiative and the “Apps for Energy” contest.

The Green Button is an industry-led effort to provide electricity customers with easy access to their energy usage data via a “Green Button” on their utility’s website. In April 2012, the DOE sought to stimulate this market by running an “Apps for Energy” competition with $100,000 in prize money. The contest encouraged software developers to create innovative applications using

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31 Id. at 110.
32 Id.
33 EPIC Testimony, supra note 3, at 4.
34 Id.
35 Id. at 7 (citations omitted).
36 Id. (citations omitted).
37 NISTIR, supra note 11, at 15. The privacy and data security risks that these smart appliances and devices on the consumer side of the meter present are heightened when these products transmit data outside of the HAN and do not have documented security requirements, effectively extending the perimeter of the system beyond the walls of the premises.
Green Button data that would allow utility customers to monitor and control their electricity use. The ultimate goal of these federal initiatives is to develop CEUD management services that mirror those already thriving in the online and mobile applications market, such as mobile banking and mobile payments.\(^{40}\)

As energy data analytic technologies become more advanced, the DOE posits that developers may provide consumers with far more innovative or sophisticated services and tools than originally intended.\(^{41}\) The increasingly interactive characteristics of these energy management tools—and the increasing risk of security breaches—will require sufficiently robust privacy and data security practices to protect sensitive consumer data.

**Federal Privacy Initiatives**

Energy usage data does not fall within the scope of existing federal privacy statutes. In the absence of federal regulation, many industry guidelines and best practices have emerged.

**Smart Grid Privacy Guidelines.** In its October 2010 report on data access and privacy issues related to smart grid technologies (DOE Privacy Report), the DOE identified privacy issues related to third-party access as one of the most critical—and difficult—issues in smart grid technologies.\(^{42}\) The report identified a number of privacy recommendations for utilities and entities processing CEUD made available through smart meters.

It emphasized that the success in the deployment of smart grid technologies depended significantly upon “the development of legal and regulatory regimes that respected consumer privacy, promoted consumer access to and choice regarding third-party use of their energy data, and secured potentially sensitive data to increase consumer acceptance of the smart grid.”\(^{43}\)

At the most fundamental level, the DOE concluded that consumers should have the right to protect the privacy of their own energy usage data and control access to it.\(^{44}\)

Similarly, the Department of Commerce’s National Institute of Standards and Technology’s August 2010 guidelines for smart grid cyber security (NISTIR) concluded that an effective “full suite of fair information practices protections” was necessary to protect consumers against the unauthorized collection and use of CEUD by CEUD management services.\(^{45}\)

Both reports recommend that utilities and state agencies implement comprehensive privacy and data security measures to protect CEUD made available through smart meters. The NISTIR notes that, problematically, there is a lack of state privacy laws or policies directly applicable to the smart grid.\(^{46}\) Given that grid modernization efforts are in their early stages, comprehensive and consistent definitions of sensitive consumer energy data do not exist at state or federal reg-

\(^{40}\) Dep’t of Energy Privacy Report, supra note 27, at 47.

\(^{41}\) Id. at 12.

\(^{42}\) See generally id. In this report, the DOE assessed comments from parties interested in the development of innovative smart grid technologies based on the availability of granular energy consumption data and provided recommendations based on substantial consensus by these parties on a number of data access issues.

\(^{43}\) Id. at 4.

\(^{44}\) Id. at 10.

\(^{45}\) NISTIR, supra note 11, at 36. In this report, NISTIR noted the following three privacy challenges presented by third-party access to smart grid information: (1) that companies holding themselves out as consumer electricity management services are what they represent themselves to be; (2) what consumers are told about how their information will be used is true; and (3) third-party access to electricity usage data is being used solely for the purpose set forth in the agreement.

\(^{46}\) Id. at 10.
ulatory levels or within the utility industry. Only a few states have passed smart grid privacy laws and there is no single accepted federal standard. And while a handful of states are taking an aggressive role in developing privacy policies for smart meter data, many states have not even started to take up the issue.

In light of this, industry members have engaged in self-regulatory efforts. In October 2012, a Washington-based think tank, The Future of Privacy Forum announced the first privacy seal program for companies processing CEUD. The seal will be powered by TRUSTe, a data privacy management company, and will be available to companies offering home energy management, remote home control or security, smart thermostats, and other services that seek to access energy data. This is the first of likely many self-regulatory programs in the energy context to ensure that participating companies commit to responsible privacy and data security practices.

**White House Consumer Privacy Code of Conduct.** In its June 2011 report on policy recommendations for the smart grid, the White House recognized that energy usage data does not fall within the scope of existing federal privacy statutes. However, the White House observed that a “company’s public commitment to follow a code of conduct, as well as existing requirements for taking reasonable measures to safeguard consumer data, were likely enforceable by the FTC under their authority to address unfair and deceptive practices.”

Eight months later, in February 2012, the White House proposed a Consumer Privacy Bill of Rights in a report entitled “Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy.” The framework relies on the FTC’s continued—and heightened—enforcement of consumers’ privacy rights through its authority to prohibit unfair or deceptive acts or practices under Section 5 of the FTC Act.

The White House’s report, in conjunction with the FTC’s Privacy Report issued the following month, may provide sufficient momentum to change the enforcement landscape for privacy violations by utilities and third parties processing CEUD made available through smart meter technology.

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47 Id.
48 Id.
50 Id.
52 Id.
54 Id. (citing 15 U.S.C. §§ 45 et seq.).
55 Under § 5 of the FTC Act, the FTC has jurisdiction to bring enforcement actions against “persons, partnerships, or corporations” that engage in “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45. To the extent that utilities constitute “corporations” under the Act, the FTC has jurisdiction to enforce Section 5 for all privacy-related violations. An article by the Congressional Research Service concludes that the FTC would clearly have jurisdiction over investor-owned utilities. It was less clear, however, whether the FTC would also have jurisdiction over publicly owned utilities or federally owned utilities. See CRS Report, supra note 23, at 29.
**FTC Privacy Report.** In March 2012, the FTC issued a final privacy framework. The final report calls on companies to implement best practices to protect consumers’ private information, Congress to enact baseline privacy and data security legislation with civil penalties, and industry to accelerate the pace of self-regulation. In particular, the framework urges companies to adopt the following three practices: privacy by design, simplified choice for businesses and consumers, and greater transparency. To the extent that utilities and third parties processing CEUD made available through smart meters fall within the FTC’s jurisdiction and within the scope of the report, they may be prosecuted for violating these privacy principles. The FTC has not yet commenced an enforcement action for entities failing to safeguard sensitive energy data. However, in recent years, the FTC has taken numerous actions to shape the consumer privacy landscape. It has “redoubled its efforts to protect consumer privacy, including through law enforcement, policy advocacy, and consumer and business education.” It may therefore only be a matter of time before these entities become the FTC’s next enforcement target.

**Consolidated Privacy Recommendations for Smart Meter Applications and Tools**

The principles in the FTC’s Privacy Report regarding privacy by design, simplified choice, and greater transparency complement the privacy recommendations advanced by the White House Administration, the NISTIR, and the Department of Energy. These reports, when collectively examined, provide comprehensive privacy guidelines for utilities and third parties processing CEUD made available through smart meters.

**Privacy by Design**

Companies should incorporate substantive privacy protections into their practices, such as data security, reasonable collection limits, sound retention and disposal practices, and data accuracy.

In line with this principle, the DOE Privacy Report noted broad consensus among industry members that privacy implications in the collection of consumer energy data be acknowledged and respected during the development of intelligent electrical-metering-and-usage monitoring technologies. For smart grid technologies, the concept of privacy by design includes: (1) data minimization and limited retention, and (2) data security.

**Data Minimization and Limited Retention**

Companies should limit data collection to that which is consistent with the context of a particular transaction or the consumer’s relationship with the business, or as required or specifically authorized by law.

For smart meter technologies, the NISTIR recommends that information be used or disclosed only for the purpose for which it was collected and be divulged only to those parties authorized to

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56 See generally FTC Privacy Report, supra note 1.
57 Id.
58 Id.
59 Id. at ii.
60 FTC Privacy Report, supra note 1, at 30.
61 Dep’t of Energy Privacy Report, supra note 27, at 9 (emphasis added).
62 FTC Privacy Report, supra note 1, at 27.
receive it. For example, the NISTIR recommends that manufacturers and vendors of smart meters, smart appliances, and other types of smart devices, collect only the energy and personal data necessary for the purposes of the smart device operations. The NISTIR further advises that personal information be aggregated or anonymized wherever possible to limit the potential for revealing private information. In addition, personal information should be kept only as long as is necessary to fulfill the purposes for which it was collected. When no longer necessary, consistent with data retention and destruction requirements, the data and information should be irreversibly destroyed. The NISTIR observes that this will become more important as energy data becomes more granular, more refined, and has more potential for commercial uses.

### Data Security

Companies should maintain comprehensive data management procedures throughout the life cycle of their products and services. The NISTIR recommends that personal information in all forms be protected from loss, theft, unauthorized access, inappropriate disclosure, copying, use, or modification. Specifically, the NISTIR advises that utilities and third parties “develop a comprehensive set of privacy use cases . . . to rigorously track data flows and the privacy implications of collecting and using data, and help the organization to address and mitigate the associated privacy risks within common technical design and business practices.” According to the DOE Privacy Report, industry members suggest that smart grid technologies “borrow” security architectures used by other areas of commerce, such as online banking, Internet shopping, and wireless communication, which include best practices for data encryption, storage, and anonymization. In line with conventional data security practices, the DOE recommends that the security architecture be updated as threats evolve.

The FTC has a long history of enforcing privacy and data security obligations for unfair and deceptive practices under Section 5 of the FTC Act and other consumer protection laws. Since 2001, the FTC has brought no fewer than 36 cases under these laws. This includes at least 7 data security actions against resellers of sensitive consumer report information, service providers that

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63 NISTIR, supra note 11, at 41.
64 Id. at 42.
65 Id.
66 Id.
67 Id. at 21.
68 Id.
69 FTC Privacy Report, supra note 1, at 30.
70 NISTIR, supra note 11, at 41.
71 Id. at 42.
72 Dep’t of Energy Privacy Report, supra note 27, at 47.
73 Id.
75 Id.
process employee data, a college savings program, and a social media service. Consequently, it is entirely feasible for inadequate data security safeguards of CEUD to result in substantial consumer injury and trigger an FTC enforcement action.

**Simplified Choice**

For practices requiring choice, companies should offer the choice at a time and in a context in which the consumer is making a decision about his or her data. Companies should obtain affirmative express consent before (1) using consumer data in a materially different manner than claimed when the data was collected; or (2) collecting sensitive data for certain purposes.77

The DOE Privacy Report recommends that utility customers “be allowed to choose whether and for what purpose any third-party should be authorized to access receive consumer energy data for innovative purposes other than the provision of electrical power.”78 This includes affirmative and informed consumer consent if utilities or CEUD management firms reduce the cost of their services by disclosing or reselling energy data to third parties for the purposes of targeted advertising.79 According to the DOE, consumer control of third-party access will promote the development of a competitive, open, transparent, and innovative marketplace for the use and management of energy consumption data.80

In recent years, the FTC has prosecuted a number of companies for making deceptive claims about the privacy and security protections they afford to consumer data.81 According to a statement by FTC Chairman Jon Leibowitz before Congress, the settlements of two highly publicized privacy cases against Google and Facebook will affect more than one billion consumers worldwide.82 In *Google, Inc.*, the FTC charged the Internet giant with deceiving consumers by taking previously private information—the frequent contacts of Gmail users—and making it public in order to generate and populate a new social network, Google Buzz.83 The FTC alleged that this was done without the users’ consent and in contravention of Google’s privacy policy.84 As part of the FTC’s decision and consent order, Google must protect the privacy of its users, and it must seek affirmative express consent before changing a product or service that makes consumer information more accessible to third parties.85 In addition, the order requires that Google implement a comprehensive privacy program and obtain independent privacy audits every other year for the next twenty years.86 To the extent that utilities and third parties deceive consumers about the pri-

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76 Id. (citations omitted).
77 FTC Privacy Report, supra note 1, at 60.
78 Dep’t of Energy Privacy Report, supra note 27, at 11 (emphasis added).
79 Id. at 12.
80 Id. at 11.
82 Id.
84 Id.
85 Id.
86 Id.
Privacy and security protections afforded to CEUD made available through smart meters, they may be subject to similar enforcement actions by the FTC.

**Transparency (Notice and Access)**

Privacy notices should be clearer, shorter, and more standardized to enable better comprehension and comparison of privacy practices.\(^{87}\)

The NISTIR recommends that utilities and third parties provide consumers with meaningful, clear, and full notice in advance of the collection, use, retention or sharing of energy usage data and personal information.\(^{88}\) According to the NISTIR, the notice should provide a detailed description of all purposes for which consumer data will be used, including any purposes for which affiliates and third parties will use the data, and how long the data will be maintained.\(^{89}\) The NISTIR indicates that clear, full, and accurate notice before data collection is essential to enabling all other privacy principles.\(^{90}\)

*Companies should provide reasonable access to the consumer data they maintain; the extent of access should be proportionate to the sensitivity of the data and the nature of its use.*\(^{91}\)

In an effort to promote innovation and efficiency in the delivery of electricity, the White House supports “providing consumers with timely access to energy usage data in standardized, machine-readable formats over the Internet.”\(^{92}\) As the NISTIR observes, CEUD made available through smart meters may be stored in multiple locations to which the consumer may not have ready access.\(^{93}\) Therefore, the NISTIR recommends that “any organization collecting energy data from or about consumers “establish a process to notify consumer account inhabitants and person(s) paying the bills (which may be different entities), when appropriate, of the data being collected, why it is necessary to collect the data, and the intended use, retention, and sharing of the data.”\(^{94}\)

**Conclusion**

The CEUD made available through smart meters will become the next frontier of PII. Many jurisdictions in which smart meters are rapidly being deployed have yet to consider their privacy implications. However, legislative action in states like California is getting the attention of other states, and the federal policymakers—both Congress and the Administration—continue to examine possible legislation to protect PII, including CEUD. This may provide sufficient momentum to change the enforcement landscape for privacy violations by utilities and third parties processing CEUD made available through the smart meter.

To the extent that utilities and third parties fall within the FTC’s jurisdiction, they may be prosecuted for misrepresenting their privacy policies and/or inadequately safeguarding CEUD made

\(^{87}\) FTC Privacy Report, supra note 1, at 64.

\(^{88}\) NISTIR, supra note 11, at 41.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) FTC Privacy Report, supra note 1, at 71.

\(^{92}\) White House Privacy Report, supra note 53, at 15.

\(^{93}\) NISTIR, supra note 11, at 21.

\(^{94}\) Id.
available through smart meters. These entities should therefore work with counsel to ensure they develop practices that respect consumer privacy, promote consumer access to and choice regarding third-party use of CEUD, and secure potentially sensitive data to increase consumer acceptance of the smart grid.

At the most fundamental level, consumers should have the right to protect the privacy of their own energy usage data and control access to it. Incorporating the consolidated privacy guidelines from the FTC Privacy Report, NISTIR, and the Department of Energy may prevent the unauthorized disclosure and use of sensitive consumer energy data and avoid future enforcement actions by the FTC.
The FTC and Privacy: We Don’t Need No Stinking Data

In March 2012, the Federal Trade Commission issued a report recommending a new privacy framework for businesses and policymakers. The new framework includes “best practices” intended to better inform consumers about the collection and use of information about them, provide consumers with easier-to-understand choices, including a “Do-Not-Track” option, and incorporate “privacy by design” in the development of firms’ products and services. The result of these best practices would be to limit how businesses collect, retain, and use customer data. The report also supports baseline privacy and data security legislation.

The Commission Report was preceded by a preliminary Staff Report that spelled out the rationale for a new privacy framework. The Staff Report stated that “[a]lthough many . . . companies manage consumer information responsibly, some appear to treat it in an irresponsible or even reckless manner.” “[M]any companies . . . do not adequately address consumer privacy interests” and, therefore, the “[i]ndustry must do better.” However, neither the preliminary Staff Report nor the final Commission Report provide data to support these assertions or shed light on whether the recommended framework would improve consumer welfare relative to the status quo or to alternative proposals. Instead, the FTC, to a great degree, relies on statements at FTC roundtables, including those of well-known “privacy advocates,” as evidence for their findings.

Analysis That Should Precede Regulation

We begin with the premise that, before undertaking a major regulatory effort, regulators should determine, first, whether there is a market failure (if the market in question is working properly, then there is no reason to proceed further) and, second, whether there is a remedy available that will yield benefits greater than costs.

Market Failure? Market failures (distortions or inefficiencies due to improper pricing or inefficient definitions of property rights) often involve information problems, such as “lemons” problems (asymmetric information), free rider problems, and public goods problems. For example, if someone’s identity is stolen, the victim probably will not know the source the thief used to obtain the information. This makes it difficult to impose costs on the source, and, as a result, reduces incen-
tives for those who possess information to adequately protect it. However, there are countervailing forces. For example, with respect to identity fraud, consumers are liable for little, if any, of the direct losses. Rather, credit card companies, which are better able to ascertain the source of the security breach, assume responsibility for direct losses, helping to reduce any market failure. Consumers are still subject to indirect costs, but the credit card companies have strong interests in encouraging the use of their products, and therefore strong interests in creating and maintaining consumer confidence through data security measures.

The Commission and Staff Reports do not provide a rigorous analysis of whether market failures exist with respect to privacy. The only systematic evidence on privacy practices referred to in the reports is out of date and likely does not represent practices today.

The most recent surveys of the privacy practices of commercial websites are more than a decade old, and the FTC did not conduct a current survey before issuing its reports. Given the changes in the online world, these data are no longer current, but they illustrate the type of data collection and analysis that should be a prerequisite to privacy policy recommendations. Notably, the period covered by the surveys saw a general improvement in the privacy practices of commercial websites. For example, the most recent (2001) survey found that relative to a 2000 FTC survey:

- Websites were collecting less information.
- Fewer websites were using third-party cookies.
- Privacy notices were more prevalent, more prominent, and more complete.
- Consumers had more opportunities to choose how personally identifiable information (PII) was used.
- More sites were offering opt-in and fewer opt-out privacy options.
- More sites were offering a combination of fair information practice elements.
- Seal programs (in which trusted third parties guarantee security) were growing relatively slowly.

The Staff Report references the 2000 FTC survey, noting that “only about one-quarter of the privacy policies surveyed addressed the four fair information practice principles of notice, choice, access, and security.” However, the 2001 survey found that 80 percent of the most popular domains implemented notice, choice, and security—up from 63 percent in the 2000 survey—and 48 percent of a random sample (which included much smaller sites) implemented those three practices—up from 27 percent a year earlier.

We are not aware of any studies indicating whether the period since 2001 saw further improve-

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8 Staff Report, supra note 2, at 8.
9 Progress & Freedom Foundation Report, supra note 7, at 24. The 2001 survey, while the same as the 2000 survey in all other respects, did not address access practices because of its “unique implementation issues.” FTC 2000 Report, supra note 7, at 17.
ment in privacy practices or what commercial website practices are today. It is inappropriate for the FTC to call for a massive new regulatory scheme when the only available systematic surveys of the industry are both out of date and suggest significant improvement over time.

**The Need for Cost-Benefit Analysis.** Market failure is not enough to justify regulation. It is also necessary to show that the proposed regulation is desirable. That requires an assessment of the benefits and costs of the proposed remedies.

Many types of regulatory proposals are subject to this type of analysis under President Clinton’s Executive Order 12866 and preceding executive orders. (The FTC, as an independent agency, is not subject to this order but has the option of following its principles.) The principles of E.O. 12866 were reaffirmed by President Obama:

> As stated in that Executive Order [12866] and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify) . . . (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits . . . . ¹⁰

There is no such analysis in either of the FTC reports. Instead, the FTC’s conclusions appear to be largely based on “the major themes and concepts developed through the roundtables.”¹¹ However, “themes and concepts” developed from roundtables are an inadequate substitute for a careful evaluation of the benefits and costs of alternative privacy regimes (including the status quo) to determine which will best serve the interests of consumers. Because the FTC has presented no data on either benefits or costs, it is impossible to know whether any of the agency’s recommendations would improve consumer welfare.

It seems clear that greater privacy protections will involve tradeoffs—costs to Internet businesses, as well as to consumers. The commercial use of online information produces a range of benefits, including advertising targeted to consumers’ interests, advertising-supported services (such as email, search engines, and fraud detection), and a reduction in other threats, such as malware and phishing.¹² More privacy, in the current context, means less information available for the marketplace and therefore fewer of these benefits to consumers.¹³ Even if the services are still offered, they will be of lower quality as providers will have less money and less data to use in providing services.

Several studies support this intuition. On the cost side, a recent study by Goldfarb and Tucker found that the European Privacy Directive, which limits the use of information, reduced the effectiveness of online advertising by about 65 percent.¹⁴ This suggests that privacy protections make advertising less useful to consumers and less valuable to advertisers. Advertisers will pay less for less-effective ads, which decreases the resources available to support online content. The authors found the effect to be particularly pronounced for more general (less product-specific) websites, such as newspapers.


¹¹ Staff Report, supra note 2, at iv.


¹³ The Staff Report mentions some of the benefits produced by consumer data but does not evaluate the tradeoffs inherent in greater privacy protections. See, e.g., Staff Report, supra note 2, at 21, 33–35.

¹⁴ Avi Goldfarb & Catherine Tucker, Privacy Regulation and Online Advertising, 57 MANAGEMENT SCI. 57 (2011).
These results are reinforced by a study by Howard Beales, which shows the rates for behaviorally targeted advertising to be more than twice the rates for untargeted ads.\(^\text{15}\) Again, this result stems from the greater value that consumers receive from ads targeted to their interest, which ultimately increases the revenue available to support content. The FTC has made no effort to determine the impact of its regulations on such content, or on the degree to which its regulations will prevent consumers from even having the option for such content.

Although only a few empirical studies of the costs of privacy regulation exist, even less information is available on benefits. The FTC takes a broad view of the benefits of privacy. The agency rejects an approach limited to physical or economic injury because

the actual range of privacy-related harms is much wider and includes reputational harm, as well as the fear of being monitored or simply having private information “out there.” Consumers may feel harmed when their personal information—particularly sensitive health or financial information—is collected, used, or shared without their knowledge or consent or in a manner that is contrary to their expectations. For instance, the Commission’s online behavioral advertising work has highlighted consumers’ discomfort with the tracking of their online searches and browsing activities, which they believe to be private.\(^\text{16}\)

Neither FTC report contains any data on any harm, however defined. Demonstrating, and to the extent feasible quantifying, harm is important because it can be the starting point for assessing benefits, which are the reduced harms associated with increased privacy protection.

Neither report demonstrates that its proposals would reduce the amount of any existing consumer harm. For example, assume that consumers’ discomfort with their information being “out there” is a major element of harm. The Staff Report provides no evidence or explanation as to how or whether its proposed framework would make consumers feel significantly more comfortable. Without a dramatic change in the Internet ecosystem, a substantial amount of information would remain “out there.” What, if anything, is the incremental benefit provided by the FTC’s proposed regulations? We do not know.

Another way to assess the benefits of additional online privacy is by using market-generated information to measure how much consumers are willing to pay for more privacy. Economists usually prefer basing consumers’ willingness to pay on observed market behavior because how people behave when confronted with actual market choices better reflects their real preferences than do responses to survey questionnaires or behavior observed in experiments. The widespread use of free, advertising-supported services, such as email and online news subscriptions, suggests that people routinely give up some information about themselves in return for access to content, more useful advertising, and other services, although the transaction is indirect. That is, consumers often are willing to exchange less privacy for the resulting benefits. The FTC has not done a similar balancing.

**Application of Standard Regulatory Principles to the FTC’s Proposed Privacy Framework**

The FTC’s proposed framework is intended to correct perceived shortcomings in the “notice-and-choice” and “harm-based” models of consumer injury. The Commission Report claims the notice-and-choice model is unsatisfactory because consumers do not understand how their data are

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\(^{16}\) Staff Report, *supra* note 2, at 20–21.
being used or the posted privacy notices. Likewise, it claims that the harm-based approach is unsatisfactory because, as indicated above, it focuses on an overly narrow range of harms. To correct these deficiencies, the FTC recommends that companies adopt privacy by design, offer simplified choices to consumers about their data practices (including a Do-Not-Track option for browsers), make their data practices more transparent to consumers, provide consumers with reasonable access to their data, and obtain affirmative consent for retroactive changes to data policies. The Commission and Staff Reports provide virtually no analysis of the benefits or costs of any of these proposals.

**Privacy by Design.** Privacy by design includes providing “reasonable” security for consumer data; “limit[ing] data collection to that which is consistent with the context of a particular transaction or the consumer’s relationship with the business, or as required or specifically authorized by law;” retaining data only as long as necessary to fulfill the purpose for which it was originally collected; and safely disposing of data no longer being used, while ensuring the accuracy of data, particularly if the data could cause significant harm to consumers. In addition, companies should have comprehensive data-management procedures, including training employees on privacy issues and conducting regular privacy reviews for products and services. As discussed above, the Commission and Staff Reports contain no analysis of how companies currently address privacy within their organizations or the extent to which companies already take such steps (without the additional burden of regulatory monitoring). Many companies already have Chief Privacy Officers and devote significant resources to privacy and data security, but the Commission does not appear to have data on these metrics.

The Commission Report notes that the Commission has brought thirty-six cases against companies that failed to provide reasonable security. In addition, the Commission has entered into settlements with Google and Facebook, after accusing the companies of deceptive practices. The Commission Report does not explain why the Commission’s current enforcement authority, together with other substantial incentives that companies already have to protect data, is insufficient. Building greater privacy protections into operations and products and services and assigning additional personnel to privacy issues entails costs that companies would likely pass through to consumers. There is no analysis of what the costs or the benefits of this “privacy by design” would be. Do consumers want companies to incur these costs or would they instead prefer to pay lower prices?

**Simplified Choice.** The Commission Report proposes requiring companies to offer choice for practices that are not “commonly accepted.” Whether a practice is commonly accepted would depend on “the extent to which the practice is consistent with the context of the transaction or the consumer’s existing relationship with the business, or is required or specifically authorized by law.” Commonly accepted practices would include product and service fulfillment, internal operations, fraud prevention, legal compliance and public purpose, and most first-party marketing. The Commission Report does not analyze the implications or the costs and benefits of making it more difficult to use data for all the remaining “not commonly accepted” practices.

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17 Commission Report, supra note 1, at 2.
18 Id. at i, iv, and 57.
19 Id. at 27–29.
20 Id. at 24.
21 Id. at 31.
**Do Not Track.** The Staff Report endorsed a Do-Not-Track mechanism that would allow consumers to opt out of collecting behavioral data for most purposes but, at the same time, asked commenters a series of questions on how a mechanism should be designed and what its impact would be, including:\textsuperscript{24}

- What are the potential costs and benefits of offering a standardized uniform choice mechanism to control online behavioral advertising?
- How many consumers would likely choose to avoid receiving targeted advertising?
- How many consumers, on an absolute and percentage basis, have used the opt-out tools currently provided?
- What is the likely impact if large numbers of consumers elect to opt out? How would it affect online publishers and advertisers, and how would it affect consumers?

These are questions the FTC staff itself should have researched before endorsing the Do-Not-Track mechanism. Despite the lack of research, the Commission Report also endorsed a Do-Not-Track mechanism.\textsuperscript{25} Partly as a result of the FTC’s recommendations, the World Wide Web Consortium (W3C) is developing an industrywide Do-Not-Track standard and the three major browser providers—Google, Microsoft, and Mozilla—have announced that their products will include Do-Not-Track mechanisms.\textsuperscript{26}

Due to the popularity of the telemarketing Do-Not-Call List, a Do-Not-Track mechanism may sound like a good idea. But the similarities between the two end at the names. For example, people sign up for the Do-Not-Call List to reduce unwanted marketing solicitations. A Do-Not-Track mechanism would not do that. Consumers would not necessarily receive fewer ads. (Indeed, for that reason, it might be difficult for them to know if the mechanism was actually working.) They would just receive ads that are less well-targeted to their interests. (Several free tools already let consumers block all online ads on the Internet.)

Some people may use a Do-Not-Track mechanism because they like knowing they are not being tracked. As the discussion above indicates, although this value is not easily quantifiable, the FTC staff should have considered what is known about consumers’ valuation of privacy and should perhaps sponsor additional research in the area.\textsuperscript{27}

These potential benefits need to be weighed against the costs, assuming a Do-Not-Track mechanism is technically feasible.\textsuperscript{28} First, what are the direct costs of implementation? Second, what are the indirect costs in terms of the quantity and quality of services and content on the Internet? Many of these costs would be borne not only by Do-Not-Track participants but by other Internet users as well. A Do-Not-Track mechanism (depending on how many people used it) would reduce the value of the Internet as an advertising medium and therefore would reduce the

\textsuperscript{22} Id. at 38–39.

\textsuperscript{23} Id.

\textsuperscript{24} Staff Report, supra note 2, at A-4.

\textsuperscript{25} Commission Report, supra note 1, at 53.


\textsuperscript{27} This point is also made in Commissioner William Kovacic’s concurring statement. See Staff Report, supra note 2, at D-1.

\textsuperscript{28} See Staff Report, supra note 2, at E-6 (concurring statement of Commissioner W. Thomas Rosch).
revenues available to support Internet content. Finally, consumers who use a Do-Not-Track mechanism will receive ads that are less well-targeted and therefore less useful. The cost of this would depend on the value these consumers place on relevant advertising.

**Increased Transparency.** The Staff Report and the Commission Report call for increased transparency, noting that many consumers do not understand how their data are collected and used and that privacy notices are complex. This is undoubtedly true, because the use of data online is quite complicated. Accordingly, the framework proposes steps to make data practices more transparent to consumers. It recommends that privacy notices should be clearer, simpler to understand, and more transparent.

Transparency and simplicity are worthwhile goals but are unlikely to be costless. Simplifying privacy notices might not just affect the notices. Because the FTC penalizes firms if they do not adhere strictly to announced policies, simplifying notices could affect the ways companies use data, which would be constrained to conform to the notice standards. Thus, implementing transparency and simplicity requirements could reduce benefits to consumers and impose costs on businesses. Whether this is an important issue or not is unclear, but it should be analyzed.

**Access.** Previous FTC reports have acknowledged the complexity of providing consumers with the ability to examine data about themselves and potentially to challenge their accuracy. The FTC 2000 Report stated that “the Commission believes that Access presents unique implementation issues . . . including what categories of data must be made available; the costs and benefits of providing access; and how to ensure adequate authentication . . . .” Yet, neither the Staff Report nor the Commission Report addressed whether access is valuable to consumers, how it would actually be implemented, and its potential to reduce the security of personal information.

**Affirmative Consent for Retroactive Changes to Data Policies.** The Staff Report and the Commission Report encourage firms to seek affirmative consent before revising their data policies to allow for greater use of previously collected data. Requiring that consumers have the opportunity to consent to “new uses” of data may have the unintended consequence of inducing firms to adopt overly vague data policies that are consistent with a very broad set of uses because of the strong tendency of consumers to stay with the default. To allow the use of data in innovative and beneficial ways, less specific data policies would offer more flexibility to companies but would at the same time diminish the usefulness of the privacy policies to consumers. An example of how FTC action might lead to less transparency comes from the recent fine levied against Google for violating an agreement to not misrepresent its privacy policies. In this instance, which involved Google’s +1 feature and tracking cookies, had Google initially been less specific, it might have avoided the historic fine of $22.5 million.

Additionally, the requirement of consent for “new uses” discourages the development of new or lower-cost products or services based on existing information. The recent Department of Commerce Green Paper recognizes this concern. While proposing that companies should incorporate “purpose specifications” and “use limitations” in their notices and privacy practices, the Green Paper notes that “[t]he current privacy policy framework has created an environment in

29 Commission Report, supra note 1, at 60.
30 FTC 2000 Report, supra note 7, at 17.
31 Lenard & Rubin, supra note 12, at 174.
which ‘creative re-use of existing information’ has led to innovations.” The Green Paper provides a useful hypothetical that illustrates the potential tradeoff:

[S]uppose that company executives have grown concerned with security threats against its network equipment and customers’ computers. The Chief Executive Officer (CEO) approves a proposal to provide . . . Internet usage records . . . to in-house researchers, so that they can analyze network traffic and develop security countermeasures. This use of personal information has the clear potential to bring privacy and security benefits to the ISP and its customers. The proposed use, however, would also be contrary to the ISP’s specified purposes for collecting the information in the first place.

There are likely to be new commercial uses (unrelated to security) that also might benefit consumers. It is important to carefully weigh the privacy benefits against the costs of not being able to use data for new uses. Obviously, new uses are not going to be known at the time a privacy rule or practice is being implemented. Innovations forgone are, by their nature, difficult to identify or measure.

Conclusion

The privacy debate is taking place in an empirical vacuum. The FTC has developed policy recommendations without the benefit of systematic data on current privacy practices of firms or consumers, or systematic analysis of the benefits or costs of alternative privacy regimes. Some of the neglected issues include:

- Collecting current data on the privacy and data-management practices of major websites. The most recent data referenced in the Staff Report are from 2000.
- Producing systematic evidence showing whether current practices are harming consumers. Although the Staff Report rejects a harm-based approach, the proposed framework will only produce benefits to the extent it alleviates identified harms.
- Reviewing what is known about how consumers value privacy and undertaking additional studies as a basis for estimating the benefits of a new privacy framework.
- Estimating the costs of the proposed framework and alternatives, including direct pecuniary costs to firms from devoting more resources to privacy and the indirect costs of having less information available. The Staff Report does not acknowledge that its proposal would entail any costs.
- Producing sufficient evidence of a reasonable expectation that the benefits of the proposal are greater than the costs. Otherwise, the proposal should not be adopted.

Although the staff acknowledged the need to assess the costs and benefits of its most prominent proposal, a Do-Not-Track mechanism, the Commission endorsed the proposal without the benefit of an assessment.

Because the Commission and Staff Reports provide virtually no new data or analysis, they are seriously deficient as a foundation for new policy recommendations. They also violate the spirit, if not the letter, of President Obama’s recent executive order on regulation, which stresses the need to evaluate both benefits and costs. Without such analysis, there is no way of knowing whether a particular regulatory action will improve or reduce consumer welfare.


34 Id. at 39.