

Dissenting Statement of Commissioner J. Thomas Rosch
Issuance of Federal Trade Commission Report

¹ Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (Report) at 50-52.

² Id. at 14, 73.

³ Id. at 26. I also support the recommendation that such legislation authorize the Commission to seek civil penalties for violations. However, despite its bow to targeted legislation, the Report elsewhere counsels that the Commission support privacy legislation generally. See, e.g. id. at 16. To the extent that those recommendations are not defined, or narrowly targeted, I disagree with them.

Finally, I concur with the Report insofar as it recommends that information brokers who compile data for marketing purposes must disclose to consumers how they collect and use consumer data.⁴

⁴ Id. at 14, 68-70.

⁵ See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Information and Privacy: In Search of a Data-Driven Policy, Remarks at the Technology Policy Institute Aspen Forum (Aug. 22, 2011), available at <http://www.ftc.gov/speeches/rosch/110822aspeninfospeech.pdf>.

⁶ See Katy Bachman, Study: Internet User Adoption of DNT Hard to Predict, *Adweek.com*, March 20, 2012, available at <http://www.adweek.com/news/technology/study-internet-user-adoption-dnt-hard-predict-139091> (reporting on a survey that found that what Internet users say they are going to do about using a

Do Not Track button and what they are currently doing about blocking tracking on the Internet, are two different things); see also Concurring Statement of Commissioner J. Thomas Rosch, Issuance of Preliminary FTC Staff Report Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (Dec. 1, 2010), available at <http://www.ftc.gov/speeches/rosch/101201privacyreport.pdf>.

⁷ See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Do Not Track: Privacy in an Internet Age, Remarks at Loyola Chicago Antitrust Institute Forum (Oct. 14, 2011), available at <http://www.ftc.gov/speeches/rosch/111014-dnt-loyola.pdf>;

Report seeks consistency with international privacy standards,¹³ I would urge caution. We should always carefully consider whether each individual policy choice regarding privacy is appropriate for this country in all contexts.

That is not how the Commission itself has traditionally proceeded. To the contrary, the Commission represented in its 1980, and 1982, Statements to Congress that, absent deception, it will not generally enforce Section 5 against alleged intangible harm.¹⁴ In other contexts, the Commission has tried, through its advocacy, to convince others that our policy judgments are sensible and ought to be adopted. And, as I stated in connection with the recent Intel complaint, in the competition context, one of the principal virtues of applying Section 5 was that that provision was “self-limiting,” and I advocated that Section 5 be applied on a stand-alone basis only to a firm with monopoly or near-monopoly power.¹⁵ Indeed, as I have remarked, absent such a limiting principle, privacy may be used as a weapon by firms having monopoly or near-monopoly power.¹⁶

¹³ *Id.* at 9-10. This does not mean that I am an isolationist or am impervious to the benefits of a global solution. But, as stated below, there is more than one way to skin this cat.

¹⁴ *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), reprinted in *International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (“Unfairness Policy Statement”) available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>; Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in *FTC Antitrust & Trade Reg. Rep. (BNA)* 1055, at 568-570 (“Packwood-Kasten letter”); and 15 U.S.C. §45(n), which codified the FTC’s modern approach.

¹⁵ *See* Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In re Intel Corp.*, Docket No. 9341 (Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

¹⁶ *See* Rosch, *supra* note 7 at 20.

¹⁷ See

More specifically, as I have said before, the major browser firms' interest in developing

²² See Rosch, *supra* note 7 at 20-21.

²³ Tony Romm, *What Exactly Does 'Do Not Track' Mean?* Politico, Mar. 13, 2012, available at <http://www.politico.com/news/stories/0312/73976.html>; see also Report at 4 (DAA allows consumer to opt out of targeted advertising).

²⁴ See *Self-Regulatory Principles for Multi-Site Data*, Digital Advertising Alliance, Nov. 2011, at 3, 10, 11, available at <http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf>; see also Tazina Vega, *Opt-Out Provision Would Halt Some, but Not All, Web Tracking* New York Times, Feb. 26, 2012, available at <http://www.nytimes.com/2012/02/27/technology/opt-out-provision-would-halt-some-but-not-all->

[web-tracking.html?pagewanted=all](#).

²⁵ See Vega, *supra* note 24.

²⁶ Why Johnny Can't Opt Out: A Usability Evaluation of Tools to Limit Online Behavioral Advertising Carnegie Mellon University CyLab, Oct. 31, 2011, available at http://www.cylab.cmu.edu/files/pdfs/tech_reports/CMUCyLab11017.pdf; see also Search Engine Use 2012, at 25, Pew Internet & American Life Project, Pew Research Center, Mar. 9, 2012, available at [http://pewinternet.org/~/media/Files/ Reports/2012/PIP_Search_Engine_Use_2012.pdf](http://pewinternet.org/~/media/Files/Reports/2012/PIP_Search_Engine_Use_2012.pdf) (Just 38% of internet users say they are generally aware of ways they themselves can limit how much information about them is collected by a website).

³³ Seid.

³⁷ Federal Communications Commission, Connecting America: The National Broadband Plan, Broadband Competition and Innovation Policy, Section 4.1, Networks, Competition in Residential Broadband Markets³⁶, available at <http://www.broadband.gov/plan/4-broadband-competition-and-innovation-policy/>.

³⁸ Federal Communications Commission Working Paper, Broadband decisions: What drives consumers to switch – or stick with – their broadband Internet provider (Dec. 2010), at 3, 8, available at [http://www.fcc.gov/workingpapers/broadband-decisions-what-drives-consumers-to-switch-or-stick-with-their-broadband-internet-provider](#).

⁴¹ Testimony of Jon Leibowitz and J. Thomas Rosch, Chairman and Comm'r, FTC, *The FTC in FY2013: Protecting Consumers and Competition* Hearing on Budget Before the H. Comm. on Appropriations Subcomm. on Financial Services and General Government Cong. 2 (2012), text from CQ Roll Call, available from: LexisNexis Congressional.

⁴² One notable example is found where the Report discusses the articulation of privacy harms and enforcement actions brought on the basis of deception. The Report then notes [l]ike these enforcement actions, a privacy framework should address practices that unexpectedly reveal previously private information even absent physical or financial harm, or unwarranted

which case there can be no pretense that they are ‘voluntary.’”⁴⁵ It makes no difference whether the federal requirement is in the form of enforceable codes of conduct or in the form of an act of Congress. Indeed, it is arguable that neither is needed if these firms feel obliged to comply with the best practices’ or face the wrath of the Commission’ or its staff.

⁴⁵ See FTC Testimony, *supra* note 41.