

THE DISSENT: WHY ONE FTC COMMISSIONER THINKS DO NOT TRACK IS OFF-TRACK  
Rosch: Concepts to Guard Online Privacy Have not Been Properly Vetted

The media loves “do not track.” In recent days, there has been a flood of news articles reporting that the Federal Trade Commission does, too. Some of those articles have even implied that the commission has endorsed particular do-not-track mechanisms. To some extent, that may be the fault of the FTC’s own press releases. But in any event, this implication is wrong.

The concept of do not track has not been endorsed by the commission or, in my judgment, even properly vetted yet. In actuality, in a preliminary staff report issued in December 2010, the FTC proposed a new privacy framework and suggested the implementation of do not track. The commission voted to issue the preliminary FTC staff report for the sole purpose of soliciting public comment on these proposals. Indeed, far from endorsing the staff’s do-not-track proposal, one other commissioner has called it premature.

I also have serious questions about the various do-not-track proposals. In my concurring statement to the preliminary staff report, I said I would support a do-not-track mechanism if it were “technically feasible.” By that I meant that it needed to have a number of attributes that had not yet been demonstrated. That is still true, in my judgment.

First, there are a number of consequences if a consumer adopts a do-not-track mechanism. To begin with, a consumer may sacrifice being served relevant advertising. On a related note, there is academic research suggesting that in order to compensate for the loss of the ability to track consumer behavior and the associated ability to serve relevant advertising, advertisers may need to turn to advertising that is more “obtrusive” in order to attract consumers’ attention.

Consumers may also lose the free content they have taken for granted. Not only could consumers potentially lose access to free content on specific websites, I fear that the aggregate effect of widespread adoption by consumers of overly broad do-not-track mechanisms might be the reduction of free content, free applications and innovation across the entire internet economy. Beyond that, consumers may forgo the reported ability to earn commissions from “selling” the right to track their behavior or allow the use of their personal information.

I also wonder whether an overly broad do-not-track mechanism would deprive consumers of some beneficial tracking, such as tracking performed to prevent fraud, to avoid being served the same advertising, or to conduct analytics that foster innovation. Concerns have been raised that do-not-track mechanisms also may have the unintended consequence of blocking tailored content, in addition to advertising.

These questions echo the concern voiced by Sens. Mark Pryor, D-Arkansas, and Claire McCaskill, D-Mo., at a hearing of the Senate Commerce, Science and Transportation Committee earlier this month.<sup>nd</sup>

behavioral advertising, may always occur. When consumers are offered a do-not-track option, they may misunderstand the limited scope of that choice; and, in some instances,