Dissenting Statement of Commissioner J. Thomas Rosch

Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies
October 22, 2012

I respectfully dissent from the issuance of the Staff Report entitled, ñFacing Facts: Best Practices for Common Uses of Facial Recognition Technologiesò (ñReportò or ñStaff Reportò). Although I appreciate Staffôs efforts to examine the issues surrounding the development and use of facial recognition technology, I believe the Report goes too far, too soon. My reasoning is threefold.

First, I object to the recommendations made in the Staff Report to the extent that they are rooted in Staffôs insistence that the ñunfairnessò prong, rather than the ñdeceptionò prong, of the consumer protection portion of Section 5 of the Federal Trade Commission Act, should govern

beneýts to consumers or to competition.ò[1] As I have pointed out before, the Commission represented in its 1980 and 1982 Statements to Congress that it will generally enforce the consumer protection ñunfairnessò prong of Section 5 only where there is alleged tangible injury, not simply ñ[e]motional impact and other more subjective types of harm.ò[2] The Staff Report on Facial Recognition Technology does not ï at least to my satisfaction ï provide a description of such ñsubstantial injury.ò Although the Commissionôs Policy Statement on Unfairness states

1. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312.
2. *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transp T Policy Statement on Unfairnessò) 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 (ñPackwood-

adequately keep up with it when, and if, a consumerôs data security is compromised or facial recognition technology is used to build a consumer proýle. On the contrary, the Commission has shown that it can and will act promptly to protect consumers when that occurs.