Keynote Remarks

Exploring Options

I. Introduction

Many thanks to Dan Caprio for his kind introduction. By way of background, Dan is the person who first introduced me to Professor Hoffman, so he indirectly had a hand in helping launch this project. Many thanks also to Dean Kelley and Professor Hoffman for their remarks, and to the Duke University Sanford School of Public Policy for hosting this event.

This evening's proceedings are the culmination of a months-long project. My office and I have worked closely with Professor David Hoffman and students at both the Duke University Law School and Sanford School of Public Policy. I'd like to give special thanks to my attorney advisor, Robin Rosen Spector, who spearheaded this project for my office. She brought to this initiative the same breadth of knowledge, dedication, and analytical prowess that she brings each day to our work at the FTC. Without her, this project would not have been possible.

David and I launched this project because preemption and private rights of action have been identified as key impasses on the road to federal privacy legislation. Our goal has been to identify and examine the different approaches Congress has employed with respect to these issues in other legislation, including but not limited to privacy laws. Our student researchers analyzed the preemption provisions in ten U.S. statutes and the E.U.'s General Data Protection Regulation (GDPR) and the private right of action and remedy provisions in six U.S. statutes and the GDPR. Their scope of research encompassed not only the statutes, but also relevant case law, law review articles, and a significant body of scholarship on preemption and private rights of action.

Duke has made the results of this comprehensive research publicly available on a Duke-hosted website[1] to serve as a resource for legislators, as well as for privacy professionals and

[1] https://sites.sanford.duke.edu/techpolicy/exploring-options/.

scholars. We hope this extensive compilation will demonstrate that preemption and private rights of action can be addressed constructively in the context of federal privacy legislation. I want to thank the students at Duke, and my summer law clerk Elizabeth Americo, for their excellent work on this important project. I also want to thank the many thought leaders who contributed their time and effort to this project. Many of them are featured on our panels this evening, so I know it will be a great discussion.

Before going further, I must add the traditional disclaimer that the remarks I deliver today are my own and do not necessarily reflect the views of the Commission or any other Commissioner. With that caveat out of the way, let me give you some context for my interest in this project.

During my tenure as a Commissioner, I have advocated for federal privacy legislation.[2] I am a strong believer in free markets and deregulation, so my advocacy in the privacy arena has come as a surprise to some observers. As you may imagine, I did not arrive at this conclusion lightly. I talked with a wide variety of stakeholders, and read case law, empirical studies, law review articles, sector-specific privacy legislation, drafts of comprehensive privacy legislation, books,

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[2] See, e.g., Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/072821_28_commr_wilson_house_ec_opening_statement_final.pdf

and news reports. Ultimately, I concluded that significant information asymmetries exist between consumers and the entities that collect, monetize, and share consumer data.

These significant information asymmetries create a market failure. Consumers do not fully understand how their data is collected, shared, and monetized. Without this information, they cannot analyze the costs and benefits of using different products and services. And the risks to consumers from the unchecked collection of their data have intensified in recent years. Gaps in existing sectoral laws have created inconsistent privacy protections that continue to widen.[3] The healthcare arena is a good example: information collected in traditional medical settings is protected by Health Information Portability and Accountability Act (HIPAA) but information collected through websites, apps, or wearables is not.[4] The COVID-19 pandemic has exacerbated this issue.[5] And the concern extends beyond consumer privacy: certain uses of consumer data also have serious implications for civil liberties, including our protections under the Fourth Amendment.[6] These concerns also intensified during the pandemic.[7]

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[3] See Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf

[4] Id.

[5] Christine Wilson, Privacy in the Time of Covid-19, TRUTH ON THE MARKET (Apr. 15, 2020), https://truthonthemarket.com/author/christinewilson/; Christine S. Wilson, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum (

My concerns begin, but do not end, with consumers and individuals. Federal privacy legislation is necessary to give businesses guidance on the rules of the road. The need becomes more pronounced as additional states consider and pass privacy legislation. From a business perspective, complying with myriad and potentially conflicting state laws is costly, at best; at worst, it is impossible. The adoption of divergent privacy regimes by other jurisdictions further compounds the patchwork phenomenon.

The bottom line is that federal privacy legislation is long overdue. But two key gating issues must be resolved before privacy legislation becomes a reality. That stubborn fact brings us to the topic at hand: possible avenues to address preemption and private rights of action.

law creates a minimum standard. HIPAA[9] and the Clean Water Act[10] are structured in this way. In other instances, statutes employ conflict preemption – the federal and state laws can coexist as long as there is no conflict but if one arises, the federal law prevails. The Civil Rights Act relies on this approach.[11]

Second, even scholars who do not support preemption acknowledge that there are circumstances under which federal consolidation has benefits. For example, Paul Schwartz, in an article arguing against preemption in federal privacy legislation, explains that preemption

industries have shown the value of national standards and the costs of a stratified, potentially conflicting regulatory environment.[21]

The GDPR experience is also instructive on questions of preemption. In June 2020, the European Commission published a two-year report on the application of GDPR.[22]

conducted during this project has led me to conclude that we need to broaden the conversation. Specifically, the discussion should not be limited to the question of whether federal privacy legislation should have a private right of action. Instead, the discussion should focus on establishing a constructive remedial framework. To do this, legislators should consider the policy goals of the regulatory regime, how best to accomplish those goals, and how best to create appropriate levels of deterrence.

This analysis is drawn from a compelling article by Jim Dempsey, Chris Hoofnagle, Ira Rubinstein, and Katherine Strandburg titled "Breaking the Privacy Gridlock: A Broader Look at Remedies."[27] The authors, including one of our panelists, created a matrix – a highly useful set of questions that we believe regulators could use to map the remedies landscape for privacy. Their analysis highlights three key points: first, remedies should be tied to policy goals; second, no one remedy can successfully promote even a simple goal and therefor

student researchers have prepared matrix analyses of numerous statutes. We hope these analyses, which are posted on the website, will be a useful resource for regulators.

Rory Van Loo, another one of our panelists, has written about several additional remedial avenues beyond private rights of action. These possibilities include enforcement through a supervisory authority, and through third-party

were to pass legislation creating a right and providing a remedy, would it survive the standing test in *Transunion*? In my view, this development highlights the importance of carefully considering other remedies and enforcement mechanisms in federal privacy legislation.

IV. Conclusion

As I hope my remarks have illustrated, these issues are complex and fascinating, and the research we have collected is robust. I hope our compendium will serve as a useful resource for regulators, scholars, and others. Following this event, I will be writing an article with Professor Hoffman and my attorney advisor Robin Spector that delves further into the research and also