Concurring Statement of Acting Chairman Maureen K. Ohlhausen
In the Matter of Vizio, Inc.
Matter No. 1623024
February 6, 2017

I appreciate staff's pursuit of the problematic practices involved in this case. In particular, I support Count II of the complaint, which alleges that Vizio deceptively omitted information about its data collection and sharing program. Evidence shows that consumers do not expect televisions to collect and share information about what they watch. Consumers who are aware of such practices may choose a different television or change the television's settings to reflect their preferences. Therefore, I have reason to believe that this information is material to consumers and the failure to disclose it was deceptive or misleading under Section 5.

However, I write separately to highlight the implications of Count I. It alleges that granular (household or individual) television viewing activity is sensitive information. And it states that sharing this viewing information without consent causes or is likely to cause a "substantial injury" under Section 5(n) of the FTC Act.

We have long defined sensitive information to include financial information, health information, Social Security Numbers, information about children, and precise geolocation information.[1] We have also recommended that companies get opt-in consent before collecting and sharing the content of consumers' communications.[2] But here, for the first time, the FTC has alleged in a complaint that individualized television viewing activity falls within the definition of sensitive information.

There may be good policy reasons to consider such information sensitive. Indeed, Congress has protected the privacy of certain video viewing activity by passing specific laws, such as the Cable Privacy Act of 1984.[3] But, under our statute, we cannot find a practice unfair based primarily on public policy.[4] Instead, we must determine whether the practice causes substantial injury that is not reasonably avoidable by the consumer and is not outweighed by benefits to competition or consumers.

This case demonstrates the need for the FTC to examine more rigorously what constitutes "substantial injury" in the context of information about consumers. In the coming weeks I will launch an effort to examine this important issue further.

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[1] 2012 Privacy Report at 59.
[2] FTC Staff Comment to the Federal Communications Commission: In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, WC Docket No. 16-106, at 20 (May 27, 2016).
[3] Cable Privacy Act of 1984, 47 U.S.C. § 551 (2012).
[4] Federal Trade Commission Act §5(n), 14 U.S.C. §45(n) ("In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.").