

February 13, 2018

The Honorable John Thune, Chairman
The Honorable Bill Nelson, Ranking Member
U.S. Senate Committee on Commerce, Science & Transportation
512 Dirksen Senate Office Building
Washington, DC 20510

RE: FTC Nominations Hearing

Dear Chairman Thune and Ranking Member Nelson:

We write to you regarding the upcoming hearing on the nominations of Joseph Simons, Rohit Chopra, Noah Joshua Phillips and Christine S. Wilson for Commissioners of the Federal Trade Commission (“FTC”).¹ For more than two decades, the Electronic Privacy Information Center (“EPIC”) has worked to establish the FTC’s authority to safeguard the privacy of Americans.² EPIC has also brought many of the leading consumers privacy complaints to the FTC, with the goal of establishing better data protection standards in the United States.³ Still, we believe that the FTC must do far more to safeguard the privacy and data security of American consumers.

Data protection must be a top priority for those who are nominated to serve as Commissioners at the FTC.

The FTC’s Failure to Protect Consumers

The FTC has thus far failed to respond to the data protection crisis in the United States. American consumers face unprecedented risks from data breaches, identity theft, ubiquitous data gathering and consumer profiling. As the recent breach at Equifax made clear, consumers cannot rely on companies to protect their data. These security breaches threaten the financial stability of

¹ *Nomination Hearing – FTC*, 115th Cong. (2018), S. Comm. on Commerce, Science, & Transportation, <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>, (Feb. 14, 2018).

² *See, e.g.*, Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm’r Christine Varney (Dec. 14, 1995), https://epic.org/privacy/internet/ftc/ftc_letter.html (urging the FTC to investigate the misuse of personal information by the direct marketing industry).

³ *See* Complaint and Request for Injunction, Request for Investigation and for Other Relief, *In the Matter of Microsoft Corporation*, (July 26, 2001), https://www.epic.org/privacy/consumer/MS_complaint.pdf; *see also* Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Facebook, Inc.*, (Dec. 17, 2009), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>; Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Google, Inc.*, (Feb. 16, 2010), https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

Americans because identity theft can result in consumers being denied credit, housing, or even a job.⁴

At a recent workshop on “informational injury,” the FTC asked, “how to best characterize” consumer privacy injuries.⁵ EPIC reminded the Commission that the injuries consumers face from identity theft and financial fraud should be obvious.⁶ The FTC should instead be asking why the levels of data breach, identity theft and financial fraud continue to rise in the United States, and what the FTC can do about it.

Despite the many benefits of the modern information economy, consumers have no ability to control their data and cannot protect themselves. Consumers did not choose to disclose their data to Equifax, yet the company had acquired detailed profiles on nearly every American consumer. Consumers confront a “black box society” in which companies acquire information without consumers’ knowledge or consent to engage in secret profiling that can have profound impacts on consumers’ lives.⁷

Even when consumers directly interact with companies, privacy policies provide little value. Research shows that consumers rarely read privacy policies, and even when they do, consumers do not understand them and often do not have a choice to opt out of data collection. As the Commission itself found, the notice-and-choice approach to privacy “led to long, incomprehensible privacy policies that consumers typically do not read, let alone understand.”⁸

Moreover, when the FTC does reach a consent agreement with a privacy-violating company, the Commission routinely fails to enforce it.⁹ American consumers do not have a private right of action to obtain redress from unfair and deceptive trade practices, and thus the FTC’s failure to enforce its own settlements has left consumers with little recourse.

EPIC’s Ten Recommendations to Protect American Consumers

In response to the FTC’s request for comments on its “Five Year Strategic Plan,” EPIC prepared extensive recommendations for the future of the FTC.¹⁰ EPIC also called for comprehensive data protection legislation and the establishment of a data protection agency at a

⁴ Identity Theft Resource Center, *Identity Theft: The Aftermath 2017*, <http://www.idtheftcenter.org/images/page-docs/Aftermath2017Finalv1.pdf>.

⁵ Fed. Trade Comm’n., *Informational Injury Workshop*, (Dec. 12, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/12/informational-injury-workshop>.

⁶ Letter from EPIC to Acting FTC Chair Maureen Ohlhausen and Commissioner McSweeney, December Workshop on “Informational Injury,” (Oct. 31, 2017), <https://epic.org/privacy/ftc/FTC-Letter-Informational-Injury-Workshop-10-24-17.pdf>.

⁷ Frank Pasquale, *THE BLACK BOX SOCIETY*, 8 (2015); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

⁸ Fed. Trade Comm’n., *Protecting Consumer Privacy in an Era of Rapid Change* 60 (2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

⁹ See *EPIC v. FTC*, No. 12-206 (D.C. Cir. Feb. 8, 2012).

¹⁰ Comments of EPIC, *FTC Releases Draft Strategic Plan for Fiscal Years 2018 to 2022*, (Dec. 5, 2017), <https://epic.org/privacy/ftc/EPIC-Comments-FTC-Draft-Strategic-Plan-12-05-17.pdf>.

hearing before the House Financial Services Committee.¹¹ These ten proposals will enable the FTC to fulfill its mission of protecting the privacy and security of American consumers.

1. The FTC Must Enforce Existing Consent Orders and Publish Findings on Compliance

The effectiveness of the FTC depends primarily upon the agency's willingness to enforce the legal judgments it obtains. However, the FTC routinely fails to enforce its consent orders, which promotes industry disregard for the FTC. Companies under consent decree have no incentive to protect consumer data if they do not anticipate the FTC to hold them accountable when they violate consent decrees. The FTC must review substantial changes in business practices that implicate the privacy and data security of American consumers, determine whether these changes comply with existing orders, and publish findings on the agency's website.

2. The FTC Should Incorporate Public Comments on Proposed Settlement Agreements

The FTC should incorporate into its final orders the public comments it solicits on proposed settlement agreements. The Commission's failure to make any changes to proposed orders is: (1) contrary to the explicit purpose of the statutory provision that requires the Commission to request public comments;¹² (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices;¹³ and (3) contrary to the interests of American consumers.

3. The FTC Should Mandate Fair Information Practices in Consumer Privacy Settlements

The FTC should require compliance with Fair Information Practices under the terms of consumer privacy consent orders. The Code of Fair Information Practices is an internationally recognized privacy framework that sets out the rights of consumers and the responsibilities of companies.¹⁴ It makes little sense for the Commission to bring consumer privacy enforcement actions without mandating any affirmative requirements for the collection and use of consumer data.

4. The FTC Should Promote Transparency

The FTC should be more transparent in how it handles complaints from consumer organizations. Specifically, the FTC should promptly confirm receipt of such complaints and notify the complainants in a timely fashion if it decides not to bring formal action, providing the reasons for that decision. The Commission should also establish a formal and transparent process

¹¹ *Examining the Current Data Security and Breach Notification Regulatory Regime, Hearing before the House Comm. on Fin. Services, S. Comm. on Fin. Institutions and Consumer Credit, 115th Cong. (2018)*, (Statement of Marc Rotenberg, Exec. Dir., EPIC), <https://epic.org/testimony/congress/EPIC-Testimony-HFS-2-14-18.pdf>.

¹² Commission Rules of Practice, 16 C.F.R. § 2.34(c) (2014).

¹³ Federal Trade Commission Act, 15 U.S.C. § 46 (2006).

¹⁴ EPIC, The Code of Fair Information Practices, https://epic.org/privacy/consumer/code_fair_info.html.

to assess significant changes in business practices by a company subject to an FTC consent order.

5. The FTC Should Seek Greater Authority to Protect American Consumers

The FTC lacks legislative authority to address the data protection crisis in the United States. Congress should enact comprehensive data protection legislation that gives the FTC authority to mandate baseline data security standards for companies. Today, our country is facing cyberattacks from foreign adversaries that target the personal data stored by companies. The FTC's failure to seek comprehensive data protection legislation puts not only consumers but our nation at risk.

6. The FTC Should Bring More Actions Based on “Unfairness Authority”

The FTC should adopt a broader understanding of consumer harm caused by companies that fail to implement strong data protection standards. The FTC's unworkable “notice and choice” approach fails to provide meaningful privacy protections and simply requires companies to adopt vague privacy policies. The Commission should use its unfairness authority to establish affirmative privacy and data security standards that reduce the risk of identity theft, data breach, and financial fraud.

7. The FTC Should Oppose Mergers that Consolidate User Data and Threaten Consumer Privacy

The risks to consumer privacy and data security posed by mergers and acquisitions cannot be overstated. When companies merge, they combine not only their products, services, and finances, but also their vast troves of personal data. This increases the risk of cyberattacks and data breaches, and also increases the invasiveness of data collection. The FTC has approved too many mergers, including Google/DoubleClick, Google/Nest, and Facebook/WhatsApp. The FTC should use its antitrust authority to block the merger of companies that consolidate user data and threaten consumer privacy.

8. The FTC Should Produce Concrete Outcomes from Workshops

FTC workshops provide an important opportunity for experts to provide input to the Commission, but these workshops should produce meaningful, actionable outcomes. To date, many of the workshops do not produce tangible results and merely lead to unenforceable suggestions for industry. The FTC should propose legislative and regulatory solutions and use its authority to address the consumer privacy issues raised in these workshops.

9. The FTC Should Enforce Privacy Shield and COPPA

Until there is a replacement for Privacy Shield, the FTC has an obligation to uphold its responsibilities and to bring enforcement action when necessary. Without strong enforcement of the Privacy Shield framework, foreign governments are reluctant to permit the transfer of the personal data of their citizens to the U.S. The FTC should also enforce the Children's Online

Privacy Protection Act (COPPA) that Congress put in place to address the unique privacy and safety risks faced by children.

10. The FTC Should Support Establishment of a Data Protection Agency in the United States

The United States is one of the few democracies in the world that does not have a federal data protection agency, even though the original proposal for such an institution emerged from the U.S. in the 1970s.¹⁵ As data flows increase and the data broker industry proliferates, the need for an effective, independent data protection agency becomes clear. An independent agency can more effectively utilize its resources to police the current widespread exploitation of consumers' personal information. The FTC should back the long overdue establishment of a Data Protection Agency in the United States.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Sam Lester

Sam Lester
EPIC Consumer Privacy Fellow

/s/ Christine Bannan

Christine Bannan
EPIC Policy Fellow

¹⁵ See, EPIC, The Privacy Act of 1974, <https://epic.org/privacy/1974act/#history>.