

September 26, 2017

The Honorable Jerry Moran, Chairman
The Honorable Richard Blumenthal, Ranking Member
U.S. Senate Committee on Commerce, Science, and Transportation
Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security
Dirksen Senate Building, Room 512
Washington, DC 20510

RE: Hearing on “FTC Stakeholder Perspectives: Reform Proposals to Improve Fairness, Innovation, and Consumer Welfare”

Dear Chairman Moran and Ranking Member Blumenthal:

We write to you regarding the upcoming hearing on “FTC Stakeholder Perspectives: Reform Proposals to Improve Fairness, Innovation, and Consumer Welfare.”¹ As evidenced by recent massive data breaches, data protection is perhaps the most important consumer welfare issue facing the FTC today. The FTC must do more to safeguard American consumers. The FTC’s continued failure to act against the growing threats to consumer privacy and security could be catastrophic.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC is a leading advocate for consumer privacy and has appeared before this Committee on several occasions.³ EPIC has fought for privacy rights for Internet users at the Federal Trade Commission for more than two decades. We filed landmark complaints about privacy violations by Uber, Microsoft, Facebook, and Google.⁴

¹ *FTC Stakeholder Perspectives: Reform Proposals to Improve Fairness, Innovation, and Consumer Welfare*, 115th Cong. (2017), S. Comm. on Commerce, Science, and Trans., Subcomm. on Consumer Protection, Product Safety, Insurance, and Data Security, <https://www.commerce.senate.gov/public/index.cfm/2017/9/ftc-stakeholder-perspectives-reform-proposals-to-improve-fairness-innovation-and-consumer-welfare> (September 26, 2017).

² See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ See, e.g. Marc Rotenberg, EPIC Executive Director, Testimony before the U.S. Senate Committee on Commerce, Science, and Transportation, *Internet Privacy and Profiling* (June 13, 2000), <https://epic.org/privacy/internet/senate-testimony.html>; Letter from EPIC to the U.S. Senate Committee on Commerce, Science, and Transportation on Oversight of the FTC (Sept. 26, 2016), <https://epic.org/privacy/consumer/EPIC-Letter-Sen-Comm-CST-FTC-Oversight.pdf>.

⁴ See Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Uber Technologies, Inc.* (Jun. 22, 2015), <https://epic.org/privacy/internet/ftc/uber/Complaint.pdf>; 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

The FTC’s Current Approach is Insufficient to Protect Consumer Privacy and Security

American consumers face unprecedented privacy and security challenges. The recent data breach by consumer credit reporting agency Equifax exposed the personal information—including names, addresses, phone numbers, dates of birth, social security numbers, and driver’s license numbers—of 143 million people.⁵ This the latest in a growing number of high-profile hacks that threaten the privacy, security, and financial stability of American consumers. Far too many organizations collect, use, and disclose detailed personal information without following proper procedures for safeguarding that information. Our government must respond with comprehensive, baseline privacy protections that ensure Fair Information Practices – an internationally recognized set of informational privacy practices⁶ – are applied across the Internet ecosystem.

At this time, the FTC is simply not doing enough to safeguard the personal data of American consumers. While we respect the efforts of the Commission to protect consumers, the reality is that the FTC lacks the statutory authority, the resources, and the political will to adequately protect the online privacy of American consumers.

The FTC’s privacy framework – based largely on “notice and choice”– is simply not working. Research shows that consumers rarely read privacy policies; when they do, these complex legal documents are difficult to understand. Nor can industry self-regulatory programs provide realistic privacy protections when they are not supported by enforceable legal standards.

Even when the FTC reaches a consent agreement with a privacy-violating company, the Commission rarely enforces the Consent Order terms.⁷ American consumers whose privacy has been violated by unfair or deceptive trade practices do not have a private right of action to obtain redress. Only enforceable privacy protections create meaningful safeguards, and the lack of FTC enforcement has left consumers with little recourse.

Fundamentally, the FTC is not a data protection agency. Without regulatory authority, the FTC is limited to reactive, after-the-fact enforcement actions that largely focus on whether companies honored their own privacy promises. Because the United States currently lacks comprehensive privacy legislation or an agency dedicated to privacy protection, there are very few legal constraints on business practices that impact the privacy of American consumers.

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.

⁵ Equifax Inc., *Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes*, <https://investor.equifax.com/news-and-events/news/2017/09-15-2017-224018832> (Sept. 15, 2017).

⁶ See EPIC, *Code of Fair Information Practices*, https://www.epic.org/privacy/consumer/code_fair_info.html.

⁷ See *EPIC v. FTC*, No. 12-206 (D.C. Cir. Feb. 8, 2012).

EPIC's Recommendations

Maintaining the status quo imposes enormous costs on American consumers and businesses. Consumers face unprecedented threats of identity theft, financial fraud, and security breach.⁸ Privacy protections based on industry self-regulation and burdensome “notice and choice” policies do not provide meaningful safeguards for consumers. The FTC must issue effective guidance and use its Section 5 enforcement authority to ensure adequate protection of consumer privacy in the digital age.

Moreover, the FTC must promptly investigate business practices, pursue complaints, enforce existing Consent Orders, and modify proposed settlements to reflect public comments. The Commission's ongoing failure to fulfill these obligations is (1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public;⁹ (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices;¹⁰ and (3) contrary to the interests of American consumers.

We urge Congress to consider the Commission's use of Section 5 authority in the context of the greater American legal landscape. Because the U.S. lacks a comprehensive privacy law or an agency dedicated to privacy protection, there are very few legal constraints on business practices that impact the privacy of Americans. The FTC's already modest Section 5 authority helps to deter and penalize the abuse of data. Any effort to limit the Commission's authority – coupled with Congress' failure to update America's privacy laws – is a disservice to the vast majority of Americans who are increasingly concerned about their loss of privacy and want their government to do more to protect this important democratic value.

We ask that this letter be submitted into the hearing record. We look forward to working with you to improve the FTC's authority in this field and to develop rules to provide meaningful and much-needed protections for consumer privacy.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Christine Bannan

Christine Bannan
EPIC Policy Fellow

⁸ See, e.g., FED. TRADE COMM'N, *Consumer Sentinel Network Data Book* (Feb. 2016), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-januarydecember-2015/160229csn-2015databook.pdf>.

⁹ Commission Rules of Practice, 16 C.F.R. § 2.34 (C) (2014).

¹⁰ Federal Trade Commission Act, 15 U.S.C. § 46 (2006).