

July 30, 2018

The Honorable Roger Wicker, Chairman
The Honorable Brian Schatz, Ranking Member
U.S. Senate Committee on Commerce, Science, & Transportation
Subcommittee on Communications, Technology, Innovation, and the Internet
Russell Senate Office Building, Room 253
Washington, DC 20002

Dear Chairman Wicker and Ranking Member Schatz:

We write to you regarding the hearing “The Internet and Digital Communications: Examining the Impact of Global Internet Governance.”¹ The failure of the United States to address the growing concerns about online privacy is threatening both the digital economy and democratic institutions.

The Electronic Privacy Information Center was established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC is a leading advocate for consumer privacy and has appeared before this Committee on several occasions, and has actively participated in the proceedings of the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”).² In a recent commentary, we said that the Commerce Department had failed to recognize the importance of privacy protection for the digital economy.³ As we wrote in the *Financial Times*, “Instead of criticizing the EU effort, the commerce department should help develop a comprehensive strategy to update US data protection laws.”

It would be a mistake for the United States to continue down the road of criticizing others instead of updating our privacy laws. Today Internet users face unprecedented levels of fraud and data breach. According to the Federal Trade Commission, identity theft is the number one concern of American consumers, just behind debt collection.⁴

¹ *The Internet and Digital Communications: Examining the Impact of Global Internet Governance*, 115th Cong. (2018), S. Comm. on Comm., Science, & Trans., Subcomm. on Communications, Technology, Innovation, and the Internet, <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=00505D23-78EC-4C8C-8C18-11770654D27A> (July 31, 2018).

² See, e.g. Marc Rotenberg, EPIC Executive Director, Testimony before the U.S. Senate Committee on Commerce, Science, and Transportation, Commerce Committee, *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>; Letter from EPIC to the U.S. House of Representatives Committee on Energy and Commerce on FCC Privacy Rules (June 13, 2016), <https://epic.org/privacy/consumer/EPIC-FCC-Privacy-Rules.pdf>.

³ Marc Rotenberg, “Congress can follow the EU’s lead and update US privacy laws,” *Financial Times*, May 31, 2018, <https://www.ft.com/content/39044ec6-64dc-11e8-a39d-4df188287fff>.

⁴ *Id.*

There is an urgent need for leadership from the United States on data protection. Virtually every other advanced economy has recognized the need for an independent agency to address the challenges of the digital age. Current law and regulatory oversight in the United States is woefully inadequate to meet the challenges. The Federal Trade Commission is not a data security agency. The FTC only has authority to bring enforcement actions against unfair and deceptive practices in the marketplace, and it lacks the ability to create prospective rules for data security. The Consumer Financial Protection Bureau similarly lacks data protection authority and only has jurisdiction over financial institutions. Neither agency possesses the expertise and resources needed to address data security across the country. And the Privacy and Civil Liberties Oversight Board, another agency that could help safeguard Americans and their data, lies dormant. As the data breach epidemic reaches unprecedented levels, the need for an effective, independent data protection agency has never been greater. An independent agency can utilize its resources to police the current widespread exploitation of consumers' personal information. An independent agency would also be staffed with personnel who possess the requisite expertise to regulate the field of data security.

The failure of the U.S. to update its data privacy laws continues to pose a significant challenge to the free flow of information online. Transborder flows of personal data are a bedrock of digital commerce. Particularly in the realm of data protection, compatible legal systems are often key to facilitating these transfers.⁵ Increasing the level of data protection and privacy provided to match the highest global standards available under law is the best means of facilitating free information flow.

The level of privacy protection guaranteed under national law can be undermined if the data is transferred to a less protective legal or regulatory regime. To build trust that undergirds free data flow, a high level of legal and regulatory protection and protecting fundamental privacy rights must be maintained regardless of where data travels. *Schrems v. Data Protection Commissioner*, the European Court of Justice's landmark decision striking down the EU-US "Safe Harbor" arrangement, is evidence that failing to adequately consider privacy risks in the global digital ecosystem ends poorly for both human rights and the digital economy.⁶

The Privacy Shield negotiated in its place fails to address the issues with Safe Harbor. It did not limit U.S. surveillance agencies' access to foreign data, nor did it address the need for independent oversight and effective remedies for surveillance.⁷ Today, Privacy Shield is subject to ongoing legal challenge and risks being struck down.⁸ This instability of data flows internationally has long-term negative consequences for free flow of information.

Simply increasing the level of data protection provided around the world and here in the U.S. is a meaningful way to facilitate information flows. For instance, there is evidence the GDPR will

⁵ See, e.g., Regulation 2016/679, 2016 O.J. (L119) 1 (EU).

⁶ C-362/14, *Schrems v. Data Prot. Comm'r*, 2015 E.C.R. 650.

⁷ See, e.g., Letter from EPIC, et. al, to Isabelle Falque-Pierrotin Chairman, Article 29 Working Party, et. al (Mar. 16, 2016), <https://epic.org/privacy/intl/schrems/Priv-Shield-Coalition-LtrMar2016.pdf>.

⁸ EPIC, *Data Protection Commissioner v. Facebook & Max Schrems (Irish High Court)*, EPIC.org <https://epic.org/privacy/intl/DPC-v-Facebook-IrishCourt/> (referral to CJEU includes questions concerning Privacy Shield).

raise and harmonize the level of protection *around the world* as some companies in the U.S. become GDPR compliant for all customers regardless of location.⁹

Conclusion

Substantial reforms to increase privacy protection are the best way to simultaneously enhance the free flow of information and individual rights. U.S. privacy law is out of date. There has always been a gap between changes in technology and business practices and developing new privacy protections. But the gap today in the United States is the greatest at any time since the emergence of modern privacy law in the 1960s. The current approach is also unnecessarily inefficient, complex, and ineffective. EPIC encourages Congress to prioritize updating U.S. privacy and data protection law to respond to changes in technology.¹⁰

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

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⁹ EPIC, *US and European Consumer Groups Urge Global Compliance with GDPR*, Epic.org (May 24, 2018), <https://epic.org/2018/05/us-and-european-consumer-group-3.html>.

¹⁰ Letter from EPIC to Senate Comm. on Commerce, Science, & Transportation (June 12, 2018), <https://epic.org/testimony/congress/EPIC-SCOM-NTIA-June2018.pdf>.