

December 3, 2019

The Honorable Roger Wicker, Chairman
The Honorable Maria Cantwell, Ranking Member
U.S. Senate Committee on Commerce, Science, and Transportation
512 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Wicker and Ranking Member Cantwell:

We write to you in regarding your hearing on “Examining Legislative Proposals to Protect Consumer Data Privacy.”¹ EPIC appreciates the Committee’s focus on data privacy. The time is past due for Congress to act on privacy. Congress’ failure to pass comprehensive baseline privacy legislation or to establish a U.S. Data Protection Agency has put Americans’ personal data at risk.

The U.S. is one of the few developed countries in the world without a data protection agency. The practical consequence is that the U.S. consumers experience the highest levels of data breach, financial fraud, and identity theft in the world. And U.S. businesses, with their vast collections of personal data, remain the target of cyber-attack by criminals and foreign adversaries. The longer the U.S. continues on this course, the greater will be the threats to consumer privacy, democratic institutions, and national security.

EPIC warned the Senate about foreign access to consumer data over two years ago. In testimony before the Senate Banking Committee, EPIC President Marc Rotenberg said:

U.S. consumers, businesses, and the U.S. government face a genuine threat from the unbounded collection of personal data without adequate legal and technical protections. This data is now the target of foreign adversaries. Two years ago it was the OPM breach. Now it is the Equifax breach. I am reluctant to imagine the consequences for the United States of the next major breach.²

But Congress has taken no action.

¹ *Examining Legislative Proposals to Protect Consumer Data Privacy*, S. Comm. on Commerce, Sci., and Trans. (Dec. 4, 2019), <https://www.commerce.senate.gov/2019/12/examining-legislative-proposals-to-protect-consumer-data-privacy>.

² *Hearing on Consumer Data Security and the Credit Bureaus*, S. Committee on Banking, Housing, and Urban Affairs (Testimony of Marc Rotenberg, President, EPIC) (Oct. 17, 2017), <https://epic.org/testimony/congress/EPIC-Testimony-SBC-10-17.pdf>.

The United States Needs a Data Protection Agency

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. In 2011, following the Facebook and Google consent orders, EPIC believed that the FTC could function as an effective privacy agency but that is clearly no longer true. Even FTC Commissioner Joe Simons recently conceded in a Congressional hearing that the FTC does not have the authority to safeguard privacy.³ ***The United States urgently needs a Data Protection Agency.***

The FTC is ineffective. The agency ignores most complaints it receives, does not impose fines on companies that violate privacy, and is unwilling to impose meaningful penalties on repeat offenders.⁴ In documents obtained in September 2019 by EPIC, we uncovered 3,000 complaints new complaints filed with the FTC *since the Commission proposed the \$5 billion settlement with Facebook two months ago.*⁵

Earlier this year, our case EPIC v. FTC determined that there were over 26,000 complaints against Facebook pending with the Commission.⁶ ***The FTC is simply ignoring thousands of consumer privacy complaints about Facebook's ongoing business practices.*** The Federal Trade Commission may help consumers with broken toasters, but the FTC is not an effective data protection agency. Even when the FTC reaches a consent agreement with a company, the Commission fails to protect the interests of consumers.⁷

The FTC Chairman has made much of the large fines recently imposed against Facebook and Google. But large fines are not the solution to data protection. EPIC, Color of Change, the Open Markets Institute and others wrote to the FTC in January telling the agency that more than fines are necessary in the Facebook case.⁸ Our groups called for equitable remedies, including reforming hiring and management practices at Facebook. *EPIC called for the FTC to require Facebook to unwind the acquisition of both WhatsApp and Instagram,*⁹ a view that is now widely shared by many

³ *Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies*, 116th Cong. (2019), H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law, <https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-4-perspectives-antitrust-agencies> (testimony of Joseph Simons, Chairman, Fed. Trade Comm'n at 1:35:45: "on the privacy side, we have one hundred year old statute that was not in any way designed or anticipating the privacy issues that we face today.") (Nov. 13, 2019).

⁴ Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.*, FTC File No. 1823109 at 17 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.

⁵ EPIC, *EPIC Uncovers 3,156 More Facebook Complaints at FTC—Over 29,000 Now Pending* (Sept. 22, 2019), <https://epic.org/2019/09/epic-uncovers-3156-more-facebo.html>.

⁶ EPIC, *EPIC FOIA - FTC Confirms More than 25,000 Facebook Complaints are Pending* (Mar. 27, 2019), <https://epic.org/2019/03/epic-foia---ftc-confirms-more-.html>.

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

⁸ Letter from EPIC et al. to Joseph Simons, Chairman, Federal Trade Comm'n (Jan. 24, 2019), <https://epic.org/privacy/facebook/2011-consent-order/US-NGOs-to-FTC-re-FB-Jan-2019.pdf>.

⁹ See Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 132-33 (2018).

experts in the antitrust field. Our groups also recommended that the FTC require Facebook to add an independent director who represents the interest of users and also examine the civil rights impacts of Facebook's products and policies.

The 2011 Facebook Order was the result of an extensive complaint filed by EPIC and a coalition of consumer organizations in 2009, following Facebook's repeated changes to its privacy settings that overrode user preferences and allowed third parties to access private information without users' consent.¹⁰ The FTC has an obligation to the American public to ensure that companies comply with existing Consent Orders. It is unconscionable that the FTC allowed this unprecedented disclosure of Americans' personal data to occur. *The FTC's failure to act imperils not only privacy but democracy as well.*

For many years, FTC Chairmen and Commissioners assured Congress and representatives of the European governments, responsible for safeguarding European consumers, that the FTC was an effective privacy agency.¹¹ One former FTC Chairman even proposed that the FCC's privacy jurisdiction be transferred to the FTC because the FTC was doing such an incredible job.¹²

The FTC's problems are not lack of budget or staff. The FTC has not even filled the current post for a Chief Technologist. The FTC has simply failed to use its current resources and current authorities to safeguard consumers.

¹⁰ EPIC, et al, In the Matter of Facebook, Inc. (Complaint, Request for Investigation, Injunction, and Other Relief) (Dec. 17, 2009), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>.

¹¹ According to the statement of the FTC Commissioners who testified before the Senate Commerce Committee in 2012:

Similar to the Google order, the Commission's consent order against Facebook prohibits the company from deceiving consumers with regard to privacy; requires it to obtain users' affirmative express consent before sharing their information in a way that exceeds their privacy settings; and requires it to implement a comprehensive privacy program and obtain outside audits. In addition, Facebook must ensure that it will stop providing access to a user's information after she deletes that information.

The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission: Hearing Before the S. Comm on Commerce, Science and Transportation, at 18, 112th Cong. (May 9, 2012) (statement of Fed. Trade Comm'n.),

https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-need-privacy-protections-perspectives-administration-and/120509privacyprotections.pdf; see also, *The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission, Hearing before the S. Comm. on Commerce, Science, and Transportation, 112th Cong. (May 19, 2012)* (statement of Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n) ("We have also charged companies with failing to live up to their privacy promises, as in the highly publicized privacy cases against companies such as Google and Facebook, which together will protect the privacy of more than one billion users worldwide. As a Commissioner, I will urge continuation of this strong enforcement record."), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120509privacystatement.pdf; Letter from FTC Chairwoman Edith Ramirez to Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, European Commission, at 4-5 (Jul. 7, 2016), <https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004q0v>.

¹² Jon Leibowitz and Jonathan Nuechterlein, *The New Privacy Cop Patrolling the Internet* (May 10, 2016), <http://fortune.com/2016/05/10/fcc-internet-privacy/>.

Given the enormity of the challenge, the United States would be best served to do what other democratic countries have done and create a dedicated Data Protection Agency, based on a legal framework that requires compliance with baseline data protection obligations.¹³ An independent agency could more effectively police the widespread exploitation of consumers' personal data and would be staffed with personnel who possess the requisite expertise to regulate the field of data security.¹⁴

EPIC encourages Congress to update U.S. privacy law and to create a Data Protection Agency. EPIC's new report *Grading on a Curve* also sets out the key elements of a comprehensive privacy law.¹⁵ As you consider data privacy legislation, we urge you to review EPIC's report, attached to this statement.

We ask that this letter and the attachments be entered in the hearing record.

Sincerely,

Marc Rotenberg

Marc Rotenberg
EPIC President

Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

Attachments

EPIC, *Grading On A Curve* (2019).

Marc Rotenberg, *America Needs a Privacy Law*, New York Times (December 25, 2018)

Marc Rotenberg, *Congress can follow the EU's lead and update US privacy laws*, Financial Times (June 1, 2018) ("Regarding innovation, it would be a critical mistake to assume that there a trade-off between invention and privacy protection. With more and more devices connected to the Internet, privacy and security have become paramount concerns. Properly understood, new privacy laws should spur the development of techniques that minimize the collection of personal data.")

¹³ EPIC, *The U.S. Urgently Needs a Data Protection Agency*, <https://epic.org/dpa/>; also see attached.

¹⁴ See Privacy and Digital Rights for All, *The Time is Now: A Framework for Comprehensive Privacy Protection and Digital Rights in the United States* (2019), <https://www.citizen.org/sites/default/files/privacy-and-digital-rights-for-all-framework.pdf>.

¹⁵ See <https://epic.org/GradingOnACurve/>.