March 26, 2019

The Honorable Jim Risch, Chairman
The Honorable Bob Menendez, Ranking Member
US Senate Committee on Foreign Relations
423 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Mr. Keith Krach

Dear Chairman Risch and Ranking Member Menendez:

We write to you regarding your upcoming nomination hearing of Mr. Keith Krach to be Under Secretary of State for Economic Growth, Energy, and the Environment. In that position, Mr. Krach would serve as the US Privacy Shield Ombudsperson. EPIC takes no position for or against the nominee. We write to underscore the urgency of Congressional action to safeguard the privacy interests of Americans.

American consumers face unprecedented privacy and security challenges. The unregulated collection of personal data has led to staggering increases in identity theft, security breaches, and financial fraud in the United States. Far too many organizations collect, use, and disclose detailed personal information with too little regard for the consequences. The US should take three steps to update domestic privacy law: (1) enact comprehensive baseline privacy legislation, (2) establish an independent data protection agency, and (3) ratify the International Privacy Convention.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC has testified about transatlantic data flows and has made recommendations on how the US and Europe could move forward to address shared concerns about the protection of privacy.

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To Support Cross Border Data Flows, Congress Must Modernize US Privacy Law

There are several steps that Congress should take to address concerns about data protection in the United States. These recommendations would also help safeguard cross border data flows that are important for US consumers and US businesses.

First, Congress should enact comprehensive baseline privacy legislation. Baseline federal legislation should be built on a familiar privacy framework, such as the original US Code of Fair Information Practices and the widely followed OECD Privacy Guidelines. The rights and responsibilities set out in these frameworks are necessarily asymmetric: the individuals that give up their personal data to others get the rights; the companies that collect the information take on the responsibilities. This is the approach that the US, the EU, and others have always taken to establish and update privacy laws about the collection and use of personal data.⁴

Second, Congress should create an independent privacy agency, as Congress contemplated in 1974 when it enacted the Privacy Act.⁵ EPIC has recommended the establishment of a privacy agency to ensure independent enforcement of the Privacy Act, develop additional recommendations for privacy protection, and provide permanent leadership within the federal government on this important issue.⁶ This independent privacy agency would be charged with enforcing privacy laws.

Enforcement should not be assigned to the FTC, as the FTC has missed many opportunities to strengthen US privacy law. 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.

Third, the US should ratify the International Privacy Convention 108, the most-well established legal framework for international privacy protection.⁸ Because of the global reach of new technologies, international agreements provide the best opportunity to establish data protection standards.⁹ The Privacy Convention would establish a global bias to safeguard personal information and enable the continued growth of the Internet economy. Many US companies have already

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indicated their support for the General Data Protection (GDPR) of the European Union.\textsuperscript{10} But there is no mechanism for the United States to accede to the EU Regulation. However, the United States is an Observer to the Council of Europe and has formally ratified COE conventions in the past, most notably the Cybercrime Convention.\textsuperscript{11} The Privacy Convention provides the opportunity for the United States to back a well known and well regarded international framework that would both protect privacy and preserve cross border data flows.

The United States should update its privacy law because it is long overdue, because it is widely supported, and because the ongoing failure to modernize our privacy is imposing an enormous cost on American consumers. This is not simply a matter of trade policy. It is a matter of fundamental rights. There is today a growing consensus on both sides of the Atlantic, supported by consumer groups and business leaders, to recognize that privacy is a fundamental human right.

*Privacy Shield Is Not an Effective Basis for EU-US Data Flows*

EPIC and many others are concerned about the adequacy of the Privacy Shield and the protection of consumer data.\textsuperscript{12} Without more substantial reforms to ensure protection for fundamental rights of individuals on both sides of the Atlantic, Privacy Shield will put users at risk and undermine trust in the digital economy. Specifically, the United States must commit to protecting the data privacy of both US-persons and non-US-persons in order to protect users and instill trust in the digital economy.\textsuperscript{13}

Neither consumers nor businesses want to see the disruption of cross border data flows. But the problems of inadequate data protection in the United States can no longer be ignored. U.S. consumers are suffering from skyrocketing problems of identity theft, data breach, and financial fraud. European governments are very concerned about what happens to the personal information of their citizens when it is transferred to the United States. Privacy Shield does not solve this problem. The US will need to do more to reform privacy law to enable cross border data flows. It is a well-known paradox that promoting the free flow of personal data across national boundaries requires comprehensive privacy protection.\textsuperscript{14}


We ask that this Statement from EPIC be entered in the hearing record. We look forward to working with you on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg  /s/ Caitriona Fitzgerald
Marc Rotenberg  Caitriona Fitzgerald
EPIC President  EPIC Policy Director

/s/ Eleni Kyriakides
Eleni Kyriakides
EPIC International Counsel