



January 18, 2017

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

RE: Hearing on “Nomination of Wilbur Ross to serve as Commerce Secretary”

Dear Chairman Thune and Ranking Member Nelson:

We write to you regarding the nomination of Wilbur Ross to serve as Commerce Secretary and the critical issue of privacy protection, perhaps the most important issue that the Secretary of Commerce will confront over the next several years.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.¹ 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

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.³ The recent Yahoo! data breach that exposed

¹ See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

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 Fed. Trade Comm’n, *Consumer Sentinel Network Data Book* (Feb. 2016), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2015/160229csn-2015databook.pdf>.

the personal information of more than one billion users⁴ is 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 with too little regard for the consequences.

The next Commerce Secretary must back strong privacy safeguards for American consumers. 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.⁵ 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.

The FCC must also do more to safeguard American consumers. As such, EPIC was concerned with the limited scope of the FCC's recent broadband privacy rules. EPIC repeatedly urged the Commission to establish comprehensive safeguards for all communications services, not simply broadband providers.⁶

Of particular concern for the incoming Commerce Secretary is the “Privacy Shield,” which permits the flow of data on European consumers to firms located in the United States that would otherwise be subject to European privacy law. EPIC and many others are concerned about the adequacy of the Privacy Shield and the protection of consumer data.⁷ Without more

⁴ Yahoo!, *Important Security Information for Yahoo Users* (Dec. 14, 2016), <https://investor.yahoo.net/releasedetail.cfm?ReleaseID=1004285>.

⁵ See *EPIC v. FTC*, No. 12-206 (D.C. Cir. Feb. 8, 2012).

⁶ See Letter from EPIC to FCC Chairman Tom Wheeler on Communications Privacy (Jan. 20, 2016), <https://epic.org/privacy/consumer/EPIC-to-FCC-on-CommunicationsPrivacy.pdf>; Comments of EPIC, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket NO. 16- 106 (May 27, 2016), <https://epic.org/privacy/consumer/EPIC-FCC-Privacy-Rules.pdf>.

⁷ See, e.g., Testimony of Marc Rotenberg, EPIC Executive Director, Testimony before the U.S. House of Representatives Energy & Commerce Subcommittees on Commerce, Manufacturing, and Trade and Communications and Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (Nov. 3, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

substantial reforms to ensure protection for fundamental rights of individuals on both sides of the Atlantic, the 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.⁸

The nominee for Commerce Secretary should make clear his commitment to a comprehensive approach to data protection, based in law. If he fails to do this, there is a real risk that the transatlantic flow of personal data will be disrupted, and consumer privacy, as well as business opportunity and innovation will suffer.

We ask that this letter be submitted into the hearing record. EPIC looks forward to working with the Senate Commerce, Science, and Transportation Committee going forward.

Sincerely,

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⁸ See, e.g., Letter from EPIC, et al., to Article 29 Working Party Chairman Isabelle Falque-Pierrotin, et al., on Privacy Shield (Mar. 16, 2016), <https://epic.org/privacy/intl/schrems/Priv-Shield-Coalition-LtrMar2016.pdf>.