



Consumer Federation of America

1620 I Street, N.W., Suite 200 * Washington, DC 20006

September 25, 2018

The Honorable John Thune
Chairman
Committee on Commerce, Science and
Transportation
United States Senate
512 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Bill Nelson
Ranking Member
Committee on Commerce, Science and
Transportation
United States Senate
512 Dirksen Senate Office Building
Washington, DC 20510

RE: Hearing September 26, 2018 on “Examining Safeguards for Consumer Data Privacy”

Dear Chairman Thune and Ranking Member Nelson:

Please accept the following comments for the record from Consumer Federation of America (CFA), an association of nearly 300 nonprofit consumer organizations across the United States. CFA was established in 1968 to advance the consumer interest through research, advocacy and education.

We welcome Congressional hearings to explore privacy issues. Consumers’ perspectives are essential to having an informed discussions of those issues, however, and we regret that they are not included in this hearing.¹ While we look forward to additional hearings that will include those voices, it would have been useful to provide an opportunity for corporate and consumer representatives to respond to each other’s views.

Our view is that comprehensive federal legislation on privacy should only be undertaken if it is based on the premise that Americans have an inherent right to privacy² and if it will require respect for that right to be integral to the development of commercial products and practices.

In far too many cases, Americans’ personal information is exploited, not protected. We see debacles such as the Cambridge Analytica case, in which consumers’ data was used

¹ CFA joined other consumer and privacy groups in a letter to Chairman Thune in this regard, see <https://consumersfed.org/wp-content/uploads/2018/09/privacy-groups-voice-concern-over-consumer-group-exclusion.pdf>.

² Described so aptly more than a century ago by Samuel D. Warren and Louis D. Brandeis in their seminal article, “The Right to Privacy,” Harvard Law Review, Vol. 4, No. 5 (December 15, 1890), pp. 193-220, available at <http://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf>.

for secondary purposes they never imagined or desired³ and the Equifax data breach where there did not seem to be a process for ensuring the security of highly sensitive information about millions of Americans.⁴ We see tactics by Google and others to mislead and manipulate individuals into consenting to privacy-invasive default settings.⁵ And we see the failure of the Federal Trade Commission (FTC) to take adequate measures to protect Americans' privacy from the corrosive effects of the increasing marketplace dominance of major tech companies.⁶

Yet rather than suggesting ways to address these problems and make real strides to improve the privacy and security of Americans' personal information, many in industry seem to be arguing that we should go backwards, to a time before the General Data Protection Regulation (GDPR)⁷ in Europe, before the California Consumer Privacy Act,⁸ before laws were enacted in Illinois and Texas protecting the privacy of biometric information,⁹ before Nevada required notice of the information collected about individuals online,¹⁰ and before the states enacted data breach laws.¹¹ They want weak federal legislation that would preempt the states and fail to give individuals meaningful control of their personal information or hold companies adequately accountable for its misuse. They want the "free flow of data" across national borders but fail to acknowledge that the United States has fallen behind the rest of the world when it comes to privacy protection.

The GDPR is not going away, and Committee members should ask the companies that will testify at the hearing what steps they have taken to implement it for their operations in Europe, whether they are treating consumers in the US the same way, and if not, why? If they are concerned about the "balkanization" of privacy requirements, why not adopt the highest standard everywhere they do business?

³ See Kevin Granville, "Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens," New York Times, March 19, 2018, available at <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

⁴ See Lily Hay Newman, "EQUIFAX OFFICIALLY HAS NO EXCUSE," Wired, September 14, 2017, available at <https://www.wired.com/story/equifax-breach-no-excuse/>.

⁵ See June 27, 2018 letter from consumer and privacy groups to the FTC, available at <https://consumerfed.org/wp-content/uploads/2018/06/deceived-by-design-letter-to-ftc.pdf> calling for investigation after the release of a report, "Deceived by Design," from the Norwegian Consumer Council.

⁶ See consumer and privacy group comments to the FTC in regard to "The intersection between privacy, big data and competition," August 20, 2018, available at <https://consumerfed.org/wp-content/uploads/2018/08/consumer-privacy-groups-comment-on-intersection-between-privacy-big-data-and-competition.pdf>.

⁷ See text at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679>.

⁸ As recently amended, text available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1121.

⁹ Texas Business and Commercial Code § 503.001 at <https://codes.findlaw.com/tx/business-and-commerce-code/bus-com-sect-503-001.html>; Illinois Biometric Privacy Information Act, 740 ILCS 14/ at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57>.

¹⁰ NRS 603A.300-360, <https://www.leg.state.nv.us/NRS/NRS-603A.html#NRS603ASec220>.

¹¹ The National Conference of State Legislatures maintains a list at <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>.

Another question to ask is whether the United States should have a federal agency that can promulgate privacy regulations and has effective enforcement powers, as other countries do. We repeatedly hear from industry that one size does not fit all but that everyone should have to comply with privacy requirements. There are many different types of businesses and their collection and use of individuals' personal information varies widely. Yet, with the exception of personal information collected online from children, the FTC is unable to craft rules to provide guidance for how individuals' personal information should be handled and no civil penalty authority. Indeed, the FTC's ability to deter unfair and deceptive conduct in privacy and security matters has been under attack, and among the arguments that have been made is that the agency failed to specify exactly what companies were expected to do.¹² The only way to develop the guidance that businesses need within an overall privacy framework is to mandate that the FTC or an independent data protection agency promulgate rules for them to follow.

The document "Developing the Administration's Approach to Privacy"¹³ which the National Telecommunications and Information Administration will formally release for comment tomorrow fails to recognize privacy as a fundamental right and instead echoes the position of the Chamber of Commerce and others that privacy is a risk to be managed. It endorses the current model of "notice and consent" without addressing the fact that in many cases Americans find that "consent" means "take it or leave it" if they want to use the products and services that are offered them, and it merely restates many common fair information principles without describing how they should be implemented in practice.

If Congress wants to undertake a serious effort to protect Americans' privacy and encourage business models to be built on respect for this vital principle, it should consider legislation that guarantees individual privacy rights, ensures their just and fair treatment, places specific obligations and responsibilities on entities that handle their data, affirms the federal government's role in protecting it, and gives an agency sufficient authority and resources to do the job. Furthermore, Congress should not interfere with states' abilities to provide stronger protections for their constituents when needed.

Sincerely,



Susan Grant
Director of Consumer Protection and Privacy
Consumer Federation of America

¹² See CFA's August 20, 2018 comments to the FTC about its lack of remedial authority in response to its examination of meeting 21st century consumer protection challenges, at <https://consumerfed.org/testimonial/cfa-urges-ftc-to-seek-legal-reforms-to-improve-its-ability-to-meet-21st-century-consumer-protection-challenges/>.

¹³ Docket No. 180821780-8780-01, RIN 0660-XC043, available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-20941.pdf>.