

Senate Committee on Commerce, Science, and Transportation

Examining Legislative Proposals to Protect Consumer Privacy Data

10:00 am, 216 Hart Senate Office Building

Purpose

The purpose of this hearing is to discuss how legislative proposals intend to provide consumers with more security, transparency, choice, and control over personal information both online and offline.

Members Present

Chairman Wicker, Ranking Member Cantwell, Senator Thune, Blumenthal, Schatz, Moran, Markey, Blackburn, Tester, Young, Rosen, Sullivan, Lee, Baldwin, Gardner

Witnesses

The Honorable Julie Brill, Former Commissioner of the Federal Trade Commission, Corporate Vice President and Deputy General Counsel, Microsoft

The Honorable Maureen Ohlhausen, Former Acting-Chair of the Federal Trade Commission, Co-Chair, 21st Century Privacy Coalition

Ms. Laura Moy, Executive Director and Associate Professor of Law, Georgetown Law Center on Privacy & Technology

Ms. Nuala O'Connor, Senior Vice President and Chief Counsel, Digital Citizenship at Walmart

Ms. Michelle Richardson, Director of Privacy and Data, Center for Democracy and Technology

Opening Statements

Chairman Wicker said that today the committee convenes to discuss legislative proposals to protect consumers' personal information. For the past year, members of this committee have worked to create a strong national privacy law to protect all Americans. It is clear that Congress needs to act now to provide consumers with more protections and work to protect the future economy. Americans deserve more transparency, choice and security related to their data sharing. Americans should have trust and confidence that their data will be protected and secure. This committee also needs to make sure that entrepreneurs and small business are encouraged to innovate. However, consumers should be able to opt out of private businesses collecting and sharing their data.

Ranking Member Cantwell said that cyber Monday was just a couple days ago and set a record of 9 billion dollars in sales. However, it is not just on cyber Monday that consumers share their data online. Too often this data can be used to target consumers in predatory ways. There are countless stories of consumers who have had their data breached. Specifically in Washington State, data breaches increased by 20 percent. Congress must act quickly to create a privacy framework to protect consumers from these data breaches. Fortunately, these discussions have been largely bipartisan and this committee is dedicated to working together. Furthermore, this committee needs to create the enforcement mechanisms necessary to enforce any law passed. Without enforcement any future law passed will be useless.

Testimony

Ms. Brill said that it is unfortunate that consumers are often responsible for protecting their own data. Consumers should have autonomy over their own data, however large corporations also need to be held accountable for their predatory practices. Rapid advances in artificial intelligence have the ability to propel society into the future and grow the economy. However, this is all made possible due to increased data collection. Some of this data is very personal and has profound implications for privacy. Privacy is a basic human right and one in which all other rights originate from. Today, consumer trust hangs in the balance. The burden on consumers to protect their own data is too great. Most Americans are deeply concerned that their data may be used in harmful and predatory ways. The time has come for Congress to act.

Ms. Ohlhausen said that the FTC is reaching the limit of its tools. Thus consumers and business are often left to navigate a complicated data collection field with little support and oversight. Legislation should provide consumers transparency into companies' data collection practices. Legislation should also enact a set of consumer rights that are relevant to the future economy. Finally, consumers must be protected from harmful data practices while also allowing companies to innovate and create products that consumers want. Furthermore, legislation must be done at the federal level because discrepancies at the state level may leave consumers vulnerable and present a burden to companies who operate across state borders.

Ms. Moy said that American are desperate for greater privacy protections. However, Congress must reject any legislation that does not protect consumers' civil rights. It is possible to concentrate harm on marginalized communities while also concentrating profits. These types of practices are already happening and it could lead to a 'worst-case scenario'. Fortunately, many of the bills introduced to this committee work to protect data and civil rights. However, in order for these bills to be successful, there need to be strong enforcement measures. The FTC is critically understaffed to address data privacy. Finally, Congress should not eliminate consumer protection laws that are already in place in certain states.

Ms. O'Connor said that data helps Walmart manage its supply chain and anticipate its customer's needs. Walmart firmly believes that data has improved the consumer experience, but understands that many consumers also have concerns about their data being collected and shared. Walmart is committed to protecting consumer data. Walmart is in the business of using data to sell products to customers but is not in the business of selling data. Walmart believes that a comprehensive data privacy law is needed at the federal level. Furthermore, legislation must be carefully crafted as to not place an undue burden on businesses and entrepreneur.

Ms. Richardson said that any law that Congress passes should shift the burden of protecting data from the consumer to the entity collecting the data. Furthermore any law passed must protect marginalized groups from having their data manipulated to

concentrate burdens on a community. It is also necessary to improve enforcement mechanisms and empower the FTC to flex their oversight authority. This committee needs to act in a bold manner. It is not enough to tackle this issue on a consumer by consumer basis. Instead it is clear that there needs to be systemic change at the national level. Congress has a tremendous amount of options and should examine what states are already doing successfully.

Questions and Answer

Chairman Wicker asked how having a nationwide standard would help consumers. **Ms. Richardson** said that many laws at the state level are not comprehensive. There is an opportunity to do better nationally. **Ms. Ohlhausen** said that a uniform law would give consumers predictability and stability across state borders. **Chairman Wicker** asked if the proposals being considered by the committee are more comprehensive than the law in California. **Ms. O'Connor** said yes. Furthermore there is strength in consistency and clarity for both consumers and retailers.

Ranking Member Cantwell asked if the panel believes in consumer privacy laws. **All panelists** said yes. **Ranking Member Cantwell** asked if privacy statements from companies should be more transparent and easier for consumers to understand. **Ms. Brill** said focusing on third parties may be very burdensome for companies. **Ms. Moy** said yes. **Ms. O'Connor** said personal data should not be shared with third parties. **Ms. Richardson** said yes.

Sen. Thune asked if it is appropriate to give consumers more information and choice surrounding how AI influences what consumers see on platforms. **Ms. Ohlhausen** said yes. **Ms. Brill** said yes. **Ms. Moy** said yes, these practices lead to political divides and infringements on civil rights. **Ms. O'Connor** said yes. **Ms. Richardson** said yes. **Sen. Thune** asked what the implications would be to a company if there was not a uniform federal law, but rather different laws in different states. **Ms. Brill** said that conflicting state laws will make it difficult for consumers and companies to conduct business across state lines.

Sen. Blumenthal asked if there should be private enforcement of a national data law. **Ms. Moy** said yes. **Ms. Richardson** said yes. **Sen. Blumenthal** asked if a federal law should add to state laws as opposed to undermine state laws. **All panelists** said yes. **Sen. Blumenthal** asked if the FTC is capable of acting alone in enforcing privacy laws. **Ms. Moy** said it would be problematic to leave enforcement up to the FTC alone. The FTC has a poor history of prosecuting all of the necessary cases. **Ms. Richardson** said there needs to be more enforcements beyond the FTC.

Sen. Fischer asked what the implications are given states have different definitions for common privacy terms. **Ms. Ohlhausen** said it creates a complex system for both consumers and sellers. **Sen. Fischer** asked if this creates a barrier to entry for new seller. **Ms. Ohlhausen** said yes. These laws help existing sellers because it is so difficult to break into the market.

Sen. Schatz asked if Facebook and AirBnB users know how their data is being used. **Ms. Brill** said it is very difficult to understand the agreements. **Ms. Ohlhausen** said some understand and some do not. **Ms. Moy** said no. **Ms. O'Connor** said Walmart has a duty of care to consumers and needs to be efficient. **Ms. Richardson** said no. **Sen. Schatz** asked if there should be protections to prevent companies from using data in a predatory way. **Ms. Richardson** said yes. **Ms. O'Connor** said yes. **Ms. Moy** said yes. **Ms. Ohlhausen** said yes. **Ms. Brill** said yes and bills on both sides of the aisle have these types of components in them. **Sen. Schatz** asked if the FTC needs more staff. **Ms. Brill** said yes.

Sen. Moran asked if consumers should be able to access and delete their own data collected by companies. **All Panelists** said yes. **Sen. Moran** asked if the FTC should be given future targeted rule making authority. **All Panelists** said yes. **Sen. Moran** asked if the FTC should increase their resources. **Ms. Ohlhausen** said yes the FTC needs substantially more resources. The FTC needs to be able to hire more personnel and improve their technological capabilities. **Sen. Moran** asked if state attorney generals should be able to enforce FTC regulations. **All Panelists** said yes.

Sen. Markey asked if a comprehensive privacy law should seek to protect children with a higher priority than adults. **All Panelists** said yes. **Sen. Markey** asked if ads targeted to kids should be banned. **Ms. Brill** said absolutely.

Sen. Blackburn asked if private right of action is a tool that big tech could use to keep competition at bay. **Ms. Ohlhausen** said that a private right of action does not give consumers additional protections. **Ms. Brill** said that Microsoft is concerned that private right of action does not address consumer's needs.

Sen. Tester asked if the FTC should be the one and only regulator. **Ms. Brill** said at the federal level yes. **Ms. Ohlhausen** said state AG's should also be empowered. **Sen. Tester** asked how policy makers ensure that consent forms are understandable. **Ms. Richardson** said Congress should adopt the consent structure proposed by the Chairman and Ranking Member. Furthermore, there should be increased rights for consumers no matter what box they check.

Sen. Young asked what provisions would be harmful to new firms and startups. **Ms. Brill** said an over emphasis on sharing with third parties can be disruptive. Many small business rely on third parties to remain viable. **Sen. Young** asked how Congress can act to ensure that small business does not become constrained. **Ms. O'Connor** said that the portability in Sen. Cantwell's bill is very crucial.

Sen. Rosen asked what the largest barrier is to companies acting proactively to protect their data. **Ms. Brill** said that consumers should be able to access their own data and delete it. This creates a great deal of hygiene surrounding the data that companies collect. **Ms. Ohlhausen** said that entities should be required to explain the data they collect, why they collect it and who they share it with.

Sen. Sullivan asked if a national standard could actually make it harder for small business. **Ms. O'Connor** said that small business often contract with places like Walmart and other large businesses. For this reason small business benefit from a uniform rule. **Ms. Brill** said that Microsoft works with a tremendous amount of small businesses and they speak on their behalf. A national standard would be good.

Sen. Lee asked how to characterize the harm being discussed today since consumers have different opinions. **Ms. Ohlhausen** said that it is true that consumers have different opinions on data collection. It is important to draw a distinction between sensitive information and non-sensitive information and explain to consumers how it is being collected. Furthermore, there should be an opt-out clause for consumers so those who want data collected can still share that data. **Sen. Lee** asked what consequences the nation could face if Congress defines data in a very broad term. **Ms. O'Connor** said it could create a lack of clarity and a lack of clarity is never good for businesses or consumers.

Sen. Baldwin asked if aspects of the legislation being considered secures consumer data. **Ms. Richardson** said yes. There is significant agreement surrounding data security and this consensus is encompassed in the bills. **Sen. Baldwin** asked if the proposals in front of the committee protect marginalized communities. **Ms. Moy** said that bill introduced by the Ranking Member takes positive steps to protect marginalized communities.

Sen. Gardner asked if Walmart believes that consumers should be aware they are purchasing products with sensitive technologies. **Ms. O'Connor** said yes. **Sen. Gardner** asked if privacy is a human right. **All panelists** said yes. **Sen. Gardner** asked if consumers have a right to control their own data. **All panelists** said yes.