

October 9, 2018

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

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

Dear Chairman Thune and Ranking Member Nelson:

We write to you regarding the hearing on Consumer Data Privacy.<sup>1</sup> We appreciate the Committee's interest in this critical issue.<sup>2</sup> For many years, EPIC has worked with the Commerce Committee to help protect the privacy rights of Americans. EPIC also led the efforts at the Federal Trade Commission to establish the FTC's authority to safeguard consumer privacy. EPIC brought the complaints concerning Google and Facebook that led to the two significant consent orders in 2011.<sup>3</sup> The Facebook consent order was discussed many times earlier this year when Mark Zuckerberg testified before this Committee.

Unfortunately, today the United States confronts a data protection crisis. Yesterday, the *Wall Street Journal* reported that Google exposed the data of 500,000 Google+ users yet failed to disclose the vulnerability for fear of reputational damage.<sup>4</sup> The company has since shut down the service.

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<sup>1</sup> *Consumer Data Privacy: Examining Lessons from the European Union's General Data Protection Regulation and the California Consumer Privacy Act*, 115th Cong. (2018), Senate Comm. on Commerce, Sci., and Trans.

<sup>2</sup> See generally, ROTENBERG, THE PRIVACY LAW SOURCEBOOK: UNITED STATES LAW, INTERNATIONAL LAW AND RECENT DEVELOPMENTS (EPIC 2018) (including the complete text of the "GDPR"), Marc Rotenberg and David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, Harvard Journal Of Law And Public Policy (Spring 2013), [http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36\\_2\\_605\\_Rotenberg\\_Jacobs.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36_2_605_Rotenberg_Jacobs.pdf), Marc Rotenberg, *On International Privacy: A Path Forward for the US and Europe*, Harvard International Review (June 1, 2014), <http://hir.harvard.edu/on-international-privacy-a-path-forward-for-the-us-and-europe/>; See also, Rotenberg, *Congress can follow the EU's lead and update US privacy laws*, Financial Times (June 1, 2018), <https://www.ft.com/content/39044ec6-64dc-11e8-a39d-4df188287fff>

<sup>3</sup> FTC, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises* (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep> ("Facebook's privacy practices were the subject of complaints filed with the FTC by the Electronic Privacy Information Center and a coalition of consumer groups."); FTC, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network: Google Agrees to Implement Comprehensive Privacy Program to Protect Consumer Data* (Mar. 30, 2011) ("Google's data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched."), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz>

<sup>4</sup> Douglas MacMillan and Robert McMillan, *Google Exposed User Data, Feared Repercussions of Disclosing to Public*, Wall Street Journal (Oct. 8, 2018), <https://www.wsj.com/articles/google-exposed-user-data-feared-repercussions-of-disclosing-to-public-1539017194>.

The week before, Facebook revealed a data breach that impacted nearly 50 million users.<sup>5</sup> This all follows the revelation earlier this year that Facebook unlawfully transferred 50 million user profiles to the data mining firm Cambridge Analytica. The FTC said it was reopening the Facebook investigation in March,<sup>6</sup> but still there is no report, no outcome, and no fine.

As the organization that worked with others to build the FTC’s authority to safeguard consumer privacy,<sup>7</sup> we cannot stress enough how badly the current system is broken. The FTC has failed to enforce its existing judgments and has failed to seek authority to protect baseline data protection standards. The FTC’s failure to enforce consumer privacy safeguards has led not only to diminished data protection in the United States, but also to less innovation and less competition among Internet services.<sup>8</sup> The FTC’s failure to enforce the original privacy rights of WhatsApp allowed Facebook to acquire user data and undermine one of the best messaging services.<sup>9</sup> Even the founders of WhatsApp know this.<sup>10</sup> But the FTC has said nothing.

The Commerce Committee has given the FTC a pass on its enforcement obligations and American consumers and businesses live with the consequences – increased identity theft and financial fraud, reduced competition and innovation. The current course is a glide path to catastrophe.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg  
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald  
EPIC Policy Director

/s/ Christine Bannan

Christine Bannan  
EPIC Consumer Protection Counsel

/s/ Jeff Gary

Jeff Gary  
EPIC Legislative Fellow

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<sup>5</sup> Mike Isaac and Sheera Frenkel, *Facebook Security Breach Exposes Accounts of 50 Million Users*, N.Y. Times (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/technology/facebook-hack-data-breach.html>.

<sup>6</sup> FTC, *Statement by the Acting Director of FTC’s Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices* (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>

<sup>7</sup> EPIC letter to FTC Commissioner Christine Varney (Dec. 14, 1995), [https://www.epic.org/privacy/internet/ftc/ftc\\_letter.html](https://www.epic.org/privacy/internet/ftc/ftc_letter.html)

<sup>8</sup> George Soros, *Remarks delivered at the World Economic Forum* (“as Facebook and Google have grown into ever more powerful monopolies, they have become obstacles to innovation, and they have caused a variety of problems of which we are only now beginning to become aware.”), <https://www.georgesoros.com/2018/01/25/remarks-delivered-at-the-world-economic-forum/>

<sup>9</sup> Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation*, TECHONOMY (May 4, 2018), <https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation/>

<sup>10</sup> Nick Statt, *WhatsApp co-founder Jan Koum is leaving Facebook after clashing over data privacy: The messaging app’s CEO pushed back against Facebook’s approach to user data, advertising, and encryption*, The Verge, (Apr. 30, 2018) <https://www.theverge.com/2018/4/30/17304792/whatsapp-jan-koum-facebook-data-privacy-encryption>