

“Time for Congress to Protect the Privacy of All Americans”

Testimony of

Jon Leibowitz

Former Commissioner and Chair, Federal Trade Commission

Hearing of the Senate Commerce Committee:

“Revisiting the Need for Data Privacy Legislation”

Senate Committee on Commerce, Science, and Transportation

September 23, 2020

Chairman Wicker, Ranking Member Cantwell, and other distinguished Members of this Committee, thank you for the opportunity to testify at this important hearing. My name is Jon Leibowitz and I am an attorney at the law firm of Davis Polk & Wardwell LLP. With Maureen Ohlhausen, I also serve as co-chair of the 21st Century Privacy Coalition, an organization composed of the nation's leading communications companies.<sup>1</sup> But I am not testifying in that capacity today. Instead, I am speaking as a former government official. During my time in government, I served as a Democratic Commissioner (2004-2009) and Chairman (2009-2013) of our nation's leading consumer privacy enforcement agency, the Federal Trade Commission ("FTC").<sup>2</sup> And before that I worked in the Senate for more than a dozen years for the late Paul Simon of Illinois and Herb Kohl of Wisconsin.

In January 2019, Mr. Chairman, you invited several of us to appear before this Committee to speak about the need for federal privacy legislation. There were at least forty staffers in the room from both sides of the aisle and, after our discussion, most of us walked out optimistic that there would soon be a federal privacy law to give all Americans greater control over their data, require more transparency and accountability by corporations, and empower the Federal Trade Commission to protect consumers through greater authority and much-needed resources.

I felt the same way when I testified before the Committee in a more formal setting the next month, and even more so at the end of last year when the leaders of this

---

<sup>1</sup> The member companies/associations of the 21st Century Privacy Coalition are AT&T, CenturyLink, Comcast, Cox Communications, CTIA, NCTA – The Internet and Television Association, T-Mobile, USTelecom, and Verizon.

<sup>2</sup> The FTC has brought hundreds of privacy and data security cases, including many against companies for misusing or failing to reasonably protect consumer data.

Committee, as well as your counterparts in the House, each released very substantive, thoughtful privacy bills.

Unfortunately, nearly two years later, our shared goal remains unfulfilled, and consumers lack multiple safeguards as a result. Here are just a few examples of ways Americans would have benefited had all of us pulled together to enact a federal statute:

- Americans across the country would be protected by the same consistent privacy regime regardless of where in the United States they live, work, or happen to be accessing information. Consumers in every state would have far more control of their own data;
- Our nation's children, who are taking classes over Zoom and connecting with their peers on Tik Tok, would be at less risk from privacy predators and data-amassing cyberazzi. There would almost certainly be nationwide privacy protections for teens which do not exist today; and
- With clearer rules of the road, Americans would feel more confident sharing information for contact tracing, and more effectively be able to come together to help fight the spread of a deadly virus. We would be able to make much better use of the testing data we already have.

To be sure, the United States has been hit by a once-in-a-century pandemic that has made legislating on anything else incredibly difficult. But, if anything, COVID-19 should spur on your effort because the virus also reminds us exactly why a federal solution is critical.

More than 100 years ago, predecessor Congresses faced a similar challenge: ensuring that the nation would have access to a free and fair economy—one not

controlled by powerful trusts—and guaranteeing that rather than a smattering of state competition statutes there would be one formidable federal law. They met the moment when they passed the Sherman Act by an overwhelming margin, and followed up with the enactment of other landmark antitrust laws for the benefit of all American consumers. In fact, it was this Committee that led the bipartisan charge to create the FTC. Today, the challenge that calls us is about a different but no less cherished value: personal privacy. There is little doubt in my mind that you can meet this challenge.

### **A Federal Solution Is Critical**

The pandemic, in addition to wreaking havoc on public health across the world, has also fundamentally changed the way we live. Now, more than ever, people across America rely on online services to obtain information, communicate, run their businesses, learn, and obtain basic human needs. By its very nature, though, the Internet connects individuals across state (and international) lines; that is, our data knows no state boundaries. As a result, one strong federal privacy regime should apply throughout the United States.

Indeed, no matter how well-intentioned and understandable it may be, state intervention in this quintessentially interstate issue is problematic. A proliferation of different state privacy requirements would create inconsistent protections for consumers. A Seattle resident visiting Biloxi should not live under a different privacy regime than a Mississippian visiting Washington State. Nor should she lose any protections if she decides to drive from one of those states to the other.

The absence of a national privacy law yields consumer confusion about both the scope of privacy protections and the jurisdictions in which such protections apply. Moreover, a proliferation of state and local consumer privacy laws in place of a national framework would create significant compliance and operational challenges for businesses of all sizes. It would also erect barriers to entry for innovation and investment, and obstacles to new consumer-friendly and beneficial uses of information.

### **Strong Enforcement and Strong Enforcers Are Necessary**

But preempting state laws should not mean weakening protections for consumers. In fact, quite the contrary: a federal law can and should be stronger and more comprehensive than existing regimes such as the California Consumer Privacy Act (“CCPA”), and more effective than the General Data Protection Regulation (“GDPR”) in Europe.

The CCPA was passed over two years ago, and technically became effective on January 1 of this year. It puts technology-neutral limits on the sale of information, and heightened restrictions on children’s information. It is proof that a legislature can pass a privacy law, and Attorney General Becerra has done extraordinary work in developing expertise and working on regulations to make the law work for Californians. But its implementation is plagued by uncertainty, with regulations delayed and an upcoming ballot initiative that may further amend the law. Meanwhile, the protections consumers receive are limited—for example, the state law fails to regulate how information, including children’s information, can actually be used. It essentially only limits how information is shared or disclosed.

And GDPR has largely failed to fulfill its promise. Its complexity has made enforcement extremely challenging, and European countries have brought no significant cases. The European public has to click through a frustrating number of pop-up consent windows when visiting websites. European (and American) law enforcement officials have been stymied by the International Corporation for Assigned Names and Numbers' ("ICANN") justice-obstructing interpretation of the EU law, which now permits domain name companies to avoid revealing domain names owned by criminals.

Rather than relying on either a state standard or the problematic one developed by the EU, the United States should be setting the standard for privacy protection around the globe. In other words, this Committee can write a smarter, stronger, and more permanent privacy law for all Americans.

### **Recommended Ingredients in a New American Privacy Regime**

So what should a national privacy law look like?

Congress does not need to reinvent the wheel. Many of the elements I would propose are consistent with recommendations made by my former agency in its 2012 Privacy Report, drafted after years of work and engagement with stakeholders of all kinds.<sup>3</sup> Technology will continue to change, but the basic principles enshrined in the Report remain the most effective way to give consumers the protections they deserve.

---

<sup>3</sup> See FTC Report, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (Mar. 2012), available at: <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>. The 2012 FTC Privacy Report was developed over a period of more than two years and was lauded by the privacy community for its powerful approach to protecting consumers. The recommendations outlined there are based on institutional expertise accrued over decades, through hundreds of cases brought by the FTC against companies to ensure privacy and security of consumer information, as well as from the input of dozens of

My view, and that of the Report, is that national privacy legislation must give consumers statutory rights to control how their personal information is used and shared, and provide increased visibility into companies' practices when it comes to managing consumer data. Such an approach should provide consumers with easy-to-understand privacy choices based upon the nature of the information itself—its sensitivity, the risk of consumer harm if such information is the subject of an unauthorized disclosure—and the context in which it is collected. For example, consumers expect sensitive information—including health and financial data, precise geolocation, Social Security numbers, and children's information—to receive heightened protection to ensure confidentiality. Therefore, a muscular privacy law should require affirmative express consent for the use and sharing of consumers' sensitive personally identifiable information, and opt-out rights for non-sensitive information. But consumers do not expect to consistently provide affirmative consent to ensure that companies fulfill their online orders or protect them from fraud; thus, inferred consent for certain types of operational uses of information by companies makes sense. Consumers should also have rights of access and deletion where appropriate, and deserve civil rights protections thoughtfully built for the Internet age.

Another key tenet of the FTC Report is that privacy should not be about *who* collects an individual's personal information, but rather should be about *what* information is collected and *how* it is protected and used. That is why federal privacy legislation should be technology- and industry-neutral. Companies that collect, use, or share the

---

stakeholders (including businesses, privacy advocates, and academics), and multiple consumer privacy and data security workshops.

same type of covered personal information should not be subject to different privacy requirements based on how they classify themselves in the marketplace.

Rigorous standards should be backed up with tough enforcement. To that end, Congress should provide the FTC with the ability to impose civil penalties on violators for first-time offenses, something all of the current Commissioners—and I believe all the former Commissioners testifying here today—support. Otherwise, malefactors will continue to get two bites at the apple of the unsuspecting consumer.

And there is no question in my mind that the FTC should have the primary authority to administer the national privacy law. The FTC has the unparalleled institutional knowledge and experience gained from bringing more than 500 cases to protect the privacy and security of consumer information, including those against large companies like Google, Twitter, Facebook, Uber, Dish Network, and others.

Congress should not stop there. The way to achieve enhanced enforcement is by giving the FTC, an agency that already punches above its weight, the resources and authority to carry out its mandate effectively. As of 2019, there were fewer employees (“FTEs”) at the agency now than there were in 1980,<sup>4</sup> and the American population has grown by more than 100 million people since then. The number of FTEs has actually decreased since I left the agency in 2013 until this year. Moreover, the FTC clearly has a role to play in developing rules to address details that Congress may not want to tackle in the legislation itself as well as new developments in technology that could overwhelm (or circumvent) enforcement. For that reason, you should give the agency some APA

---

<sup>4</sup> Federal Trade Commission, FTC Appropriation and Full-Time Equivalent (FTE) History, available at: <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.



rulemaking authority to effectively implement your law. Having said that, Congress should not overwhelm the FTC with mandated rulemaking after rulemaking, which would only bog the agency down instead of permitting it to focus on enforcing the new law. When I came to the FTC as a Commissioner in 2004, the attorneys in our Financial Practices Division were devoting enormous resources to writing rules and reports mandated by Congress in the Fair and Accurate Credit Transactions Act (“FACTA”)—resources that could have been used for critically needed enforcement efforts.

The FTC also needs continued authority to provide redress directly to consumers. Disturbingly, the Seventh Circuit recently upended the longstanding interpretation of Section 13(b) of the FTC Act,<sup>5</sup> which allows the agency to seek consumer redress in federal court, and which has enabled the Commission to return billions of dollars to victimized Americans.<sup>6</sup> The Supreme Court will be reviewing that case and another related one from the Ninth Circuit this term,<sup>7</sup> but Congress should step in and make the FTC’s authority to seek such redress unambiguous in legislation.

Mr. Chairman, I am glad to see that language confirming the FTC’s authority to obtain equitable relief in federal court has been included in your recently introduced bill, and I hope everyone on the Committee can support that.

And the FTC, even with greater resources and authority, should not be alone in its efforts to protect privacy. State attorneys general are critical allies in the realm of

---

<sup>5</sup> 15 U.S.C. § 53(b).

<sup>6</sup> See *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019).

<sup>7</sup> See *AMG Capital Management, LLC v. FTC*, No. 19-508, 2020 WL 3865250 (U.S. July 9, 2020) (Mem.); *FTC v. Credit Bureau Ctr., LLC*, No. 19-825, 2020 WL 3865251 (U.S. July 9, 2020) (Mem.).

consumer protection. They should also be given the power to fully enforce any new federal law.

Senator Cantwell and Chairman Wicker, I am heartened to see that almost all of the key tenets described above are incorporated into both of your bills, which share many commonalities.

Let me make one other point: it would be a tragedy if we let a fight over private rights of action kill the far more important protections for American consumers that you can otherwise put in place. In the Children’s Online Privacy Protection Act (“COPPA”),<sup>8</sup> Congress gave state attorneys general the ability to enforce the federal standard but did not allow for private enforcement. The consensus seems to be that this approach has worked well: the vast majority of companies comply with the law; if they do not, they are penalized; and the Commission also has significant flexibility to update the rules.<sup>9</sup>

Private rights of action come in multiple flavors, and though my own preference would be to limit private enforcement, you should be able to find a compromise in the context of a national privacy standard that allows actual victims to be compensated but does not lead to frivolous litigation.

## **Conclusion**

What this last year has taught us, if anything, is that we simply cannot afford to

---

<sup>8</sup> 15 U.S.C. §§ 6501-6506.

<sup>9</sup> Few people knew what “precise geolocation” meant when the late Senator John McCain and then-Congressman Ed Markey worked to enact COPPA in 1998, but in 2012 we expanded the definition of “personal information,” that triggers COPPA responsibilities to clarify that it included geolocation information. This meant that companies could not collect such information unless parents gave them permission to do so.

kick the privacy legislation can down the road. Congress must pass a federal privacy law that gives consumers the choice, clarity, and enforcement they deserve, avoiding the pitfalls that have befallen statutes like CCPA and GDPR, so that this nation can once again be the global consumer protection standard-bearer. A robust, clear, federal privacy regime was long overdue before the pandemic, and now, every day seems to teach us something new about the necessity of such a law.

It may be difficult, with so many issues needing your attention right now, to put privacy on the top of your to-do list. However, the most difficult moments in our nation's history are the ones that require us to meet the moment with a decisive response. Just as this Committee led the fight for antitrust laws and the creation of the FTC more than a century ago—making John Sherman of Ohio one of the most famous Senators of his era—there is little doubt in my mind that you can meet the preeminent challenge of today, and pass comprehensive federal privacy legislation.

Thank you.