

MEMORANDUM

TO: ESPC Members

FROM: D. Reed Freeman, Jr.
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DATE: June 29, 2012 FILE: 68223-0000001

RE: Senate Commerce Committee Hearing—The Need for Privacy Protections: Is Industry Self-Regulation Adequate?

We write to update you about the hearing held yesterday by the Senate Committee on Commerce, Science and Transportation (“Committee”), entitled “The Need for Privacy Protections: Is Industry Self-Regulation Adequate?” The hearing was the second to review the privacy frameworks put out by the Department of Commerce and the FTC earlier this year.

The hearing was attended by Senators **Jay Rockefeller (D-WV)**, the Chairman of the Committee; **Amy Klobuchar (D-MN)**; **Kelly Ayotte (R-NH)**; and **John Thune (R-SD)**. Witness testimony was provided by **Bob Liodice**, the President and CEO of the Association of National Advertisers (ANA); **Alex Fowler**, the Global Privacy and Policy Leader for Mozilla; **Peter Swire**, the C. William O’Neill Professor of Law at the Ohio State University; and **Berin Szoka**, the President of TechFreedom.

I. Opening Statements

In a written statement, **Chairman Rockefeller**:

- ◆ called for balance and increased consumer control over their personal online information
- ◆ expressed skepticism that such self-regulation would ultimately be effective
 - the proposed “market research” and “product development” exceptions to the W3C’s Do-Not-Track standard could be so broad as to swallow the rule
- ◆ underscored that he would continue to push for legislation to ensure consumers are adequately protected.

Senator Klobuchar:

- ◆ stated that she believes that consumers need a larger voice in the online experience
- ◆ believes that self-regulation is moving forward in a positive way, but
- ◆ urged the Committee to keep working to find legislative balance.

Senator Ayotte:

- ◆ echoed the sentiment that the Committee must find the proper balance between making sure e-commerce has the tools it needs to thrive, and making sure that the regulatory climate provides adequate consumer safeguards
- ◆ expressed confidence in the ability of the market to achieve this balance, and
- ◆ urged that the Committee should not act hastily.

II. Witness Statements

Mr. Liodice focused on the status of the Digital Advertising Alliance Self-Regulatory Program.

- ◆ The DAA system works, and works well.
 - The program has succeeded in getting the Ad Choices icon in front of consumers:
 - the icon is served more than a trillion times per month
 - reaching essentially all consumers.
 - Since the program’s inception, more than a million consumers have opted out
 - indicating the program’s success at educating consumers.

Mr. Fowler brought the point of view of a browser programmer.

- ◆ The internet is a public resource which must be improved and protected, and that a healthy economic ecosystem is necessary for it to flourish.
- ◆ Commerce is not mutually exclusive of consumer choice and control.
 - They must, in fact, coexist.
- ◆ Self-regulation may not achieve this end, however:
 - Very few consumers use the icon
 - Many misunderstand its purpose
- ◆ He urged a broader, multi-stakeholder approach to self-regulation.
 - The W3C is engaged in such an approach
 - Attempting to iron out, substantively, what Do-Not-Track means.
- ◆ He also called for Privacy by Design.

Mr. Swire brought a historical perspective.

- ◆ Self-regulation works best when the government is paying attention to the same issues.
- ◆ The DAA’s principles are not enforceable by the FTC, but the DAA is working hard to improve.
- ◆ Internet commerce and privacy can coexist through the use of improved anonymization and de-identification technology.
- ◆ It is time to lock in some of the progress being made.

Mr. Szoka called for a different approach to privacy regulation.

- ◆ Increased rule of law.

- There is already baseline privacy legislation in the United States—Section 5 of the FTC Act.
- FTC should take steps to create a quasi-common law regime:
 - explaining its analysis in settlements;
 - issuing No Action Letters;
 - issuing advisory opinions;
 - issuing guidelines about future enforcement.
- Allows better understanding of the law, but also allows for flexibility
- ◆ The direction of certain self-regulatory efforts is cause for concern.
 - The W3C seems to be acting in the interest of the incumbent browser manufacturers
 - Microsoft’s recent announcement that Do-Not-Track would be turned on by default in Internet Explorer 10
 - This could lead to an internet environment where fewer companies collect even more data.
 - Congress should investigate the role of the FTC in Microsoft’s decision.

III. Questions

- ◆ **Senator Klobuchar** asked about the FTC’s current regulatory activities, and whether a self-regulatory opt-in regime was possible.
 - **Mr. Liodice** indicated that the DAA has been coordinating with the FTC and evolving the program based on their guidance.
 - He also noted that an opt-in regime is against the interests of commerce, and urged adherence to an opt-out regime.
- ◆ She also inquired into the efficacy of privacy policies.
 - **Mr. Fowler** cited to studies that show that consumers do make choices based on privacy practices
 - such practices are becoming a point of competition between companies.
 - **Professor Swire** pointed out that privacy policies serve purposes beyond consumers
 - Enable enforcement
 - He suggested a process for developing new disclosures similar to the process used in implementing disclosures required by the Gramm-Leach-Bliley Act.
 - **Mr. Liodice** noted that the DAA is moving aggressively to incorporate the mobile space into the DAA program, but the technology is not there yet.
- ◆ **Senator Ayotte** asked whether Section 5 of the FTC Act was not already strong enough to cover privacy harms, and wanted to know what, if anything, it does not protect.
 - **Mr. Szoka** suggested that there are certain targeted areas where legislation may be helpful
 - E.g., not allowing employers to ask for social media passwords
 - He returned to his theme of an FTC-developed quasi-common law.
 - Creating a privacy enforcement system that is more than merely a list of dos and don’ts, but analytical and robust.

- **Mr. Swire** noted that in the absence of rulemaking authority, the FTC could only go after companies for statements made in privacy policies, which may not cover all of their practices, leaving consumers unprotected.
- ◆ She also inquired about cybersecurity concerns that might arise from Do-Not-Track legislation.
 - **Mr. Liodice** indicated that the internet only works by collecting data, and that Do-Not-Track legislation that is too broadly drawn might choke off the kind of data collection necessary for fraud monitoring or law enforcement
 - **Mr. Swire** and **Mr. Szoka** expressed the opposite concern:
 - Definition of cybersecurity so broad that the government has the power to monitor all data;
 - Government should adhere to constitutional limitations when collecting data.
- ◆ **Chairman Rockefeller** noted that the cybersecurity conversation was a red herring, as the legislation had appropriate exceptions written in. He also reiterated his concern that exceptions in Do-Not-Track could swallow the rule, and asked for reactions to the assertion that Do-Not-Track should mean Do-Not-Collect.
 - **Mr. Liodice** noted that there need to be boundaries to the exceptions so that consumers understand their rights and choices.
 - He also noted that the DAA system is evolutionary, so if exceptions are not working, it can change to address consumer concerns
 - No need for a Do-Not-Collect system, but there must be a responsible approach to Do-Not-Track.
- ◆ He asked whether consumers were aware of how much information was being collected about them, and whether legislation was required to ensure that companies do not collect consumer data overzealously.
 - **Mr. Swire** stated that consumers do not know how much data is collected about them.
 - **Mr. Fowler** said that there is not the same backlash against consumer data collection as there was against spam (spawning CAN-SPAM) or telemarketing (spawning the Do-Not-Call Registry)
 - Some users are polarized, but most consumers will decide to engage or not based on transparency and value
 - Suggested the W3C could address these concerns through technology
 - He also suggested that innovation can overcome the “small print” problem, where consumers do not read privacy policies because they are long and cumbersome.
- ◆ **Senator Thune** inquired about the risks of imposing a European-style privacy regime on the United States.
 - **Mr. Liodice** expressed the fear that by locking in a regime now, we lock out creativity and innovation.
 - **Mr. Szoka** warned of unintended consequences, where attempts to enforce internet privacy end up hurting it.
 - **Mr. Swire** noted that by falling too far behind other jurisdictions, we put American leadership online at risk.

- **Mr. Fowler** noted that as an international company, they and many other major companies have to comply with European regulations already.