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3 MARKUP ON H.R. 2221, TO PROTECT CONSUMERS BY REQUIRING

4 REASONABLE SECURITY POLICIES AND PROCEDURES TO PROTECT

5 COMPUTERIZED DATA CONTAINING PERSONAL INFORMATION, AND TO

6 PROVIDE FOR NATIONWIDE NOTICE IN THE EVENT OF A SECURITY

7 BREACH; AND

8 H.R. 1319, TO PREVENT THE INADVERTENT DISCLOSURE OF

9 INFORMATION ON A COMPUTER THROUGH THE USE OF CERTAIN ``PEER

10 TO PEER'' FILE-SHARING SOFTWARE WITHOUT FIRST PROVIDING

11 NOTICE AND OBTAINING CONSENT FROM THE OWNER OR AUTHORIZED

12 USER OF THE COMPUTER

13 WEDNESDAY, SEPTEMBER 30, 2009

14 House of Representatives,

15 Committee on Energy and Commerce

16 Washington, D.C.

17 The Committee met, pursuant to call, at 10:08 a.m., in

18 Room 2123 of the Rayburn House Office Building, Hon. Henry A.

19 Waxman [Chairman of the Committee] presiding.

20 Members present: Representatives Waxman, Dingell, Rush,
21 Eshoo, Stupak, Green, Doyle, Schakowsky, Gonzalez, Inslee,
22 Matheson, Butterfield, Barrow, Hill, Castor, Sarbanes, Space,
23 Barton, Stearns, Deal, Shimkus, Blunt, Radanovich, Pitts,
24 Bono Mack, Walden, Terry, Burgess, Blackburn and Gingrey.

25 Staff present: Phil Barnett, Staff Director; Kristin
26 Amerling, Chief Counsel; Bruce Wolpe, Senior Advisor;
27 Michelle Ash, Chief Counsel, Commerce, Trade, and Consumer
28 Protection; Timothy Robinson, Counsel; Anna Laitin,
29 Professional Staff Member; Will Cusey, Special Assistant;
30 Marc Groman, FTC Detailee; Sarah Fisher, Special Assistant;
31 Lindsay Vidal, Special Assistant; Earley Green, Chief Clerk;
32 Sharon Davis, Chief Legislative Clerk; Jen Berenholz, Deputy
33 Clerk; Caitlin Haberman, Staff Assistant; Mitchell Smiley,
34 Special Assistant; Matt Eisenberg, Staff Assistant; Lance
35 Kotschwar, General Counsel; David Cavicke, Chief of Staff;
36 Jerry Couri, Senior Professional Staff Member; Brian
37 McCullough, Senior Professional Staff Member; Shannon
38 Weinberg, Counsel; Will Carty, Professional Staff Member;
39 Peter Kielty, Senior Legislative Analyst; and Sam Costello,
40 Legislative Analyst.

|
41 The {Chairman.} The committee will please come to
42 order.

43 Today the committee is meeting to consider two bills:
44 H.R. 2221, the Data Accountability and Trust Act; H.R. 1319,
45 the Informed P2P User Act. A third bill that was initially
46 on the agenda, H.R. 2190, the Mercury Pollution Reduction
47 Act, will not be considered today. It was taken off the
48 agenda so that members could have additional time to discuss
49 issues related to the bill before marking it up.

50 The first bill we will be considering today is H.R.
51 2221, the Data Accountability and Trust Act. Despite
52 increased attention to data security and identity theft over
53 the past several years, data breaches continue to occur at an
54 alarming and an unacceptable rate. To help stem the tide of
55 security breaches and help American consumers detect and
56 prevent identity theft, this bill requires companies to
57 implement reasonable and appropriate safeguards to secure
58 personal information and to provide notice to individuals
59 when such information is compromised. This bipartisan bill
60 originally was introduced in the 109th Congress by
61 Representative Stearns, who was then chairman of the
62 Subcommittee on Commerce, Trade, and Consumer Protection. It
63 was introduced in this Congress by Subcommittee Chairman

64 Rush. I will be introducing a bipartisan Manager's Amendment
65 in the nature of a substitute that makes a number of
66 substantive changes to H.R. 2221, which I will explain in
67 more detail upon introduction.

68 The second bill we will be considering today is H.R.
69 1319, the Informed P2P User Act. This also was a bipartisan
70 bill. We are all too familiar with the dangers of
71 inadvertent sharing of sensitive information through the use
72 or misuse of certain file-sharing programs. Tax returns,
73 medical files and even classified government documents have
74 been found on these networks. The purpose of H.R. 1319 is to
75 reduce the inadvertent disclosures of sensitive information
76 by making the users of this software more aware of the risks
77 involved. This important bill was introduced by
78 Representative Bono Mack along with Ranking Member Barton and
79 Representative Barrow. As with the previous bill, I will be
80 introducing a bipartisan Manager's Amendment in the nature of
81 a substitute. I urge my colleagues to support these bills
82 and I look forward to further discussion of them in the
83 markup.

84 [The prepared statement of Mr. Waxman follows:]

85 ***** COMMITTEE INSERT *****

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86 The {Chairman.} Mr. Blunt.

87 Mr. {Blunt.} Thank you, Mr. Chairman. I think I will
88 waive my opening statement and with your approval we will go
89 to our Subcommittee Chairman on Telecom, Mr. Stearns.

90 [The prepared statement of Mr. Blunt follows:]

91 ***** COMMITTEE INSERT *****

|
92 The {Chairman.} Mr. Stearns is recognized.

93 Mr. {Stearns.} Thank you, Mr. Chairman. I thank my
94 colleague, Mr. Blunt.

95 I think we are all very pleased to be here this morning,
96 and this new bill, the Data Accountability and Trust Act,
97 DATA, H.R. 2221, is a very good bill. As Mr. Waxman
98 mentioned, Chairman Waxman mentioned, I held two hearings on
99 identity theft and security breaches involving personal
100 information and of course these hearings led me to introduce
101 the Data Accountability and Trust Act of 2005. My bill,
102 which is identical to the bill Chairman Rush has introduced
103 this Congress, was reported out of the full committee by
104 unanimous vote in the 109th Congress, so I hope, my
105 colleagues, that you will all support it in the same way that
106 you gave to me and my bill in the 109th Congress.

107 I would like to thank Chairman Rush for his leadership
108 in reintroducing the DATA bill, and I am pleased the bill has
109 progressed through our committee in a strong bipartisan. I
110 thank the chairman for his efforts in the bipartisan
111 Manager's Amendment that he will offer today, which makes a
112 few important changes and I think clarifies certain affected
113 entities and it is all for the good, so with that, Mr.
114 Chairman, I yield back.

115 [The prepared statement of Mr. Stearns follows:]

116 ***** COMMITTEE INSERT *****

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117 The {Chairman.} Thank you very much, Mr. Stearns.

118 The chair will now recognize members who wish to make an
119 opening statement. Except for the chairman of the full
120 committee and the ranking member and the chairman of the
121 subcommittee and the ranking member, I would like to
122 recognize members for 1 minute for an opening statement. Who
123 seeks recognition? Mr. Inslee.

124 Mr. {Inslee.} Thank you, Mr. Chair. Thanks for holding
125 this markup. We all know how important this issue is. I
126 just want to say that I think we do have some more work to do
127 to make sure that we do protect legitimate peer-to-peer
128 usage. You know, this is obviously a rapidly changing
129 technology. I think the bill today as it stands would
130 unintentionally perhaps cover some commercial products that
131 have significant value that will be in everyday use and I
132 hope that we will have an opportunity for some further work
133 in improving the bill to make sure that we don't
134 unintentionally sweep up in any probative language peer-to-
135 peer filing that has legitimate value both economically and
136 for consumers, and I look forward to working with you, Mr.
137 Chair, before we get to the Floor to make those improvements.
138 Thank you very much.

139 [The prepared statement of Mr. Inslee follows:]

140 ***** COMMITTEE INSERT *****

|
141 The {Chairman.} Thank you very much, Mr. Inslee.

142 On the Republican side, members wish to be--Mr.

143 Radanovich.

144 Mr. {Radanovich.} Mr. Chairman, thank you very much.

145 Today we will consider two bills that I intend to support.

146 The H.R. 2221, the Data Accountability and Trust Act,

147 represents the committee's bipartisan effort dating back to

148 the 109th Congress to address data breach problems at the

149 federal level. This legislation balances requirements

150 Congress recognized starting back in 2005. first, it sets a

151 federal standard for business to protect sensitive personal

152 information it maintains, and second, it requires

153 notification to customers when their data has been breached,

154 and finally, it provides consumers with some tools to help

155 mitigate the problems that might arise from the data being

156 used.

157 We will consider also an amendment the chairman will

158 offer that has been worked on in a bipartisan manner and that

159 makes further changes based on comments we have received from

160 stakeholders since the subcommittee markup, and I intend to

161 support that as well.

162 I want to add one comment for consideration. The

163 jurisdiction of the FTC does not extend to nonprofits or

164 educational institutions. Unfortunately, that means this
165 legislation before us will not cover a substantial source of
166 data breaches. Many colleges and universities have been
167 hacked or had computers stolen. They are repositories of
168 volumes of personal data about the current and former
169 students. Consumers want to know that their data is safe
170 regardless of the entity that holds it. I hope that we can
171 work with other committees toward filling the gap as this
172 legislation moves forward.

173 Turning to H.R. 1319, I want to echo Ranking Member
174 Barton's remarks about the committee process because we
175 worked closely with the majority, the cosponsors and the
176 industry and consumer groups to get the technical issues
177 taken care of. We agreed by bypassing subcommittee in this
178 rare case as being acceptable. I want to recognize Ms. Bono
179 Mack's leadership on digital security over the years. The
180 legislation we are considering today to prevent inadvertent
181 file sharing and peer-to-peer networks is an important step
182 in giving consumers more tools to protect their sensitive
183 information. Informing consumers and allowing them to make
184 an educated choice is a framework that we can all stand
185 behind, and that is exactly what this bill does. Ms. Bono
186 Mack brought her attention to this issue in the previous
187 Congress, introducing an earlier version of the bill. File-

188 sharing software has many legitimate and important uses but
189 it can present potential privacy and security issues as
190 evidenced by multiple instances of inadvertent sharing of
191 sensitive files across peer-to-peer networks in the past
192 year. However, not only have many thousands of personal
193 financial and health records been found on these networks but
194 the schematics of Marine One were discovered on a P2P server
195 in Iran. These are clearly not legitimate uses. The problem
196 of inadvertent sharing is exacerbated by the actual
197 architecture of the programs. It is often unclear to a user
198 what files may be open to others on the network and it can be
199 difficult to change settings to prevent it. Now with the
200 help of stakeholders I believe that we have carefully
201 tailored this bill to address this problem without doing
202 damage to the P2P software or discouraging innovation in this
203 space. I commend all those involved and I am glad that we
204 are moving forward on this legislation. As a father, I am
205 glad to support the bill because it improves our children's
206 safety in a digital world.

207 Finally, Mr. Chairman, I understand that the bill H.R.
208 2190, the Mercury Pollution Reduction Act, was pulled, and I
209 appreciate the concern of the chairman but look forward to--
210 we have got a number of amendments and such--look forward to
211 further consideration on a markup down the road on this bill.

212 Thank you, Mr. Chairman, and I yield back.

213 [The prepared statement of Mr. Radanovich follows:]

214 ***** COMMITTEE INSERT *****

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215 The {Chairman.} Thank you, Mr. Radanovich.

216 The Chair would like to now recognize the chairman of
217 the subcommittee, Mr. Rush, for 5 minutes.

218 Mr. {Rush.} I want to thank you, Mr. Chairman.

219 Today the committee is considering two bills for markup,
220 both of which were favorably voted out of the Subcommittee on
221 Commerce, Trade, and Consumer Protection on June 3, 2009.

222 Each of these bills has been improved since subcommittee
223 markup and introduction to better protect consumers yet that
224 the industry is not excessively regulated. Chairman Waxman's
225 Manager's Amendment makes several changes to H.R. 2221 and to
226 H.R. 1319 in the nature of a substitute.

227 The first bill that we will take up is H.R. 2221, the
228 Data Accountability and Trust Act. This new bill addresses
229 data breaches by requiring entities holding personal
230 information to adopt reasonable and appropriate security
231 measures to protect that information and for those covered
232 entities to notify affected consumers in the event of a
233 breach bearing ``any reasonable risk of theft, fraud or other
234 unlawful conduct.'' First, the Manager's Amendment makes
235 several deletions to requirements contained in the original
236 bill. Specifically, the FTC no longer will be required to
237 make additional findings in associated with its rulemaking

238 authority to prescribed candidates for destroying paper
239 documents containing personal information. Second, the
240 amendment clarifies that Congress shall deem that covered
241 entities which are subject to more strict or substantively
242 similar federal data security statutes such as the Gramm-
243 Leach-Bliley Act safeguards rule and the Health Insurance
244 Portability and Accountability Act are in compliance with the
245 amended bill's data protection and notification safeguards.
246 Thirdly, the amendment clarifies that an exemption for fraud
247 databases will be extended to data brokers. It also permits
248 consumers to prohibit the use of their personal information
249 for marketing purposes in select circumstances in lieu of
250 access and dispute resolution. Fourth, the amendment will
251 now impose on covered entities a 60-day consumer notification
252 requirement following the discovery of a breach absent
253 extraordinary circumstances. Fifth, the amendment expands
254 consumers' option for redress in the event of a breach by
255 affording consumers free credit monitoring or other services
256 to provide misuse of personal information as an alternative
257 to free credit reports. Sixth, the amendment lets authority
258 in the FTC to determine over time which security technologies
259 and methodologies would entitle covered entities using said
260 technologies and methodologies to a rebuttal presumption,
261 exempting them from section 3 requirements to provide

262 notification to consumers in the event of a breach. If the
263 FTC or the States' attorney generals can show, however, that
264 notwithstanding the adoption of such technology there still
265 is a reasonable risk of identity theft, fraud or unlawful
266 conduct following the data security breach, then the
267 rebuttable presumption would fail. Seventh, the amendment
268 clarifies that H.R. 2221 applies only to commercial entities
269 that are subject to FTC jurisdiction and that consumer
270 penalties cap related to state enforcement could not exceed
271 \$5 million per discrete violation. Eighth, the amendment
272 preempts state data security and breach notification laws.
273 Finally, the amendment adds a new definition in section 6 of
274 the bill for ``service provider.'' It is important in that
275 these entities filling that definition would be exempt from
276 the bill's section 2 security practices and policy
277 requirements and from section 3, consumer notification
278 requirements. A service provider is defined as an entity
279 that merely provides to a user transmission router,
280 intermediate and transient authority storage or connection to
281 its system or network.

282 Thank you, Mr. Chairman. I yield back the balance of my
283 time.

284 [The prepared statement of Mr. Rush follows:]

285 ***** COMMITTEE INSERT *****

|
286 The {Chairman.} Thank you, Mr. Rush.

287 The Republican side, who seeks recognition for an
288 opening statement? Ms. Bono Mack.

289 Ms. {Bono Mack.} Thank you, Mr. Chairman. Before I
290 discuss the Informed P2P User Act, I would like to thank
291 Ranking Member Barton and Congressman Barrow for their
292 willingness to work together on this project. In addition, I
293 would like to thank legislative counsel and committee staff,
294 specifically, Marc Groman and Will Carty, for their
295 outstanding work on this bill. From the beginning, this has
296 been a bipartisan bill and their cooperation has been
297 essential.

298 The risks associated with file-sharing programs have
299 been widely reported by the media and thoroughly investigated
300 by Congress. Previously we have held hearings where
301 stakeholders made promises but the problem of inadvertent
302 file sharing persists. Normally I support offering industry
303 the opportunity to self-regulate but when it comes to
304 entities such as LimeWire, who repeatedly and clearly
305 disregard the consumers' interest, it is clear the time of
306 self-regulation has passed. Today, by passing the Informed
307 P2P User Act, we move closer to arming the consumer with the
308 information to protect themselves. While drafting this bill

309 we sought to do three things: one, create a system where
310 users of file-sharing programs are provided with conspicuous
311 notice and forced to give consent prior to installation and
312 activation of a file-sharing program; two, require entities
313 who market and develop file-sharing programs to make it
314 reasonably simple to block or to remove these programs once
315 installed; and three, to not discourage the legitimate use of
316 file-sharing technology. With H.R. 1319, I believe we have
317 accomplished these goals.

318 My bill would require an easy-to-understand notice and
319 consent rule for file-sharing software. It is my belief that
320 the consumer will make the best choice when provided with
321 clear, easy-to-understand information. Additionally, my bill
322 requires entities who distribute file-sharing programs to
323 make it simple to prevent these file-sharing programs from
324 being loaded onto their computers and also easy to remove
325 after they are loaded onto the computer. Finally, H.R. 1319
326 exempts technologies like e-mail, instant message, real-time
327 audio or video communications and real-time voice
328 communications to ensure a narrow scope.

329 Again, I would like to thank Chairman Waxman, Ranking
330 Member Barton, Chairman Rush and Ranking Member Radanovich
331 for their leadership, and I encourage the passage of the
332 Informed P2P User Act. Thank you, Mr. Chairman. I yield

333 back the balance of my time.

334 [The prepared statement of Ms. Bono Mack follows:]

335 ***** COMMITTEE INSERT *****

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336 The {Chairman.} Thank you, Ms. Bono Mack.

337 Mr. Dingell.

338 Mr. {Dingell.} Thank you, Mr. Chairman.

339 I note that we will concern ourselves today with two
340 bills meant to improve consumer protection. This has long
341 been a goal of the committee's work and you are to be praised
342 for carrying it forward. I wish to commend my dear friend,
343 Mr. Rush, for his fine work on H.R. 2221, the Data
344 Accountability and Trust Act. This important legislation
345 requires the Federal Trade Commission to promulgate
346 regulations for the improved protection of personal
347 information. Countless stories of identity theft in the news
348 reinforce the simple necessity of H.R. 2221. This is a good
349 bill and it will protect consumers and ensure information
350 brokers are held to rigorous standards as stewards of
351 personal information. This bill has my wholehearted support.

352 The committee will also consider H.R. 1319, the Informed
353 P2P User Act. I understand my colleague Ms. Bono Mack's
354 concern for preserving the individual's right to consent to
355 sharing information stored on computer discs with others via
356 peer-to-peer file-sharing programs. While I believe this
357 bill would have been benefited by consideration by the
358 Subcommittee on Commerce, Trade, and Consumer Protection, I

359 applaud, however, its intent and plan to support it and would
360 daresay it would have some bearing on consideration of this
361 committee on the subject of behavioral advertising.

362 Finally, I would like to comment briefly on H.R. 2190,
363 which is not being called up this morning. I believe that is
364 important that we should reduce mercury emissions,
365 particularly with regard to the Nation's Great Lakes. I
366 understand that the bill has been pulled and I believe that
367 this is a good idea. I understand my colleagues from Ohio
368 and Georgia have legitimate concerns about the effect of this
369 bill and I believe the committee would want to inquire as to
370 whether or not this legislation should be necessary or
371 whether it should better be considered under TOSCA as it is
372 or perhaps some other amendment of TOSCA.

373 In conclusion, I would note that both H.R. 2221 and H.R.
374 1319 would expand the authority of the FTC. This committee
375 has long recognized the effectiveness of this agency in
376 protecting consumers and has worked hard to see to it that
377 the agency has the authority necessary to carry out its
378 functions, and as such I applaud this legislation for that
379 reason. I hope my colleagues will bear this thought in mind
380 when we consider legislation to improve consumer financial
381 protections which is flitting around in other parts of the
382 buildings in which we labor.

383 Thank you for your courtesy, Mr. Chairman. I yield back
384 the balance of my time.

385 [The prepared statement of Mr. Dingell follows:]

386 ***** COMMITTEE INSERT *****

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387 The {Chairman.} Thank you, Mr. Dingell.

388 Mr. Barton.

389 Mr. {Barton.} Thank you, Mr. Chairman. Before I do my
390 opening statement, I want to start with an apology. In the
391 last markup that we had on the health care amendments, you
392 worked with me and others to put in a transparency provision,
393 and I am very appreciative of that, and I mentioned you by
394 name and Mr. Green by name and Dr. Burgess by name and Mr.
395 Deal by name but I didn't mention my good friend, Mr. Stupak,
396 by name, and Congressman Stupak has worked very hard on
397 transparency and worked closely with me and my staff, and I
398 didn't mention his name. I do want to apologize to him
399 because he has been a tiger on that issue and I felt very
400 badly that I didn't complement him.

401 On these bills, Mr. Chairman, first, let me compliment
402 you for pulling the mercury bill. I think that would have
403 been a long, drawn-out process had you wanted to mark the
404 bill up and I think it was the wise decision to remove it
405 from today's markup. I won't say anything more about it but
406 I compliment you on that.

407 On the other two bills, we do have bipartisan
408 cooperation. H.R. 2221 is known as the DATA bill. This is
409 something that we considered in the committee in the 109th

410 Congress. It is still timely because it addresses an
411 important problem, the breach of personal information and
412 notification of people who are affected so that they can take
413 appropriate precautions. We have worked on this issue
414 together in the past and I am pleased that the product before
415 us today is a result of those bipartisan discussions in the
416 past. As this bill moved through subcommittee, we did agree
417 on a manager's mark containing several commonsense amendments
418 in response to legitimate stakeholder concerns. We also
419 pledged to continue working on the provisions that required
420 more attention. Today we have a chairman's mark that does
421 represent further improvements based on our bipartisan work.
422 I think this strengthens the bill. Despite the FTC's
423 aggressive enforcement efforts and increased attention on
424 safeguarding personal information, identity theft is still a
425 serious threat. This legislation will help guard against
426 criminals' malicious behavior. It establishes a national
427 requirement for companies to maintain enhanced security of
428 consumers' personal data. Additionally, consumers will
429 benefit from notification in order to take swift proactive
430 measures to protect their identity. I think this is a good
431 bill and I hope everyone on the committee supports it.

432 The second bill, H.R. 1319, is a simple, straightforward
433 bill. For people who install peer-to-peer software, they

434 should be made aware of what it does. P2P technology allows
435 for easy sharing of files between users but it can also
436 facilitate accidental sharing of personal files. Despite
437 some effort by some in the industry, there has been no
438 consensus solution developed to address the problem. H.R.
439 1319 establishes a clear choice of notice and consent regime.
440 It requires P2P to be accompanied by notice that a human
441 being of average intelligence can read and actually
442 understand. That means me, Mr. Chairman. This notice will
443 explain how the software makes a user's files available to
444 other users. It requires consent prior to the download,
445 installation and activation. The legislation makes unlawful
446 the deceitful practice of forcing the installation of P2P or
447 preventing its removal. Given the state of the industry and
448 the many reports of identity theft and security breaches, I
449 hope that we pass this bill.

450 I want to commend Congresswoman Bono Mack for bringing
451 this issue to our attention. I want to thank you, Mr.
452 Chairman, and Subcommittee Chairman Rush, for your
453 bipartisanship in this effort. I want to thank all the
454 stakeholders who have worked very closely with our various
455 staffs to solve the complicated technical issues.

456 I also have to make some comment on the process.
457 Everybody here knows how much I love the reliable value of

458 regular order in nearly everything that we do on the
459 committee but there are some exceptions for every rule.
460 Today we have before us that reasonable exception. Given the
461 complex technical issues I have already mentioned, we made a
462 bipartisan decision, and I want to emphasize that,
463 bipartisan, I was a part of it, to bypass the subcommittee
464 markup while we worked collaboratively to get this bill
465 right. I want to thank the other cosponsors for facilitating
466 the process.

467 With that, Mr. Chairman, I look forward to the markup
468 and I yield back the balance of my time.

469 [The prepared statement of Mr. Barton follows:]

470 ***** COMMITTEE INSERT *****

|
471 The {Chairman.} Thank you, Mr. Barton.

472 Who seeks recognition on the Democratic side? Mr.

473 Matheson.

474 Mr. {Matheson.} Thank you, Mr. Chairman. I do want to
475 really thank the committee staff, particularly Marc Groman of
476 your staff, for working with my office to help improve H.R.
477 2221, the DATA Act. Everyone here knows data security is a
478 very important issue, which is why I have worked to ensure
479 the legislation protects consumers and does not needlessly
480 complicate enforcement and compliance with the law. And, Mr.
481 Chairman, I want to thank you on the Manager's Amendment. I
482 think the amendment in the nature of a substitute has made
483 good improvements on the original legislation. I hope we can
484 continue to work on the bill as it moves to the Floor in
485 order to minimize any potential duplicative or inconsistent
486 regulation and, again, Mr. Chairman, I just want to thank you
487 for working with me. You and your staff have been very
488 helpful. I will yield back.

489 [The prepared statement of Mr. Matheson follows:]

490 ***** COMMITTEE INSERT *****

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491 The {Chairman.} Thank you very much, Mr. Matheson.

492 On the Republican side, recognition for an opening
493 statement? Mr. Gingrey.

494 Mr. {Gingrey.} Mr. Chairman, I want to thank you for
495 calling the markup today on two bills we have already
496 received consideration in Commerce, Trade and Consumer
497 Protection Subcommittee. The two bills are consideration
498 today, H.R. 2221 and 1319, have been drafted in a fully
499 bipartisan way and I certainly look forward to reporting them
500 to the full House.

501 However, I have significant concerns about H.R. 2190,
502 the Mercury Pollution Reduction Act, although we now know
503 that that bill has been pulled. Mr. Chairman, this
504 legislation, 2190, bans the manufacture of chlorine used in
505 the mercury cell process within 2 years and immediately bans
506 the export of elemental mercury. H.R. 2190 only affects four
507 facilities across the country but one of them happens to be
508 in my hometown of Augusta, Georgia. The companies that will
509 be disproportionately affected by the legislation have
510 already unequivocally stated that if this bill is passed as
511 written, it will leave more than 1,000 good manufacturing
512 workers without a job. In Augusta, the Olin Corporation,
513 this will directly impact close to 200 workers, removing \$9

514 million in annual payroll and reduce economic impact that
515 generates close to \$25 million in goods and services for the
516 local community. Mr. Chairman, at a time when our national
517 unemployment is close to, maybe even now beyond 10 percent,
518 we can't afford to pass harmful legislation that would put
519 even more hardworking Americans out of work. I am glad that
520 in your wisdom, Mr. Chairman, that this bill was pulled. I
521 look forward to working very closely with you and with the
522 author. We have a number of amendments on this side. I have
523 an amendment that I think would make the bill better and
524 hopefully we can work with you on that.

525 With those comments, Mr. Chairman, I yield back.

526 [The prepared statement of Mr. Gingrey follows:]

527 ***** COMMITTEE INSERT *****

|
528 The {Chairman.} The gentleman yields back his time.

529 Further recognition? Mr. Butterfield.

530 Mr. {Butterfield.} Thank you very much, Mr. Chairman,
531 for convening this hearing. Let me go on record, Mr.
532 Chairman, and say to you that I am definitely in support of
533 the two bills that are before us for consideration and I hope
534 that the chairman and the ranking member and others can work
535 can work with Ms. Schakowsky in trying to resolve their
536 concerns on her bill.

537 Mr. Chairman, the Rush bill provides immediate
538 protections to personal data. During the subcommittee
539 consideration, I offered an amendment to better protect
540 consumers victimized by data breaches. After working with
541 the chairman and staff, valuable protection has been added as
542 part of the Manager's Amendment. These provisions require
543 that victims be provided 2 years of credit monitoring
544 services at absolutely no cost. While this will not undo the
545 initial breach, it will provide victims peace of mind as they
546 move forward.

547 I also support Ms. Bono Mack's bill, Mr. Chairman. That
548 is the Informed Peer-to-Peer User Act in order to ensure that
549 users are better aware that potentially sensitive information
550 may be inadvertently shared and that action may be required

551 to safeguard personal information.

552 I say good work to both of these authors and I look
553 forward to supporting each of these bills and I yield back
554 the balance of my time.

555 [The prepared statement of Mr. Butterfield follows:]

556 ***** COMMITTEE INSERT *****

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557 The {Chairman.} The gentleman yields back the balance
558 of his time. The Chair recognizes Ms. Blackburn.

559 Mrs. {Blackburn.} Thank you, Mr. Chairman. I thank you
560 for this markup today and I am appreciative of the fact that
561 you have pulled the Mercury Pollution Reduction Act. We in
562 Tennessee do have some very serious concerns about that
563 legislation and we look forward to working with you on making
564 certain that we address those concerns in the appropriate
565 way.

566 H.R. 1319, the Informed P2P User Act, as we continue to
567 try to highlight ID theft and piracy and the linkage between
568 those two issues, how it leads to cyber crime, the markup
569 that we are having today of 2221 for the DATA Act and then
570 also for the P2P Act. We are appreciative of the good work
571 that has gone there looking at these as crimes, providing the
572 appropriate notification and awareness and continuing to
573 bring these issues and the concerns with P2P users and also
574 with ID theft to our constituents. I thank you and I yield
575 back.

576 [The prepared statement of Mrs. Blackburn follows:]

577 ***** COMMITTEE INSERT *****

|
578 The {Chairman.} Thank you, Ms. Blackburn.

579 Further recognition? Ms. Schakowsky.

580 Ms. {Schakowsky.} Thank you, Mr. Chairman. I support
581 both pieces of legislation that are up today.

582 I do want to say something about the Data Accountability
583 and Trust Act, which I have worked on for several years now
584 along with many members of the committee and the bill offers
585 strong consumer protections which will help prevent data
586 breaches and inform consumers when they do happen. It also
587 includes provisions that I worked on to provide Americans
588 with additional rights when dealing with data brokers, those
589 companies that make their money buying and selling the
590 personal information of consumers. Now information brokers
591 are required to ensure the accuracy of their data. Consumers
592 will have access to the information maintained by the
593 companies and the right to request resolution of inaccurate
594 information.

595 Regarding H.R. 2190, which a number of members have
596 referred to, the mercury bill. I do look forward to working
597 with my colleagues but I do also want to remind them that we
598 are talking about a very dangerous substance here and the
599 importance of acting on this cannot be overstated, so I look
600 forward to making sure that in a couple of weeks now we will

601 be able to consider and pass that legislation.

602 Thank you, Mr. Chairman. I yield back.

603 [The prepared statement of Ms. Schakowsky follows:]

604 ***** COMMITTEE INSERT *****

|
605 The {Chairman.} Thank you, Ms. Schakowsky.

606 Further recognition on the Republican side? On the
607 Democratic side, Mr. Barrow.

608 Mr. {Barrow.} Thank you, Mr. Chairman. I am glad we
609 are meeting today to mark up H.R. 1319, the Informed Peer-to-
610 Peer User Act, which I cosponsored with Congresswoman Bono
611 Mack. This bill tackles the privacy and security risks that
612 come with peer-to-peer file-sharing programs. A lot of folks
613 who connect to these networks don't even realize that the
614 most personal and private files are visible to everyone else
615 on the network at any time. They are posting their tax
616 returns, financial records and personal message on the
617 Internet and don't even know it. I hope that our work on the
618 committee will come up with a strategy to let folks know in a
619 way that can understand when the information on a computer is
620 at risk. We have truth in lending, truth in labor. I think
621 it is time we had truth in networking as well.

622 I want to thank Congresswoman Bono Mack for allowing me
623 to work with her on this legislation. I want to thank
624 Chairman Waxman and Ranking Member Barton for bringing these
625 issues to the forefront in our committee. I also want to
626 acknowledge the good work of my senior legislative assistant,
627 Brandon Webb, on this legislation.

628 Thank you, and I yield back.

629 [The prepared statement of Mr. Barrow follows:]

630 ***** COMMITTEE INSERT *****

|
631 The {Chairman.} Thank you, Mr. Barrow. Any further
632 opening statements? If not, by unanimous consent all members
633 may have an opportunity to insert in the record an opening
634 statement.

|

635 H.R. 2221

636 The {Chairman.} The Chair calls up H.R. 2221. I ask
637 the clerk to report the bill.

638 The {Clerk.} H.R. 2221, a bill to protect consumers by
639 requiring reasonable security policies and procedures to
640 protect computerized data containing personal information and
641 to provide for a nationwide notice in the event of a security
642 breach.

643 [H.R. 2221 follows:]

644 ***** INSERT 1 *****

|
645 The {Chairman.} Without objection, the reading of the
646 bill will be waived, and the Chair recognizes himself to
647 offer a Manager's Amendment to H.R. 2221. The clerk will
648 report the amendment.

649 The {Clerk.} Amendment in the nature of a substitute to
650 H.R. 2221 offered by Mr. Waxman. Strike all after the
651 enacting clause and insert the following: section 1, short
652 title--

653 [The amendment follows:]

654 ***** INSERT 2 *****

|
655 The {Chairman.} Without objection, that amendment will
656 be considered as read. The Chair recognizes himself.

657 The bipartisan substitute amendment I am offering
658 incorporates the changes made at the subcommittee markup and
659 further strengthens the bill. This amendment is the result
660 of a cooperative process. Staff reached out to stakeholders
661 and improved an already good piece of legislation. I would
662 like to thank members and staff from both sides of the aisle
663 for their work on this bill. In particular, I would like to
664 thank Mr. Rush for his leadership and for introducing this
665 critical piece of legislation. I also would like to
666 acknowledge Mr. Stearns, Mr. Barton, Mr. Radanovich and Ms.
667 Schakowsky for working in a bipartisan fashion to move this
668 important legislation forward.

669 The bipartisan Manager's Amendment makes a number of
670 changes to the bill, and I will highlight the most
671 significant of these. We streamlined the FTC's ability to
672 conduct rulemaking concerning the destruction of paper
673 documents. In addition, the amendment clarifies our intent
674 to avoid overlapping, inconsistent or duplicative
675 regulations. The amendment also modifies the pipes exemption
676 to ensure that those entities that are serving as conduits of
677 information are not subject to the data security requirements

678 of the Act when they are simply transmitting data.
679 Furthermore, the Manager's Amendment narrows the definition
680 of information broker to ensure that it covers only those
681 entities that collect personal information in order to sell
682 such information to third parties and not entities that
683 collect information to provide services to third parties.
684 The amendment makes several changes that will impact the
685 regulation of these entities.

686 Moreover, the amendment makes changes that will improve
687 notifications to consumers regarding data breaches.
688 Importantly, the Manager's Amendment provides that in certain
689 circumstances consumers who have been impacted by a breach
690 may be offered credit monitoring which actively monitors a
691 consumer account for signs of misuse in lieu of quarterly
692 credit reports. This provision benefits consumers and
693 businesses alike because not all breaches are the same and
694 different remedies may be appropriate in different
695 circumstances. I would like to thank Mr. Butterfield for
696 proposing this important provision and for his leadership on
697 behalf of American consumers. This change will encourage
698 innovation and competition and will ultimately provide better
699 services for consumers whose information was compromised.
700 Finally, the Manager's Amendment clarifies that the bill only
701 applies to commercial entities subject to FTC jurisdiction.

702 I urge my colleagues to support the Manager's Amendment
703 in the nature of a substitute.

704 The Chair recognizes Mr. Barton.

705 Mr. {Barton.} Well, thank you, Mr. Chairman. The
706 minority also supports this bipartisan piece of legislation.
707 The base bill is identical to the bill that passed this
708 committee in the 109th Congress and did not get to the Floor
709 because of a jurisdictional dispute between this committee
710 and the Financial Services Committee. I am sure with your
711 leadership we will get over that hurdle and get the bill to
712 the Floor and hopefully get it to the Senate and have them
713 pass it.

714 The changes that you enumerated in the Manager's
715 Amendment we all support. There was one change that I don't
716 believe you mentioned. The Manager's Amendment does expand
717 the accepted methods for protection of data to include
718 encryption or other accepted technologies or methodologies.
719 This is to provide a more technology-neutral approach, and
720 the Manager's Amendment also clarifies that the civil
721 penalties for each violation are capped at \$5 million in
722 total rather than per each prosecution per State.

723 Mr. Chairman, we support the bill, we support the
724 Manager's Amendment and we look forward to passing this bill
725 very quickly on a bipartisan basis.

726 The {Chairman.} Thank you, Mr. Barton. Any member wish
727 to be heard on the Manager's Amendment? Ms. Eshoo.

728 Ms. {Eshoo.} Thank you, Mr. Chairman, first of all for
729 bringing up these bills and I look forward to the work that
730 will continue on the one that is not being brought up today
731 because it is an important one that we need to address.

732 On the Manager's Amendment, first of all, I maintain the
733 same reservations that I have expressed consistently since
734 2006. I of course support strongly the data security
735 legislation and I remain committed to protecting consumers
736 and businesses from the harmful effects of data breaches, but
737 when it comes to the safe harbor provision that encourage
738 market-based incentives for the adoption of stronger security
739 measures, and Mr. Barton just mentioned this, I think the
740 legislation absolutely must be technology-neutral. During
741 our discussion and debate and taking up the bill on health
742 information technology, I also pointed this out to a section
743 that applied as it does in this legislation, and I think that
744 we need to really stick to being technology-neutral. Now,
745 some may say well, you are being picky and what is in one
746 word. Plenty. Plenty is in one word. The legislation as
747 originally written exempted data that is unreadable or
748 indecipherable but not unusable, and ``unusable'' is the
749 operative word. That one-word omission means the different

750 between exclusivity using encryption technology or
751 encouraging other equally efficient technologies that would
752 serve the same purpose or even be more effective. So while
753 the subcommittee mark and now the Manager's Amendment
754 contains the word ``unusable'' so my point is that that still
755 leaves encryption. So while I am not going to offer an
756 amendment on this, what I would like to ask you, Mr.
757 Chairman, is for your commitment that the report language
758 will state that the legislation is not intended to suggest
759 that encryption methods alone are capable of securing
760 personal information and that the FTC must consider all
761 technologies on an equal basis for safe harbor protection.

762 I think there is some confusion when the word
763 ``encryption'' is used. I think people think that is it a
764 very broad term. It actually is very specific, and so that
765 is why I raise this and I think that if you would--

766 The {Chairman.} Will the gentlelady yield?

767 Ms. {Eshoo.} --doing that, that it would really
768 straighten this area out.

769 The {Chairman.} I think you raise an important point.
770 We tried to address that in the language but I think report
771 language would clarify it even more and we would be pleased
772 to work with you on report language.

773 Ms. {Eshoo.} Thank you very much, Mr. Chairman. I will

774 yield back.

775 The {Chairman.} Any further discussion on the Manager's
776 Amendment. Yes, the gentleman is recognized.

777 Mr. {Burgess.} Mr. Chairman, I just wonder if I might
778 ask a question of counsel for clarification.

779 The {Chairman.} The gentleman is recognized for 5
780 minutes.

781 Mr. {Burgess.} Counsel, on page 12 of both the
782 underlying bill and the Manager's Amendment, the phrase is
783 used ``if the broker knew or should have known that the
784 person to whom a request is made will obtain or attempt to
785 obtain such information in a manner described in subparagraph
786 A'' which is obtaining information of a false or fictitious
787 manner. I am just a little bit concerned about the vagueness
788 of ``knew or should have known.'' Do we have any real-world
789 applications? Are there other areas in other bills where
790 this has proven to be useful, use of phraseology or is it
791 something that we should perhaps look to tighten up as this
792 moves through the process?

793 {Counsel.} I am just taking a very close look at the
794 language.

795 Mr. {Burgess.} Well, Mr. Chairman, in the interest of
796 time--

797 {Counsel.} I am sorry, sir.

798 Mr. {Burgess.} If this is something we could look at as
799 this thing moves forward in the process, I just want to make
800 sure we are as precise as possible and we all know when these
801 things get to the various federal agencies and the rules are
802 written, sometimes things can look different when they come
803 back to us. So I would just like to have some degree of
804 certainty on this as we move forward.

805 The {Chairman.} If the gentleman would yield, I think
806 you raised an important point and let us continue to look at
807 it. I think other statutes have used that language but I
808 think your point is that we don't want it to be too vague and
809 so let us review it as we move forward.

810 Mr. {Burgess.} I will yield back. Thank you, Mr.
811 Chairman.

812 The {Chairman.} Is there further discussion of the
813 Manager's Amendment? If not, the vote now comes on the
814 Manager's Amendment. All in favor say ``aye.'' Opposed,
815 ``no.'' The Manager's Amendment is adopted.

816 The motion now comes to us to order reported H.R. 2221
817 as amended with the usual instructions. All in favor say
818 ``aye.'' Opposed, ``no.'' The ayes have it. The ayes have
819 it and the motion is agreed to.

|

820 H.R. 1319

821 The {Chairman.} The chair now calls up H.R. 1319, the

822 Informed P2P User Act. The clerk will report the bill.

823 The {Clerk.} H.R. 1319, a bill to prevent the

824 inadvertent disclosure of information on a computer through

825 the use of certain peer-to-peer file-sharing software without

826 first providing notice and obtaining consent from the owner

827 or authorized user of the computer.

828 or other purposes.

829 [H.R. 1319 follows:]

830 ***** INSERT 3 *****

|
831 The {Chairman.} Without objection, the bill will be
832 considered as read.

833 The Chair recognizes himself to offer a Manager's
834 Amendment. The clerk will report the Manager's Amendment.

835 The {Clerk.} Amendment in the nature of a substitute to
836 H.R. 1319 offered by Mr. Waxman. Strike all after--

837 [The amendment follows:]

838 ***** INSERT 4 *****

|
839 The {Chairman.} Without objection, the amendment will
840 be considered as read.

841 The bipartisan Manager's Amendment I am offering to H.R.
842 1319 is the result of a cooperative process. Staff reached
843 out to stakeholders and improved this important legislation
844 by addressing several concerns. I would like to thank
845 Representatives Bono Mack, Barrow and Barton for their
846 leadership in raising awareness about the risks of file-
847 sharing software and for introducing this legislation. I
848 would also like to acknowledge the efforts of Chairman Rush
849 and Ranking Member Radanovich.

850 File-sharing software enables users to share files over
851 the Internet by accessing each other's computer hard drives.
852 Lawful applications of file-sharing technology provide
853 enormous benefits to business, academia and individuals.
854 However, the use of certain file-sharing software presents
855 significant risk for consumers through the inadvertent
856 sharing of sensitive files. Inadvertent file sharing has led
857 to countless sensitive documents being disclosed including
858 Social Security numbers, tax returns, health records and even
859 classified government documents. Inadvertent file sharing is
860 not a new problem, and despite calls from Congress for the
861 file-sharing industry to clean up its act, the problem

862 persists. The purpose of this bill is to reduce inadvertent
863 disclosures of sensitive information by making users of file-
864 sharing programs more aware of the risks involved. In short,
865 this bill is about notice and consent. The bill does not
866 prohibit the use or distribution of file-sharing programs but
867 requires that if such programs are distributed they provide
868 the user with clear and conspicuous notice that such programs
869 will allow files to be shared. The program must then obtain
870 the informed consent of the user for the installation.
871 Notice must again be provided before the initial activation
872 of the file-sharing function of the program. The bill would
873 be enforced by the FTC and violations are subject to civil
874 penalties.

875 In response to concerns that the bill as introduced was
876 overbroad, the Manager's Amendment narrows the definition of
877 a covered file-sharing program to avoid sweeping in
878 legitimate technologies that are unrelated to the problem of
879 inadvertent file sharing. The amendment also adds a new
880 definition for covered entity that limits liability under the
881 bill. Additionally, the Manager's Amendment provides the FTC
882 with the discretionary rulemaking authority and clarifies
883 that the bill does not apply to the Federal Government. I
884 urge my colleagues to support the Manager's Amendment in the
885 nature of a substitute.

886 I wish to recognize Mr. Barton.

887 Mr. {Barton.} Thank you, Mr. Chairman. I am not going
888 to take long because I want Congresswoman Bono Mack to have
889 the ability to really go into the bill in depth if she wishes
890 to do so. Suffice it to say that this is a good piece of
891 work. I want to commend you and Mr. Rush for bringing it to
892 the committee. I also want to thank Congressman Barrow of
893 Georgia for his co-authorship with Mrs. Bono Mack and of
894 course I thank Mary for all that she has done on this for the
895 number of years that she has worked on it.

896 I think this is a good bill. I think it needs to be
897 passed. This P2P software is benign if used properly but it
898 can be very dangerous if used improperly. So with that, Mr.
899 Chairman, I support the bill and I support the Manager's
900 substitute and would yield back.

901 The {Chairman.} Who seeks recognition on the Manager's
902 Amendment?

903 Mr. {Rush.} Mr. Chairman.

904 The {Chairman.} Mr. Rush.

905 Mr. {Rush.} Mr. Chairman, I want to also commend you
906 and Ranking Member Barton, Ms. Bono Mack and Mr. Barrow for
907 the outstanding work on this bill.

908 Mr. Chairman, I will be quite brief. I just want to say
909 that normally we would prefer to examine the markup in the

910 subcommittee before advancing it to the full committee but in
911 this instance, Mr. Chairman, both parties consented to bypass
912 the subcommittee markup and to work diligently on a
913 bipartisan basis, and you have already outlined the bill and
914 how important this bill is. With that, Mr. Chairman, I yield
915 back the balance of my time.

916 The {Chairman.} Thank you, Mr. Rush.

917 Further recognition? Mr. Doyle.

918 Mr. {Doyle.} Mr. Chairman, I would like to engage in a
919 colloquy with you.

920 The {Chairman.} The gentleman is recognized.

921 Mr. {Doyle.} Thank you, Mr. Chairman. I agree with the
922 intent of the proposed legislation. Consumers should be
923 aware of what they are doing with their computers, especially
924 when it might clearly risk this privacy, and I want to
925 acknowledge the efforts of you and Mr. Barton, Mr. Barrow and
926 Ms. Bono Mack and the committee staff to respond to the
927 concerns of stakeholders that H.R. 1319 is overbroad and
928 sweeps in legitimate technologies unrelated to the problems
929 this bill seeks to address.

930 I am concerned that despite these efforts, the bill
931 still needs some additional tweaking. I am worried that an
932 overbroad definition of file-sharing programs could result in
933 overnotification to consumers and cause consumers to ignore

934 notices because they appear so frequently. It is my hope
935 that as we move the bill to the Floor, the definition of
936 covered file-sharing program can be reviewed to determine if
937 it should be narrowed further.

938 The {Chairman.} If the gentleman would yield, I thank
939 you for your comments on H.R. 1319 and I understand and
940 appreciate your concerns. Since the legislative hearing on
941 H.R. 1319, staffs from both sides of the aisle have been
942 working in a fully bipartisan fashion with stakeholders to
943 narrow the scope and breadth of the bill. Our staff has made
944 tremendous progress on this front. The extensive changes in
945 the Manager's Amendment are evidence of this progress and the
946 committee's attempt to accommodate stakeholders' concerns.
947 There is no policy disagreement here. We do not want to
948 sweep in technologies that are unrelated to the problem.
949 This bill is intended to address the inadvertent sharing of
950 files. To the extent that the definition of covered file-
951 sharing program may continue to be overbroad and capture
952 legitimate technologies, we want to work with you to address
953 that concern. I personally look forward to working with the
954 gentleman from Pennsylvania on H.R. 1319 as we move forward.

955 Mr. {Doyle.} Thank you, Mr. Chairman.

956 The {Chairman.} Further discussion of the Manager's
957 Amendment. If not, let us proceed to a vote on the Manager's

958 Amendment in the nature of a substitute. All those in favor
959 say ``aye.'' Opposed, ``no.'' The ayes have it and the
960 amendment is agreed to.

961 The vote now comes on reporting H.R. 1319 as amended.

962 Mr. {Barton.} Mr. Chairman.

963 The {Chairman.} Yes, Mr. Barton.

964 Mr. {Barton.} I don't think there are amendments, but
965 we should give members an opportunity to offer amendments--

966 The {Chairman.} The gentleman is correct.

967 Mr. {Barton.} --before we go to final passage.

968 The {Chairman.} The gentleman is correct. The chair
969 did not know of any amendments, but the gentleman is right in
970 suggesting that this is an opportunity for member should they
971 have any to offer those amendments to this legislation. Are
972 there further amendments to H.R. 1319? Good thing there
973 aren't because we just adopted the substitute. That means we
974 can move forward to report H.R. 1319 as amended with the
975 usual instructions. All in favor of that motion say ``aye.''
976 Opposed, ``no.'' The ayes have it and the bill is agreed
977 to.

978 That concludes our markup for today.

979 [Whereupon, at 11:00 a.m., the Committee was adjourned.]