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1 {York Stenographic Services, Inc.}
2 HIF203.170
3 HEARING ON H.R. 5777, THE ``BEST PRACTICES ACT,``
4 AND
5 H.R. _____, A DISCUSSION DRAFT TO REQUIRE NOTICE TO AND
6 CONSENT OF AN INDIVIDUAL PRIOR TO THE COLLECTION AND
7 DISCLOSURE OF CERTAIN PERSONAL INFORMATION RELATING TO THAT
8 INDIVIDUAL
9 THURSDAY, JULY 22, 2010
10 House of Representatives,
11 Subcommittee on Commerce, Trade, and Consumer Protection
12 Committee on Energy and Commerce
13 Washington, D.C.

14 The Subcommittee met, pursuant to call, at 2:33 p.m., in
15 Room 2322 of the Rayburn House Office Building, Hon. Bobby L.
16 Rush [Chairman of the Subcommittee] presiding.

17 Members present: Representatives Rush, Stupak, Green,
18 Barrow, Castor, Space, Boucher, Whitfield, Stearns, Gingrey,

19 Scalise, and Latta.

20 Staff present: Michelle Ash, Chief Counsel; Timothy
21 Robinson, Counsel; Marc Groman, Counsel; Will Wallace,
22 Special Assistant; Brian McCullough, Senior Professional
23 Staff; Shannon Weinberg, Counsel; Will Carty, Senior
24 Professional Staff and Counselor; Robert Frisby, FTC
25 Detailee; and Sam Costello, Legislative Analyst.

|

26 Mr. {Rush.} Good afternoon. Today we are pleased to
27 welcome seven witnesses representing the Federal Trade
28 Commission, the consumers, industry, especially businesses
29 with an Internet presence and whose mainline of business is
30 to create and sell advertising. And I would like to thank
31 them for taking the time out of their busy schedules to share
32 in their perspectives on consumer privacy as well as to
33 outline their view as appropriate offline and online business
34 privacy protection and personal information use practices.

35 Have you ever been in the midst of a group of people and
36 heard someone say ''What is said in this room stays in this
37 room?'' As someone in that room you know just from that
38 statement that what may be said could be juicy enough,
39 sensitive enough, or valuable enough to tempt one of the
40 other persons in that room to violate that compact by leaking
41 that information to people who are not in the room during the
42 discussion. And the very utterance of these words evidences
43 a conscious intent by the participants to set the needed
44 environmental conditions that will encourage those in the
45 room to interact freely with one another to share data, share
46 information without them fearing that that very information
47 will harm them economically, emotionally, or otherwise at
48 some point in the future.

49 As an avid user of the Internet and as a person
50 interested in technology and communications, and all things
51 visual, I know there is no free lunch when I go onto the
52 Internet and website and to read or view content, especially
53 when I am not paying for that content. That Internet website
54 and advertisers on the right, and overhead, and operating
55 costs of that website know that my information whether it can
56 be used to identify who I am, or whether it gets merged in
57 with other user's information has substantial value and can
58 be monetized when it is provided to others.

59 Before the House was scheduled to adjourn for its August
60 recess, I for one felt that it was imperative on Monday of
61 this week to introduce privacy legislation in the form of
62 H.R. 5777, the Best Practices Act. I also felt it was
63 important that we quickly hold a hearing in this Subcommittee
64 on the assorted pros and cons of my bill as well as other
65 issues outlined in the discussion draft released by Chairman
66 Boucher and Ranking Member Stearns of the CIT Subcommittee.

67 The Best Practices Act speaks to a host of issues
68 affecting consumer privacy, including consumer's expectations
69 as to how their personal information should be handled,
70 shared, and disclosed to third parties. This legislation
71 also addresses other important issues including what defaults
72 should be set in connection with those expectations to

73 provide regulatory certainty to industry and to investors.
74 What safeguards should be crafted to anticipate foreseeable
75 abuses and violations of consumer privacy expectations? What
76 sets of remedies will make consumers whole in the event of
77 privacy breach, and how to calibrate penalties and other
78 possible legal causes of action without chilling industry
79 incentives to innovate and grow their businesses.

80 This legislation also addresses to what extent, if any,
81 should the privacy framework set forth in my bill preempt
82 state privacy laws and regulations. In holding this hearing
83 I would like to get a better handle on how extensively
84 personal information gets shared without an individual's
85 understanding and without their consent. I also want to
86 shine a spotlight on some of the actual harms that befall
87 individual users through no fault of their own.

88 With that said I yield back the balance of my time.

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

90 ***** COMMITTEE INSERT *****

|
91 [The information follows:]

92 ***** INSERT 1, 2 *****

|
93 Mr. {Rush.} And now I recognize the Ranking Member of
94 the Subcommittee, Mr. Whitfield, for 5 minutes for the
95 purposes of an opening statement.

96 Mr. {Whitfield.} Well, Chairman Rush, thank you very
97 much and we certainly appreciate our panel of expert
98 witnesses here today. As you know we are having this hearing
99 to explore privacy legislation. I want to commend Chairman
100 Rush for introducing his bill and want to thank him and his
101 staff for giving us an opportunity to review that
102 legislation. And all of us recognize that some steps need to
103 be taken in this area, and we are hopeful that after today's
104 hearing a lot of these issues will be clarified even more for
105 us because as I said in the beginning we look forward to your
106 testimony on this important issue.

107 It seems to me the threshold question is whether
108 Congress can require meaningful protections without forcing
109 businesses online and offline to abandon or severely curtail
110 legitimate business practices that benefit consumers. We
111 know that it is easy to misuse information, and we also know
112 there are benefits from sharing information, so that
113 balancing act is very important. The problem I believe for
114 most consumers is the lack of understanding about how their
115 information is collected, and once used how--and once they

116 provide it how that is being used, and the impact that it has
117 on them.

118 This is a preparatory hearing and we always have a lot
119 of concerns about legislation, particularly when it is in the
120 area of privacy. One of the areas that I have some concern
121 about is that the first party, third party distinction
122 created by this bill could also give certain players in the
123 Internet ecosystem a competitive advantage over others, and I
124 think we need a level playing field. I think it would be
125 very difficult also for Congress to be involved of every
126 nuance of privacy, and I think we need to be very careful
127 about the latitude that we give the FTC in this area.

128 One of the areas that is vitally important obviously in
129 policing any legislation is the enforcement mechanism. I am
130 always concerned about private rights of action because I
131 know in some instances it has really created a cottage
132 industry for trial lawyers seeking to manufacture privacy
133 concerns. But I also know that sometimes those appear to be-
134 -these private rights of actions seem to be a good way to go.

135 I do support the ability of State Attorneys General to
136 enforce the Federal Statute. I don't think this bill goes
137 far enough in terms of preempting state laws, creating the
138 possibility that despite the bill's intent, covered entities
139 would be subject to actions under multiple potentially

140 conflicting laws or legal theories for conduct sanctioned by
141 this bill.

142 Whatever Congress ultimately enacts consumers will not
143 care really about the corporate structure or the regulatory
144 regime that governs the entity collecting their information.
145 They only want to be sure that their information is treated
146 the same by all entities and that they have reasonable
147 protection. And I feel quite confident that when we enact
148 privacy legislation that we will have a balanced bill that
149 everyone will be satisfied with. Maybe I shouldn't say
150 everyone, but most people will be satisfied with, and of
151 course, that is our objective.

152 Now I yield back the balance of my time.

153 [The prepared statement of Mr. Whitfield follows:]

154 ***** COMMITTEE INSERT *****

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155 Mr. {Rush.} We will be seeking everyone on this bill.
156 We will now have Ms. Castor for 2 minutes.

157 Ms. {Castor.} Thank you, Chairman Rush, very much, and
158 thank you to the witnesses for being here today. I am
159 looking forward to your discussion of consumer privacy in the
160 Internet age, and such an exciting age of technological
161 innovation. And I hope your comments will be directed to the
162 two draft discussion bills that are on the table. We need
163 your expert advice on how we balance the important competing
164 interests of personal privacy and business innovation.

165 We do need to have rules in place that give consumers
166 the option to share their information or keep it private.
167 Both bills before us require that companies explain to
168 consumers what information is being collected and gives them
169 the ability to opt out of certain data collection practices.
170 And I think this is what consumers are looking for. They
171 want a simple explanation followed by a choice. But there
172 are literally thousands--millions of new businesses that have
173 been created as a result of the ability to share information,
174 and I think that this is absolutely vital that we protect
175 that interest as well. Nearly all Internet businesses rely
176 on some form of information gathering. So we want to insure
177 that these businesses continue to grow, and flourish, but in

178 a way that protects--that promotes transparency for the
179 consumer.

180 So thank you for being here and thank you, Mr. Chairman.

181 I yield back.

182 [The prepared statement of Ms. Castor follows:]

183 ***** COMMITTEE INSERT *****

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184 Mr. {Rush.} Mr. Scalise, you are recognized for 2
185 minutes.

186 Mr. {Scalise.} Thank you, Mr. Chairman. I want to
187 thank you and Ranking Member Whitfield for having this
188 hearing on the bills before us today, both focusing on
189 consumer privacy. I am pleased that we are once again
190 examining this issue and that legislation has been brought
191 forward with the goal of protecting consumers and their
192 personal information. I look forward to hearing from our
193 panelists and discussing the merits of these bills. As we
194 take them into consideration and debate the best steps moving
195 forward, I hope we proceed wisely and carefully.

196 As I have stated at previous hearings, I hope we focus
197 on how to protect consumers and their personal information,
198 and look at steps the industry will take on their own to do
199 that. We need to make sure that these bills do not focus on
200 ways government can get involved in more areas of people's
201 lives where it does not belong. For this reason, I hope
202 these bills take self-regulation into account and include
203 provisions that allow companies to continue with steps that
204 they have already taken to protect personal information. If
205 self-regulation is not sufficient, and if any additional
206 privacy provisions or regulatory requirements are needed,

207 they should be targeted, consistent, and not discriminate
208 against any one business or industry. Congress should not
209 pick winners and losers.

210 I also hope that these bills do not harm the ability to
211 maintain or invest in their businesses. We must strike a
212 balance that protects personal information without limiting a
213 company's ability to do business in an honest and ethical
214 way. Again, I will look forward to hearing from our
215 panelists on whether they feel these bills strike that
216 important balance.

217 Mr. Chairman, I also want to close by addressing the
218 rumors that FCC Chairman Genachowski may add broadband
219 classification to the commission's September 16 agenda.
220 First of all, I do not believe that the FCC should reclassify
221 broadband services or impose burdensome regulations on the
222 Internet. And more importantly, the FCC should definitely
223 not rush any process that gives Congress little time to react
224 after returning from recess.

225 Over 8,000 pages of comments have been submitted to the
226 FCC on this proposal, and the comment period is open until
227 August 12. For reclassification to be on the September 16
228 agenda, the other commissioners would have to receive
229 chairman's proposal by August 26, giving the commissioners 2
230 weeks to review the thousands of comments. Clearly we need

231 to make sure that they have that ability to review those
232 comments from the public. So I hope those rumors are in fact
233 just rumors. Otherwise it would seem that the FCC intends on
234 ignoring those 8,000 pages of comments as well as the
235 bipartisan staff discussions that are ongoing on this issue.
236 We must continue to pursue targeted legislation that serves
237 the American people, not a hastened process that serves a
238 political agenda.

239 Thank you, and I yield back.

240 [The prepared statement of Mr. Scalise follows:]

241 ***** COMMITTEE INSERT *****

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242 Mr. {Rush.} The chair recognizes now the gentleman from
243 Georgia, Mr. Barrow, for 2 minutes.

244 Mr. {Barrow.} Thank you, Chairman, I will waive time.

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

246 ***** COMMITTEE INSERT *****

|
247 Mr. {Rush.} Mr. Green, you are recognized for 2
248 minutes.

249 Mr. {Green.} Thank you, Mr. Chairman. Thank you
250 Chairman Rush, and Ranking Member Whitfield. I want to thank
251 you for raising the issue of consumer privacy and for holding
252 this hearing today, and also Chairmen Rush and Boucher, as
253 well as Ranking Member Stearns for introducing the bills
254 which we examine today.

255 As technology continues to evolve, the privacy
256 implications for consumers require frequent reexamination by
257 Congress. In 2003 we passed the Canned Spam Act that
258 countered the alarming rise of unsolicited spam email
259 messages that interfered with the use of Internet and email
260 by in users. Today technology has continued its progress and
261 as a result, we are once again confronted with challenges for
262 protecting consumers and ensuring that private data is not
263 shared without consent.

264 The ability to easily aggregate and share information
265 over the Internet has provided tremendous benefits to our
266 society and our economy, and the collection of consumer
267 information can provide tremendous benefits to small and
268 upstart businesses by allowing them to target customers that
269 have tendencies to purchase individualized products or

270 services. One problem, however, is that these are not the
271 only ones using the data, and the ability and entire entities
272 that sell this information to collect such a wide variety of
273 information on individuals is extremely troubling because it
274 allows bad actors to target vulnerable individuals based on
275 very specific and granular data that has been collected
276 across a number of online and offline platforms. We have
277 laws that regulate how this information can be used by
278 financial institutions in relating to medical record privacy,
279 but outside these defined areas the information is largely
280 unregulated and has the potential for being tremendously
281 harmful to consumers.

282 I am pleased that our committee is confronting these
283 challenges head on. It is important that we examine methods
284 that introduce transparency into the system and give the
285 consumers the ability have control over the large scale data.
286 Collection is currently occurring at most times without their
287 knowledge. And I look forward to hearing the testimony from
288 witnesses.

289 Mr. Chairman, I yield back.

290 [The prepared statement of Mr. Green follows:]

291 ***** INSERT 10 *****

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292 Mr. {Rush.} Mr. Latta is recognized for 2 minutes.

293 Mr. {Latta.} Thank you, Mr. Chairman, Ranking Member
294 Whitfield. I appreciate you holding today's hearing on the
295 important issue of protecting an individual's privacy.

296 Meaningful legislation to protect consumer's data is
297 important, as there have been recently high profile
298 incidences involving the compromising of consumer data that
299 has increased privacy and concerns. There are many benefits
300 that the Internet provides consumers and it is important that
301 consumers are protected. However, as with many of the public
302 policy issues that this Subcommittee considers, there needs
303 to be a balance between protecting consumers and
304 overburdening companies with regulations.

305 The collection of consumer information is a great
306 benefit to companies that process transactions as well as to
307 market their products. In addition, many of these company's
308 products are based on information that the consumers submit
309 to then obtain information specific to them. This personal
310 information must be protected whether it regards personal
311 health, employment, or any other information.

312 While it is important for companies to disclose their
313 privacy practices, companies should not have to disclose the
314 propriety practices or information for collecting this

315 information. In moving forward on either of these pieces of
316 legislation, we need and to ensure that by expanding the
317 authority of a government agency that there are no unintended
318 consequences on ecommerce. I have heard concerns, especially
319 from small businesses, about this legislation have a chilling
320 effect on ecommerce and curbing innovation. These small
321 businesses are concerned that increased regulations will have
322 negative effect on their businesses and have increased costs
323 for them, and those that are self-employed ultimately which
324 would then have to be borne by the consumers.

325 I will look forward to working--continue to work on--
326 with the Subcommittee on this important issue relating to
327 protecting consumer's privacy. In this time of rapidly
328 advancing technology, we must protect personal information.
329 I am hoping that this balance can be achieved for all the
330 parties involved, and with that, Mr. Chairman, I yield back.
331 Thank you.

332 [The prepared statement of Mr. Latta follows:]

333 ***** COMMITTEE INSERT *****

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334 Mr. {Rush.} The Chair recognizes Mr. Stearns for 5
335 minutes.

336 Mr. {Stearns.} Thank you, Mr. Chairman, and like other
337 members, I am very glad we are having the hearing on H.R.
338 5777, Best Practices Act, as well as the proposal drafted by
339 Mr. Boucher, the Chairman of the Communication, Technology,
340 and the Internet Subcommittee, the CTI Subcommittee. I was a
341 sponsor, principle sponsor with Mr. Boucher on his bill, and
342 so I am happy to join with him in soliciting comments as he
343 did over the some 70 days. And as many of you perhaps know
344 that I have had a lot of experience working on this privacy
345 issue. It is complex, involves a broad range of interests.
346 During my time as Chairman of this Subcommittee I introduced
347 several privacy bills, so I understand the importance of
348 transparency when it comes to collection, use and sharing of
349 consumer information. Now it is my capacity as the CTI
350 Subcommittee, I have been focusing on privacy issues and the
351 Internet, which it becomes so ubiquitous in our everyday
352 lives, that we have started to presume, just presume a
353 certain level of privacy that may not actually exist, so that
354 is why I think we should be looking at this privacy
355 situation.

356 We must recognize that online advertising supports much

357 of the commercial content, applications, and services that
358 are available on the Internet today without charge and my
359 colleagues, we do not want to disrupt this well-established
360 and successful business model.

361 Now this bill Best Practices seeks to enhance
362 transparency over the commercial use of personal information
363 that provides consumers with choices about the collection,
364 use, and disclosure of this information. I support providing
365 consumers with choices and transparency, but we must also
366 keep in mind that only the consumer knows how he or she feels
367 about the information that is being collected, the parties
368 doing the collecting and the purpose for which the
369 information for which the information is ultimately
370 collected. Congress cannot and should not make that decision
371 for them.

372 Now I do have some concern with this Best Practices Act
373 as currently drafted, including the overly expansive
374 definition of covered information. The private right of
375 action with uncapped punitive damages and the safe harbor
376 provision which is too prescriptive and relies too heavily on
377 the Federal Trade Commission. In order to have an effective
378 safe harbor and privacy legislation we must craft a provision
379 that creates the right incentives for businesses to subscribe
380 to the very best practices with respect to the use of

381 personal information of those consumer's standards that have
382 been developed over time and are capable of being modified
383 rapidly to address any new significant consumer privacy
384 concern about businesses use of consumer's data.

385 I would like to work with my colleagues to develop a
386 better self-regulatory structure that will protect consumers
387 while creating the proper incentives for businesses to adopt
388 and maintain the best privacy and protection standards. I
389 obviously appreciate having these hearings. I regret though,
390 Mr. Chairman, we are having a hearing only four days after
391 the bill was publicly released. This is an important and
392 complicated topic, and members, and staff, and our witnesses
393 need more time to adequately analyze the provisions in this
394 legislation. It is a credit to Mr. Boucher. He released
395 this privacy discussion draft on May 4, and he allowed ample
396 time for comments. And if I recollect correctly, there was
397 70 different organizations, companies, universities,
398 colleges, and concerned citizens that have taken the time to
399 send their comments on this discussion draft.

400 So we have a--plenty of information to consider for his
401 bill. So there is clearly a lot of interest out in privacy--
402 out in the industry for privacy legislation. I feel that
403 more time allowed for more robust discussion is necessary, so
404 I hope we have that in the future. But again I appreciate

405 your work, and the leadership on this issue, and also Mr.
406 Boucher's hard work as I look forward to working with members
407 of both Subcommittees as we try to find the good, equal
408 balance of protecting consumers and allowing innovation to
409 flourish.

410 I will just conclude and sort of mention which Mr.
411 Scalise mentioned a little bit about the FCC and their haste
412 to move the--from Title I to Title II, the Internet
413 jurisdiction, and I would say--one thing that I would add to
414 his comment is when we get back in September it will only be
415 a couple of days perhaps until the FCC acts, and that is
416 really not enough time for us to even consider what they are
417 doing, so again, I urge as Mr. Scalise did that the FCC hold
418 off. Thank you, Mr. Chairman.

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

420 ***** COMMITTEE INSERT *****

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421 Mr. {Rush.} The Chair thanks all the members for their
422 opening statements, the Chair really wants to reassure every
423 member of this Subcommittee that the time to--necessary for
424 deliberation will be forthcoming at that we are in no way do
425 we expect to rush--pardon the pun--to rush towards judgment.
426 However, we do feel as though we need to start this process
427 in a robust way and a robust manner, and that is what was the
428 intention of the Chairman. You know, discussion has got to
429 end sometime and now is the time for the discussion to be
430 ended and the work to begin.

431 So with that said, I want to welcome our witnesses now
432 and I am so honored that these individuals have taken the
433 time out from their busy schedule to come and share with this
434 subcommittee their valuable information, insight, and their
435 expertise on this most important matter that affects us, the
436 American people. I want to introduce them now. From my left
437 is Mr. David Vladeck--

438 Mr. {Vladeck.} Vladeck.

439 Mr. {Rush.} Vladeck. He is the Director of the Bureau
440 of Consumer Protection for the Federal Trade Commission.
441 Seated next to Mr. Vladeck is Leslie--Ms. Leslie Harris. She
442 is the President and CEO of the Center for Democracy and
443 Technology. Next to Ms. Harris is Mr. David Hoffman. He is

444 the Global Privacy Officer for the Intel Corporation. Seated
445 next to Mr. Hoffman is Mr. Ed Mierzwinski. He is the
446 Consumer Program Director for the U.S. Public Interest
447 Research Group. And next to Mr. Mierzwinski is Mr. Ira
448 Rubinstein. He is the adjunct Professor of Law in the New
449 York School of Law. And next to Mr. Rubinstein is Mr. Jason
450 Goldman. He is in Counsel, Technology, and E-commerce for
451 the U.S. Chamber of Commerce. And then we have seated next
452 to Mr. Goldman is Mr. Mike Zaneis, and Mr. Zaneis is the
453 Vice-President of the Public Policy Interactive Advertising
454 Bureau. Again, thank you all so very much for being present
455 here at this hearing, and it is the practice of this
456 subcommittee to swear in the witnesses, and I ask each of you
457 if you would stand and raise your right hand. There is a big
458 panel of witnesses we got here.

459 [Witnesses sworn.]

460 Mr. {Rush.} Please let the record reflect that the
461 witnesses have all answered in the affirmative and now we
462 will begin with testimony from our witnesses. We will begin
463 with Mr. Vladeck. Mr. Vladeck, you are recognized for 5
464 minutes.

|
465 ^TESTIMONY OF DAVID VLADECK, DIRECTOR, BUREAU OF CONSUMER
466 PROTECTION, FEDERAL TRADE COMMISSION; LESLIE HARRIS,
467 PRESIDENT AND CHIEF EXECUTIVE OFFICER, CENTER FOR DEMOCRACY
468 AND TECHNOLOGY; DAVID HOFFMAN, GLOBAL PRIVACY OFFICER, INTEL
469 CORPORATION; ED MIERZWINSKI, CONSUMER PROGRAM DIRECTOR, U.S.
470 PUBLIC INTEREST RESEARCH GROUP; IRA RUBINSTEIN, ADJUNCT
471 PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW; JASON
472 GOLDMAN, COUNSEL, TECHNOLOGY AND E-COMMERCE, U.S. CHAMBER OF
473 COMMERCE; AND MIKE ZANEIS, VICE PRESIDENT, PUBLIC POLICY,
474 INTERACTIVE ADVERTISING BUREAU

|
475 ^TESTIMONY OF DAVID VLADECK

476 } Mr. {Vladeck.} Thank you very much, Chairman Rush,
477 Member Whitfield, members of the Committee, I really
478 appreciate the opportunity to be here today.

479 The Federal Trade Commission has a long track record of
480 protecting consumer privacy. The Commission began examining
481 online privacy in the mid-1990's. Initially the Commission's
482 work was built on the so-called Fair Information Practice
483 principles of notice, choice, access, and security. The
484 Commission's efforts were widely credited with raising public
485 awareness about privacy, prompting companies to post privacy

486 policies online for the first time and improving companies'
487 accountability for privacy practices.

488 In the early 2000's the FTC shifted its focus and
489 targeted harmful uses of information, uses presenting risks
490 to physical security, economic injury, or causing unwarranted
491 intrusions. This approach was designed to protect privacy
492 without imposing costly notice and choice requirements for
493 all uses of information. The Commission's privacy agenda
494 included aggressive enforcement on data security, children's
495 privacy, spam, spyware, and unwanted telephone calls,
496 telemarketing robocalls.

497 Last year the Commission announced that it was going to
498 again re-evaluate its approach to privacy. We recognize that
499 the traditional models governing consumer privacy have
500 limitations. The Fair Information Practices model placed a
501 heavy burden on consumers to read and understand complicated
502 and lengthy privacy policies, and then make choices about the
503 collection and use of their data. The harm-based model
504 generally did not address concerns about having one's
505 personal information exposed where there is no direct
506 intangible consequence. Often, harms to consumers were
507 addressed after they occurred.

508 Late last year the Commission began its re-evaluation of
509 privacy by holding three round tables which highlighted a

510 number of important themes. First and most urgently
511 consumers do not understand the extent to which companies are
512 collecting and using their personal data. This is a remark
513 that I think many of the members echoed in their opening
514 remarks. Second, existing privacy policies don't work as a
515 means of communicating privacy practices to consumers, and
516 certainly will not work well on small screen mobile devices
517 like smart phones. Third, consumers do care about privacy
518 and they care about privacy as a value in and of itself
519 beyond any tangible economic harm that may be associated with
520 it. And finally, as others have pointed out, the free flow
521 of information does help make tremendous benefits possible,
522 so we need to be cautious about restricting information
523 exchanges and uses.

524 Recognizing many of these same issues, Chairman Rush and
525 Chairman Boucher each have proposed legislation to advance
526 the goal of improving privacy protection in today's
527 commercial marketplace. We share this goal and we applaud
528 Chairman Rush and Chairman Boucher for their leadership.

529 Although the Commission has not taken a position on the
530 legislation, both proposals include a number of key policy
531 objectives that the Commission supports.

532 First, both include requirements for data security for
533 customer information, a requirement the Commission has long

534 endorsed. Second, the Commission supports the proposal's
535 data accuracy requirements, especially where the data will be
536 used for decisions about a consumer's eligibility for
537 benefits or services. Third, both proposals give the FTC
538 limited rule making authority in the privacy area. We
539 believe that the content, timing, and scope of privacy
540 disclosures required by the legislation will benefit from
541 broad stakeholder input and consumer testing which can be
542 accomplished as part of an APA rulemaking proceeding.
543 Finally, both proposals include innovations to simplify
544 consumer's ability to exercise meaningful privacy choice.

545 If Congress enacts legislation in this area we urge it
546 to consider some additional issues. Most importantly we
547 think it would be useful to require short disclosures at the
548 point of information collection and/or use and to give the
549 FTC rulemaking authority so we can provide guidance on this
550 requirement.

551 Let me share an example of why we think short and
552 concise notices at the right moment are important. A few
553 months ago it was reported that approximately 7,500 consumers
554 had ``sold their souls'' to an online computer game retailer.
555 To drive home the point the consumers don't read lengthy
556 disclosures, the company provided a provision in its privacy
557 policy that by placing an order with the company the consumer

558 granted the company ``the nontransferable option to claim for
559 now and forever more your immortal soul''. The company even
560 went on to provide an opt-out provision for this particular
561 soul selling clause, but not surprisingly very few consumers
562 opted out. Now I don't believe that these consumers really
563 meant to transfer their rights of their immortal soul to an
564 online gaming company, and we think this illustration drives
565 home the need for short and concise notices the consumers
566 will read and understand at the time of data collection and
567 use.

568 Another issue we would urge Congress to look at is
569 whether the sharing of individual's data among companies
570 affiliated through common ownership should necessarily be
571 exempt from consent requirements, especially where a company
572 may share data with dozens or even hundreds of affiliate
573 companies.

574 Finally we also have concerns that the safe harbor
575 programs contained in the proposed legislation could lead to
576 multiple consent mechanisms that may differ in important ways
577 which could add to consumer confusion when consumers need
578 more simplicity.

579 The Commission looks forward to working with Congress to
580 resolve these issues and any others that may arise in order
581 to accomplish our shared objective of improving consumer

582 privacy, while at the same time promoting innovation and
583 beneficial flows of information on the Internet. Thank you
584 very much.

585 [The prepared statement of Mr. Vladeck follows:]

586 ***** INSERT 3 *****

|
587 Mr. {Rush.} The Chair now recognizes Ms. Harris for 5
588 minutes.

|
589 ^TESTIMONY OF LESLIE HARRIS

590 } Ms. {Harris.} Chairman Rush, Ranking Member Whitfield,
591 members of the Subcommittee, on behalf of CDT I thank you for
592 the opportunity to testify today. Chairman Rush, you,
593 Chairman Boucher, Representative Stearns have shown great
594 leadership in putting the issue of consumer privacy
595 legislation back on the Congressional agenda.

596 At a time when more and more personal information is
597 collected, analyzed and sold, an astonishing 88 percent of
598 Americans are concerned about their online privacy. A
599 consumer privacy law is long overdue. Drafting a privacy law
600 that can stand the test of time requires a careful balancing
601 of interest. The law must provide consumers rights, it must
602 provide meaningful obligations for companies, and at the same
603 time it has to be flexible and high level enough to respond
604 to the rapid changes in technology and changing business
605 models. It needs to give companies certainty while at the
606 same time encouraging privacy, innovation, and accountable
607 practices, and of course, it needs strong enforcement. CTD
608 believes the bills before the Subcommittee today include the
609 essential building blocks for a privacy law that meets this
610 test. Chairman Boucher's draft, the critical first steps to

611 that end, we believe the Best Practices Act builds on that
612 draft to significantly advance the discussion.

613 Let me just mention a few key points. Fair Information
614 Practices, commonly known as FIPs, must be the foundation of
615 any consumer privacy law. The Boucher draft provides the
616 basic obligations in notice, and choice, and security, but as
617 Mr. Vladeck said, that places most of the burden on the
618 consumer to figure out notices. Best Practices goes further
619 to a full set of substantive Fair Information Practices that
620 place obligations on companies for things like specifying
621 purposes, limiting data collection to those purposes,
622 minimizing how long one retains data, paying attention to
623 data quality, and integrity. And we think that in this
624 complex environment all of those obligations are critical.

625 With respect to cope--scope, excuse me, CDT does support
626 the application of a single baseline set of rules to be
627 online and offline environment. We do support a robust
628 definition of covered information and heightened protection
629 for sensitive information, and we strongly support the
630 special rules for covered entities, right now mainly ISPs,
631 that collect all or substantially all of an individual's data
632 stream. We are pleased with the innovative provision on
633 accountability in Best Practices, which requires companies to
634 conduct PIAs, Privacy Impact Assessments, and periodic

635 reviews of privacy practices. American companies including
636 my colleague from Intel, HP, and Microsoft have been the
637 global leaders in developing an accountable privacy culture
638 within companies and we think this provision will broaden the
639 culture of responsibility for all covered entities.

640 We also strongly support the inclusion of a safe harbor
641 provision. Safe harbors, when they are backed up by rigorous
642 internal compliance and some FTC supervision, can take
643 account of differences between industries and create
644 certainty for companies. It can encourage privacy innovation
645 and reward the adoption of accountable practices.

646 Finally, strong enforcement must back up privacy rules,
647 and we endorse the dual enforcement regime at the FTC and
648 with the State Attorneys General. And we also applaud the
649 inclusion of a strong private right of action in the Best
650 Practices bill.

651 Mr. Chairman, thank you for the opportunity to testify
652 and holding this important hearing. We intend to submit a
653 lengthy side by side of the bills and our recommendations for
654 moving forward, and we look forward to working with you to
655 enact a historic privacy legislation that consumers are
656 strongly demanding and that we believe businesses need to
657 compete in the global economy.

658 [The prepared statement of Ms. Harris follows:]

659 ***** INSERT 4 *****

|
660 Mr. {Rush.} The Chair recognizes Mr. Hoffman for 5
661 minutes.

|
662 ^TESTIMONY OF DAVID HOFFMAN

663 } Mr. {Hoffman.} Mr. Chairman, Ranking Member Whitfield,
664 and members of the Subcommittee, I am David Hoffman, Director
665 of Security Policy and Global Privacy Officer at Intel
666 Corporation, and I appreciate the opportunity to testify
667 before you today.

668 Intel supports the Best Practices Act of 2010 and we
669 believe that innovation requires a policy environment in
670 which individuals feel confident that their privacy interests
671 are protected. We thank Chairman Boucher and Ranking Member
672 Stearns for putting forward such a thoughtful and important
673 draft from which to work. Their bill and the Best Practices
674 Act include many of the important concepts for a
675 comprehensive U.S. privacy law and we strongly support
676 Congress's efforts to legislate in this area. I congratulate
677 you on the work you have done to protect consumer privacy and
678 to promote continued technology innovation.

679 It is Intel's mission to deliver the platform in
680 technology advancements that have become essential to the way
681 we work and live. We see computing moving in a direction
682 where an individual's applications and data will move as that
683 person moves through his or her day. To manage these

684 applications and data, the individual will use a wide
685 assortment of digital devices including servers, laptop
686 computers, smart phones, tablets, televisions, and handheld
687 PCs. Thus it is necessary that individuals have trust in
688 being able to create, process, and share all types of data,
689 including data that may be quite sensitive such as health and
690 financial information. The provisions in the bills we are
691 discussing today can help provide a policy environment which
692 creates that trust.

693 I would like to highlight five specific aspects of the
694 two bills. First, we are pleased that both bills are
695 technology neutral and give flexibility to the FTC to adapt
696 the bill's principles to changes in the technology.
697 Maintaining technology neutrality in the legal framework
698 provides protection for individuals in a rapidly evolving
699 society as the creation of legislation and regulatory
700 requirements will invariably trail innovation of new
701 technology. We specifically like the Best Practices Acts
702 guidance given to for the FTC to create regulations for
703 certain key provisions of the bill.

704 Second, we support federal legislation based upon the
705 Fair Information Practices as articulated in the 1980 OECD
706 Privacy Guidelines. We are pleased that the Boucher/Stearns
707 discussion draft is based upon the framework of the Fair

708 Information Practices. Further, we are supportive of
709 Chairman Rush's bill which goes further and includes
710 provisions applying all of the Fair Information Practices
711 such as individual access to data, data minimization, and
712 purpose specification.

713 Third, we are pleased that the Best Practices Act
714 includes a provision requiring covered entities to engage in
715 the accountability processes in the deployment of
716 technologies and services. In addition we would advocate
717 that a specific privacy by design requirement also be
718 included in the accountability section. A privacy by design
719 model focuses on insuring that privacy is included as a
720 foundational component of the product and service development
721 process. Such a provision should not require compliance with
722 detail standards or mandatory third party product reviews,
723 but should instead focus on including privacy into a
724 business's product and service development processes.

725 Fourth, Intel commends both bills for contemplating that
726 certain operational uses of data are implicitly consented to
727 by individuals and should not require explicit notice and
728 consent. Specifically Intel supports the Best Practices Acts
729 drafting of such a use-based model.

730 Fifth and finally, Intel is strongly supportive of Title
731 IV of the Best Practices Act which establishes a safe harbor

732 for participation and self-regulatory choice programs. Intel
733 has long been a supporter of privacy trust mark problems and
734 believes they provide a way to work with organizations on
735 their accountability processes. We believe that in many
736 instances trust marks and other similar mechanisms can
737 substantially increase the reach and the effectiveness of
738 government enforcement. This co-regulation is a better
739 solution than a private right of action which is likely to
740 result in baseless claims, causing organizations to spend
741 resources on litigation when those resources could be better
742 directed toward the organization's privacy compliance
743 program. However, if a private right of action is included,
744 then the choice program should continue to provide a safe
745 harbor from liability.

746 Intel again thanks Chairman Rush and the Subcommittee
747 for your excellent work to protect consumer privacy, and to
748 promote and continue privacy innovation. We are supportive
749 of the Best Practices Act, we look forward to continuing our
750 engagement to improve the overall protection of privacy.

751 [The prepared statement of Mr. Hoffman follows:]

752 ***** INSERT 5 *****

|
753 Mr. {Rush.} Mr. Mierzwinski, you are recognized for 5
754 minutes.

|
755 ^TESTIMONY OF ED MIERZWINSKI

756 } Mr. {Mierzwinski.} Thank you very much. Thank you very
757 much Chairman Rush and Ranking Member--I was trying to work
758 my timer--this one is not working, but I will try to stick to
759 5 minutes. Ranking Member Whitfield, members of the
760 Committee, I am Ed Mierzwinski. I am Consumer Program
761 Director for the Public Interest Research Group, U.S. PIRG.
762 My testimony as submitted includes co-signed by the Consumer
763 Federation of America and the Center for Digital Democracy.
764 Since then four other organizations and I will provide this
765 for the record: Consumer Action, the Consumer Watchdog,
766 Privacy Rights Clearinghouse, and the World Privacy Forum
767 have also endorsed the testimony.

768 I want to start out with one point that is really the
769 main point that I want to make, and that is that the current
770 digital marketing system does not meet consumer's
771 expectations of privacy. A recent study by two leading
772 universities, the University of Pennsylvania and the
773 University of California at Berkeley, found that most
774 consumers believe that the government already protects their
775 privacy. It does not. Instead we have a digital marketing
776 system that I call or could call the Hoover model, and I am

777 not talking about J. Edgar. I am talking about the vacuum
778 cleaner. The vacuum cleaner model of collecting every bit of
779 information, every web track that a consumer ever makes and
780 keeping it forever is the way that companies like in their
781 virtually unregulated digital ecosystem. And we have a
782 system right now where the Federal Trade Commission has been
783 hobbled for 30 or 40 years by limits on its ability to
784 improve the rules that--and that and enforce the rules by the
785 Maggots and Moss rulemaking that was imposed on it that this
786 Committee tried to fix in the Wall Street Reform Act, but
787 unfortunately the Wall Street Reform Act did not finally give
788 the Federal Trade Commission fully capable of making
789 authority or full aiding and abetting liability, or the full
790 ability to impose civil penalties, and we would hope that
791 that would be on the committees agenda to continue to try to
792 achieve those goals.

793 But--so our organizations share long-standing concerns
794 for consumer privacy and look forward to working with the
795 Committee on these matters. And the Committee has had a
796 long-standing history of bipartisan bases working on consumer
797 privacy, so we are very encouraged by the work that was done
798 first by Chairman Boucher and Ranking Member Stearns, and
799 then by you, Chairman Rush, in putting together your
800 thoughtful proposals.

801 However, our concern is that the proposals tend to graft
802 Fair Information Practices on top of the digital ecosystem
803 that it just won't work as well as a full Fair Information
804 Practices based provision might work. So we are suggesting
805 that the committee start over and among the key elements of a
806 revised bill would be a framework focused on overall data
807 minimization. Anyone who knows the online and offline data
808 collection industry will tell you that the focus is on data
809 maximization, as I said, the Hoover model. ``Every move you
810 make'' as the lyrics of the Police song go could be the data
811 collection industry's theme song as we are all being watched,
812 compiled, analyzed, and then acted upon. While tools
813 involving opt-in and safe harbors for example provide greater
814 control by a consumer, they do not constrain the dramatic and
815 far reaching growth of online and offline data collection for
816 personalized and innovative targeting. A vast automated and
817 powerful data collection complex has emerged capable of
818 generating and continually revising a profile, a consumer x-
819 ray of our habits, interests, worries, financial status, and
820 everything else about us. It is now being collected not just
821 on the Internet, but also whenever we use a cell phone, or
822 play an online game, or use any other variety of electronic
823 gimmickry that we might be carrying around with us.

824 Some of the specific concerns that we have, again we

825 think the bills are thoughtful for a start, but we would urge
826 you to consider a few other things. First of all notice and
827 choice are not enough. And I totally agree with the other
828 witnesses that these bills go further than the industry
829 preferred FIPs light of notice and choice. But we need to
830 have a greater reliance on limiting the amount of information
831 that is collected, used, and shared, increasing the knowledge
832 of consumers, limiting data retention, and maximizing data
833 minimization.

834 The second, self-regulation has not worked. The Federal
835 Trade Commission under various Administrations has failed in
836 self-regulation, as has the industry. And there are several
837 reports that I cite in my testimony that go through the
838 details of how first the individual references service group
839 self-regulatory body that supposedly regulated information
840 brokers didn't work in the 1990's, then we have the network
841 advertising initiative didn't work, and there is an IAB
842 provision that was started last year that we don't think has
843 worked. So we think we need greater oversight, greater
844 statutory protections, and we need a broader private right of
845 action. Although the Rush bill has a narrow private right of
846 action, we don't think enrich trial lawyers. We think
847 private rights of action deter lawlessness and they encourage
848 companies to comply with the law. And second, we believe

849 that state laws should always be allowed to be stronger than
850 federal law. If you have got a good enough federal law the
851 states will move on and do other things. But if Congress
852 doesn't solve the job we need the States as quick responders
853 to new problems.

854 With that I will just conclude my comments and tell you
855 that I am very pleased for our organization's want to
856 continue to work with you to refine and enhance this
857 legislation. Thank you.

858 [The prepared statement of Mr. Mierzwinski follows:]

859 ***** INSERT 6 *****

|
860 Mr. {Rush.} Thank you. Mr. Rubinstein, you are
861 recognized for 5 minutes.

|
862 ^TESTIMONY OF IRA RUBINSTEIN

863 } Mr. {Rubinstein.} Mr. Chairman, Ranking Member
864 Whitfield, and members of the Subcommittee, thank you for the
865 opportunity to testify today. My name is Ira Rubinstein and
866 I am an adjunct professor at NYU School of Law. This
867 afternoon I will focus my comments specifically on a key
868 question in Congressional efforts to regulate privacy. What
869 is the relationship between privacy legislation and industry
870 self-regulation and the role and effectiveness of safe harbor
871 provisions in promoting self-regulation?

872 A safe harbor is a familiar legislative device intended
873 to shield or reward firms if they engage in desirable
874 behavior as defined by statute. In the privacy arena the
875 most familiar example is the Children's Online Privacy
876 Protection Act. Over the past decade COPPA safe harbor
877 programs have met with success mainly in terms of
878 complimenting FTC's own enforcement efforts. But the program
879 has two main shortcomings, weak incentives, and a low rate of
880 participation. Only about 100 firms have joined. In my
881 written testimony I propose several ways in which Congress
882 might improve upon the COPPA safe harbor by adopting a more
883 co-regulatory approach in which industry enjoys greater scope

884 in shaping self-regulatory guidelines while government sets
885 default requirements and retains general oversight authority
886 to improve--approve and enforce such guidelines.

887 A co-regulatory approach relies on both sticks and
888 carrots as incentives. Sticks for non-participating firms
889 might include a private right of action, broader opt-in
890 requirements, external and independent audits of regulatory
891 compliance and much stricter requirements for online
892 behavioral advertising. Carrots, on the other hand, might
893 include not only exemptions from private actions for safe
894 harbor participants, but also cost saving such as compliance
895 reviews based on self-assessments rather than external
896 audits, government recognition of better performing firms,
897 and regulatory flexibility in the form of tailored
898 requirements addressed to specific sectors or business
899 models.

900 In proposing this new approach to privacy safe harbors
901 it bears emphasizing that safe harbor benefits should be
902 limited to firms demonstrating superior performance and would
903 not be available to other firms that merely satisfy the fault
904 statutory requirements. In other words, the safe harbor
905 would only benefit firms that meet high performance standards
906 based on, for example, sound data governance practices such
907 as appointing a chief privacy officer who is accountable for

908 setting privacy protection policy and standards; advanced
909 privacy methodologies such as use of development guidelines
910 for building privacy protection into products or services,
911 also called privacy by design as Mr. Hoffman mentioned; and
912 other Best Practices such as privacy training for relevant
913 staff and online guidance on privacy and security for other
914 employees and for consumers.

915 In closing I want to emphasize that this new approach to
916 privacy safe harbor should not be confused with existing
917 self-regulatory schemes in which industry alone develops and
918 then oversees the privacy code of conduct. Rather, in a
919 privacy safe harbor as envisioned here, the government sets
920 default requirements and relevant standards and practices
921 emerge from a multi-stakeholder process in which both
922 advocacy groups and members of the public have an opportunity
923 to participate. This requires that interested parties engage
924 in difficult and perhaps protracted negotiations and keep
925 talking with each other until they forge a rough consensus.

926 One way to insure public participation is negotiated
927 rule making, a statutorily defined process by which agencies
928 formally negotiate rules with regulated industries and other
929 stake-holders as an alternative to conventional rule making.
930 An alternative approach would be to modify the safe harbor
931 approval process by requiring that program sponsors engage in

932 a public consultation and report on these consultations in
933 their applications.

934 I will conclude by offering three recommendations which
935 I am happy to elaborate upon during this hearing. First,
936 Congress needs to enact comprehensive privacy legislation
937 incorporating robust Fair Information Practices. Second,
938 this legislation should include a safe harbor program based
939 on a co-regulatory approach as described above. Finally,
940 this safe harbor program should include strong performance
941 standards based on data governance, advance privacy
942 methodologies, and other Best Practices, and it should also
943 require public consultation as part of the safe harbor
944 approval process.

945 The two bills being considered today represent important
946 first steps in developing this new approach to safe harbors,
947 but should be expanded as discussed above. I want to thank
948 you again for this opportunity to testify. I will be pleased
949 to answer your questions and would be happy to provide any
950 further assistance.

951 [The prepared statement of Mr. Rubinstein follows:]

952 ***** INSERT 7 *****

|
953 Mr. {Rush.} Mr. Zaneis, you are recognized for 5
954 minutes.

955 Mr. {Zaneis.} I am happy--

956 Mr. {Rush.} I am sorry--

957 Mr. {Zaneis.} That is all right, we don't want to skip
958 over Jason.

959 Mr. {Rush.} Mr. Goldman, I am sorry. Mr. Goldman--

960 Mr. {Goldman.} Thank you very much.

961 Mr. {Rush.} You are recognized for 5 minutes.

|
962 ^STATEMENT OF JASON GOLDMAN

963 } Mr. {Goldman.} Good afternoon, Chairman Rush, Ranking
964 Member Whitfield, and members of the Subcommittee. I am
965 Jason Goldman, Telecommunications, and E-commerce Counsel at
966 the U.S. Chamber of Commerce. The U.S. Chamber of Commerce
967 is the world's largest business federation representing the
968 interest of more than three million businesses and
969 organizations of every size, sector, and region. On behalf
970 of the Chamber and its members, I thank the Subcommittee for
971 its work on consumer protection and for the opportunity to
972 testify here today.

973 Privacy is a key issue for the Chamber. The Chamber
974 supports policies that foster business opportunities while
975 respecting consumer's privacy. The collection of personal
976 information is necessary to provide consumer, social, and
977 business benefits. Given the diversity of private sector
978 businesses should have latitude within acceptable guidelines
979 in defining what they need--what kind of information they
980 need to collect and use.

981 Recently the debate over privacy has been brought to the
982 forefront by the growth of the Internet. The Internet has
983 revolutionized the way business is conducted in all sectors

984 of the global economy including financial services, retail,
985 wholesale distribution, and manufacturing. Today the vast
986 majority of companies, small and large, are online and use
987 the Internet to communicate with consumers and with the
988 vendors, and all the different other entities. In
989 particular, ad-supported content has been key to the success
990 of broadband. Frequently online content is provided free of
991 charge to consumers and revenues are instead generated
992 through advertising. This ad-supported business model has
993 been a key to the success of many Internet adventures and has
994 helped to make the Internet an engine of growth in the U.S.
995 economy.

996 I will now turn to the bills that are the topic of this
997 hearing. The Chamber received the text of the Best Practices
998 Act just a few days ago, so my comments today are based on
999 our initial read of the bill and may change as we further
1000 analyze the bill and vet the bill through our membership.
1001 The Chamber's analysis of Boucher/Stearns discussion draft
1002 was submitted to their Subcommittee in June and is attached
1003 to our testimony.

1004 The Chamber very much appreciates the work that went
1005 into drafting the Best Practices Act. Despite the inclusion
1006 of some of the provisions that we support, we still have
1007 strong concerns the bill as currently drafted. The Chamber--

1008 I will go through some of the provisions that we support and
1009 also some of the ones that we have modifications to. The
1010 Chamber is pleased that the bill directs the FTC to
1011 promulgate rules under this act in a technology-neutral
1012 manner. Government should not pick winners and losers. The
1013 Chamber applauds the inclusion of language that preempts
1014 State laws governing the collection and use of data.
1015 However, the Chamber believes the language could have been
1016 even stronger to help businesses avoid having to comply with
1017 50 different State laws. The Chamber agrees with the intent
1018 of Section 502 which states that the bill should have no
1019 effect on activities covered by other federal privacy laws.
1020 However, the opening clause of this section states ``except
1021 as provided expressly in the Act.'' This could be
1022 interpreted by the FTC or by the courts as permitting the
1023 creation of multiple layers of regulation.

1024 The Chamber appreciates the bill attempts to maximize
1025 regulatory flexibility. However, at the same time the
1026 Chamber is concerned that the sheer number of rulemakings
1027 will created needless regulatory uncertainty. The Chamber
1028 also believes that the safe harbor provision as drafted is a
1029 good start but improvements could be made. We are gratified
1030 by the recognition that industry self-regulation in this area
1031 has and will continue to protect consumers, however the safe

1032 harbor in our opinion is too narrow and should follow FTC and
1033 industry principles. And also the Chamber has serious
1034 concerns about private right of action as well as an explicit
1035 grant of authority to State Attorneys General to enforce the
1036 legislation.

1037 When combined with the FTC's own enforcement authority
1038 we are concerned that these official mechanisms will serve to
1039 impose duplicative and potentially inconsistent findings of
1040 liability as well as excessive damage awards. In addition
1041 the explicit grant of authority for the award of punitive
1042 damages and attorney's fees will serve to increase the
1043 likelihood that elements of the plaintiff's class action
1044 trial bar will use this legislation as a way to increase
1045 class action litigation with little benefit being given to
1046 the general public.

1047 The Chamber also has some concerns covered in more
1048 detail in our testimony with the opt-in requirements of third
1049 party sharing and opt-out requirements for information
1050 collection, as these provisions could upset established
1051 business practices for many of our members.

1052 Finally the Chamber has concerns with access and dispute
1053 resolution and the definition of covered information which I
1054 will be happy to discuss further during our Q and A. Thank
1055 you again, and I am happy to answer your questions following

1056 Mr. Zaneis.

1057 [The prepared statement of Mr. Goldman follows:]

1058 ***** INSERT 8 *****

1059

|

Mr. {Rush.} Mr. Zaneis, please 5 minutes now.

|
1060 ^STATEMENT OF MIKE ZANEIS

1061 } Mr. {Zaneis.} Thank you. I used to work for the U.S.
1062 Chamber of Commerce, but I don't think they would appreciate
1063 me delivering their testimony here today. Thank you,
1064 Chairman Rush, Ranking Member Whitfield, members of the
1065 Subcommittee for holding this hearing for the opportunity to
1066 testify about these important legislative proposals. My name
1067 is Mike Zaneis, and I do work for the Interactive Advertising
1068 Bureau as Vice President of Public Policy.

1069 The IAB represents some 460 companies involved in online
1070 advertising. Our companies run the gamut from the largest
1071 portals and search engines to branded publishers. It
1072 includes ad networks all the way down to the smallest Mom and
1073 Pop shop publisher online. The common theme for all of these
1074 folks is that they depend upon online advertising. It is a
1075 good industry and we are--continue to grow even in these
1076 tough economic times. In the first quarter of this year
1077 online advertising revenue in the U.S. grew to \$6 billion.
1078 And that represents a 7.5 percent increase over the first
1079 quarter of 2009. More importantly, our industry is a major
1080 component of the national economy. We add more than \$300
1081 billion to the U.S. economy and provide more than 3.1 million

1082 jobs total.

1083 But we know it is not all about economic numbers here
1084 today. We know in our industry that the number one asset
1085 that any company has is the consumer relationship in building
1086 trust through protecting their privacy and meeting their
1087 privacy expectations. That is why our industry has a long
1088 successful history of strong self-regulation. It began over
1089 a decade ago with input from the Federal Trade Commission
1090 when industries stood up to network advertising initiative.
1091 And this was a program to oversee third party ad networks and
1092 how they have collected and used data for consumers and
1093 provided choice.

1094 But we knew over time as our industry grew and innovated
1095 then so too did our self-regulatory programs. They needed to
1096 innovate, and grow, and expand. That is why over 2 years ago
1097 IAD joined with the Association of National Advertisers, the
1098 American Association of Advertising Agencies, the Direct
1099 Marketing Association and in conjunction with the Council of
1100 Better Business Bureaus, one of the most respected, reputable
1101 self-regulatory monitoring and compliance programs in the
1102 world, to create for the first time a broad comprehensive set
1103 of online privacy practices for advertising purposes.

1104 Here, too, we took away lessons from the Federal Trade
1105 Commission. They issued their staff report about online

1106 behavioral advertising privacy principles in February of '09.
1107 We incorporated many of those principles in our draft--excuse
1108 me--in our final principles that were issued in July of last
1109 year, including transparency, consumer notice, and something
1110 that we haven't talked about which is consumer education,
1111 which is really a key component here.

1112 All of this leads me to the bills and the legislative
1113 proposals that are on the table today. And Mr. Chairman, I
1114 want to thank you for your recognition in H.R. 5777 about the
1115 importance of industry self-regulation. We think that that
1116 is the right approach in that it has a long history of
1117 success, it can be more flexible and dynamic, and there is a
1118 commitment by industry and government agencies to make sure
1119 that it works. And we stand ready to work with you to make
1120 sure that any legislation that moves forward reflects upon
1121 and bolsters the success that not only the FTC has pushed out
1122 there and achieved, but in industry and our cross-industry
1123 self-regulatory group. We are beginning to see fundamental
1124 change online already in this marketplace about how consumers
1125 receive information about how data is collected and used, and
1126 pushing choice out ubiquitously.

1127 That leads me to my second point that we are very
1128 gratified to see your recognition in the bill that a one size
1129 fits all consumer noticed jammed down in a privacy policy

1130 often is written in legalese may not serve consumers all that
1131 well. In fact, in our industry we are seeing a tremendous
1132 amount of innovation in better ways to serve notice to
1133 consumers and we hope to preserve that type of flexibility
1134 with any legislation that moves.

1135 But--and there is always a but--we do have a number of
1136 reservations about H.R. 5777 and Congressman Boucher's
1137 proposal. And they share a couple of components that I would
1138 like to just identify here. The first is the concept that
1139 first party data usage requires an opt-out. Here we simply
1140 have to agree with the Federal Trade Commission's finding in
1141 their staff report. When consumers go to an online website
1142 they understand there is going to be a certain amount of data
1143 exchanged by that first party site and to serve them content
1144 and services and yes, advertising. And so, we think that
1145 they should be first party--clearly first party usage should
1146 be exempted out of this choice mechanism. Not notice--we
1147 should always do better around giving consumers notice about
1148 how the data is collected and used.

1149 The second issue I would like to raise with you is the
1150 third party data sharing provision. The Internet is nothing
1151 but a series of third party relationships. Virtually every
1152 website requires these third party data sharing whether it is
1153 to customize content, to run your analytics on the back side

1154 to make sure you know who is coming to your site and who--and
1155 getting paid, or whether it is for relevant advertising. And
1156 so here again we agree with the FTC's principle in their
1157 staff report that you should have an opt-out requirement
1158 empowering consumers to exercise their choice when they have
1159 legitimate concerns around privacy. You need to give them good
1160 notice, you need to empower them, and you need to educate
1161 them which is something that the IAB is committed to.

1162 So I will just sort of leave you with this last thought
1163 and I look forward to your questions. I think it is
1164 impossible to take information out of the information age,
1165 because if you do that is what you are going to get is less
1166 relevant advertising, and less relevant advertising by
1167 definition is spam. I don't think anybody wants that. That
1168 is not good for consumers, and it is not good for business.
1169 Thank you.

1170 [The prepared statement of Mr. Zaneis follows:]

1171 ***** INSERT 9 *****

|
1172 Mr. {Rush.} The Chair wants to thank all of the
1173 witnesses for your outstanding testimony today. A vote now
1174 occurs on the Floor of the House of Representatives. There
1175 are two votes--should be probably about 30 minutes or more--
1176 around 30 minutes, so it is the Chair's intention to recess
1177 the Subcommittee and to reconvene immediately after the last
1178 vote takes place. So it will be about half an hour. So I
1179 apologize for the interruption of this hearing, but we will
1180 be back as soon as we can. The Subcommittee now stands in
1181 recess.

1182 [Recess.]

1183 Mr. {Rush.} The Committee will reconvene, return to
1184 order. The Chairman recognizes himself for 5 minutes for the
1185 purposes of questioning the witnesses.

1186 Mr. Hoffman, I was interested in your testimony, and in
1187 your testimony you highlighted the importance of providing
1188 FTC rulemaking authorities to flesh out certain requirements
1189 in the Best Practices Act and to adapt the bill's provisions
1190 to changes in technology. Other stake-holders have raised
1191 concerns that providing FTC with this type of rulemaking
1192 authority in the bill will create enormous regulatory
1193 uncertainty that is bad for commerce.

1194 What are your thoughts on this? If FTC does not provide

1195 a rulemaking authority, will the bill quickly become
1196 outdated? Are you concerned about regulatory uncertainty and
1197 would you answer those questions for me, please?

1198 Mr. {Hoffman.} We think the Best Practices Act does an
1199 excellent job of not just providing rulemaking authority to
1200 the FTC, but guiding that rulemaking authority by certain
1201 criteria that should have to shape the regulations that would
1202 emanate from the FTC. Our perspective when we look at
1203 privacy legislation is to allow privacy to continue to
1204 actually aid innovation instead of impede innovation.

1205 Individual pieces of legislation need to be
1206 technologically neutral to allow for the enforcement agencies
1207 to apply those principles to the individual new business
1208 models when they come up and to provide guidance in that way.
1209 The FTC has been an absolute leader in doing that for the
1210 past decade.

1211 Mr. Vladeck mentioned the various methods that they have
1212 used to do that with the different enforcement actions that
1213 they have taken, plus the round tables that they have held,
1214 and how they have communicated with industry and academics.
1215 We think that the Best Practices Acts balances those
1216 different interests very well.

1217 Mr. {Rush.} Ms. Harris, is the importance to FTC
1218 rulemaking the--in this act just for consumers and is it just

1219 for business also?

1220 Ms. {Harris.} We think so. You are always--when you
1221 are writing a bill like this you can be highly specific, and
1222 the bill will lock in today's business practices, it will not
1223 have the flexibility that you need for business practices
1224 that we haven't seen, and it will not allow the law to
1225 basically live in a way that will address business practices
1226 we haven't seen. Giving the FTC very specific rulemaking
1227 authority here first of all allows them to take into account
1228 the different kinds of business models and technologies that
1229 we are dealing with, but it also, I think, allows over time
1230 for modifications depending on changed circumstances. So
1231 yes, we think FTC rulemaking is essential here.

1232 Mr. {Rush.} In past legislation the third party or
1233 unaffiliated party has been defined based on the corporate
1234 structure of an entity, such as common ownership or corporate
1235 control. And during this hearing and in other sidebar
1236 conversations we have heard that concerns that consumers may
1237 not understand which entities are subsidiaries, affiliates,
1238 parent corporations, or otherwise under common control with
1239 another company. On the other hand, corporate structuring is
1240 known and we do not know--we don't want to draw an arbitrary
1241 line.

1242 Ms. Harris and Mr. Mierzwinski, do you believe that

1243 consumers may have difficulty understanding when entities are
1244 related by common ownership or control? Should privacy
1245 matter? Should privacy legislation take into account the
1246 best reasonable expectations of the consumer as this act
1247 does? And is this a workable definition? Lastly I--you can
1248 answer these three questions in the manner that you would
1249 choose to. Lastly, what are the benefits of an approach
1250 based on common ownership or control and does it provide
1251 companies with more clarity? Those are a series of
1252 questions. I hope you can kind of summarize the questions in
1253 your answers.

1254 Ms. {Harris.} I am going to let Ed go first.

1255 Mr. {Mierzwinski.} Oh, thank you, Chairman Rush, and I
1256 think I want to commend you on your provision recognizing
1257 that the artificial distinction of this corporate common
1258 control. Consumers don't have any idea that their bank owns
1259 some hundreds or thousands of other affiliated entities. And
1260 the Internet has a number of networked companies that are the
1261 same way. So going to an activities based definition rather
1262 than a corporate ownership definition we support that, and I
1263 think it is much closer to consumer expectations that except
1264 for the company you are doing business with, pretty much
1265 everyone else is a third party.

1266 Ms. {Harris.} So I generally agree. I do think that

1267 your bill probably gets it as close to right as you can
1268 because it is a complicated issue. I am glad that there is
1269 some room for FTC rulemaking on that provision. The key
1270 question here is would a consumer under reasonable
1271 circumstances believe that they are dealing with an entity
1272 that is under common control. And I really think that that
1273 is probably--has to do with common branding. I think most of
1274 us know that GAP and Banana Republic and Old Navy and a whole
1275 set of companies are sort of one. But given a sort of large
1276 multi-nationals that own many, many, many different lines of
1277 business, we have to keep that very narrow in the interest of
1278 the consumer and I think you've done that.

1279 Mr. {Rush.} The Chairman's time is concluded. Now the
1280 Chairman acknowledges Mr. Whitfield for 5 minutes.

1281 Mr. {Whitfield.} I thank all of you for your testimony
1282 and trying to balance protecting privacy versus generating
1283 revenue for advertising to keep the Internet the vibrant
1284 marketplace that it is--searching browsing history of a
1285 particular person, and can some of you, maybe Ms. Harris or
1286 Mr. Mierzwinski, identify for me the privacy concerns with
1287 the anonymous monitoring of web browsing history, and should
1288 that require the same level of consent of using information
1289 like Social Security number, bank account numbers and so
1290 forth, and just give me your perspective on the differences

1291 therein.

1292 Ms. {Harris.} Mr. Whitfield, the way that they are able
1293 to collect discreet pieces of browsing history are usually to
1294 tie them together with an IP address. In that instance
1295 companies can pull them together into profiles, and they can
1296 be put together with information to identify the consumer.
1297 So in the technological environment that we are in now, the
1298 ability to bring discreet pieces of information together into
1299 an identifiable profile is simply much easier. I think that
1300 there is a conversation to be had in where you draw the line
1301 and--but I think that that is something that has changed
1302 dramatically from, you know, the first time that privacy
1303 legislation was introduced in Congress.

1304 Mr. {Mierzwinski.} Mr. Whitfield, I would agree and I
1305 would say that from my perspective one of the strongest
1306 pieces of both bills is that IP addresses insensitive
1307 information. We are concerned that de-identified or
1308 supposedly anonymous information can be repackaged back
1309 together. There are numerous examples of that happening, and
1310 I would also point out that a recent complaint by U.S. PIRG,
1311 the Center for U.S. Democracy, and other groups talks about
1312 just how easy it is and how the technology has changed in the
1313 last few years that consumers are being sold on a real time
1314 basis now. They are not compiling dossiers that take even

1315 half an hour to compile. The ads are being served instantly.
1316 They are being brokered to the highest bidder. It is a very
1317 sophisticated, and little bits of information can add up very
1318 quickly.

1319 Mr. {Whitfield.} Mr. Zaneis, would you like to comment
1320 on this?

1321 Mr. {Zaneis.} Yes, thank you very much, appreciate the
1322 opportunity. I think Congress has to be careful not to try
1323 to legislate the possible, or the theoretical, and to
1324 understand the business model. And here I actually disagree
1325 slightly with Leslie. It is not that VAS or predominate
1326 business model to tie click stream data back to personally
1327 identifiable information--certainly not in the online
1328 advertising space. In fact many of the ad networks
1329 specifically--advertising networks deliver some 90 percent of
1330 all ads online. They are generally third part by nature.
1331 Their business model generally is not to try to tie it back
1332 to what we would traditionally think of as personally
1333 identifiable information. Certainly there is a lot that is
1334 possible through technology, but I don't think we can
1335 legislate the possible. We ought to be looking at actual
1336 business models, and I think that when we look at H.R. 5777
1337 it actually gets closer under their definition of covered
1338 information to what we ought to be focusing on, which is

1339 things that are actually personally identifiable, not sort of
1340 anonymous in nature.

1341 Mr. {Whitfield.} And Mr. Rubinstein, since you are an
1342 academic here do you have any comments on this? We always
1343 value academic's thoughts.

1344 Mr. {Rubinstein.} Thank you, Mr. Whitfield. I would
1345 think I would just add that it is important not to think of
1346 anonymous data as just a binary category that it is--data is
1347 either anonymous or it is not anonymous. And the emphasis
1348 might be on specific context, so how much data is being
1349 assembled and what is the quantity of data? Is it being
1350 publicly shared or privately shared? What is the specific
1351 context? Rather than try to get at this through definitions
1352 that have just a black and white aspect to them.

1353 Mr. {Hoffman.} I would just like to add one point on
1354 that--to that. I think the current draft of the Best
1355 Practices Act actually recognizes that reality that Professor
1356 Rubinstein is commenting on. As an employee of a technology
1357 company there are a number of unique identifiers in hardware
1358 and software that are used on most computing platforms. What
1359 is happening in reality--Mr. Zaneis' point is a very good
1360 one. We need to look at the realities. It is some of those
1361 unique identifiers that are used and apt to correlate to a
1362 lot of this data that could be described sometimes as

1363 personally identifiable information. Others might say no, it
1364 is only identifying a particular device or a particularly
1365 device at a point in time. That is why I actually think the
1366 definition of preference profile which is saying that it is a
1367 list of preferences associated with an individual or with an
1368 individual's computer or other device, but then tying that to
1369 allow exception for participation in a choice program is an
1370 excellent way to navigate the issues that even if something
1371 is not completely identifiable to a particular individual it
1372 still could have the great potential to impact an individual.

1373 Mr. {Whitfield.} Thank you. I see my time has already
1374 expired.

1375 Mr. {Rush.} The Chair now recognizes Mr. Space.

1376 Mr. {Space.} I won't need fifteen, Mr. Chairman. In
1377 fact, I won't even need five, but thank you. I really don't
1378 have any questions having come in after the votes and after
1379 the testimony, but I do want to express my appreciation to
1380 Chairman, and to the Ranking Member for the deliberate
1381 process that we have undertaken in examining, reviewing, and
1382 modifying issues relating to privacy when it comes to access
1383 to the Internet and broadband generally. I think that having
1384 all the stakeholders present and participating in this
1385 discussion is very, very important and we see that today. We
1386 have seen it in the past, and we will see it in the future

1387 whether it is academia, industry, govern officials, consumer
1388 advocacy groups--all of those stakeholders deserve a place at
1389 the table and our Chairman and the Ranking Member have
1390 offered them that.

1391 So I want to thank the witnesses today, thank you, Mr.
1392 Chairman, and the Ranking Member for again such a deliberate
1393 a thorough analysis of an issue that is becoming increasingly
1394 important as we see the role of broadband integrated into
1395 virtually all aspects of our lives. And I yield back my
1396 time.

1397 Mr. {Rush.} The Chair thanks the gentleman for his kind
1398 remarks. And the Chair will now entertain a second round of
1399 questions, and with that in mind, the Chair recognizes
1400 himself for 5 minutes.

1401 This question is addressed to Mr. Vladeck and Mr.
1402 Zaneis. Section 303 of the Act says some entities using
1403 covert information or sensitive information for any purpose
1404 for as long they are in--business or in law enforcement need.
1405 Is our rebuttal presumption--is it too vague? What would be
1406 wrong with setting a date certain restrictions say in six
1407 months or a year?

1408 Mr. {Vladeck.} Mike, do you want to go first?

1409 Mr. {Zaneis.} No, you go ahead.

1410 Mr. {Vladeck.} The Commission has not taken a position

1411 on any of these issues and we would like the opportunity to
1412 comment later on once we have had a fuller opportunity to
1413 look at this. Just generally, you know, we believe that
1414 certain kinds of information ought to be subject to
1415 heightened protection. And so that is, you know, the
1416 Commission has made that clear in other context.

1417 Mr. {Zaneis.} We are going to figure this out. Luckily
1418 I represent the advertising industry so I know how to get my
1419 message heard even when people don't want to hear it. I
1420 think Section 303--I think one size fits all doesn't always
1421 make sense in the online space. What you see here is a
1422 diversity of opinions, but what we see in the industry is a
1423 diversity of business models. And sometimes they may need to
1424 keep information for different purposes, and what is a
1425 legitimate business purpose I think differs, so you know, I
1426 want to take that back to my members and see if it is
1427 something that they are going to be supportive of or if there
1428 is some refinements we need to make. But as we have seen
1429 around things like consumer notice and other areas, a one
1430 size fits all isn't always the best approach, but we are
1431 willing to look at that and work with the Committee and you,
1432 Mr. Chairman, on that.

1433 Mr. {Rush.} Mr. Rubinstein, would you chime in on this
1434 with your opinion, please?

1435 Mr. {Rubinstein.} I would generally agree that having
1436 different time periods for different types of data or
1437 different purposes is a good idea rather than a single limit.
1438 I think the one thing that Congress should worry about,
1439 though, is companies that would retain data simply because
1440 they might have some use of it in the future. So where it is
1441 that non-specific and it is just a future business
1442 possibility, I don't think that is a sufficient reason for
1443 some unlimited period of retention.

1444 Mr. {Rush.} Mr. Rubinstein and Mr. Mierzwinski
1445 suggested in their testimony that this safe harbor in H.R.
1446 5777 in several ways. I am going to ask both gentlemen what
1447 specific recommendations do you have for structuring the safe
1448 harbor provisions?

1449 Mr. {Mierzwinski.} Thank you, Mr. Rush. I think the
1450 bill as currently structured captures the key point that I
1451 emphasized about having a mix of carrots and sticks, and that
1452 the Private Right of Action serves as a very significant
1453 stick or incentive for businesses to join. I think the one
1454 thing that I would call attention to, though, is whether the
1455 safe harbor choice program has a strong enough emphasis on
1456 high performance standards. And that is why I emphasized
1457 data governance practices such as appointing a chief privacy
1458 officer or having privacy by design methodologies so that

1459 there are other standards that a choice participant lives up
1460 to which in effect entitles them to the exemptions that they
1461 enjoy under the choice program. And I think the question
1462 then is how to best balance that mix of exemptions on the one
1463 hand that serve as incentives to join while ensuring that
1464 only companies engaged in a very high level of privacy
1465 protection are then entitled. Finally I would point to the
1466 desirability having some form of public consultation as part
1467 of this process and one way to do that might be for a choice
1468 program as part of their application for approval to indicate
1469 what type of public consultation they have engaged in. Have
1470 they met with advocacy groups, have they met with the public,
1471 if so how have they addressed concerns that those groups have
1472 raised. If they haven't addressed them, why not. So that
1473 all is transparent and available to the FTC in making its
1474 evaluation of the choice program.

1475 Mr. {Mierzwinski.} Mr. Chairman, I would add to that
1476 that I think our concern is that many self-regulatory
1477 programs whether under the Securities and Exchange
1478 Commission, whether under the FTC, or other agencies, they
1479 work best when they have a robust legal standard, robust
1480 statutory framework underneath. And relying on the companies
1481 themselves and rule making only by the FTC is usually not
1482 good enough. And we would urge you to consider strengthening

1483 the Federal Trade Commission's monitoring of the choice
1484 program and the accountability mechanisms in there. And to
1485 do that of course, we would also support strengthening the
1486 Federal Trade Commission in general if they need additional
1487 resources to do those kind of things.

1488 Mr. {Rush.} My time is up. The Chairman recognizes the
1489 Ranking Member.

1490 Mr. {Whitfield.} Thank you. Is there anyone on the
1491 panel other than Mr. Goldman that believes there should not
1492 be private right of action? Okay.

1493 Mr. {Hoffman.} Intel does not support a private right
1494 of action. We think that it--in the context of privacy in
1495 the great percentage of situations the individual actually
1496 does not even potentially know that they have been harmed,
1497 and they don't know who actually has caused the harm until
1498 after. We think that the best use of resources is to focus
1499 on mechanisms like the choice program in a way that was just
1500 articulated. It really--to vote those resources to
1501 organizations putting into place robust accountability
1502 mechanisms into their compliance programs that way we will
1503 avoid the breaches before they even happen.

1504 Mr. {Zaneis.} And I won't take up much of your time. I
1505 couldn't agree more. I would just say then I think what we
1506 might want to focus on legislatively is strengthening the

1507 Federal Trade Commission and their enforcement, and more
1508 resources, more cops on the beat I think would be a good
1509 thing in this area.

1510 Mr. {Whitfield.} I am certainly not an expert in this
1511 area. In fact, I am far from it, but I have read that the
1512 OECD's privacy protection rules, guidelines for privacy
1513 protection are some of the most stringent in the world. Is
1514 that your understanding as well--most of you? Do you
1515 understand that to be true?

1516 Mr. {Mierzwinski.} I would just say it is--the
1517 understanding in privacy that they are the most robust
1518 implementation of the Fair Information Practices that were
1519 actually first developed by a U.S. Regulatory Committee, but
1520 how they are implemented in law is different in different
1521 places. And I would say the only U.S. law that comes close
1522 to implementing them in a very strong way is something called
1523 the Fair Credit Reporting Act which regulates credit bureaus.
1524 Other laws rely on a much weaker version on the FIPs.

1525 Mr. {Whitfield.} Well, we--if we were to adopt the OECD
1526 principles basically would you support that or--

1527 Mr. {Mierzwinski.} Oh absolutely, and I want to say
1528 that both bills adopt parts of it. And in fact the Best
1529 Practices bill adopts quite a bit of the Fair Information
1530 Practices. We think we can go further with purpose,

1531 specificity, data minimization, data retention, and again
1532 accountability that is giving more rights to the data
1533 subjects.

1534 Ms. {Harris.} Mr. Whitfield, I just--I want to agree
1535 that a strong set of Fair Information Practices and certainly
1536 the OECD is sort of the foundational in the United States.
1537 The Department of Homeland Security issued a set a few years
1538 ago that I think are you know perhaps captures some of the
1539 more modern concerns just a little bit that basically the
1540 bill really needs to include them all. That we have spent a
1541 long time focusing on you know opt-in, opt-out consent from
1542 the consumer, and when that is all you have in a bill, then
1543 you are pretty much telling the consumer that they have got
1544 to figure it out. They have to read privacy policies, they
1545 have got to understand it, and that the companies don't have
1546 any substantive obligations. When you include data
1547 minimization, et cetera, then you are putting real limits and
1548 the companies have to decide how to handle those.

1549 Mr. {Whitfield.} Mr. Mierzwinski--oh I am sorry, go
1550 ahead.

1551 Mr. {Zaneis.} Sorry, I just--I want to be sure that the
1552 Chairman and you, Ranking Member Whitfield understand that
1553 there is a lot of Fair Information Practices in--certainly in
1554 H.R. 5777. I--you are talking about notice, and choice, and

1555 data security, and accuracy. These are Fair Information
1556 Practice principles. That does not mean you need all of them
1557 in a bill about things like marketing databases. In our
1558 written testimony we go into the access and correction
1559 provisions and the reality there is what we are talking about
1560 in some of these marketing databases are strings, user agent
1561 strings which are nothing more than computers talking to
1562 computers telling you what for instance operating system a
1563 computer--a person is using to go to a site. This is used to
1564 render the content readable to the consumer. I ask you what
1565 is the, you know, what is the purpose in allowing correction
1566 to that type of database? It is gobbly-goop to the consumer,
1567 and I worry about allowing people to get into those databases
1568 when there is no real harm. We are not talking about Fair
1569 Credit Reporting Act. There you are talking about adverse
1570 actions against consumers, things centered around employment
1571 eligibility, access to credit, getting a home mortgage that
1572 is not what we are talking about here.

1573 Mr. {Whitfield.} May I ask one other question?

1574 Mr. {Rush.} Ms. Harris wanted to respond.

1575 Mr. {Whitfield.} Oh, I am sorry.

1576 Ms. {Harris.} I want to strongly disagree with that.

1577 Access is one of the key Fair Information principles. The
1578 likelihood that a consumer is going to demand access to a

1579 string of code I think you know if that is the concern my
1580 guess is we can figure out how to handle it in this
1581 Committee. But we are building larger and larger databases
1582 with all kinds of information and to me that is one of the
1583 fundamental rights that consumers have and that it needs to
1584 be part of this bill.

1585 Mr. {Whitfield.} In Mr. Rush's bill in the definitions
1586 under covered entity it simply says engaged in interstate
1587 commerce whatever, whatever, whatever, and since I was in the
1588 railroad industry I know that when we talk about federal
1589 preemption it is from the business standpoint. We always
1590 loved federal preemption because we had some certainty in
1591 whatever state we operated in and so forth. And I know that
1592 a number of you would be opposed to federal preemption in
1593 this arena. Are any of you opposed to--okay--

1594 Mr. {Mierzwinski.} We are very strongly opposed and the
1595 Best Practices bill is a much narrower form of preemption,
1596 but we prefer that federal law be a floor.

1597 Mr. {Whitfield.} What about you, Mr. Rubinstein? Do
1598 you have a comment on that?

1599 Mr. {Rubinstein.} I would favor a narrow form of
1600 preemption. I think that it does allow businesses to operate
1601 with more certainty, and it is extremely difficult, and
1602 costly, and not very effective to have to design compliance

1603 programs that vary depending on which state you operate in.
1604 So I think some form of preemption is a necessary aspect of
1605 this bill.

1606 Mr. {Whitfield.} Did you want to make comment, Ms.
1607 Harris?

1608 Ms. {Harris.} Yes, Mr. Whitfield, it is CDT's position
1609 is that first the bill has to be good enough at the federal
1610 level to consider preemption. So you know in saying whether
1611 we support it or don't support it you know this is a messy
1612 process. But assuming that the bill provides the right
1613 degree of protection then a narrow preemption that really
1614 covers just those covered entities and just those practices
1615 is something that we are comfortable with. But you know
1616 there is a threshold of what the bill is implying, and we do
1617 think that Mr. Rush's bill gets that right.

1618 Mr. {Whitfield.} Yeah, well I was assuming that if Mr.
1619 Rush pushed the bill through it would be all right.

1620 Mr. {Rush.} I want to get in on one of the questions,
1621 and this question is addressed to Mr. Goldman and Ms. Harris.
1622 In your testimony earlier you say that user ID's and
1623 implications alone should not be defined as covered
1624 information. And given the fact that there are software
1625 passwords, guessing tools out in the marketplace, what kind
1626 of concerns can we have? And I am kind of pointing to a

1627 recent development among myself and--with myself and some
1628 other members of Congress. There is a certain company that
1629 has something they call street maps and I am really alarmed
1630 by these street maps. My residence has shown up on these
1631 street maps, and there are other members of Congress whose
1632 residence has shown up on these street maps and we are
1633 concerned about the notability (ph) especially for us
1634 protecting--protecting assets to the webs and Internet. What
1635 kind of harm could be visited by consumers with some of these
1636 different programs and would you respond to that Ms. Harris
1637 and Mr. Goldman about these certain issues?

1638 Mr. {Goldman.} I think as in our testimony I think we
1639 talked about how if the information is not directly linked
1640 back to the individual, so if it is just a password or some
1641 other kind of information that is not, you know, connected to
1642 your other kind of personal information, that should not be
1643 part of the PII. And so I think that is where we are at.
1644 You know, you could--theoretically you could have a lot of
1645 information out there. There is a lot of information out
1646 there. You might, for example, if you belong to a social
1647 network, you know, a social networking site you might put
1648 your name up there, you might created a username. You know,
1649 but it might not be linked back to your own name, your own
1650 personal--I guess whether financial or health information.

1651 So I think you know, as long as that is--the question is what
1652 is going to harm us in result from all that I think. And as
1653 we go into--our testimony also talks about we are hesitant
1654 about adopting sort of new standards and new definitions of
1655 covered information. I think you know to the extent that we
1656 can standardize definitions across, you know across bill,
1657 across state bills, and federal bills that would be a good
1658 thing. So if you look at personal information as defined in
1659 some of the state bills, some of the state data breach and
1660 privacy bills I think, you know we have not taken--I think
1661 there will be some support for that. But I have not talked
1662 to our members about that at all yet.

1663 Mr. {Rush.} Ms. Harris, you have a response?

1664 Ms. {Harris.} If the question is about, you know,
1665 whether we should be covering passwords and unique
1666 identifiers that protect this kind of information then I
1667 think in the right circumstances we should and I think that
1668 your bill does do that.

1669 Mr. {Rush.} Does any other witness want to respond?

1670 Mr. Hoffman?

1671 Mr. {Hoffman.} Yeah, I think it is a very good
1672 question. I think we find ourselves in a situation where
1673 there are a number of different kinds of data that while they
1674 do not point to a very specific individual, they might point

1675 to a device or a location or something that could end up
1676 impacting that individual. This is a very difficult balance
1677 to sort out. I actually think the Best Practices Act comes
1678 very close to getting this as right as you possibly can. We
1679 are saying if you have got those kinds of identifiers whether
1680 it is a password, a user alias, an IP address, or something
1681 that it will be covered if it falls under two different
1682 categories. One would be if it relates to a specific
1683 individual or then if whether it is created to maintain a
1684 preference profile. That may not cover every way that this
1685 information could potentially impact an individual at some
1686 time, but I think that would give business enough certainty
1687 to understand what is being covered and would cover the great
1688 bulk of the situations where people are concerned right now.

1689 Mr. {Zaneis.} I think the definition and some--we are
1690 in some ways putting the cart before the horse. The choice
1691 options that we identify really also matter because when you
1692 put a blanket opt-in for third party data usage which is the
1693 Internet--we did a survey earlier this year that demonstrated
1694 then over 80 percent of all online advertising campaigns used
1695 behavioral targeting or techniques. So when you are talking
1696 about opt-in for third party data usage, you are talking
1697 about the vast majority of the economic engine of the
1698 Internet. So it really matters what choice mechanism you

1699 give because the stakes really get high. Now in our self-
1700 regulatory system that we put out we actually followed very
1701 closely the FTC's own definition which was extremely broad
1702 and included, you know, sort of all data used for behavioral
1703 advertising--online behavioral advertising. But because we
1704 had an opt-out requirement instead of an opt-in, it was
1705 something that our industry at least--I can speak for us, we
1706 could live with that. We could live with the broader
1707 definition if we got the choice mechanism right. So I think
1708 they all kind of, you know--this is a holistic bill and the
1709 different provisions really have to work together. You have
1710 had great staff work to put this together and we just need to
1711 be cognizant of that, and we stand ready to work through
1712 those issues with you.

1713 Mr. {Rush.} Do you have any additional questions?

1714 Mr. {Whitfield.} I will just make one other comment.
1715 We are in a little bit of a debate about adopting a fully
1716 opt-in system in the--we have heard some people say whether
1717 it would significantly impact e-commerce in a negative way,
1718 how many of you feel that it would? An opt-in system would
1719 dramatically impact e-commerce? Okay, good. So almost
1720 everybody up there, except I guess you Mr. Mierzwinski and--

1721 Ms. {Harris.} There is some ambiguity here. Go ahead.

1722 Mr. {Vladeck.} I think that we have been struggling

1723 with this question for a long time, and I am not speaking for
1724 the Commission now. I am speaking for staff. I think there
1725 is too much fray given to the question of the label of opt-in
1726 or opt-out. The concepts are not self-defining and skilled
1727 marketers, and there are lots of them out there, can easily
1728 make either method of expressing choice either easy or
1729 difficult. We have both given what is called affirmative
1730 consent because we have clicked the button and we both, you
1731 know, all of us have easily given in to either method. In
1732 our view the questions merely doesn't boil down to this
1733 label. It is a legal label. It is not really a practical
1734 label. We believe that the goal ought to be to insure the
1735 consumers are well informed, and are given easy, and clear
1736 tools with which to exercise choice. Clarity and ease of use
1737 ought to be the key metrics, not easily manipulable legal
1738 terms like opt-in, and opt-out. And that is what we think
1739 the real problem is.

1740 Mr. {Whitfield.} Thank you, thank you.

1741 Ms. {Harris.} I have nothing to add to that.

1742 Mr. {Whitfield.} We should have asked him a question
1743 earlier.

1744 Mr. {Vladeck.} I am fine.

1745 Mr. {Rush.} Well, the Chair--that concludes our
1746 questioning. And I merely want to reiterate to the witnesses

1747 how appreciative we are for you taking your time to come and
1748 share with us your expertise and your insights into this
1749 process and into both of the drafts, Mr. Boucher's draft bill
1750 and to H.R. 5777. And the Chair wants to assure everyone who
1751 is present, including our witnesses, that there will be ample
1752 opportunity for more input before we mark up this bill. I am
1753 cognizant of the fact that this bill was introduced four days
1754 ago and we are having a hearing, but I am also determined
1755 that we need to move forward, you know. I am not sure, there
1756 won't be--there will be a lot of deliberation, but it won't
1757 be unnecessary delay in terms of getting this bill to the
1758 floor as it be, and hopefully to the floor. And we want to--
1759 what was some--I want to give you assurances that your time
1760 is not just being wasted here. It is really--your investment
1761 in this process will result in a better bill but it will be a
1762 bill that hopefully will become law. And I want to thank you
1763 so very much for being here this afternoon. And with that
1764 said this Subcommittee is now adjourned.

1765 [Whereupon, at 4:42 p.m., the Subcommittee was
1766 adjourned.]