

July 1, 2011

The Honorable John D. Rockefeller IV, Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510

The Honorable Kay Bailey Hutchison, Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510

Dear Chairman Rockefeller and Ranking Member Hutchison,

The undersigned privacy and consumer organizations, representing tens of millions of Americans who make use of new technology every day, are writing to you in response to the letter sent by trade associations and business groups concerning privacy and the various legislative proposals pending in the Congress.¹

Those groups wrote to you recently to assure you that the current approach to privacy protection is working and to say that any legislation you might consider would threaten business and innovation.

As you know, there are two sides to every story. This is the other side.

1. America Confronts a Real Problem with Inadequate Privacy Protection

Open a newspaper today and it is not difficult to find a report about another company that has lost control of the detailed personal information it has collected from American consumers. Bank account numbers, social security numbers, sensitive medical record information – this data is now routinely lost in data breaches by some of the largest and most sophisticated companies in the United States.²

At least 500 million records have been breached since 2005, with the loss of more than 22.4 million sensitive records in 2011.³ A consumer who has been the victim of a data breach is four times more likely to suffer identity theft.⁴ According to the Federal

¹ Letter from American Advertising Federation *et al.* to Senate Committee on Commerce, Science, and Transportation, July 29, 2011.

² See, e.g., Eric Dash, *Citi Says Many More Customers Had Data Stolen by Hackers*, N.Y. Times, June 16, 2011, available at <http://www.nytimes.com/2011/06/16/technology/16citi.html>.

³ Privacy Rights Clearinghouse, *Data Breaches: Why You Should Care and What You Should Do*, June 27, 2011, available at <http://www.privacyrights.org/data-breaches-why-you-should-care-what-to-do-2011>.

⁴ *Id.*

Trade Commission, identity theft has been the number one concern of American consumers for the past decade.⁵

And these problems will get worse. Businesses and consumers both are moving data to remote computing services – “the cloud” – and relying on a small number of companies to safeguard an enormous amount of detailed personal information. As the New York Times stated today, “We are putting our lives in the cloud, as companies and consumers store everything from family photos to corporate business secrets on remote servers. Beefing up online security is of paramount importance.”⁶

Consumers today face an unfair choice: either stay offline and ignore the benefits of new technology, or plug in and run extraordinary risks to privacy and security. It shouldn’t be this way.

Consumers are more concerned about the privacy threat from big business than from big government.⁷ A solid majority of consumers favor action by Congress.⁸

Congress has a central role to play in protecting consumers.

2. Current US Privacy Law is Inadequate

The United States has a long tradition of developing privacy laws in response to new technology, new business practices, and new communications services. In fact, it was Benjamin Franklin who, after establishing the postal service to enable the transport of private messages across the young country, came to Congress and helped ensure the adoption of the first national privacy law to protect the service he helped create.⁹

In the years that followed, similar laws came about in response to the emergence of telephony, computer-based record systems, electronic mail, rental movies, fax machines, DNA databases, and more.¹⁰

⁵ Federal Trade Commission, “Fighting Back Against Identity Theft,” *available at* <http://www.ftc.gov/bcp/edu/microsites/idtheft/>.

⁶ Editorial, “The Cloud Darkens,” N.Y. Times, June 29, 2011 *available at* <http://www.nytimes.com/2011/06/30/opinion/30thu1.html>.

⁷ University of Southern California Annenberg School for Communication & Journalism, 2010 Digital Future Report, June 3, 2011, *available at* http://www.digitalcenter.org/pdf/2011_digital_future_final_release.pdf.

⁸ Consumers Union, “Consumers Union Unveils New Poll Results in Online Privacy Hearing Testimony: Two-Thirds of Consumers Say Government Should Help Safeguard Online Privacy,” June 28, 2011, *available at* <http://www.consumersunion.org/pub/2011/06/017842print.html>.

⁹ Robert Ellis Smith, *Ben Franklin's Web Site: Privacy and Curiosity from Plymouth Rock to the Internet* (2002).

¹⁰ Marc Rotenberg, *The Privacy Law Sourcebook: United States Law, International Law, and Recent Developments* (EPIC 2005).

Congress has routinely considered how to establish appropriate privacy safeguards precisely because new technologies pose new challenges. This was clear, most recently, with the privacy legislation adopted for electronic health records.

But it is obvious that technology has outpaced the law. There is still nothing comparable to the successful Do Not Call program to protect consumers from unwanted advertising and profiling by Internet firms. Legislation enacted in the 1990s to take account of the special privacy concerns of children has yet to be updated in response to Facebook and new privacy challenges to young people. Consumers have no meaningful ability to limit the use of their personal information that they provide to companies online.

3. Privacy Protection Promotes Innovation and Commerce

There is a widespread misperception that privacy protection stands in opposition to innovation and commerce. Nothing could be further from the truth.

First, it is the technology of privacy that has turned the Internet, which was originally a research network linking Universities, into the most robust platform for commercial activity in the world today. Without the safeguards made possible by encryption, and other privacy enhancing techniques, no consumer would dare provide a credit card number or personal information when connected to an unknown computer in a remote location.

Second, privacy laws can also encourage companies to develop innovative services that minimize the reliance on personal information while promoting a new business service or business model. Most recently, a decision by the FTC to protect the privacy of Internet users led Google to develop a social network service that attempts to be more responsive to user privacy concerns.¹¹

Congress has a similar opportunity to encourage meaningful innovation with the development of forward-looking privacy legislation.

4. The Time to Update Privacy Laws is Now

The industry groups that wrote to you hope that you will be satisfied with the status quo, that you will ignore the mounting evidence of identity theft and data breaches, and that you will simply allow things to continue as they have.

We urge you to reject that view. We are firmly committed to innovation and economic growth and we share the enthusiasm that new technologies and new businesses generate. But it is clear that there must be stronger safeguards in place to protect the

¹¹ Claire Cain Miller, *Google Introduces Facebook Competitor, Emphasizing Privacy*, N.Y. Times, June 29, 2011 available at <http://www.nytimes.com/2011/06/29/technology/29google.html>.

interests of consumers and Internet users. The self-regulatory “notice and choice” approach has simply failed.¹²

We look forward to working with you to protect the interests of American consumers.

Sincerely,

American Civil Liberties Union
Center for Digital Democracy
Consumer Action
Consumer Federation of America
Consumers Union
Consumer Watchdog
Electronic Frontier Foundation
Electronic Privacy Information Center
National Consumers League
Privacy Activism
Patient Privacy Rights Foundation
Privacy Rights Clearinghouse
Privacy Times
U.S. PIRG
World Privacy Forum

CC: Members of the Senate Committee on Commerce, Science, and Transportation

¹² See, e.g., Pam Dixon, World Privacy Forum, *The Network Advertising Initiative: Failing at Consumer Protection and at Self-Regulation*, Fall 2007.