



October 24, 2019

United States Senate
Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Re: October 24, 2019 Full Committee Hearing on Data Ownership: Exploring Implications for Data Privacy Rights and Data Evaluation

Dear Chairman Crapo and Ranking Member Brown:

Consumer Reports¹ writes to urge the US Senate Committee on Banking, Housing, and Urban Affairs to reject policy proposals based on quasi-property rights over data, or that respond to consumers' concern around data selling by simply giving them a cut of the action. For over 80 years, we have worked with consumers for truth, transparency, and fairness in the marketplace. And, we are strong proponents of legislation that bolsters consumers' privacy and their individual right to choose who accesses their data and for what purposes. It is within this framework that we must recommend that the Committee reject the false solution of data ownership and the dangerous precedent it establishes. Furthermore, privacy is an inalienable human right that cannot be traded away, even if a monetary value of a consumer's data could be assessed.

We appreciate your interest in protecting individual privacy in the United States and ensuring fairness in the marketplace, but advancing data ownership as a possible solution does neither. It would instead risk turning the basic right to privacy into a luxury out of reach to lower-income Americans. Indeed, consumers desire more control over their private information and dislike such information being shared and monetized in this way.²

¹ Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 83 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

² For example, a Consumer Reports survey found that 92 percent of Americans think companies should get permission before sharing or selling users' online data and that 70 percent of Americans lack confidence that their personal information is private and secure. *Consumers Less Confident About Healthcare, Data Privacy, and Car Safety, New Survey Finds*, CONSUMER REPORTS (May 11, 2017),

For this reason, we have strenuously advocated against pay-for-privacy regimes in which companies give consumers a discount on services in exchange for gaining access to, and the ability to monetize, a consumer's personal data.³ In response to consumer outcry, many of these types of proposals have been abandoned. For instance, in 2016 AT&T offered a pay-for-privacy plan with poor results.⁴ Not only was it confusing and difficult for consumers to opt out of the collection and use of their data in the first place, the disparity between the privacy protective plan and the discounted plan was \$30 dollars a month, a significant portion of the monthly charge for internet service. This discounted amount was not tied to the relative value of the personal data being shared: "The inducement engendered by such a steep discount, which did not even appear tied to the monetary value of the data, effectively took away the ability of AT&T customer to make a reasoned choice about their privacy."⁵ In addition, it is hard to conceive of a workable model in which consumers could claim property rights over their information since data is often co-created, useful only when combined with other data, and, unlike physical goods, can be held by many at once and easily disseminated. All of these issues present serious obstacles to applying traditional ownership rights over personal data.⁶

<https://www.consumerreports.org/consumer-reports/consumers-less-confident-about-healthcare-data-privacy-and-car-safety/>. In addition, 88 percent of individuals say it is important that they not have someone watch or listen to them without their permission. Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security, and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <https://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>. A Mozilla study found that a third of people feel like they have no control of their information online. *Hackers, Trackers, and Snoops: Our Privacy Survey Results*, MOZILLA (Mar. 9, 2017), <https://medium.com/mozilla-internet-citizen/hackers-trackers-and-snoops-our-privacy-survey-results-1bfa0a728bd5>. The majority of consumers (74%) find it is "very important" to be in control of who can get information about them. Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security, and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <https://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>. Indeed, this is not a new sentiment for consumers: a Pew research poll in 2014 found that 91% of adults "agree" or "strongly agree" that consumers have lost control over how personal information is collected and used by companies." (Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RESEARCH CTR. (Nov. 12, 2014), <https://www.pewinternet.org/2014/11/12/public-privacy-perceptions/>.)

³ See *State Broadband Privacy Issue Brief*, CONSUMER REPORTS (Aug. 27, 2019), <https://advocacy.consumerreports.org/research/state-broadband-privacy/>.

⁴ See Karl Bode, *AT&T's \$30 'Don't Be Snooped On' Fee is Even Worse than Everybody Thought*, TECHDIRT (Mar. 2, 2015), <https://www.techdirt.com/articles/20150219/11473630072/ats-30-dont-be-snooped-fee-is-even-worse-than-everybody-thought.shtml>. Comcast has discussed offering a similar program in regulatory filings. See *Comments to the Fed. Comm'n Comm'n Re: Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, COMCAST (Aug. 1, 2016), <https://assets.documentcloud.org/documents/3004210/Comcast-FCC-Filing.pdf>.

⁵ *Open Technology Institute Publishes Model State Legislation for Broadband Privacy*, OPEN TECH. INST. (Oct. 30, 2017), <https://www.newamerica.org/oti/press-releases/open-technology-institute-publishes-model-state-legislation-broadband-privacy/>.

⁶ Dylan Gilbert, *Federal Privacy Legislation Should Not Be Based on Data Ownership*, PUB. KNOWLEDGE (June 27, 2019), <https://www.publicknowledge.org/blog/federal-privacy-legislation-should-not-be-based-on-data-ownership/>.

In formalizing the market for the sale of personal information, legislation advancing data ownership would coerce consumers to sign away their right to privacy, without the full context to understand the impact a single sale could have for themselves and our broader society. Furthermore, individuals who sell their data would receive compensation for something that cannot realistically be appraised, or its loss fully reimbursed.⁷ Instead, privacy should be understood as an inalienable human right that cannot be bought or sold.

For these reasons, we urge the Committee to focus on legislative proposals that give consumers substantive rights over data, in addition to requiring companies to minimize the amount of data collected about consumers in the first case.

Designing privacy rights around the basic human right to privacy

As technology evolves, consumer trust in the continued existence of genuine privacy is eroding. Yet, although trust is decaying, that troublesome future is not inevitable. But, this bill could hasten its arrival.

There is already an opaque market for consumers' personal information and consumers are left out of the profit chain. But the solution is not to pay Americans to give up their privacy—they deserve privacy rights to shield their personal information from being monitored and sold by data brokers. It would also lend credibility to a market that has been truly harmful for consumers. One that enabled the collection and use of data to create psychological profiles of voters for illicit political purposes⁸; and that enables businesses to create alternative, non-evidence based and potentially discriminatory, credit scores based on consumers' digital footprint.⁹

⁷ “Figuring out precisely what value consumers place on their personal data is starting to look like a fool’s errand...That’s partly because the dollar amounts people attach to data privacy in various studies are all over the map. In Winegar and Sunstein’s survey, the \$5 per month and \$80 per month figures are medians. But a fraction of respondents valued their privacy at wildly higher levels — in the hundreds or even thousands per month — while 14% were willing to hand over all their data to internet companies for free.

While the variation tends to be less extreme in experiments involving actual money, it makes sense that people would value online privacy very differently.” Will Oremus, *How Much Is Your Privacy Really Worth?*, ONEZERO (Sept. 17, 2019), <https://onezero.medium.com/how-much-is-your-privacy-really-worth-421796dd9220>.

⁸ Ahead of the 2016 presidential election, Cambridge Analytica acquired data on Facebook users through an online entertainment quiz, which was only completed by about 270,000 people but revealed data on 50 million individuals. This was a prominent example of how data collected through seemingly innocuous ways can be used for illicit purposes. Jerry Beilinson, *Facebook Data May Have Been Illicitly Used for Politics, and It Started with a Quiz*, CONSUMER REPORTS (March 17, 2018), <https://www.consumerreports.org/privacy/facebook-data-illicitly-collected-for-politics-and-what-it-means-for-privacy/>.

⁹ *Working Paper: On the Rise of FinTechs – Credit Scoring Using Digital Footprints*, NAT’L BUREAU OF ECON. RESEARCH (April 2018, Revised July 2018), <https://www.fdic.gov/bank/analytical/cfr/2018/wp2018/cfr-wp2018-04.pdf>. This study raises the concern that the digital footprint may be used as a proxy for legally prohibited variables—such as race, color, gender, national origin, and religion, which can lead to discrimination.

We thank you for recognizing the need to get privacy rights back on track, and for your willingness to approach the fraught issue of consent in the developing data economy. Rather than moving this flawed data ownership concept forward, we urge you to put forward legislation that focuses on shoring up individual privacy as a basic human right.

Legislation that encourages data minimization, gives people agency over the sale and sharing of data, guaranteed transparency into what companies do with that information, and the right to take companies to court for violating those rights, is what Americans need to ensure that privacy continues to be a human right now and in the future.

We stand at a critical juncture for individual privacy rights. Now is the time for the U.S. Congress to pass privacy legislation that prioritizes Americans, not legislation that fortifies a status quo that is eroding fairness and trust in the marketplace.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katie McNinnis', with a long horizontal flourish extending to the right.

Katie McNinnis
Policy Counsel

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