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## **Response to Additional Questions for the Record**

### **“Algorithms:**

### **How Companies’ Decisions About Data and Content Impact Consumers”**

by

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Submitted to

Committee on Energy and Commerce

Subcommittee on Communications and Technology

Subcommittee on Digital Commerce and Consumer Protection

#### The Honorable Robert E. Latta

1. Do algorithmic technologies and processes pose unique challenges for a disclosure and consent model of data collection

Response: Algorithmic technologies pose heightened, and in my view insurmountable, challenges for disclosure and consent model of data collection. Evidence shows that disclosures have failed to produce “informed” consent in areas that involve less complex subject matter. In the area of algorithmic technologies, the underlying information that needs to be communicated to consumers in order to accomplish meaningful consent is large and complex. Consumers need to be told what information is collected and used by algorithms, how it shared by companies, and how it is secured. Because consumers visit many apps and websites daily, the amount of information necessary makes any model of meaningful consumer choice entirely unrealistic.

#### The Honorable Gregg Harper

1. What limits does the First Amendment place on the government requiring or preventing disclosure of certain information?

Response: I am not a constitutional lawyer and cannot provide authoritative response on this matter.

2. In your testimony, you make it clear that you believe disclosure regimes are ineffectual. What are the alternatives?

Response: The primary regulatory alternative is a regime that prohibits some types of algorithmic information collections and uses altogether. It reduces risk, but also benefit. I do not recommend this, other than in extremely vulnerable areas.

The critical requirement for the design of any good alternative regulatory solution is to diagnose the problem that the solution seeks to address. In the area of data privacy, the questions “what is the consumer injury” and “what is the risk to society” have not been answered convincingly, and until then we should not devise solutions.

It is clear, however, algorithmic data collection is leading to market power and concentration. Large companies are getting larger *because* of the data they have. They are able to tailor more personalized and satisfying experience for their customers and gain further edge on their competitors. Accordingly, the best way to regulate these markets is to guarantee thriving entry and competition.

The Honorable Michael C. Burgess

1. In your testimony, you state that mandatory disclosure requirements don’t work because people agree to terms without reading them in order to access the content or application. Does access to content or applications have to be all or nothing?
  - a. Is it possible for a consumer to agree to limited or no collection of their information and still gain access to their desired content?

Response: It is possible to design partial collection options, that grant consumers partial access to websites and applications. It is challenging, however, to create a *tool* that enables consumers to choose smartly between the options. Companies would, naturally, try to direct consumers towards “checking the boxes” that best serve the companies’ commercial interests. It would require sophistication, knowledge, and savvy among consumers to be able to pick the best “limited” option. Evidence in this area and in many other consumer markets suggest such efforts would most likely fail.

2. Algorithms have vast positive potential and capacity from self-driving cars to medicine and public health, including helping to find cures for diseases. Is there a way to help consumers understand algorithms as they apply to all sectors that may affect our daily lives?

Response: No. The complexity of the issues involve defeat such educational goal

The Honorable Adam Kinzinger

- 1.a. How can government and the content providers work together to balance free speech and our national interest?
- 1.b. Can data be considered speech? Can data collection be covered by the First Amendment?

Response: I am not an expert on these matters and regrettably cannot provide authoritative responses to these important questions.