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RPTR JOHNSON

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MARKUP OF H.R. \_\_\_\_\_, DATA SECURITY AND

BREACH NOTIFICATION ACT OF 2015

TUESDAY, MARCH 24, 2015

House of Representatives,

Subcommittee on Commerce, Manufacturing, and Trade,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 5:34 p.m., in Room 2123, Rayburn House Office Building, Hon. Michael C. Burgess, M.D., [chairman of the subcommittee] presiding.

Present: Representatives Burgess, Blackburn, Bilirakis, Schakowsky, and Pallone (ex officio).

Staff Present: Charlotte Baker, Deputy Communications Director; Karen Christian, General Counsel; James Decker, Policy

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Coordinator, CMT; Melissa Froelich, Counsel, CMT; Howard Kirby, Legislative Clerk; Peter Kielty, Deputy General Counsel; Olivia Trusty, Professional Staff, CMT; Jessica Wilkerson, Legislative Clerk; Michelle Ash, Minority Chief Counsel, Commerce, Manufacturing, and Trade; Jen Berenholz, Minority Chief Clerk; Lisa Goldman, Minority Counsel; and Tim Robinson, Minority Chief Counsel.

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Mr. Burgess. The subcommittee will come to order.

The chair will recognize himself for an opening statement.

In January we heard testimony about the key elements of sound data security and breach notification legislation. Last week the subcommittee heard from a wide variety of stakeholders about a discussion draft. Now we move further into the legislative process with today's subcommittee markup.

I am very pleased with the progress shown by my colleagues, the vice chairman of the full committee, Congresswoman Blackburn, and Congressman Welch, in announcing the draft legislation. I would also like to recognize Congressman Loeb sack for joining in this effort.

This subcommittee has a history of bipartisan cooperation, demonstrated by the work of Congressman Barton and Congressman Rush, the efforts that they have put into this over the past several years.

Finding a workable bipartisan compromise that can become law has been elusive. But I believe that, by focusing on how the criminals make their money, we can work together and achieve a workable solution for the millions of Americans impacted by identity theft and financial fraud.

The perfect cannot be the enemy of the good, and we must ensure that there are meaningful consumer protections in this draft. Among them, we must protect consumers from the annual \$100-billion bill that they pay in higher fees and prices. Cyber crime is estimated to cost Americans over half a million jobs annually. It would be great to have

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a bill with so many jobs to show our constituents.

Many will complain about what is not in the bill. We have chosen to learn from Congress's failures of the past 10 years if we want to actually pass legislation. It will be impossible to guard this process against the future, but we cannot shade into areas such as privacy.

The administration and our minority colleagues have had 6 years and still can't agree on how to address privacy. Let me be very clear on this. While we don't tackle privacy, we don't preempt privacy either.

This bill is focused on unauthorized access that leads to identity theft and financial fraud. It has nothing to do with permanent access or when that permission can be given or when data can be collected.

I look forward to continuing this discussion in good faith with all interested stakeholders. Our doors remain open. Our telephone lines remain free.

We will have a full committee markup later, and I hope that some members will actually hold issues until then so we can work to address as many concerns as possible and achieve as broad a compromise as possible.

With that, I will yield back the balance of my time and recognize the gentlelady from Illinois, Ms. Schakowsky, for purposes of her opening statement.

[The prepared statement of Mr. Burgess follows:]

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Ms. Schakowsky. Thank you, Mr. Chairman. I appreciate your holding tomorrow's markup on the Blackburn-Welch Data Security and Breach Notification Act.

Over the past decade, almost 1 billion records with personal information have been compromised. Just last week we learned of another major breach at Premera Blue Cross, affecting 11 million customers. We all agree that we should enhance our protections against data breaches and provide consumers with relevant information in the event of a breach.

Unfortunately, as I said last week, the Blackburn-Welch bill does not, in my opinion, achieve that goal. I appreciate some of the improvements this bill would make to existing law, including providing the FTC with penalty authority. But each and every witness at last week's hearing, less one, said that there were changes that could be made to improve this bill. Actually, all of them agreed that there could be changes that would improve this bill.

I believe that sending a clear message that not only can we amend and strengthen this bill, but we should. Some on the subcommittee have argued in advocating for this bill that we should not make the perfect the enemy of the good, and I agree. But we also shouldn't take a step backwards.

I and other members of the subcommittee will offer amendments tomorrow that would improve the bill's consumer protections without sacrificing the advantages this bill seeks for businesses. Those

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amendments will include efforts to better protect types of information that are unprotected in the current draft and, also, to ensure consumers do not lose any existing protections that they enjoy.

I hope and expect that these amendments will receive the full support of the subcommittee so that we can send truly a comprehensive bill to the full committee for consideration next month. If these changes are not made, I don't believe this bill will receive the broad bipartisan support its sponsors have worked to attract.

Again, I thank the chairman for holding this markup. And I yield back the remainder of my time.

[The prepared statement of Ms. Schakowsky follows:]

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Mr. Burgess. The chair thanks the gentlelady. The gentlelady yields back.

The chair now recognizes the gentlelady from Tennessee, the vice chair of the full committee, 3 minutes for an opening statement.

Mrs. Blackburn. Thank you, Mr. Chairman. I appreciate that.

And I appreciate the attention that we are putting on the issue of data security. 2014 was called the year of the breach. And people are very well aware of what has happened when there is not a Federal standard and we do not have a process for moving forward on those protections. That is why it is imperative that Congress take action.

I want to thank Congressman Welch for his leadership on the issue. His efforts have been commendable as he has continued to work with us regularly to find a point of agreement.

I also want to thank you, Chairman Burgess, for your work, and the subcommittee staff, the interested stakeholders, who have all been so diligent in their work in assisting as we work to find language that would protect consumers by improving data security protections and setting a national data breach notification standard for industry.

The discussion draft is, by design, narrowly tailored. It is a framework where we can begin to address data security issues in a subset of industry. It is by no means comprehensive. It is not intended to be broad. Rather, the draft is a starting point. And I would hope that, given the need for such legislation, that all members are going to offer serious and sincere input.



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I think the American people are watching to see how it is that we are going to proceed in giving them the toolbox and defining a standard whereby they can protect their virtual selves, their virtual you, online.

With that, I yield back my time. And I thank the gentleman for his attention to the issue.

[The prepared statement of Mrs. Blackburn follows:]

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Mr. Burgess. The gentlelady yields back. The chair thanks the gentlelady.

The chair now recognize the gentleman from New Jersey, the ranking member of the full committee, Mr. Pallone, 5 minutes for an opening statement.

Mr. Pallone. Thank you, Mr. Chairman.

Today we begin the subcommittee markup process of a draft data security and breach notification bill. As I said at our hearing on this issue last week, I want this committee to take action to reduce data breaches and the adverse effects from them.

Unfortunately, the bill before us does not reduce breaches or their negative effects and, worse, it fails to ensure that existing protections for consumers are not weakened. Many of the 51 State and territorial breach notification laws provide greater protections for consumers. For example, at least 7 States and the District of Columbia do not require a harm analysis before providing notice to consumers. At least 17 States' laws include a private cause of action. At least 9 States' laws cover health information.

In contrast, this draft preempts stronger State and Federal laws, requires a financial harm analysis, preempts State private rights of action, and does not cover health information. The draft also eliminates State data security laws and replaces them with an unclear standard that will surely be litigated and left to judicial interpretation.

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Again, I want to be supportive of sound data security and breach notification legislation, but to get there we must ask the right question: Does legislation put consumers in a better place than they are today? And, unfortunately, the draft before us today does not meet that test, in my opinion.

Let me also address specifically the issue of Federal agency jurisdiction within the draft before us. While it may sound to some as an inside-the-beltway issue with no effect on consumers, I disagree. It is with my eye on protecting consumers that I oppose the efforts here to remove data security breach notification and privacy for telecommunications, VoIP, cable, and satellite services from the jurisdiction of the FCC.

No one questions the FTC's expertise in data security. But the FTC is primarily an enforcement agency, and it lacks the necessary tools to effectively handle the unique data security, breach notification, and privacy issues of those services.

Furthermore, media reports this past weekend a high-profile FTC investigation where the FTC chose not to take legal action shows that an enforcement-only approach is not as effective as when legal standards are supported by agency rulemaking.

As one former FTC employee said about the case -- and I quote -- "Even if we were in the right and could win, it could take a lot of resources away from other enforcement." Clearly, the threat of enforcement action alone is not enough to protect consumers in these

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cases or in these types of cases, and industry knows it.

In closing, Mr. Chairman, I must again raise a process issue. While I understand your interest in keeping to a timetable, it does not make sense to move forward on a bill where even the authors of the bill are not in agreement.

The document before us has several paragraphs in brackets. We do not know whether the bracketed language is in or out, and some language in brackets explicitly states the lack of consensus on a major portion of the bill.

So I hope we can work together to improve this bill before it moves to full committee so that all members of the committee have clear text before them, and I hope the text changes so that we can all support it.

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

[The prepared statement of Mr. Pallone follows:]

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Mr. Burgess. The chair thanks the gentleman. The gentleman does yield back.

The chair reminds members that, pursuant to the committee's rules, all members' opening statements will be made part of the record.

Further opening statements, the chair will recognize Mr. Bilirakis of Florida for 3 minutes.

Mr. Bilirakis. Thank you, Mr. Chairman. I appreciate it. Thank you very much. I would like to, of course, thank Dr. Burgess and Ms. Schakowsky for holding this hearing. I look forward to working with you in the coming Congress.

Consumers must be able to trust that the information they provide retailers is safe. In the digital world, where sales are increasingly online, such trust is vital to our economy. However, I do not believe such trust will be preserved by the current patchwork of laws.

We need a stable regime that ensures merchants are appropriately protecting consumers without sacrificing prosperity. The Center for Strategic and International Studies values cyber crime at costing the economy more than \$400 billion annually.

In the past year, there were a number of damaging breaches that have hurt my constituents and have shown we need a serious solution. I hoped that we could have a solution that all parties agreed to because it is the right thing to do. Unfortunately, that is not the case.

The discussion draft, while not perfect, is the best chance to move a solution forward that will ensure consumers are protected. I

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encourage my fellow subcommittee members to vote for this legislation.

And I yield back the balance of my time.

[The prepared statement of Mr. Bilirakis follows:]

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Mr. Burgess. The chair thanks the gentleman. The gentleman yields back.

The chair recognizes the gentleman from Vermont, Mr. Welch, for 3 minutes for an opening statement, please.

Mr. Welch. Thank you. I want to thank Dr. Burgess and my ranking member on this committee, Jan Schakowsky, and my colleague, Marcia Blackburn.

You have outlined how consumers and businesses are getting hammered. Congress has to act, and it hasn't acted. And we have got now an opportunity to take a step that, in my opinion, moves us in the right direction. A long way from perfect, but a lot farther ahead than where we are.

I want to talk about three things: One, what the bill does; number two, what it doesn't do; and, three, areas where we can improve it.

The bill, one, moves us in the right direction to better protect consumers from identity theft and fraud.

Second, it is a narrow bill, as the chairman said, securing our personal information that is consistent with a consistent breach notice to ensure consumers take the necessary steps to protect themselves.

Three, it provides the FTC with explicit authority to operate in this space.

Four, it provides the FTC with robust civil penalties.

Five, it moves data and breach notification requirements for

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common carriers from the FCC to the FTC. It does not touch FCC's authority to continue to regulate the privacy requirements or write privacy rules.

Six, it does preempt State data security and breach notifications, but it keeps the State Attorney General in an enforcement role.

Seven, it provides the FTC authority to regulate nonprofits for data security and breach. They have been exempted in the past, and your information is there and it has got to be protected.

Second, the bill does not -- one, it is not a privacy bill. The FCC is going to continue to operate in that space.

Number two, it is not a net neutrality bill. We have got a difference of opinion about the FCC's recent order. We are not trying to resolve that here. This is a narrow bill.

And, three, it doesn't take away any authority that the FTC currently has.

Third, we are going to have a markup process. And I do hope the bill gets better. There is always room. And I know the chairman and the ranking member are going to be open to consideration of amendments that may affect the definition of personal information, the timeliness of the notification, the notice of FTC law enforcement when there is a breach, the definition of CPNI information, what are third-party obligations, the notice trigger, and the fact that the AG should absolutely be noticed after the FTC is noticed when breaches occur



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within their States so that they can be ready to investigate in the event they need to. Another issue is possible AG penalties.

So, my view, this is an action that is long overdue to protect businesses and consumers. It takes a step in the right direction. We have had an open committee process that I am sure will continue for us to have the opportunity to improve this.

I yield back.

[The prepared statement of Mr. Welch follows:]

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Mr. Burgess. The gentleman yields back. The chair thanks the gentleman for his comments.

Seeing no other members wishing to make an opening statement, the chair calls up the committee print and asks the clerk to report.

The Clerk. Discussion draft. To require certain entities who collect and maintain personal information of individuals to secure such information and to provide notice to such individuals in the case of a breach of security involving such information, and for other purposes.

Mr. Burgess. Without objection, the first reading of the bill is dispensed with, and the bill will be open for amendment at any point. So ordered.

[The information follows:]

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Mr. Burgess. For the information of members, we are now on the committee print. And the subcommittee will reconvene at 12 p.m. tomorrow afternoon.

I remind members that the chair will give priority recognition to amendments offered on a bipartisan basis. And certainly look forward to seeing everyone back here tomorrow at noon.

Without objection, the committee stands in recess.

[Whereupon, at 5:51 p.m., the subcommittee was adjourned.]