

THE WASHINGTON REPORT December 2013

As Christmas approached, and with the end of 2013 in sight, “data brokers”—which the FTC defines broadly to include consumer reporting agencies—once again found themselves in the spotlight of a congressional hearing and ongoing FTC scrutiny.

On December 18th, the Senate Commerce Committee held a hearing titled: “What information do data brokers have on consumers and how do they use it?” Hearing witnesses included:

- **Ms. Jessica Rich**, Director, Bureau of Consumer Protection (BCP), Federal Trade Commission (FTC)
- **Ms. Pam Dixon**, Executive Director, World Privacy Forum
- **Dr. Joseph Turow**, Robert Lewis Shayon Professor of Communication, Associate Dean for Graduate Studies, The Annenberg School for Communication
- **Mr. Tony Hadley**, Senior Vice President of Government Affairs and Public Policy, Experian
- **Mr. Jerry Cerasale**, Senior Vice President of Government Affairs and Public Policy Direct Marketing Association (DMA)

In conjunction with the hearing, the Majority Staff of the Committee released a Staff Report: “A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes.” The report, while adopting the FTC’s broad definition of data brokers as its starting point, limited its focus primarily to the use of data broker information for marketing purposes. Much of the hearing focused on marketing issues as well, but the hearing was not limited to marketing issues.

Chairman Rockefeller (D-WV) opened the hearing by framing the data broker industry in the context of the controversial National Security Agency (NSA) spying and information collection program. Senator Rockefeller stated that, as a member of the Senate Select Committee on Intelligence, he believes the NSA is far more regulated than the data broker industry, which collects “massive” amounts of information “to learn about and sell the details about our private lives” whether consumers know it or like it, and with “little or no oversight.” Existing laws, he stated, do not cover data brokers’ marketing activities.

Chairman Rockefeller and Ranking Member John Thune (R-SD) were present during the entire two hour hearing. Democratic Senators Cory Booker (NJ), Edward Markey (MA), Mark Pryor (AK), Claire McCaskill (MO), and Richard Blumenthal (CT) all attended, for part of the time, and all except Pryor asked questions. Democrats generally accepted that data brokers provide many benefits to consumers but mostly focused on consumer protection concerns. Republican Senators Ron Johnson (WI) and Deb Fischer (NE) also attended part of the hearing and asked questions. Republicans appeared skeptical of both increased regulation and of the lack of any meaningful definition of “data brokers,” but appeared sensitive to consumer privacy concerns. Republicans tended to direct their questions to BCP Director Rich about the FTC’s actions and approach.

BCP Director Rich indicated in her testimony that the FTC is taking “a three-pronged strategy to ensure consumer interests are protected in the data broker context”:

- Taking “aggressive enforcement action to ensure that data brokers comply with the FCRA where it applies”;
- Conducting research and issuing reports examining data broker industry practices; and
- Educating businesses about their legal responsibilities “especially small data brokers that may be unaware of their legal obligations and consumers how their data is disseminated.”

Director Rich’s testimony noted that “FCRA enforcement is a vital priority for the agency, particularly as companies that are not traditional credit reporting agencies venture into territory covered by the FCRA.” She also noted that the FTC has brought “almost 100 cases and obtained in excess of \$30 million in civil penalties” for alleged FCRA violations. Among the cases and actions that she emphasized were the FTC’s enforcement action against Spokeo in 2012 for allegedly selling reports for employment purposes without complying with FCRA and this year’s action against Filiquarian Publishing LLC for allegedly selling reports for employment purposes through its mobile application without FCRA protections. As part of her discussion of the FTC’s education efforts, Ms. Rich noted warning letters that the FTC has issued over the past two years to data brokers that the FTC believed may be selling reports for employment or tenant screening purposes without complying with the FCRA.

Senator Fischer began her questioning with the FTC, asking Director Rich about the FTC’s existing authority to prevent identity theft, and if the FTC has advocated before the Committee in the past about strengthening data security and identity theft laws; Director Rich stated that the FTC has been successful but has indeed advocated for more authority. Fischer also asked Professor Turow about a definition of a “data broker” and questioned whether an expanded definition would include big box retailers and small business and why the government should be imposing greater regulations on such businesses. Senator Fischer seemed interested in Director Rich’s perspective on protecting consumers’ privacy in the course of standard business transactions. Director Rich later stated that “although I think that there’s been a lot of discussion about how the definition [of data broker] is so broad, we can work on that.”

Director Rich stated that the data broker industry evidenced “very little transparency.” When Sen. Johnson asked Rich to discuss “what is transparency to the FTC,” Rich suggested providing consumers with a centralized website for consumers to learn what information the industry collects about them and to “opt-out” of online tracking.

In closing the hearing, Senator Rockefeller returned to comparing data brokers unfavorably with the NSA. He called the industry the “dark underside of American life” and promised “to continue on this track,” but offered no specifics about his intended next steps. The FTC could be the next to advance the issue. The Commission expects to issue its own long-awaited report on data brokers early in the new year.

Disclaimer: The *Washington Report* provides a general summary of recent legal and legislative developments and is for informational purposes only. It is not intended to be, and should not be relied upon as legal advice. For more information, please contact Kevin Coy at 202-677-4034.