

# “Not Outgunned, Just Outmanned” (For Now): Senate Hearing on Privacy Law Addresses Under-resourced FTC

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October 1, 2021

On September 29, 2021, the Senate Commerce Subcommittee held a hearing titled [Protecting Consumer Privacy](#). The senators addressed the potential \$1 billion earmarked to strengthen the FTC’s privacy work, the future of a federal privacy and data protection law, and a myriad of other privacy related topics such as children’s privacy.

**Prepared Statements.** In their opening testimonies, the witnesses emphasized different types of needs for the FTC.

- [David Vladeck](#), a former Director of the FTC Bureau of Consumer Protection, strongly advocated for a federal privacy law and additional funding for the FTC to support increased efforts on technology-centered consumer protection enforcement. In his remarks, Vladeck noted that the FTC has been wholly understaffed and underfunded for forty years, despite the agency’s ever increasing responsibilities and the complexity of issues it now faces. Additionally, Vladeck emphasized the need to increase the FTC’s enforcement powers by giving the FTC rulemaking authority under the APA and civil penalty authority.
- [Morgan Reed](#), the president of The App Association, focused more on the need for a federal privacy law to reduce the compliance costs for small businesses. He reiterated that the patchwork of state laws increases risk and costs for small businesses.
- [Maureen Olhausen](#), a former Acting FTC Chairman and Commissioner, shifted the conversation from funding for the FTC to the importance of a federal privacy law. She noted that “the FTC lacks explicit authority to enforce statutory privacy requirements or promulgate privacy regulations,” and that a federal privacy law should address this gap, allowing for enforcement, along with state attorneys general.
- [Ashkan Soltani](#), a former FTC Chief Technologist, primarily concentrated on the urgent need for expertise at the FTC. He emphasized the importance of hiring technologists and experts, but also paying them competitive rates to retain talent. The FTC is understaffed to handle litigation matters or to monitor compliance with consent orders, particularly those that require technical fluency.

**Discussing the Federal Privacy Bill.** The senators appeared to be in consensus that there is a

need for a federal privacy law. Senator Wicker called on the Biden Administration to provide a liaison to Congress to prioritize the enactment of a law.

- **Right to Cure.** Reed was adamant that a right to cure provision be written into the bill to protect small businesses from being punitively fined for unintentional mistakes such as not responding to an email within 30 days.
- **Private Right of Action.** The witnesses went back and forth on the correct approach to a private right of action. While Soltani supported a private right of action as a means to “make up for the concern that there’s not enough enforcement capacity,” Olhausen was concerned that the private right of action would not result in consumer redress, but rather attorney’s fees. Reed stated that he preferred injunctive relief as a type of private right of action. Similarly, Soltani noted that in his experience, core behavior changes come not from fines, but injunctions and restrictions imposed on the business.
- **Preemption.** Vladeck, Reed, and Olhausen supported federal preemption. Soltani agreed that a federal privacy law should only be a floor, and not a ceiling. In other words, a federal privacy law should preempt less rigorous laws to set a baseline standard, but states could enact additional measures and add further protections for their constituents.
- **Carve-out.** The witnesses went back and forth on whether size of business should factor into whether an entity would be covered by the bill. Vladeck emphasized that small businesses can create big harms; therefore, the legislation needs to be focused on consumer harm rather than the size of the company. Reed agreed, but reiterated the need for a right to cure for small businesses.

**Funding for the FTC.** Senators focused on whether the FTC needs \$1 billion to achieve its goal of protecting consumers. Vladeck wholeheartedly agreed and said that an additional \$100 million a year would be a good start for the FTC. For example, on the recent Google litigation, Vladeck theorized that Google had 1,000 privacy attorneys, whereas the FTC had less than 100. Vladeck noted that the funding would be earmarked for hiring more attorneys, engineers, and technologists, as well as setting up a new bureau of privacy.

**Children’s Privacy.** The witnesses received several questions on their thoughts on protecting children’s privacy in the aftermath of reports on how social media impacts children’s mental health. Vladeck specifically advocated for lowering the scienter standard that the FTC has to prove to show that a developer knew their technology was tracking children. This mirrors the EU’s “constructive knowledge” standard that is used for children’s privacy. Additionally, Vladeck suggested getting rid of COPPA’s safe harbor program and rethinking the age limit. All witnesses agreed that children were vulnerable to targeted ads. In response to Senator Markey’s concern for children’s privacy, all witnesses responded that they would approve of another children’s privacy bill if Congress could not enact a sweeping data protection and privacy law for adults.